WOLF THEISS

THE WOLF THEISS GUIDE TO:

Corporate Investigations in Central, Eastern & Southeastern Europe

2019 Edition

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Corporate Investigations in Central, Eastern & Southeastern Europe

This 2019 Wolf Theiss Guide to Corporate Crises and Investigations is intended as a practical guide to the general principles and features of the basic legislation and procedures in countries included in the publication.

While every effort has been made to ensure that the content is accurate when finalised, it should be used only as a general reference guide and should not be relied upon as definitive for planning or making definitive legal decisions. In these rapidly changing legal markets, the laws and regulations are frequently revised, either by amended legislation or by administrative interpretation.

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FOREWORD

Wolf Theiss' strength has always been its regional coverage and we believe this is particularly true for our Corporate Investigations team. With experts on the ground throughout the region, we are familiar with the risks companies are exposed to when conducting business in Central, Eastern and Southeastern Europe and can guide you through large-scale corporate events and cross-border investigations.

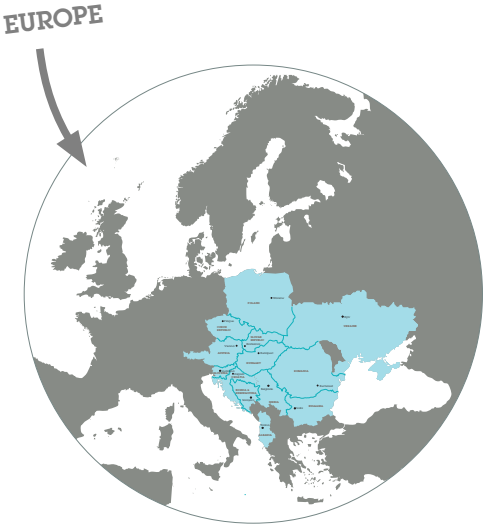
Situations in corporate life can develop surprisingly quickly into crises; with regulators and law enforcement agencies under increasing pressure to investigate and prosecute companies and individuals for criminal misconduct and regulatory breaches. As a director, you may even find yourself personally liable for alleged wrong-doing in the course of business. When personal and company reputation is at stake or large compensation claims threaten your corporate existence, a timely and right response is key.

To assist in this, we are pleased to present this Wolf Theiss Guide to: Corporate Investigations in Central, Eastern and Southeastern Europe. The guide is intended to be a resource tool highlighting the most important issues to be aware of when structuring internal investigations in the 13 CEE/SEE countries where Wolf Theiss provides services.

We trust that you find the overview helpful. If you have any questions about its content, please do not hesitate to contact us.

Jitka Logesová ▪ September 2019

Partner, Wolf Theiss, Head of Corporate Investigations



WOLF THEISS REGION
EUROPE

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ALBANIA

WHISTLEBLOWING

? Is there any specific regulation related to whistleblowers?

? If so, is there any obligation to react to whistleblowing/to have a system in place for reacting to whistleblowing?

Yes, there are specific regulations for employers operating whistleblowing systems. By law[1] all public institutions and private companies operating in Albania, and which have more than 100 employees, have to set up a special unit to register and investigate alleged cases of corruption. Such unit has to act independently and should not be under either influence that might prevent it for implementation of its duties. Any allegations of corruption have to be reported to the High Inspectorate of Declaration and Audit of Assets ("HIDAA") and/or the prosecution office. The Unit has to register any reporting to a specific registry and HIDAA shall have access to such documents.

A whistleblower may choose to remain anonymous and the employer must respect this (also in case of anonymous reports). Generally, whistleblowers are protected from retaliation and cannot be fired or demoted. They cannot be penalized in any other way either, such as blacklisting, reduction of pay, reassignment, salary decrease, loss of office or privileges or change in duties. Failure to comply with this obligation may lead to a fine of up to ALL 500.000 (approx. EUR 4.000). In addition, any failure by the employer to initiate an investigation after receiving an indication of corruption by an employee may also lead to a fine of ALL 500.000 (approx. EUR 4.000).

Any act of retaliation against the whistleblower will be investigated by the competent authorities, i.e. HIDAA, or the prosecution office, and the whistleblower has the right to ask for compensation for any damages incurred as a result thereof.

CIVIL LIABILITY

? In which situations is the decision to hold an internal investigation necessary to deflect civil responsibility of board members?

In case of any reasonable suspicion of a possible wrongdoing, the management is expected to take all appropriate steps to review (and rectify, if necessary) the situation. Unless an internal investigation is conducted, the directors risk that they will be found in breach of their fiduciary duties and could, therefore, become liable for any prejudice (including damages) to the company that could have been prevented, had the wrongdoing been discovered in time.

CRIMINAL LIABILITY

? In which situations will an internal investigation decision be necessary to deflect criminal liability of board members?

Criminal sanctions may be brought against both the legal entity and the individuals who committed the criminal offence, i.e. non-reporting of alleged corruption, etc.

There is no specific threshold to trigger criminal liability.

1 Law No. 60/2016 "On whistleblowing".

CORPORATE CRIMINAL LIABILITY

? Is there a corporate criminal liability in your country?

? If so, would a compliance system including internal investigation prevent/mitigate corporate criminal liability?

Yes. All legal entities are liable for criminal offenses perpetrated while carrying out their activity. The criminal liability of a legal entity does not exclude the criminal liability of the natural person who contributed to the offense. In addition, a legal entity shall be liable for criminal offences carried out by its representatives or corporate bodies, in the name of or for the benefit of the legal entity.[2] A company is liable to pay for any damages resulting from its unlawful acts.[3]

PARALLEL PROSECUTION OF COMPANIES AND INDIVIDUALS

? Can both individuals and companies be prosecuted for the same misconduct?

Yes. Both the company and the individual may be prosecuted for the same misconduct; although they face different criminal sanctions.

COOPERATION

? Would cooperation and voluntary self-disclosure be considered by the law enforcement authorities (in relation to both individual and corporate liability)?

Cooperation and voluntary self-disclosure will always be considered at least as a mitigating circumstance (i.e. leading to a lower sanction).

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE ("LEGAL PRIVILEGE")

? Who can enjoy the protection of legal privilege?

? What information/data is protected by legal privilege, what is not and what are (if any) the exceptions from legal privilege?

? Does legal privilege extend to documents created by attorneys after they are handed over to the client?

"Legal privilege" under Albanian law is extended to communication between attorneys and their clients as well as the documentation/information obtained by the attorney in the course of providing legal advice; i.e. not just during regulatory or criminal investigations, but during all administrative authority procedures as well as all court procedures launched by Albanian authorities or before Albanian courts.

2 Art. 3 of Law No. 9754, of 14.06.2007 "On criminal liability of the legal entities".

3 Art. 32 of Law No. 7850, of 29.07.1994 "On the Civil Code" as amended from time to time.

Such legal privilege will prevent Albanian authorities from reviewing or using as evidence any communication containing legal advice relating to a client's defence in regulatory proceedings. Thus, the attorney has a duty to protect the confidentiality of information received from the client in connection with its defence and may not disclose any information to a third party without the client's prior consent, except to the extent the attorney is required to do so by any applicable law, rules or court order.

IN-HOUSE LAWYERS' PRIVILEGE

? Is there any privilege for in-house lawyers?

Legal privilege may be applied if the in-house lawyer qualifies as an attorney (i.e. is registered with the Albanian Bar Association and the tax authorities) and not as an employee.

OTHER SERVICE PROVIDERS' PRIVILEGE

? Is there any privilege for other types of service providers?

? Can legal privilege be extended to them if they are sub-contracted by attorneys?

Legal privilege is reserved for attorneys (and attorneys' personnel) and does not extend to third parties sub-contracted by the attorney.

Other regulated professions such as auditors, notaries etc. are also bound by certain secrecy obligations, but these privileges fall rather within the client-provider relationship.

DATA PROTECTION ISSUES

? What conditions must be met to allow investigators access to employees' e-mails/ other records potentially containing private information?

? Is the consent of the respective custodian necessary before any data collection starts?

? Are there any restrictions in relation to cross-border transfer of data collected during the investigation?

In principle, personal data processing may take place only on one of the grounds specified by Albanian Data protection Law.

With regard to processing employee data, an employer may collect, process and transfer data concerning its employees only to the extent that the data relate to the employee's suitability for employment or are necessary for the performance of the employment contract,[4] i.e., the data processing is necessary in the legitimate interests of the controller or any third parties (i.e. the necessity to perform contractual obligations), except where such interests are clearly in contradiction with the privacy right of the data subject.

4 Instruction no. 11, of 08.09.2011 of the DCM.

The following elements need to be considered: the reason for collecting the information/data; the limit to which data controllers are able to use the personal data collected, the individual consent given by the employee for the employer to access the employee's email; and the security measures in place. Further to the consent of the employee, we recommend that the following is taken into consideration by the employer:

- The access and use of e-mail correspondence should be strictly for legitimate purposes and only for the purposes for which the employee has given consent. The employee has the right to withdraw consent at any time. Such a withdrawal does not affect the validity of any actions carried out up to that point and which were within the scope of the consent previously given.

- The confidentiality of personal data must be ensured at all times; therefore, e-mail communications must be accessed only by authorised personnel for legally authorised purposes.

- Any personal data collected during the access of the employee's e-mail should be protected against accidental or unlawful destruction, storage, processing, access or disclosure of data.

- There should be an internal policy in place regulating the usage of IT equipment, such as sending e-mails for private purposes, and the consequences in the event of any breach thereof. Employees should be informed in writing and should sign their acknowledgment of the policy.

- The employer must inform the data subject of their rights; such as the right to withdraw consent at any time, the period for which the data will be stored, as well as the employees right to access/correct information.

The processing of sensitive data is lawful if there is a legitimate reason. However, the employee's explicit written consent is required and the personal data may be processed only for the purpose for which the data subject has given consent. The consent must be absolutely clear and should cover the specific processing/transfer details: (i) the type of information (or even the specific information); (ii) the purpose of the processing/transfer; (iii) the category of recipients; and (iv) any special aspects that may affect the individual, such as any disclosures that may be made during the retention period.

The Data Protection Law further establishes certain minimal and standard requirements for the protection of personal data. Under the Data Protection Law the data collector is obliged to ensure that organizational and technical measures are in place to protect personal data from: (i) being illegally destroyed or accidentally lost; (ii) unauthorized access and persons; and (iii) illegal processing.

Cross-border transfer of data collected during an investigation to a third country is subject to strict requirements. In particular, companies must ensure adequate protection of the data even after its transfer. Available and adequate means include binding corporate rules and standard data protection clauses adopted by the Commissioner Office.

INTERVIEWS

? Does an employee have an obligation to actively participate at the interviews organised by the counsel of the employer?

No, the employee is not bound by such obligation. However, employees are bound by the legal obligation to inform the employer of all circumstances that affect or may affect the performance of their duties, as well as to refrain from taking any actions that may incur material damages or might be considered as detrimental to the employer.

REPORTING DUTIES

? Is there any reporting duty towards enforcement authorities on the outcome of the investigation or any information obtained during the investigation?

? If yes, who is subject to the reporting duty and who is exempted?

In case of any suspicion of corruption, the employees or entity representatives, who have become aware of this, have an obligation to report their suspicions to the High Inspectorate of Declaration and Audit of Assets and/or the prosecution office or the – soon to be established – National Investigation Bureau.

In addition, legal entities and natural persons in the financial services sector, as well as attorneys and notaries, are bound by the legal obligation to report any and all suspicious transactions that might fall within the scope of the Albanian Law "On the prevention of Money Laundering". Except for such cases, attorneys are exempted from the reporting duty due to legal privilege, unless expressly required to do so by a specific law or court decision.

This chapter was written by Jonida Braja.

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WOLF THEISS

AUSTRIA

WHISTLEBLOWING

? Is there any specific regulation related to whistleblowers?

? If so, is there any obligation to react to whistleblowing/to have a system in place for reacting to whistleblowing?

Specific companies, such as credit institutions, investment firms or investment services firms, are required to implement appropriate procedures for their employees allowing them to confidentially report internal breaches of certain laws, regulations or rulings and to further conduct investigations based on such reports.[1]

In addition, there is a general obligation pursuant to the duty of care (see b.) below) to reasonably react to information provided by a whistleblower, which can include the initiation of further internal investigations, if appropriate and necessary.

CIVIL LIABILITY

? In which situations is the decision to hold an internal investigation necessary to deflect civil responsibility of board members?

Austrian statutory law provides for certain cases, in which internal investigations shall be performed. For instance, a shareholder minority of at least 10% can file a court application for the appointment of a special investigator (*Sonderprüfer*), if a prior shareholder resolution aiming at conducting such investigations could not be passed in a prior shareholder meeting with the required majority.[2] While such investigation is limited to the audit of the latest financial statements of a limited liability company (*GmbH*), every action in the course of the incorporation or every action performed by the managing directors within the last two years can be subject to such investigations in respect of a joint stock corporation (*AG*).

In addition, the management board can be obliged, according to their general duty of care,[3] to pursue claims of the company against other or former board members or employees for which the prior performance of an internal investigation is often necessary. Furthermore, the supervisory board can be obliged to conduct such investigations regarding potential wrong-doings of members of the management board. In case the management or supervisory board violate their duty of care by omitting to pursue such claims, they can be liable for the company's damage caused by such omission. In accordance with general standards of civil liability, even a board member's slightly negligent violation of his/her duty of care is sufficient.

CRIMINAL LIABILITY

? In which situations will an internal investigation decision be necessary to deflect criminal liability of board members?

From a strategic point of view, it is advisable that as soon as the managing board or the supervisory board members become aware of or suspect any wrongdoing that might constitute criminal liability (either for individuals or the corporation) inside their scope of responsibility, they initiate internal investigations as a mitigation measure.

1 Art. 99g para 1 Austrian Banking Act, Art. 95 Austrian Stock Exchange Act.

2 Art. 130 Act on Joint Stock Corporations (*AktG*) and Art. 45 Act on Limited Liability Companies (*GmbHG*).

3 Art. 84 para 1 AktG; Art. 25 para 1 GmbHG.

Under certain circumstances the omission of mitigation measures might even lead to the criminal liability of the respective board members themselves.

According to the Austrian Criminal Code, if the law criminalizes causation of a result,[4] any person failing to avert that result shall also be criminally liable if the person has a legal duty to act.[5] The respective duty to act may result from due diligence obligations under the relevant civil and commercial law provisions for companies.[6]

In case a board member becomes aware of a criminal act being committed it is also possible that he/she becomes criminally liable as a participator; as not only the immediate perpetrator but also any person contributing in any way to the offence is taken to have committed the offence.[7]

In summary, in case a board member becomes aware of a criminal act being committed by a decision-maker or an employee and knowingly omits to act in his/her duty of care for the company to prevent the crime or mitigate a possible damage, the board member can, under certain circumstances, be held criminally liable himself/herself. Therefore, the initiation of internal investigations is advisable and might even be obligatory under certain circumstances.

CORPORATE CRIMINAL LIABILITY

? Is there a corporate criminal liability in your country?

? If so, would a compliance system including internal investigation prevent/mitigate corporate criminal liability?

As a general principle, a person is only criminally liable if the person's fault can be proven.[8] However, the Austrian Corporate Criminal Liability Act[9] determines that under certain preconditions, corporations can be criminally liable for the criminal acts committed by individuals. Thereafter corporations can be liable for any crime committed under Austrian law.

Any corporate entity qualifies as a corporation,[10] but any official acts (*hoheitliches Handeln*), such as acts of the state, the federal states or any corporate entities are excluded as long as they are acting in the execution of the laws.

A corporation can be criminally liable for criminal acts of a decision-maker (*Entscheidungsträger*) or an employee, in case the criminal act has been committed either (i) for the advantage of the corporation or (ii) in breach of the corporation's duties.[11]

The duties of a corporation[12] are stipulated all over the legal system, predominantly in civil and administrative law provisions. Therefore, a compliance system might not only be necessary to prevent/mitigate corporate criminal liability, but the lack of a compliance system might even lead to criminal liability of a corporation in the first place.

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4 E.g. the occurrence of a damage pursuant to Art. 146 StGB – Fraud).

5 Art. 2 of the Austrian Criminal Code (*StGB*, *Strafgesetzbuch*).

6 I.e. Art. 84 para 1 AktG; Art. 25 para 1 GmbHG.

7 Art. 12 StGB.

8 Art. 4 StGB.

9 *Verbandsverantwortlichkeitsgesetz*, *VbVG*.

10 Art. 1 para 2 VbVG.

11 Art. 3 para 1 VbVG.

12 According to Art. 3 para 1 No. 2 VbVG.

PARALLEL PROSECUTION OF COMPANIES AND INDIVIDUALS

? Can both individuals and companies be prosecuted for the same misconduct?

Yes, both individuals and corporations can be criminally liable for the same misconduct. A corporation can only be liable for criminal acts of an individual.[13] However, the corporate liability for a criminal act and the individual liability of a person for the same act do not exclude each other.[14]

COOPERATION

? Would cooperation and voluntary self-disclosure be considered by the law enforcement authorities (in relation to both individual and corporate liability)?

For certain offences against the property of another,[15] the law stipulates active repentance (*Tätige Reue*) under the following preconditions:[16]

- the person fully rectifies any damage caused by the offence; or
- enters into a contractual obligation to fully compensate the victim; and
- before the authorities become aware of the person´s culpability, even at the urging of the victim but without being forced to do so.

The person is also not liable if he/she fully rectifies any damage caused after reporting to the authorities (voluntary self-disclosure) and depositing the relevant compensation with the authorities.[17]

The Austrian Criminal Procedure Code (*Strafprozessordnung*, *StPO*) stipulates the leniency programme (*Kronzeugenregelung*).[18] The Public Prosecutor may proceed with measures of diversion (rescission from prosecution) if the suspect contributes to solving the crime. If the requirements for the contribution of the suspect are met, the Public Prosecutor must stop the proceedings against the suspect. In proceedings against corporations, the provisions on the leniency programme apply *mutatis muntandis*.[19]

13 Art. 1 VbVG.

14 Art. 3 para 4 VbVG.

15 E.g. fraud pursuant to Art. 146 StGB, embezzlement pursuant to Art. 133 StGB or breach of trust pursuant to Art. 153 StGB).

16 Art. 167 para 2 StGB.

17 Art. 167 para 3 StGB.

18 Art. 209a StPO (and Art. 209b StPO in case of antitrust violations).

19 Art. 209a para 6 StPO.

The Austrian Criminal Code also determines special mitigation factors (*Milderungsgründe*) that the judge has to consider in his or her verdict.[20] These include instances in which the person:

- deliberately refrained from causing a major detriment although the person had the opportunity to do so, or if the person or another person rectified the detriment;[21]
- genuinely endeavoured to rectify any detriment caused or sought to avoid further adverse consequences;[22]
- remorsefully confessed to the offence, or through the person´s testimony made a significant contribution to finding the truth.[23]

Furthermore, the Austrian Financial Criminal Code (*Finanzstrafgesetz, FinStrG*) stipulates the possibility of voluntary self-disclosure (*Selbstanzeige*) which prevents the perpetrator from criminal liability if the very narrow preconditions of this provision are met for financial crimes committed under the FinStrG.[24]

In summary, cooperation and self-disclosure are definitely considered by the Austrian enforcement, prosecution and judicial authorities. Furthermore, internal investigations can be a helpful procedure to create a basis for effective retribution and subsequent impunity.

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE ("LEGAL PRIVILEGE")

? Who can enjoy the protection of legal privilege?

? What information/data is protected by legal privilege, what is not and what are (if any) the exceptions from legal privilege?

? Does legal privilege extend to documents created by attorneys after they are handed over to the client?

In general, an Austrian lawyer is bound by professional secrecy obligations in all matters which have been confided to him or her and all facts which have otherwise become known to him/her in their capacity as a lawyer. Such professional secrecy is safe-guarded by various statutory provisions.[25]

Differences in the scope of legal privilege depend on the type of proceedings.

Under criminal procedure an attorney-at-law is entitled to refuse to give evidence (*Aussageverweigerung*). This right may not be circumvented by the confiscation of any documents or data medium or by the examination of the attorney's employees or sub-contractors. A verdict based on such evidence is null and void.[26]

20 Art. 34 StGB.

21 Art. 34 No 14 StGB.

22 Art. 34 No 15 StGB.

23 Art. 34 No 17 StGB.

24 Art. 29 FinStrG.

25 E.g. Art. 321 para 1 no. 4 Act of Civil Procedure (*Zivilprozessordnung*, *ZPO*); Art. 157 para 1 no. 2 StPO; Art. 171 para 2 Federal Fiscal Code (*Bundesabgabenordnung*, *BAO*).

26 Art. 157 StPO.

Also, civil procedure provides for the right to refuse to give evidence in civil proceedings. However, any evidence gained by violating this right, can be used in these proceedings without any further consequences.[27]

However, an attorney's secrecy may be pierced by certain reporting obligations to the Federal Criminal Police Office (*Bundeskriminalamt*) regarding potential cases of money laundering or terrorist financing.

In criminal proceedings, legal privilege extends to documents and information in the dispose of the suspect or the attorney, which were produced for advising or defending the client (e.g. transcripts of interviews of employees, memos, internal investigation reports etc.).

IN-HOUSE LAWYERS' PRIVILEGE

? Is there any privilege for in-house lawyers?

Generally, in-house lawyers do not fall within the scope of legal privilege.

OTHER SERVICE PROVIDERS' PRIVILEGE

? Is there any privilege for other types of service providers?

? Can legal privilege be extended to them if they are sub-contracted by attorneys?

Within the scope of the above-mentioned privilege are also patent lawyers, notaries and auditors as well as their employees and subcontractors. Legal privilege, as applicable for attorneys in criminal proceedings, extends to subcontractors if they are commissioned by the attorney (e.g. legal experts, forensic experts, etc).

DATA PROTECTION ISSUES

? What conditions must be met to allow investigators access to employees' e-mails/ other records potentially containing private information?

? Is the consent of the respective custodian necessary before any data collection starts?

? Are there any restrictions in relation to cross-border transfer of data collected during the investigation?

Under data protection law, the copying, storage, filtering, review and analysis of emails and files of suspected employees located on the employer's IT infrastructure for inspection purposes or in case of reasonable suspicion of criminal actions may be justified based on the employer's legitimate interest to investigate and/or prosecute the possible crimes.[28]

The review must be performed in such a way that the interests are not overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data (e.g. using filtering techniques to only search for the relevant parts etc.). In general, only the review of business related emails and files is justified without obtaining the employee's consent. The review of private personal data usually requires the

27 Art. 321 para 1 no. 4 ZPO.

28 Art. 6 para 1 lit f GDPR.

employee's consent from a data protection law perspective. Employee consent is however seen critically by courts and authorities as the criteria of "freely given" might be questionable.

However, under specific circumstances the processing of private emails containing relevant information may be legitimate if it inter alia complies with the principle of proportionality and limitation of the privacy intrusion according to the scope of the investigation (as mentioned above).

Furthermore, the respective employees shall be informed about e.g. the inspection of their mailbox and files, the purpose of and legal grounds for the data processing, the recipients, and the employees' data subject rights.[29] The information must be provided within specified timeframes (at the latest within 1 month of having obtained the data). It is still debated whether this information might be deferred to a slightly later point in time to not jeopardize the investigation.

If third parties who act as data processors for the company (e.g. providing forensic services) are engaged, the conclusion of a written data processing agreement is necessary.[30]

Finally, it must be reviewed internally whether the processing in this context (considering the nature, scope and purposes of the processing) is likely to result in a high risk to the rights and freedoms of natural persons. If this is the case prior to the processing a privacy impact assessment (impact of the envisaged processing operations on the protection of personal data) must be carried out.

In case of an envisaged transfer of data to countries outside of the EU/EEA, for which an adequate level of data protection has not been determined (e.g. USA), additional guarantees are required, e.g. the conclusion of the EU Standard Contractual Clauses.[31]

INTERVIEWS

? Does an employee have an obligation to actively participate at the interviews organised by the counsel of the employer?

Employees are generally bound by their employer's instructions, which can include the participation in interviews organised and conducted by an attorney.

Members of the management board of a limited liability company can be specifically instructed by the company's shareholders, by way of a shareholder resolution, to participate in such interviews. Furthermore, a board member's general duty of care (see b. above) can lead to the obligation of board members to participate in such interviews.

29 Art. 14 GDPR.

30 Art. 28 GDPR.

31 Art. 44 et seqq. GDPR.

REPORTING DUTIES

? Is there any reporting duty towards enforcement authorities on the outcome of the investigation or any information obtained during the investigation?

? If yes, who is subject to the reporting duty and who is exempted?

In general, only public authorities are obliged to notify criminal authorities of any committed criminal offenses of which they become aware.[32] Only in extraordinary cases are reporting duties of other persons triggered, for example:

- In case of specific transactions, Austrian attorneys are obliged to report cases of money laundering[33] or terrorist financing[34] to the Federal Criminal Police Office (*Bundeskriminalamt*).
- If internal investigations, which include a special audit of the company's financial statements, are conducted on an investment firm or an investment services firm, and the auditor determines severe violations of statutory laws or the articles of association, the auditor is obliged to submit a respective report to the Austrian Financial Market Authority.[35]

32 Art. 78 para 1 StPO.

33 Art. 165 StGB.

34 Art. 278d StGB.

35 Art. 93 para 1 Securities Supervision Act, (*Wertpapieraufsichtsgesetz*, *WAG*).

This chapter was written by Valerie Hohenberg, Markus Taufner, Paulina Pomorski and Patrick Mittlboeck.

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WOLF THEISS

BOSNIA AND HERZEGOVINA

Bosnia and Herzegovina (***BiH***) is a country consisting of two separate entities, i.e. the Federation of Bosnia and Herzegovina (***FBiH***) and the Republic of Srpska (***RS***), and one special autonomous district under the direct sovereignty of the state, i.e. the Brčko District of Bosnia and Herzegovina (***BD***). In addition, FBiH is divided into 10 cantons.

In each of these parts essentially different legal regimes apply, however, certain legal matters are regulated by laws enacted on the state level and as such are applicable in all parts of the country. Furthermore, in many cases the relevant legislation of the entities regulating a particular matter is harmonized, however, differences may occur in terms of the application and interpretation by different entities' courts.

Certain topics in this overview are regulated at the entity/district level and others are regulated at the state level. If not specifically indicated, the regulation of certain matter is harmonized, and where applicable, a separate overview of the regimes applicable in BiH is provided.

WHISTLEBLOWING

? Is there any specific regulation related to whistleblowers?

? If so, is there any obligation to react to whistleblowing/to have a system in place for reacting to whistleblowing?

The following laws primarily regulate whistleblowing in BiH:

- BiH Law on Protection of Persons Reporting Corruption in BiH Institutions;
- RS Law on Protection of Persons Reporting Corruption;
- BD Law on Protection of Persons Reporting Corruption.

There are no specific whistleblowing laws adopted in FBiH, however, the draft of the FBiH Law on Protection of Persons Reporting Corruption in FBiH has been prepared by the Government of FBiH in March 2018 and is currently in the parliamentary procedure.

The BiH Law on Protection of Whistleblowers regulates the protection of whistleblowers in BiH government institutions and companies established by such institutions. It regulates the status of whistleblowers, corruption reporting procedures, obligations of the institutions in relation to reporting of corruption, protection of whistleblowers and sanctions for breaching the statutory provisions. However, the application of this law is limited, as stated above, and is in general not applicable to companies (unless they are established by BiH institutions). Under the BiH Law on Protection of Whistleblowers, the reporting of corruption may be conducted internally and externally, whereby internal reporting should be regulated by the internal bylaws of the relevant BiH institution or company established by a BiH institution published at the premises and on the website of the institution. A whistleblower may opt to report corruption externally if: (i) the duration of the internal procedure exceeds 15 days; (ii) the whistleblower considers that the internal procedure was not properly conducted; or (iii) the whistleblower believes that the person authorized for collecting reports on corruption, or the head of the institution, may be directly or indirectly involved in the corruption.

The RS Law on Protection of Whistleblowers regulates the protection of whistleblowers, corruption reporting procedures, obligations of the authorized person and competent bodies in relation to the reporting of corruption and protection of whistleblowers, and sanctions for breaching the statutory provisions. The law stipulates that all persons are entitled to report (in good faith) any kind of corruption in the public or private sector, of which they have direct knowledge. Therefore, the RS Law on Protection of Whistleblowers is also applicable to privately owned companies. The law further provides for (i) the obligation to act upon a report of corruption as a general principle – stipulating that the authorized (responsible) person is obliged to undertake measures for detection,

prevention, suppression and punishment of all kinds of corruption as well as measures for the protection of whistleblowers; and (ii) the urgency principle (*ekonomičnost*) – stipulating that the procedure for the protection of whistleblowers is urgent and should be conducted without delay, in the shortest time period necessary to determine all relevant facts. The RS Law on Protection of Whistleblowers provides that a whistleblower may initiate an internal protection procedure if he/she suffers any harmful effects from reporting corruption, by submitting a request to the authorized person. The authorized person is obliged to decide on such request within 30 days as of the day the request is submitted. The law also provides the following obligations of the authorized person to:

- enable the reporting of corruption;
- receive the report on corruption;
- return the report to the whistleblower for amendments if the report does not contain all statutory elements;
- ensure data protection and the anonymity of the whistleblower;
- act upon the report, i.e. work on detection, prevention, suppression and punishment of corruption, within seven days as of the date of receipt of the report;
- undertake without delay activities to eliminate harmful effects to the whistleblower and ensure the protection and rights of the whistleblower;
- undertake measures for the determination of the disciplinary and material liability of persons involved in the corruption;
- notify the whistleblower of the measures and activities undertaken on the basis of his/her report within 15 days as of the day of submitting a request for delivery of the subject notification;
- deliver the decision or the notification of the outcome of the procedure to the whistleblower within eight days as of the day of conclusion of the procedure;
- forward the report without delay to the competent authorities if there are grounds for criminal liability;
- deliver the report to the RS Ministry of Justice in accordance with the law.

Any authorized person who manages 15 or more employees shall adopt a whistleblowing policy (*uputstvo*), which shall include the regulations on the procedure itself, on the whistleblowers' rights, obligations of the authorized person and especially the protection of the whistleblower's anonymity. The authorized person is further obliged to deliver a report on the number of reports received on corruption and their outcome, and the number of procedures conducted and completed in the previous year, at the latest by the end of January of the current year.

The BD Law on Protection of Whistleblowers is harmonized with the BiH Law, but with one significant difference in its application. In comparison to the BiH Law on Protection of Whistleblowers, the BD Law is applicable to both public institutions and privately owned companies.

CIVIL LIABILITY

? In which situations is the decision to hold an internal investigation necessary to deflect civil responsibility of board members?

Under the applicable Labour Laws, employers are obliged to conduct disciplinary proceedings following any violation of employment obligations by the company's employees; whereas the disciplinary procedure often involves an internal investigation as well. To deflect any civil responsibility of members of management, and also of the company, an internal investigation should be conducted to determine whether, for example, an employee is responsible for damages. In any case, the company is obliged to indemnify third persons for any damages, but is in turn entitled to compensation from the responsible employee.

Under the applicable Companies Laws, the management organises the work, manages the business, represents the company and is responsible for the legality of the company's business. The management members, among others, are obliged to carry out their business conscientiously, with the due care expected of a prudent businessman and in the reasonable belief of acting in the best interests of the company. In case a management member causes damages to the company by failing to act in a previously stipulated manner, the company is entitled to claim for damages against such member. Thus, if the management members do not claim compensation for indemnified damages, they may be seen as liable for the occurrence of the latter.

Further, the shareholders of a company are entitled to suspend management members prior to the expiration of their appointment, should they determine the liability of management members for any damages occurred to the company due to the failure of the management members to act in accordance with their duties and obligations or if they act in a way that is contrary to the applicable law, articles of association or decisions of the shareholders. In any of these cases, the company is entitled to claim damages. It may, therefore, be argued that an internal investigation is also necessary in case of the termination of a management member's contract due to inflicting damages to the company.

CRIMINAL LIABILITY

? In which situations will an internal investigation decision be necessary to deflect criminal liability of board members?

Under the applicable Criminal Codes, a company shall be responsible for any criminal offence committed in the name of, on account of or in favour of the company, (i) when the criminal offence occurs on the conclusion, order or approval of the managerial or supervisory bodies of the company; or (ii) when the managerial or supervisory body has influenced the perpetrator or enabled him/her to commit the criminal offence; or (iii) when the company has been disposing with the wrongfully acquired monetary gain or has been using the items originating from the criminal offence; or (iv) when the managerial or supervisory body failed to act with due care in supervising the legality of its employees' work.[1]

The criminal sentence for a company may be mitigated if the managerial or supervisory body voluntarily reports a perpetrator after he/she commits a criminal offense;

1 Article 128 of the FBiH Criminal Code and 127 of the RS Criminal Code.

Furthermore, the company may be exonerated from criminal sentence if:

- its managerial or supervisory body returns the wrongfully acquired monetary gain,
- or remedies any adverse consequences of the wrongdoing,
- or provides information on justification of other companies' liability.[2]

Therefore, even though it is not an explicit obligation in the applicable laws, it may be argued that an internal investigation is necessary to determine the existence of any criminal liability and that it is in fact an obligation imposed indirectly in the applicable laws.

CORPORATE CRIMINAL LIABILITY

? Is there a corporate criminal liability in your country?

? If so, would a compliance system including internal investigation prevent/mitigate corporate criminal liability?

Yes, there is corporate criminal liability in BiH.

As indicated above, the applicable Criminal Codes regulate when a company shall be held responsible for a criminal offence.

The following sanctions may be imposed: (i) monetary fine; (ii) property seizure; or (iii) dissolution of the legal entity. In addition to these sanctions, the following security measures may also be imposed: (i) forfeiture of items; (ii) publishing the conviction decision; or (iii) suspension from performing certain business activities.[3]

In case the managerial or supervisory bodies prevent the perpetrator from carrying out the attempted criminal offence, the company may be exonerated.

A compliance system, that includes internal investigation, may mitigate or even prevent corporate criminal liability if correctly enforced and monitored by the company's management.

PARALLEL PROSECUTION OF COMPANIES AND INDIVIDUALS

? Can both individuals and companies be prosecuted for the same misconduct?

Yes, both individuals and companies can be prosecuted for the same misconduct. The liability of a company shall not exclude the liability of individuals, i.e. the responsible persons who committed the criminal offence.[4]

2 Article 129 of the FBiH Criminal Code and 128 of the RS Criminal Code.

3 Articles 135 and 141 of the FBiH Criminal Code and 134 and 140 of the RS Criminal Code.

4 Article 129 of the FBiH Criminal Code and 128 of the RS Criminal Code.

COOPERATION

? Would cooperation and voluntary self-disclosure be considered by the law enforcement authorities (in relation to both individual and corporate liability)?

As indicated above, the criminal sentence for a company whose managerial or supervisory body voluntarily reports a perpetrator after he/she commits a criminal offense can be mitigated, whereby in some cases (as previously indicated above) the company may also be exonerated.

Under the applicable Criminal Codes, a perpetrator who attempts to commit a criminal offence, but voluntarily forsakes the completion of a punishable attempt, may be exonerated. However, he/she shall still be punished for any actions that constitute a separate criminal offence, e.g. in case of forgery of documents through which the perpetrator attempted to commit fraud or embezzlement (but voluntarily forsake its completion), the court and relevant authority will still consider his/her liability for the actual forgery itself.

Generally, cooperation and voluntary self-disclosure will be considered by the law enforcement authorities, especially when deciding on sanctions.

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE ("LEGAL PRIVILEGE")

? Who can enjoy the protection of legal privilege?

? What information/data is protected by legal privilege, what is not and what are (if any) the exceptions from legal privilege?

? Does legal privilege extend to documents created by attorneys after they are handed over to the client?

Under the relevant FBiH and RS laws, including the Law on Advocacy and Code of Ethics for Attorneys, any information an attorney obtains during a mandate from the client or otherwise, including all documentation, written submissions, as well as audio or video records, constitute a legal privilege. Even if an attorney does not accept a mandate, such obligation exists in relation to information which was provided to the attorney by the potential client.

Legal privilege extends to all attorneys in a joint lawyers' office, and to a law firm and all its employees, and is not time limited. Even after the authorization to represent a client in a certain matter is cancelled or revoked, or the relevant proceeding is finalized, the obligation still exists for information which became known to the attorney in the course of the relevant mandate and/or proceedings.

Under FBiH law, an attorney may disclose facts and circumstances that represent a legal privilege only in certain types of court proceedings (i) upon the written approval of the person who disclosed such information to the attorney; or (ii) if the disclosure of the information is indispensable in criminal proceedings or disciplinary proceedings in order for the attorney to prove his/her innocence. On the other hand, under RS law, the disclosure of such information is possible if it is necessary for the client's defence or, if necessary, to justify a decision on denial of defence in a certain matter.

In addition, in both entities, the obligation of attorneys (to the client) to preserve the confidentiality of all information received when providing legal services is protected by the state in various procedural situations, e.g. an attorney can refuse to testify if this would lead to a breach of the confidentiality obligation.

IN-HOUSE LAWYERS' PRIVILEGE

? Is there any privilege for in-house lawyers?

In-house lawyers do not enjoy the protection of legal privilege.

These may be obliged to protect a business secret, however information regarding a breach of law or other legislation cannot be determined as a business secret.

OTHER SERVICE PROVIDERS' PRIVILEGE

? Is there any privilege for other types of service providers?

? Can legal privilege be extended to them if they are sub-contracted by attorneys?

There are other types of privileges, but these fall within the client-provider relationship and do not apply in corporate investigations (e.g. tax advisors' privilege does not prevent tax advisors from providing any information they have on a company if necessary in investigation or criminal procedures, upon a written request from the court).

Under the applicable Criminal Codes, certain individuals are exempted from testifying in a criminal procedure, among others, persons who have a duty to keep state, military or official secrets, until released thereof by the competent authority; persons who have a duty to keep professional secrets (confessional priest, journalist for the purpose of protecting a source of information, attorney, public notary, doctor, midwife, etc.) unless they have been released thereof either by special law or by a statement of the person in whose favour the professional secret has been kept.

The legal privilege is extended only in cases stipulated by the applicable Code of Ethics for Attorneys, as indicated above, and it may be argued that these service providers are also entitled to the privilege that falls within the client-provider relationship.

DATA PROTECTION ISSUES

? What conditions must be met to allow investigators access to employees' e-mails/ other records potentially containing private information?

? Is the consent of the respective custodian necessary before any data collection starts?

? Are there any restrictions in relation to cross-border transfer of data collected during the investigation?

GDPR is not directly applicable in BiH, with the exception of Article 3 para 2, based on which GDPR could also apply to non-EU companies if certain requirements set out in GDRP are met. It is due to be implemented into BiH legislation via amendments to the BiH Personal Data Protection Law, but it is not certain when such amendments will be adopted and come into force. Until that date, all personal data processing of companies in BiH has to be carried out in compliance with the currently applicable BiH Personal Data Protection Law.

The BiH Personal Data Protection Law does not specifically regulate investigations involving employee e-mails or other records potentially containing private information. Thus, the general rules apply to such matters.

In general, the processing of personal data is considered legal if performed on a valid legal basis, which includes consent, legitimate interest of the controller, public interest requirements, etc. Due to the specific imbalance of power in an employment relationship (especially in terms of obligation to obtain a freely given consent), it may be argued that performing an internal investigation based solely on consent, without another more reliable legal basis, might be problematic.

Thus, when performing corporate investigations, the legitimate interests of the controller should also be considered. In such cases, the investigation and supervision needs to be conducted only when necessary, to the amount and in a way strictly stipulated by the controller's internal acts, as well as in a way that protects the controller's legitimate interests, but does not compromise or jeopardize the private and personal life of the data subject, i.e. the employee, which shall be assessed taking into account the circumstances of each particular case. The controller is obliged to carefully review the relevant data during the investigation, but in a way that does not involve any private information of the employee. On the other hand, as part of the transparency obligation, the controller should ensure that the respective employees (or potentially other relevant persons, as the case may be) are duly informed about the processing as part of the investigation.

Cross-border transfer of data from BiH is, in general, allowed if the third-country or the international organization to which the personal data is being transferred implements adequate safeguards for personal data as set out in the BiH Personal Data Protection Law. The transfer of personal data to another country that does not provide adequate safeguards as stipulated by the BiH Personal Data Protection Law may exceptionally be allowed in specific cases stipulated by the law, for example, if the transfer is necessary due to public interest, the disclosure of personal data is necessary to fulfil the contract between the data subject and the controller or the fulfilment of pre-contractual obligations undertaken at the request of the person whose data are being processed, etc. In any case, if there are no valid grounds for transferring personal data to a third-country, the controller may request approval from the BiH Agency for Personal Data Protection.

INTERVIEWS

? Does an employee have an obligation to actively participate at the interviews organised by the counsel of the employer?

Under the applicable labour legislation, an employer shall allow an employee to present his/her defence in case of a disciplinary procedure. However, if absent, the employee will miss the opportunity to defend themselves in front of the employer's representatives. Therefore, the employee does not have an obligation but rather a right to participate in any interviews organised by the employer, especially in the course of a disciplinary procedure, but he/she may decide not to exercise such right.

REPORTING DUTIES

? Is there any reporting duty towards enforcement authorities on the outcome of the investigation or any information obtained during the investigation?

? If yes, who is subject to the reporting duty and who is exempted?

Under the applicable Criminal Codes, it is a criminal offence not to report the preparation of a potential crime at the time of becoming aware of it and when its prevention was still possible, and the crime was later attempted or even committed. In addition, not reporting a committed crime or the perpetrator, after becoming aware of it, when such a report may lead to the timely discovery of the perpetrator or the crime, is also a criminal offence. Furthermore, officials or other responsible persons have a special responsibility to report any discovery in the course of their duties of a crime for which a punishment of five years imprisonment or more may be imposed; whereas they can be sentenced in the same manner as the perpetrator of the crime itself.

The perpetrator's spouse, extramarital partner, lineal blood relative, brother or sister, adoptive parent or adoptive child and their spouse/extramarital partner, as well as his/her defence lawyer, doctor or confessional priest, are exempted from the obligation to report the preparation of a criminal crime, a committed crime or the perpetrator of such offence.

This chapter was written by Lana Sarajlić.

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WOLF THEISS

BULGARIA

WHISTLEBLOWING

? Is there any specific regulation related to whistleblowers?

? If so, is there any obligation to react to whistleblowing/to have a system in place for reacting to whistleblowing?

There is no specific regulation related to whistleblowing in Bulgaria, nor any formal legal definition of whistleblowing. Bulgarian courts do not acknowledge specific rights of whistleblowers.

Saying that, current legislation provides for relevant examples where the rights of an employee in similar circumstances are protected. Thus for example, the Bulgarian Labour Code provides that submitting a signal to the Financial Supervision Commission for breaches by an employer of certain financial services laws, the social security code and others, shall not constitute a breach of work discipline in the form of abuse of the confidence and damage of the reputation of the business, nor a disclosure of confidential information, unless the employee deliberately communicates false information.

The Bulgarian Anticorruption Act (*Counter-Corruption and Unlawfully Acquired Assets Forfeiture Act*) provides that any citizen who has any evidence of corruption or conflict of interest for a person acting as senior public officer may report this to the Anticorruption Commission. The Commission has an obligation to undertake specific measures to preserve the identity of the citizen, including measures to prevent any psychological or physical pressure over him or her. Specific measures to preserve a witness are also provided in criminal proceedings but not in civil or commercial proceedings.

CIVIL LIABILITY

? In which situations is the decision to hold an internal investigation necessary to deflect civil responsibility of board members?

The Bulgarian Commercial Act provides that the manager of a company may be liable for damages, both for active actions and for omission of oversight. Therefore, an internal investigation may be required in case of reasonable suspicions of a possible wrongdoing in the company, as it could prevent further damages for the company and potential liability for the manager. Also, if a manager has or receives information of a possible wrongdoing and does not take appropriate mitigation measures (such as an internal investigation), his or her actions could be considered as negligence and may be a sufficient ground for the company and/or shareholders to claim civil liability.

CRIMINAL LIABILITY

? In which situations will an internal investigation decision be necessary to deflect criminal liability of board members?

Certain types of misconduct may give rise to criminal prosecution against the board members or managers of a company and may trigger fines and/or custody. This could be the case, for example, in case of negligence in the exercise of management or supervisory activity, entering into disadvantageous transactions, bribery, bankruptcy, money laundering, tax fraud etc. If a corporate director has a suspicion of criminal wrongdoing but takes no action to stop it, he or she may be held liable for “non-hindering criminal wrongdoing”. More complex constructions of co-liability in the form of aiding and abetting also cannot be excluded. Internal investigations are required to mitigate the potential liability of the board members or managers.

Board members or managers may also bear criminal liability if they have not conducted their business with the "*care of a good trader*" and for that reason the company enters insolvency causing harm to creditors. This obligation includes also the obligation to control and manage the employees in the company and to be aware of their actions.

CORPORATE CRIMINAL LIABILITY

? **Is there a corporate criminal liability in your country?**

? **If so, would a compliance system including internal investigation prevent/mitigate corporate criminal liability?**

There is no corporate criminal liability in Bulgaria. Only natural persons may be held criminally liable. Companies may be subject to administrative sanctions for some types of breaches, but not criminal liability.

PARALLEL PROSECUTION OF COMPANIES AND INDIVIDUALS

? **Can both individuals and companies be prosecuted for the same misconduct?**

Only natural persons may be prosecuted and held criminally liable. Legal entities may bear only civil or administrative liability. Criminal and civil proceedings may take place concurrently.

COOPERATION

? **Would cooperation and voluntary self-disclosure be considered by the law enforcement authorities (in relation to both individual and corporate liability)?**

Yes, under Bulgarian criminal law, in case of cooperation and voluntary self- disclosure, the punishment of the liable person shall be reduced. This is applicable also in respect of administrative breaches (i.e. not criminal) in case of cooperation by the company.

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE ("LEGAL PRIVILEGE")

? **Who can enjoy the protection of legal privilege?**

? **What information/data is protected by legal privilege, what is not and what are (if any) the exceptions from legal privilege?**

? **Does legal privilege extend to documents created by attorneys after they are handed over to the client?**

Any papers, files, electronic documents, and computer equipment held by an attorney-at-law may not be subject to violation, inspection, copying, verification or seizure. Similarly, correspondence between an attorney-at-law and a client may not be subject to inspection, verification or seizure and may not be used as evidence. Meetings and calls between an attorney-at-law and his or her client may not be intercepted and recorded. Any recordings, where available, shall not be used as means of evidence and shall be subject to immediate destruction.

The legal privilege provided under the Bulgarian Bar's Act applies to a lawyer irrespective of any investigation, dispute, litigation, inspection etc. Lawyers are covered also when they are providing advice not related or arising out of investigations or litigations. This has been consistently applied by civil and criminal courts. However, some administrative authorities (such as the Bulgarian Competition Protection Commission) are more reticent to apply this provision during their investigations.

Attorneys-at-law cannot be questioned on their procedural capacity, on meetings, calls and correspondence with clients or other attorneys-at-law as well as with regard to any facts and circumstances, of which they become aware in relation with their capacity. When a client is held in custody or deprived of liberty, his or her attorney-at-law has the right to meet him or her privately and their conversation during meetings may not be intercepted or recorded, however meetings may be subject to observation. Moreover, during meetings the attorneys-at-law have the right to hand over and receive written material in relation to the case. According to the Bar Act the contents of such documents may not be subject to inspection; which leads to the conclusion that legal privilege extends to documents created by attorneys after they are handed over to the client, but only in this hypothesis.

IN-HOUSE LAWYERS' PRIVILEGE

? Is there any privilege for in-house lawyers?

The legal privilege concerns any attorney-at-law, attorney-at-law from the European Union, junior attorney-at-law or attorney-at-law assistant within the meaning of the Bar Act, who has been admitted to the Bar Association. It does not matter whether this attorney-at-law works as an in-house lawyer or as an attorney-at-law with various clients, it only matters whether he or she has been admitted to the Bar Association and accordingly whether the Bar Act and its legal privilege provisions apply to him or her.

In-house lawyers which are not admitted to the Bar are not covered by the provisions in respect of legal privilege.

OTHER SERVICE PROVIDERS' PRIVILEGE

? Is there any privilege for other types of service providers?

? Can legal privilege be extended to them if they are sub-contracted by attorneys?

Legal privilege does not apply to other persons or entities.

DATA PROTECTION ISSUES

? What conditions must be met to allow investigators access to employees' e-mails/ other records potentially containing private information?

? Is the consent of the respective custodian necessary before any data collection starts?

? Are there any restrictions in relation to cross-border transfer of data collected during the investigation?

Personal data processing in Bulgaria is subject to the GDPR. The draft law implementing the GDPR in Bulgaria[1] explicitly regulates certain matters relating to the processing of personal data in the context of employment relationships. Among others, employers should adopt rules and procedures where systems are in place to report breaches and restrict use of internal company resources (e.g. emails, laptops, etc.). These rules must be communicated to the employees.

Employees have clear and specific rights to privacy in the workplace, recognized under Bulgarian law, but these rights are balanced with certain entitlements of the employer in the course of its business operations. Without the explicit consent of the employee the employer only has the right to monitor or review the professional correspondence, messages, etc. of the employee. The employer has no right to check the personal e-mails of the employee. Any private correspondence is protected under the Bulgarian Constitution and any access or disclosure without the explicit consent of the employee, could be subject to criminal liability. As an exception to this rule, the protection of private correspondence may be waived only by court order for the purposes of detection and prevention of serious crimes.

The employer should make clear in the internal company rules whether employees are entitled to use the company's e-mail for personal use.

- If yes, the employer needs the explicit consent of the employee for access, processing and disclosure of their correspondence (as the employer would not be able to differentiate between professional and personal correspondence before accessing the e-mail).

- If no, i.e. if all use for personal purposes is strictly forbidden and only professional correspondence is allowed, then the employer has the right to monitor and process such correspondence without the consent of the employee, if employees have been informed that personal use is prohibited and that they will be monitored and as long as the extent of the monitoring is proportionate.

In case of an envisaged transfer of data to countries outside of the EU/EEA, for which an adequate level of data protection has not been determined (e.g. USA), additional guarantees are required, e.g. the conclusion of the EU Standard Contractual Clauses.[2]

1 On 24.01.2018 the Bulgarian Draft Law implementing the GDPR was officially approved by the Bulgarian Parliament at the second hearing. Pursuant to the legislative procedure, the approved Draft Law shall be promulgated in the State Gazette not later than 15 days as of its acceptance and will enter into force after 3 days following its promulgation (unless stated otherwise in the law itself).

2 Art. 44 et seqq. GDPR.

INTERVIEWS

? Does an employee have an obligation to actively participate at the interviews organised by the counsel of the employer?

An employee has an obligation to actively participate at the interviews organised by the counsel of the employer if this obligation exists in his or her employment agreement as part of the job description or if it is included as part of the internal rules or the interior labour regulations adopted in the enterprise. Otherwise, the employee is required to participate in such interviews only in case of a lawful order issued by the employer.

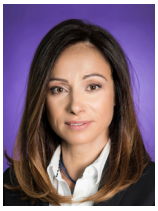
REPORTING DUTIES

? Is there any reporting duty towards enforcement authorities on the outcome of the investigation or any information obtained during the investigation?

? If yes, who is subject to the reporting duty and who is exempted?

Yes. If the employer has information about a serious crime that is being committed in the enterprise, he or she must inform the enforcement authorities and provide them with any details they are aware of. Otherwise, he or she may bear criminal liability for not hindering the perpetration of an obvious serious crime.

This chapter was written by Anna Rizova and Oleg Temnikov.



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CROATIA

WHISTLEBLOWING

? Is there any specific regulation related to whistleblowers?

? If so, is there any obligation to react to whistleblowing/to have a system in place for reacting to whistleblowing?

The Whistleblowing Act is in effect as of 1 July 2019. It provides that corporations and employers in general have an obligation to establish a procedure for reporting a potential wrongdoing and to appoint an internal officer responsible for receiving such reports. If confronted with plausible information from a whistleblower, the responsible officer has an obligation to initiate an appropriate analysis – and eventually investigation – of the situation as part of his or her duties.

CIVIL LIABILITY

? In which situations is the decision to hold an internal investigation necessary to deflect civil responsibility of board members?

Firstly, under the draft bill on whistleblowers the board has a strict obligation to set up a system for reporting wrongdoings. The board's failure to do so, let alone any board's interference with an internal investigation, may lead to a fine up to EUR 7.000.

Secondly, a part of a corporate director's general fiduciary duty is his or her obligation to ensure that the corporation behaves in compliance with all relevant regulations. Whenever a corporate director has a reasonable suspicion of a possible wrongdoing in the corporation, he or she has to initiate appropriate steps to confirm (or dissipate) it, and to prevent further damage and wrongdoing with the appropriate level of information. An internal investigation will often be such an appropriate step. In such cases, a failure to conduct an internal investigation would mean a breach of the corporate director's fiduciary duties and he or she would thus be liable for any prejudice to the corporation (e.g. penal or administrative fines, damages to be paid to third persons, loss of further profits etc.) that could have been prevented, had the wrongdoing been discovered in time.

CRIMINAL LIABILITY

? In which situations will an internal investigation decision be necessary to deflect criminal liability of board members?

In general, an omission to investigate a potential wrongdoing, as long as the omission is not the result of an intentional decision by the board, should not result in criminal liability for offences that have already been committed and, in relation to which, the management board's action could not have influenced or prevented the criminal offence. However, should such omission be intentional and potentially aimed towards assisting the perpetrator, board members could be found criminally liable in certain circumstances.

More generally, if a corporate director has a certain suspicion of a serious criminal wrongdoing (e.g. corruption, money laundering, serious fraud) and does nothing about it, he or she may be held liable for "non-hindering criminal wrongdoing".

CORPORATE CRIMINAL LIABILITY

? **Is there a corporate criminal liability in your country?**

? **If so, would a compliance system including internal investigation prevent/mitigate corporate criminal liability?**

Yes, there is a strict corporate criminal liability in Croatia. Companies may be held criminally liable for actions of the company's officers entrusted with business responsibilities. A company may avoid criminal liability if it has implemented and applied adequate procedures for the early detection and reporting of such a crime committed by persons whose actions are attributed to the company.

PARALLEL PROSECUTION OF COMPANIES AND INDIVIDUALS

? **Can both individuals and companies be prosecuted for the same misconduct?**

Yes. Both, the company and the individual perpetrator may be prosecuted for the same misconduct.

COOPERATION

? **Would cooperation and voluntary self-disclosure be considered by the law enforcement authorities (in relation to both individual and corporate liability)?**

Cooperation and voluntary self-disclosure will always be considered at least as a mitigating circumstance (i.e. leading to a smaller sanction). In some cases, voluntary self-disclosure may lead to a substantial reduction or even immunity from sanctions.

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE ("LEGAL PRIVILEGE")

? **Who can enjoy the protection of legal privilege?**

? **What information/data is protected by legal privilege, what is not and what are (if any) the exceptions from legal privilege?**

? **Does legal privilege extend to documents created by attorneys after they are handed over to the client?**

"Legal privilege" under Croatian law is construed as the attorneys' obligation (to the client) to preserve confidentiality of all information received when providing legal services. This is respected by the State in various procedural situations: e.g. if an attorney is obliged to testify, the testimony can be refused if this would lead to a breach of the confidentiality obligation. The same principle is applied to the obligation of delivery of documents or their seizure. To ensure it, a special proceeding is applied when attorneys' premises are searched: a Bar representative must be present and documents can only be seized if this representative attests that they are not covered by legal privilege.

"Legal privilege" covers, therefore, any information/data received when providing a legal service, regardless of whether this is received from the client or from third persons. However, the privilege is tied to the person of the attorney (and his or her employees and subcontractors), not to the information or document itself; thus the

information or document which is protected when kept by the attorney is not protected in the hands of the client or an unrelated third person.

A stronger privilege covers legal services provided within the frame of defence in penal proceedings: in those cases even any communication between the attorney and the client is protected.

IN-HOUSE LAWYERS' PRIVILEGE

? Is there any privilege for in-house lawyers?

No. In-house lawyers do not enjoy any privilege.

OTHER SERVICE PROVIDERS' PRIVILEGE

? Is there any privilege for other types of service providers?

? Can legal privilege be extended to them if they are sub-contracted by attorneys?

Although other types of privileges exist (e.g. tax advisors' privilege), they are not relevant for our purposes. All such privileges fall within the client-provider relationship when providing regulated services; corporate investigation cannot be subsumed under any other type of regulated services other than legal services.

As noted above, "legal privilege" covers not only the attorney personally, but also any other person used by the attorney for providing legal services. This means that if other service providers (such as forensic or accountancy experts) are sub-contracted by the attorney in direct connection with a specific legal service, they can invoke legal privilege to the same extent as the attorney. However, the special protection of premises does not apply to them. Therefore, all relevant documents shall be kept in the attorney's premises.

DATA PROTECTION ISSUES

? What conditions must be met to allow investigators access to employees' e-mails/ other records potentially containing private information?

? Is the consent of the respective custodian necessary before any data collection starts?

? Are there any restrictions in relation to cross-border transfer of data collected during the investigation?

Any personal data processing may only take place on one of the lawful grounds specified by the GDPR. In particular, processing of employees' personal data within an internal investigation may only be based on the legitimate interests of the controller. However, the controller must perform a delicate balancing of its own interests against the interests or fundamental rights of the employees (e.g., right to private life and secrecy of communication). This balancing exercise should be well-documented. Furthermore, the extent of the processing must be strictly necessary to achieve the aim of the investigation and there should be no less invasive measures available. Data included in the investigation should be carefully selected prior to their review and no private information should be accessed within the investigation. The set-up of the right key words and sufficient training of the reviewers is essential here.

Employees should also be informed that their personal data may be processed within the investigation. The privacy notice must include, among others, the legal basis for the data processing, its purpose and the employees' corresponding rights.

Reliance on employees' consent during an investigation is problematic. The GDPR requires that the consent is "freely given". According to the EU Data Protection Working Party, employees are almost never in a position to freely give consent, given their dependant position. Also, processing of employees' personal data by using applications or tracking systems is subject to the data protection impact assessment and under the eye of the Croatian data protection regulator AZOP.

Cross-border transfer of data collected during an investigation outside the EU is subject to strict requirements. In particular, companies must ensure that the data will be adequately protected even after their transfer to a third country. Available instruments include binding corporate rules and standard data protection clauses adopted by the Commission. In addition, companies in the USA may receive investigation data under the EU/US Privacy Shield. In order to participate, the companies must sign up for the Privacy Shield with the U.S. Department of Commerce and fulfil the relevant personal data processing requirements.

INTERVIEWS

? Does an employee have an obligation to actively participate at the interviews organised by the counsel of the employer?

Yes. This obligation can be inferred from the general obligation of all employees to prevent damages and, in the case of managing employees, also from their obligation to "ensure compliance with legal and internal regulations".

REPORTING DUTIES

? Is there any reporting duty towards enforcement authorities on the outcome of the investigation or any information obtained during the investigation?

? If yes, who is subject to the reporting duty and who is exempted?

There is a general obligation under the Criminal Code to report certain crimes such as bribery. Only attorneys, who learn about this information when providing legal services (i.e. conducting investigations), are exempted from this reporting duty. This means that if there is a risk that the suspicion of bribery may be uncovered during an internal investigation, such investigation should be led by an attorney.

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CZECH REPUBLIC

WHISTLEBLOWING

? Is there any specific regulation related to whistleblowers?

? If so, is there any obligation to react to whistleblowing/to have a system in place for reacting to whistleblowing?

No. There is no comprehensive law on whistleblowing and the courts do not acknowledge the rights of whistleblowers as such. However, if confronted with plausible information from a "whistleblower", a corporate director (by "corporate director" we understand any member of an executive or supervisory board of a corporation) has the obligation to initiate an appropriate analysis - and eventually investigation - of the situation as part of his or her general fiduciary duties.

CIVIL LIABILITY

? In which situations is the decision to hold an internal investigation necessary to deflect civil responsibility of board members?

A part of the general fiduciary duties of a corporate director is his or her obligation to ensure that the corporation behaves in compliance with all relevant regulations. This means, that whenever a corporate director has a reasonable suspicion of a possible wrongdoing in the corporation, he or she has to initiate appropriate steps to confirm (or dissipate) it, and to be able to prevent further damage and wrongdoing with the appropriate level of information. An internal investigation will often be such an appropriate step. In such cases, not to conduct an internal investigation would mean a breach of the fiduciary duties of the corporate director and he or she would thus be liable for any prejudice to the corporation (e.g. penal or administrative fines, damages to be paid to third persons, loss of further profits etc.) that could have been prevented, had the wrongdoing been discovered in time.

CRIMINAL LIABILITY

? In which situations will an internal investigation decision be necessary to deflect criminal liability of board members?

In the same circumstances as specified above, i.e. "reasonable" suspicion of wrongdoing, the corporate director may also be held liable for "negligent breach of duty of trust", if the damages amount to at least CZK 500.000 (ca EUR 20.000). If the corporate director remains passive even in case of strong suspicion, he or she may even be liable for intentional "breach of duty of trust"; in this case the sanction is more severe and the threshold of damages is only CZK 50.000 (ca EUR 2.000).

Furthermore, if a corporate director has a certain suspicion of a still ongoing criminal wrongdoing (e.g. corruption, money laundering, serious fraud), he or she may be held liable for "non-hindering criminal wrongdoing".

More complex constructions of co-liability in the form of aiding and abetting can also not be excluded in specific situations.

CORPORATE CRIMINAL LIABILITY

? Is there a corporate criminal liability in your country?

? If so, would a compliance system including internal investigation prevent/mitigate corporate criminal liability?

Yes, there is a strict corporate criminal liability in the Czech Republic. Companies may be held criminally liable for actions of certain persons who are defined by the law (e.g. employees, directors). A company will not be held criminally liable if it has implemented adequate procedures which were able to prevent the respective crime committed by persons whose actions are attributed to the company. The Czech General Prosecutors office published a methodology for prosecution authorities which explains, inter alia, how companies' compliance efforts shall be evaluated.[1] Some of these adequate procedures (called "compliance management systems" in the methodology) are procedures for internal investigations (as part of the detective measures of a company).

PARALLEL PROSECUTION OF COMPANIES AND INDIVIDUALS

? Can both individuals and companies be prosecuted for the same misconduct?

Yes. Both, the company and the individual perpetrator may be prosecuted for the same misconduct.

COOPERATION

? Would cooperation and voluntary self-disclosure be considered by the law enforcement authorities (in relation to both individual and corporate liability)?

Cooperation and voluntary self-disclosure will always be considered at least as a mitigating circumstance (i.e. leading to a smaller sanction). In some cases, the status of "cooperating defendant" can be awarded which may lead to a substantial reduction or even immunity from sanctions.

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE ("LEGAL PRIVILEGE")

? Who can enjoy the protection of legal privilege?

? What information/data is protected by legal privilege, what is not and what are (if any) the exceptions from legal privilege?

? Does legal privilege extend to documents created by attorneys after they are handed over to the client?

"Legal privilege" under Czech law is construed as the obligation of attorneys (to the client) to preserve confidentiality of all information received when providing legal services. This is respected by the State in various procedural situations: e.g. if an attorney is obliged to testify, the testimony can be refused, if this would lead to a breach of the confidentiality obligation. The same principle is applied to the obligation of delivery of documents or their seizure. To ensure it, a special proceeding is applied when attorneys' premises are searched: a Bar representative must be present and documents can only be seized if this representative attests that they are not covered by legal privilege.

1 Partner Jitka Logesová is a co-author of the General Prosecutors Office methodology.

"Legal privilege" covers, therefore, any information/data received when providing a legal service, regardless if received from the client or from third persons. However, the privilege is tied to the person of the attorney (and his or her employees and subcontractors), not to the information or document itself; thus the information or document which is protected when kept by the attorney is not protected in the hands of the client or an unrelated third person.

A stronger privilege covers legal services provided within the frame of defence in penal proceedings: in those cases even any communication between the attorney and the client is protected.

Finally, a special privilege leads to the exemption of attorneys from the obligation to report information on listed crimes (such as bribery) if this information was learnt in the context of providing legal services. Other advisors such as forensic experts are not exempted from the reporting duty.

IN-HOUSE LAWYERS' PRIVILEGE

? Is there any privilege for in-house lawyers?

No. In-house lawyers do not enjoy any privilege.

OTHER SERVICE PROVIDERS' PRIVILEGE

? Is there any privilege for other types of service providers?

? Can legal privilege be extended to them if they are sub-contracted by attorneys?

Although other types of privileges exist (e.g. tax advisors' privilege), they are not relevant for our purposes. All such privileges fall within the client-provider relationship when providing regulated services; corporate investigation cannot be subsumed under any other type of regulated services other than legal services.

As noted above, "legal privilege" covers not only the attorney personally, but also any other person used by the attorney for providing legal services. This means that if other service providers (such as forensic or accountancy experts) are subcontracted by the attorney in direct connection with a specific legal service, they can invoke legal privilege to the same extent as the attorney. However, the special protection of premises does not apply to them. Therefore, all relevant documents shall be kept in the attorney's premises.

DATA PROTECTION ISSUES

? What conditions must be met to allow investigators access to employees' e-mails/ other records potentially containing private information?

? Is the consent of the respective custodian necessary before any data collection starts?

? Are there any restrictions in relation to cross-border transfer of data collected during the investigation?

Any personal data processing may only take place on one of the lawful grounds specified by GDPR. In particular, processing of employees' personal data within an internal investigation may only be based on the legitimate interests of the controller. However, the controller must perform a delicate balancing of its own interests against the interests or fundamental rights of the employees (e.g., right to private life and secrecy of communication).

This balancing exercise should be well-documented. Furthermore, the extent of the processing must be strictly necessary to achieve the aim of the investigation and there should be no less invasive measures available. Data included in the investigation should be carefully selected prior to their review and no private information should be accessed within the investigation. The set-up of the right key words and sufficient training of the reviewers is essential here.

Employees should also be informed that their personal data may be processed within the investigation. The privacy notice must include, among others, the legal basis for the data processing, its purposes and the employees' corresponding rights.

Reliance on employees' consent during the investigation is problematic. GDPR requires that the consent is "freely given". According to the EU Data Protection Working Party, employees are almost never in a position to freely give consent, given their dependant position.

Cross-border transfer of data collected during an investigation outside the EU is subject to strict requirements. In particular, companies must ensure that the data will be adequately protected even after their transfer to a third country. Available instruments include binding corporate rules and standard data protection clauses adopted by the Commission. In addition, companies in the USA may receive investigation data under the EU/US Privacy Shield. In order to participate, the companies must sign up for the Privacy Shield with the U.S. Department of Commerce and fulfil the relevant personal data processing requirements.

INTERVIEWS

? Does an employee have an obligation to actively participate at the interviews organised by the counsel of the employer?

Yes. For every employee this obligation can be inferred from the general obligation to prevent damages and, in the case of managing employees, also from their obligation to "ensure compliance with legal and internal regulations".

REPORTING DUTIES

? Is there any reporting duty towards enforcement authorities on the outcome of the investigation or any information obtained during the investigation?

? If yes, who is subject to the reporting duty and who is exempted?

Yes, there is an obligation according to the Criminal Code to report certain crimes such as bribery. Only attorneys, who learn about this information when providing legal services (i.e. conducting investigations), are exempted from this reporting duty. This means that if there is a risk, that during the internal investigation the suspicion of bribery may be uncovered, such investigation should be led by an attorney.

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HUNGARY

WHISTLEBLOWING

? Is there any specific regulation related to whistleblowers?

? If so, is there any obligation to react to whistleblowing/to have a system in place for reacting to whistleblowing?

Yes, there are special regulations for employers operating whistleblowing systems. However, there is no obligation to have such a system in place.

When there is a whistleblowing system, the employer is obliged to investigate the report and the whistleblower shall be notified of the result as well as the steps that are taken. However, certain reports defined by the relevant Act,[1] those that are made anonymously or by an unidentifiable whistleblower, may be ignored.

The regulations do not specify any obligations or requirements for the whistleblowing system – except that it shall be created in a manner ensuring that the name of the whistleblower shall not be known by any person other than the examiner.

The employer is subject to strict notification obligations under the relevant Act.

CIVIL LIABILITY

? In which situations is the decision to hold an internal investigation necessary to deflect civil responsibility of board members?

Corporate representatives have the general fiduciary duty to ensure that they, as well as the company managed by them, follow all relevant laws as well as the company's articles of association and any resolutions of the company's supreme decision-making body.

Accordingly, in case of any reasonable suspicion of any possible wrongdoing, management is expected to take all appropriate steps to review (and rectify, if necessary) the situation. Unless an internal investigation is conducted, the directors risk that they will be found in breach of their fiduciary duties and could therefore become liable for any prejudice (including damages) to the company that could have been prevented, had the wrongdoing been discovered in time.

CRIMINAL LIABILITY

? In which situations will an internal investigation decision be necessary to deflect criminal liability of board members?

The general threshold to trigger criminal liability under the Hungarian Criminal Code is set at damages caused in excess of HUF 50.000 (approx. EUR 150). However, there are situations when criminal liability can be triggered without any monetary damage arising.

Furthermore, if a corporate director has any suspicion of an ongoing criminal wrongdoing (e.g. corruption, money laundering, antitrust behaviour in public procurement or concession projects, etc.), he or she may be held liable for "non-hindering criminal wrongdoing".

1 Hungarian Act CLXV of 2013 on complaints and notifications of public interest.

CORPORATE CRIMINAL LIABILITY

? **Is there a corporate criminal liability in your country?**

? **If so, would a compliance system including internal investigation prevent/mitigate corporate criminal liability?**

Yes, there is strict corporate criminal liability in Hungary. A Hungarian company may be held criminally liable if its management and/or shareholder committed a crime through the company (within the company's field of business) or the company otherwise benefited from those crimes, unless the management has implemented and deployed adequate procedures which would have prevented the respective crime.

PARALLEL PROSECUTION OF COMPANIES AND INDIVIDUALS

? **Can both individuals and companies be prosecuted for the same misconduct?**

Yes. Both the company and the individual perpetrator may be prosecuted for the same misconduct, though they would face different criminal sanctions.

COOPERATION

? **Would cooperation and voluntary self-disclosure be considered by the law enforcement authorities (in relation to both individual and corporate liability)?**

Cooperation and voluntary self-disclosure will always be considered at least as a mitigating circumstance (i.e. leading to a lower sanction). In some instances (e.g., antitrust behaviour in public procurement or concession projects) such a cooperation can lead to a substantial reduction of or even immunity to criminal sanctions.

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE ("LEGAL PRIVILEGE")

? **Who can enjoy the protection of legal privilege?**

? **What information/data is protected by legal privilege, what is not and what are (if any) the exceptions from legal privilege?**

? **Does legal privilege extend to documents created by attorneys after they are handed over to the client?**

Legal privilege under Hungarian law protects all communication between attorneys and their clients in the course of, in the interest of or within the framework of defence during any proceedings, i.e. not just during regulatory or criminal investigations, but all administrative authority procedures as well as all court procedures launched by Hungarian authorities or before Hungarian courts. These include, in particular, competition, data protection and tax related proceedings, as well as regulatory proceedings relating to the financial services, energy, food, gambling, insurance, and pharmaceutical industry.

Such legal privilege will prevent Hungarian authorities from reviewing or using as evidence any communication containing legal advice relating to defence in regulatory proceedings.

IN-HOUSE LAWYERS' PRIVILEGE

? Is there any privilege for in-house lawyers?

Legal privilege applies to communication between the company and its in-house counsel to the extent the in-house counsel concerned is registered with the Hungarian Bar Association to perform attorney activities.

OTHER SERVICE PROVIDERS' PRIVILEGE

? Is there any privilege for other types of service providers?

? Can legal privilege be extended to them if they are sub-contracted by attorneys?

Legal privilege is reserved for attorneys (and in-house counsels in certain instances as discussed above). Other regulated professions in Hungary (such as auditors, notaries, forensic or accountancy experts etc.) are also bound by certain secrecy obligations, but such privileges fall within the client-provider relationship.

DATA PROTECTION ISSUES

? What conditions must be met to allow investigators access to employees' e-mails/other records potentially containing private information?

? Is the consent of the respective custodian necessary before any data collection starts?

? Are there any restrictions in relation to cross-border transfer of data collected during the investigation?

Any personal data processing may take place only on one of the lawful grounds specified by the GDPR. Employee consent cannot serve as a lawful ground, as the precondition of "freely given nature" is almost never satisfied in case of employment relationships.[2] According to the Hungarian data protection authority (NAIIH), the legal basis for monitoring employees' business e-mail addresses could be the employer's legitimate interest; although this requires a previous legitimate interest assessment.[3]

Based on NAIH's recommendations it is of utmost importance to create an internal policy for the monitoring of business e-mail addresses. In such a policy the employer could prohibit the private use of a business e-mail address by which means the employer would be able to avoid the processing of private data. According to the recent changes in the Hungarian Labour Code, unless otherwise agreed, employees are obliged to use the employer's information technology system solely for work purposes. Within the framework of his monitoring rights the employer is entitled to inspect any information stored on the IT system used for the performance of work, which are related to the employment relationship.

Any investigation requires compliance with further obligations. Accordingly, the affected employees have to be, among others, informed in advance of the legal basis for the data processing, the purpose of the processing and the (possible) technical means used for monitoring (in accordance with the GDPR and the applicable Hungarian law). The investigation and monitoring can affect employees only to the extent of their employment relationship related behaviour, and the means and methods used may not infringe human dignity. The private lives of employees may not be monitored.

2 As opined by the EU Data Protection Working Group.

3 Recommendation following the rules of the Grand Chamber of the ECHR in *Barbulescu vs. Romania*.

An investigation is allowed only to the extent strictly necessary to achieve its aim. For example, if the headline or subject field of the e-mail is sufficient to recognise the infringement, the employer cannot process further data and open the e-mail. The investigation should also refer only to a certain limited period in time, etc. Moreover, as a general rule the presence of the affected employee shall also be ensured.

As an investigation where a large amount of data is processed may imply a high risk for the data subject – despite the fact that NAIH's "black list" of mandatory data protection impact assessments does not contain the investigation of business e-mail addresses – the monitoring may require a data protection impact assessment[4] and, where appropriate, evidence of consultation with the data subjects (employees and their representatives).

Cross-border transfer of data collected during an investigation to a third country is subject to strict requirements. In particular, companies must ensure adequate protection of the data even after their transfer. Available and adequate means include binding corporate rules and standard data protection clauses adopted by the Commission.

INTERVIEWS

? Does an employee have an obligation to actively participate at the interviews organised by the counsel of the employer?

Yes, the obligation can be inferred from the general obligation of cooperation, but the employee cannot be obliged to testify against him or herself.

REPORTING DUTIES

? Is there any reporting duty towards enforcement authorities on the outcome of the investigation or any information obtained during the investigation?

? If yes, who is subject to the reporting duty and who is exempted?

According to the Criminal Code in case of certain crimes (e.g. offences against the state, corruption crimes, etc.) there is a reporting obligation, the failure of which constitutes a crime.

4 Art. 35 of the GDPR.

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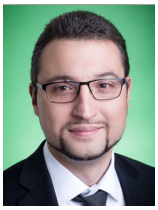

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WOLF THEISS

POLAND

WHISTLEBLOWING

? Is there any specific regulation related to whistleblowers?

? If so, is there any obligation to react to whistleblowing/to have a system in place for reacting to whistleblowing?

At present, there is no specific regulation in Poland related to whistleblowers.

The Polish Government is working on a new law on transparency in public life, which is supposed to introduce protection for whistleblowers. In the draft law anyone who notifies the authorities about corruption or other crimes committed by his or her employer is protected from having their employment relationship terminated.

Polish law does not explicitly require entrepreneurs to have a system in place for reacting to whistleblowing, however, it does require that employers implement the necessary procedures to prevent corruption.

CIVIL LIABILITY

? In which situations is the decision to hold an internal investigation necessary to deflect civil responsibility of board members?

The decision itself does not deflect the civil liability of board members towards third parties. As far as liability of the company is concerned, the decision to hold an internal investigation may constitute a valid defence if it can be established that the board member acted in line with his or her fiduciary duties towards the company.

CRIMINAL LIABILITY

? In which situations will an internal investigation decision be necessary to deflect criminal liability of board members?

Under the Criminal Code, a company officer may be held liable if he or she abuses the authority vested in him or her, or fails to perform his or her duty and inflicts substantial damage by doing so. A board member may be released from criminal liability by evidencing that he or she has acted diligently to prevent such damage via an internal investigation.

This is also relevant for liability in connection with the failure to declare a company insolvent in time as well as with certain tax frauds.

However, the decision to conduct an internal investigation does not by itself release board members from liability for acts preceding the investigation.

CORPORATE CRIMINAL LIABILITY

? Is there a corporate criminal liability in your country?

? If so, would a compliance system including internal investigation prevent/mitigate corporate criminal liability?

Yes, there is. A company may be held criminally liable for a criminal offence committed by an individual acting on behalf of or for the benefit of this company. Implementing the relevant procedures aimed at preventing such acts may lead to limiting or excluding such liability.

PARALLEL PROSECUTION OF COMPANIES AND INDIVIDUALS

? Can both individuals and companies be prosecuted for the same misconduct?

Yes. However, the proceedings are not parallel. The liability of the person acting on behalf of or for the benefit of the company must be established prior to the liability of the company itself.

Currently, the Polish government is working on an amendment to the act on the liability of collective entities, allowing for parallel proceedings against the individual and the company, or even against the company itself.

COOPERATION

? Would cooperation and voluntary self-disclosure be considered by the law enforcement authorities (in relation to both individual and corporate liability)?

Cooperation and voluntary self-disclosure will always be considered at least as a mitigating circumstance (leading to a less severe sanction). In some instances (e.g., when the disclosure occurs before the proceedings are initiated, or with respect to acts of unfair competition) such cooperation can lead to a substantial reduction of or even release from criminal sanctions.

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE ("LEGAL PRIVILEGE")

? Who can enjoy the protection of legal privilege?

? What information/data is protected by legal privilege, what is not and what are (if any) the exceptions from legal privilege?

? Does legal privilege extend to documents created by attorneys after they are handed over to the client?

All information obtained by attorneys (advocates, legal advisors and tax advisors) when providing legal advice is subject to legal privilege. This includes, among others, case files, electronic communication, hand-written notes, etc. As a rule, legal privilege also extends to documents created by attorneys even after they have been handed over to the client. In such cases, it is the responsibility of the client to inform the authorities that certain documents are subject to legal privilege.

Legal privilege can be waived by the court, if a given circumstance cannot be proved through any other piece of evidence.

Legal advisors are obliged to inform the authorities of any tax schemes used by clients which may be a tool to avoid taxation.[1]

IN-HOUSE LAWYERS' PRIVILEGE

? Is there any privilege for in-house lawyers?

If the in-house lawyer is qualified as an advocate, legal advisor or tax advisor, legal privilege should apply. However, in practice, the authorities tend to limit the extent of legal privilege for in-house lawyers due to the fact that in performing their services they are not fully independent.[2]

OTHER SERVICE PROVIDERS' PRIVILEGE

? Is there any privilege for other types of service providers?

? Can legal privilege be extended to them if they are sub-contracted by attorneys?

In Poland there are no special privileges reserved for other types of service providers.

DATA PROTECTION ISSUES

? What conditions must be met to allow investigators access to employees' e-mails/ other records potentially containing private information?

? Is the consent of the respective custodian necessary before any data collection starts?

? Are there any restrictions in relation to cross-border transfer of data collected during the investigation?

Personal data processing in Poland is subject to the GDPR restrictions. Monitoring an employee's email correspondence needs to be limited to employment-related data. Monitoring should be based on internal policies (work regulations) known to the employees. Employees need to be informed in advance of the technical measures and legal basis for data processing.

In terms of internal investigations, the data collection needs to be strictly limited to the scope of the investigation (subsidiarity rule). No excessive data collection is allowed.

The cross-border transfer of data collected during an investigation is subject to GDPR restrictions. Companies must ensure adequate protection of the data even after their transfer.

1 EU Directive 2018/822. This regulation is currently (end of 2018) being implemented into the Polish law.

2 This position is reflected in the ECJ judgment of 14 September 2010 in Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, where the court supported narrowing legal privilege and concluded that the exchange of correspondence between internal lawyers within an enterprise is not covered by legal privilege.

INTERVIEWS

? Does an employee have an obligation to actively participate at the interviews organised by the counsel of the employer?

Yes. However, the employee has the right not to answer questions that could incriminate him or her.

REPORTING DUTIES

? Is there any reporting duty towards enforcement authorities on the outcome of the investigation or any information obtained during the investigation?

? If yes, who is subject to the reporting duty and who is exempted?

Under the Code of Criminal Procedure, a legal obligation to report is limited to only certain severe kinds of crimes such as homicide, terrorism, espionage etc.

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ROMANIA

WHISTLEBLOWING

? Is there any specific regulation related to whistleblowers?

? If so, is there any obligation to react to whistleblowing/to have a system in place for reacting to whistleblowing?

Public institutions and state-owned companies (irrespective of the number of shares owned by the state) must ensure that employees have the possibility to submit whistleblowing complaints in several areas.[1] In addition, in case of any suspicion of corruption (such as misuse of EU funds), the employees or entity's representatives have an obligation to report this to the criminal authorities.[2] This applies to all persons who have a public position within public authorities or public institutions, participate in decision-making or who can influence decision-making in public companies or other economic units, as well as anybody who achieves, controls, or grants specialized assistance involving capital circulation, banking, credit operations, investments in stock exchanges, in insurance or regarding bank accounts or other domestic or international transactions.

In the private sector, for instance, banks have an obligation to establish a reporting line, especially for anti-money laundering and counter terrorism financing, and to react to whistleblowing by analysing the complaint and reporting it along with the results of the internal investigation, as the case may be, to the competent authorities (e.g. the Romanian National Bank or the law enforcement authorities).

CIVIL LIABILITY

? In which situations is the decision to hold an internal investigation necessary to deflect civil responsibility of board members?

There are several situations in which board members/administrators (herein referred as board members) are liable for damages caused to the company itself, to the shareholders, to third parties or for bankruptcy. In case of civil responsibility, the claims may be raised directly in the court within the legal term, as the case may be, based on the evidence that is provided by the firm to the court.[3]

In such a case, it is important to mention that the board members are also liable for damages caused to the firm by the firm's directors or personnel, if the board members themselves did not fulfil their general obligation to oversee the firm's activity. Otherwise stated, the board members have a general duty to prevent the damage of the company, and they have to ensure the implementation of all the necessary measures to achieve this aim. This includes in our view also the duty to establish a compliance culture within the organisation and also to investigate the cases where there are red flags for wrongdoings or even indications for damage's occurrence, and ultimately address the identified issues by making informed and appropriate decisions to mitigate their negative consequences. Such a diligent behaviour of the board members might deflect their civil responsibility, even though the legislation does not provide express rules related to this outcome of the internal investigations.

In other terms, even if there is no legal requirement for performing an internal investigation (as a separated process), before claiming any civil responsibility from an employee or a board member in the court, the benefit of the internal investigation is unquestionable. Noticeably, in case the board members perform such an internal investigation and they are not involved in the offence that created the civil damages to the firm, the board members may use in their defence the evidence that proves their innocence.

1 Law no. 571/2004 (regarding the protection of the whistleblowers from the public sector). Possibility to report must be ensured in areas such as corruption, conflicts of interest, discrimination, public procurement, gross negligence, non-compliance with transparency in relation to public information or decision-making processes in the public sector, etc.

2 Art. 23 of Law no. 78/2000 on preventing, discovering and sanctioning corruption.

3 Law no. 31/1990 on trading companies (Article 155).

On the other hand, the Labour Law regulates the disciplinary procedure for all personnel – management and non-management which is applicable to both public and private sectors (being applicable for the board members/directors who are also contracted by the firm on an individual labour contract basis). This is rather a right of the firm/shareholders than an obligation of the firm. Thus, if the employer/the firm decides to take disciplinary measures, such a decision may be made in most of the cases as a result of an internal investigation performed under the disciplinary procedure regulated by the Romanian Labour Code. Within the disciplinary procedure the firm will manage the evidence for the potential misbehaviour of the employee and offer the employee the possibility to defend himself/herself and present his/her own evidence. As a board member, the evidence revealed by a preceding internal investigation may be useful to prove the fact that the general duty of protecting the company was fulfilled.

Accordingly, the firm has also the possibility to perform an internal investigation as a preceding process, and pursuing the findings of such investigation to commence a disciplinary procedure against the involved employees, which is mandatory to apply the most of the disciplinary sanctions provided by the labour legislation (except for warning). In any of these cases, the legal term for applying the disciplinary sanction shall be observed.

CRIMINAL LIABILITY

? In which situations will an internal investigation decision be necessary to deflect criminal liability of board members?

The board members/administrators or the shareholders are liable for criminal offences for the way they run the company's business.[4]

Nonetheless, in certain conditions, such as self-disclosure of bribe-offering the legal entity and its management (the offender) benefit from leniency. In addition, in case the company and the board members contribute to the mitigation of the negative consequences of the criminal offence, the board members that made appropriate decisions, actively investigating the wrongdoing, and acting diligently in the manner they perform their activities on behalf of the company, may use this evidence to defend themselves and even to obtain a full deflection of the criminal liability for the cases where they have not been directly involved in the criminal offence and prove that they do not tolerate such misbehaviour and cooperate with the law enforcement agencies.

CORPORATE CRIMINAL LIABILITY

? Is there a corporate criminal liability in your country?

? If so, would a compliance system including internal investigation prevent/mitigate corporate criminal liability?

Under the Criminal Code,[5] legal entities in the private sector are liable for criminal acts. The main sanction is a penal fine. Other penalties might consist of the dissolution of the legal entity, suspension of its activity, the closure of certain points of work, prohibition from participating in public procurement procedures, placement under judicial supervision or displaying or publishing the conviction decision.

A compliance system may prevent and mitigate corporate criminal liability if correctly implemented, enforced and monitored by the firm's management.

4 E.g. Law no. 31/1990 on trading companies, Law no. 85/2014 on insolvency prevention procedures and insolvency proceedings.

5 Art. 135 et seq.

PARALLEL PROSECUTION OF COMPANIES AND INDIVIDUALS

? Can both individuals and companies be prosecuted for the same misconduct?

Under the Criminal Code,[6] criminal sanctions may be applied to both the legal entity and to the individuals who committed the same criminal offence.

All legal persons (except for the state and public authorities) are liable for criminal offenses perpetrated while carrying out their activity or when acting in the interest of or on behalf of the legal person. Public institutions are not liable for criminal offences perpetrated while carrying out an activity that cannot be carried out by the private sector. The criminal liability of a legal person does not exclude the criminal liability of the natural person who contributed to the offense.

COOPERATION

? Would cooperation and voluntary self-disclosure be considered by the law enforcement authorities (in relation to both individual and corporate liability)?

According to the Criminal Code, cooperation and voluntary self-disclosure may be considered by the criminal authorities in relation to both an individual and a legal entity.

Based on the Criminal Code, a person shall not be punished if, before the act is discovered, that person denounces the crime so that it can still be prevented, or if the person directly prevents the respective crime from being carried out.[7] In addition, the person or the legal entity that self-disclose the bribe offering before the criminal authorities become aware of such offense (i.e. the offender) are not punished.[8]

Any efforts made by an offender to eliminate or reduce the consequences of their offense or any circumstances relating to the committed offense, which reduce the seriousness of the offense or the threat posed by the offender, may count as mitigating circumstances and therefore the penalty prescribed by law is reduced by one-third.[9]

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE ("LEGAL PRIVILEGE")

? Who can enjoy the protection of legal privilege?

? What information/data is protected by legal privilege, what is not and what are (if any) the exceptions from legal privilege?

? Does legal privilege extend to documents created by attorneys after they are handed over to the client?

Confidentiality and attorney-client privilege refers to the information/data/ correspondence and communication between the attorney and his/her clients, and to the legal services provided by an external attorney to his or

6 Art. 35 (3).

7 Article 34 of the Romanian Criminal Code.

8 Article 290 of the Romanian Criminal Code.

9 Art. 75 and 76 of the Romanian Criminal Code.

her clients, in compliance with the deontological and ethical standards. It will not apply to any criminal activities carried out by the attorney in relation to the client activities for the client.[10]

According to the law, the attorney has an obligation to keep the professional secrecy regarding any aspect of a case entrusted to him/her, unless the law expressly stipulates otherwise. To ensure professional secrecy, professional documents and paperwork that are in the attorney's custody or in his/her law office shall be inviolable. The search of an attorney, of his/her residence or law office, or the seizure of records and assets may only be made by a public prosecutor, based on a warrant issued under the terms of the law.

Documents containing communications between an attorney and his/her client or containing records made by an attorney on matters relating to the defence of a client are exempted from evidence seizure and confiscation.

In addition, an attorney's phone calls may not be listened to or recorded by any technical means, nor shall his/her professional correspondence be intercepted and recorded, except under the conditions and by the procedure provided by the law.

The relationship between an attorney and the person he/she assists or represents may not be subject to technical supervision unless there is evidence that the attorney does or is preparing to commit a serious criminal offence. If the technical supervision also covered the relationship between the attorney and the suspect or defendant, the evidence obtained cannot be used in any criminal proceedings and will be immediately destroyed by the prosecutor.

Furthermore, the contact between an attorney and his/her client cannot be hindered or controlled, directly or indirectly, by any state body.

Thus, an attorney may not be heard as a witness and may not provide information to any authority or person regarding a case entrusted to him/her, unless he/she has the prior express and written consent of all clients involved in the case.

IN-HOUSE LAWYERS' PRIVILEGE

? Is there any privilege for in-house lawyers?

In Romania, the law does not provide such privilege for the in-house legal advisors.[11]

OTHER SERVICE PROVIDERS' PRIVILEGE

? Is there any privilege for other types of service providers?

? Can legal privilege be extended to them if they are sub-contracted by attorneys?

In Romania, there are no specific legal provisions related to these providers' privileges. Nonetheless, as they are employed by the attorney to support the attorney in dealing with the investigation or for the purpose of clarification certain aspects in order for the attorney to be able to advise his/her clients, in principal, we consider that the legal privilege is extended over the communication and correspondence with the service providers. This privilege shall be expressly written in the contract signed between the attorney and the service providers.

10 Legal professional privilege is regulated by Law no. 51/1995 regarding the organisation and exercise of the attorney's profession and the Statute of the attorney profession, but also by the Romanian Civil Procedure Code, Romanian Criminal and Procedure Codes and by the Law no. 21/1996 regarding competition.

11 Law no. 514/2003 regarding legal advisors.

DATA PROTECTION ISSUES

? **What conditions must be met to allow investigators access to employees' e-mails/ other records potentially containing private information?**

? **Is the consent of the respective custodian necessary before any data collection starts?**

? **Are there any restrictions in relation to cross-border transfer of data collected during the investigation?**

In Romania, the interception, storage, or any other operations in relation to electronic communications are allowed in certain cases, such as: (i) the processing is regulated by the law; (ii) the user of the equipment consented to such processing; (iii) access is given to the competent authorities.

For the purpose of internal investigation, under the GDPR, access to the employees' business email accounts would be possible in our view only based on Article 6 (1) letter f), namely on a legitimate interest of the employer in ensuring the efficient running of the organisation, or for other similar legitimate interest, and following the conditions below mentioned:

- the employee was informed about this possibility before using the email account (i.e. when the person was employed by the company), and the internal policy of the firm provides that the email should be strictly used for business communication only;
- the balancing test provided by article 6 (1) letter f) of GDPR is in favour of the employer, meaning that the measure to monitor/access the employees' emails and other communication methods is proportionate to the specific aim pursued by the employer (e.g. the trigger is related to a very serious incident, such as indication for serious fraud cases, corruption, etc.);
- the employee was additionally informed in accordance to the Article 13 of GDPR about this monitoring/ access of the business emails and the privacy note was sent to him/her in advance (before the email account has been accessed);
- if the data is copied/stored on a different media storage, this is made known to the employee;
- the private related emails are not accessed.

Under some circumstances the employer may need to perform a data protection impact assessment[12] (Article 35 of GDPR), as well as to demonstrate that there is no other less intrusive means for achieving the legitimate interest of the employer or the evidence that the data subjects (employees and their representatives) have been consulted, especially in case the legal entities decide to implement an internal investigation process that may imply processing of personal data through the access of the employees emails or monitoring systems (such as data loss prevention tools or e-forensic tools).

Consequently, a thorough analysis on a case by case basis is recommended for establishing the framework in which such email access is allowed, depending on the case circumstances.

12 Article 35 of GDPR in conjunction to Article 5 of the Law no. 190/2018 regarding the implementation of GDPR and the Decision of the National Supervisory Authority for Personal Data Processing no. 174/2018 regarding the list of the personal data processing that are mandatory in the scope of the data protection impact assessment.

INTERVIEWS

? Does an employee have an obligation to actively participate at the interviews organised by the counsel of the employer?

The employee has the right to participate in the interviews performed as part of the disciplinary procedure (i.e. it is not an obligation, but in case of absence, the employee will miss the opportunity to defend himself/herself in front of the employer's representatives).

In corporate investigations/internal audits, there is no express legal obligation for the employee to actively participate. Such an obligation may be regulated through the internal procedures of the company, and communicated transparently to the employees, being part of the loyalty obligation of the employees or of their general duty to act responsible and cooperate with the company in protecting the integrity of the other employees or the assets of the firm. However, in case the employee refuses to participate to such an interview, the employer can not oblige him/her to participate. For the public authorities, the assessment of the legal obligation of the public clerks to participate in the internal investigations shall be assessed case by case.

REPORTING DUTIES

? Is there any reporting duty towards enforcement authorities on the outcome of the investigation or any information obtained during the investigation?

? If yes, who is subject to the reporting duty and who is exempted?

In case the outcome of the investigation is related to corruption or other assimilated crimes, the representatives of the firm (with power of control) have an obligation to report it to the authorities.[13]

According to the Romanian Criminal Code, if a public servant (but also any person who supplies a public service, or who shall be subject to the public authorities' control or supervision) becomes aware of an offense criminalized by law in connection with the service but omits to immediately notify the criminal investigation body, shall be punished up to 3 years of imprisonment or a penal fine. A person employed in the private sector might also be subject to this obligation, if his/her activity falls under a public authority's control or supervision; e.g. employees working in banking, insurance or in other areas regulated and controlled by a public authority.

In case the outcome of the investigation is related to corruption, other assimilated crimes or, in some cases, offences in connection with a certain job, the company's representatives (with control powers) have the obligation to report those facts to the authorities. In these cases, deliberate non-fulfilment of this obligation represents a criminal offence.

13 The situations are provided e.g. by Law no. 78/2000 for certain entities (such as public entities, state owned companies), and cases (e.g. EU funds related, etc.).

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SERBIA

WHISTLEBLOWING

? Is there any specific regulation related to whistleblowers?

? If so, is there any obligation to react to whistleblowing/to have a system in place for reacting to whistleblowing?

Yes, Serbia has adopted the Law on Protection of Whistleblowers in 2014.[1]

Under the Whistleblowers Act, employers are obligated to act upon a whistleblower's report within 15 days and remedy the reported issue, in accordance with its authorizations. The whistleblower must be protected from all harmful consequences and his/her identity must remain anonymous, if the whistleblower did not reveal it on his/her own initiative.

The employer must inform all employees of their rights under the Whistleblowers Act, and a specific person for receipt of whistleblowing reports must be appointed. Furthermore, any employer with more than 10 employees must adopt a specific internal act, which regulates the whistleblowing procedure and must be available to all employees (e.g. via announcement boards, copies, intranet, etc.).

CIVIL LIABILITY

? In which situations is the decision to hold an internal investigation necessary to deflect civil responsibility of board members?

In Serbia, members of the management bodies (i.e. directors, supervisory board members, other representatives) have specific duties towards the company, including a general fiduciary duty.

This duty means that all of the above persons must act in accordance with their duties consciously, with the diligence of a "prudent businessman", and with a reasonable belief that they are acting in the best interest of the company.

One of the obligations of directors of the company is to report to the shareholders assembly or the supervisory board on the status of company's compliance with applicable laws and regulations.

Breaching the abovementioned duties may lead to liability for damages of the director towards the company and/or the shareholders. Further, if the action (or inaction) of the director caused damages to third parties under the general rules of tort, the company may also be liable for damages to such third parties.

Thus, it may be concluded that the director (or a person acting in some other capacity in the company, depending on the specific case), needs to take appropriate steps in order to ensure the remediation of identified breaches, one of which steps could be the performance of an internal investigation.

CRIMINAL LIABILITY

? In which situations will an internal investigation decision be necessary to deflect criminal liability of board members?

Serbian company law does not specifically incriminate the breach of fiduciary duty by directors; however, the general criminal framework may apply.

1 *Official Gazette of RoS*, No. 128/2014 ("Whistleblowers Act").

Due to stricter terms of criminal liability, compared to civil liability, it may be assumed that acting in accordance with fiduciary duties described above may also serve to exclude potential criminal liability of directors for potential breaches of laws and regulations within the company.

On the other hand, a director may be charged for the criminal act of "non-reporting a criminal act", if he/she consciously does not report a criminal act of which he/she became aware in the course of his/her duties, and if the unreported criminal act carries a penalty of at least five years of imprisonment.

Other specific criminal acts and/or liability may be applicable as well, depending on the specifics of the case.

CORPORATE CRIMINAL LIABILITY

? Is there a corporate criminal liability in your country?

? If so, would a compliance system including internal investigation prevent/mitigate corporate criminal liability?

Yes, Serbia has adopted the Law on Liability of Legal Entities for Criminal Acts in 2008.[2]

The liability of a company is based on the liability of its authorized person. Under the Criminal Law provisions, an authorized person is broadly defined as a person within a legal entity that under a law, regulation or other authorization performs management, supervision or other duties in the scope of the legal entity's business activity, as well as the person that actually performs such activities.

There are two main grounds of criminal liability of legal entities under Criminal Liability Law, i.e. a legal entity shall be liable for:

(i) a criminal act performed by its authorized person, within the scope of the activities and/or authorizations of the authorized person, with an intent to establish a gain for such legal entity; or

(ii) a criminal act carried out for its benefit, if such an act was committed by a natural person acting under the supervision and control of an authorized person within the company, if the act resulted from the lack of required supervision or control by the authorized person.

While there is still no established practice which would confirm that having a compliance system would exculpate the company, it is obvious from the above provisions that the acts of supervisions and control of a company's authorized person(s) are crucial for evaluating the criminal liability of the company. The existence of such a compliance system would, thus, surely serve an important role in the legal defence of the company.

In addition to criminal liability, Serbian laws also recognize the liability of legal entities for misdemeanours (*prekršaji*) and commercial offences (*privredni prestupi*).

PARALLEL PROSECUTION OF COMPANIES AND INDIVIDUALS

? Can both individuals and companies be prosecuted for the same misconduct?

Yes. Both the company and the individual perpetrator may be prosecuted for the same misconduct

2 *Official Gazette of RoS*, No. 97/2008 ("Criminal Liability Law").

COOPERATION

? Would cooperation and voluntary self-disclosure be considered by the law enforcement authorities (in relation to both individual and corporate liability)?

Yes. The defendant's cooperation and actions taken after the act will always serve as a beneficial circumstance before the authorities, leading to lesser punishment and/or other sanctions (e.g. warning measures, security measures, etc.), or even exclusion of any punishment (e.g. for some criminal acts the punishment will not be imposed if the defendant reported the act before it was officially identified and if the consequences of the act have been remedied).

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE ("LEGAL PRIVILEGE")

? Who can enjoy the protection of legal privilege?

? What information/data is protected by legal privilege, what is not and what are (if any) the exceptions from legal privilege?

? Does legal privilege extend to documents created by attorneys after they are handed over to the client?

Legal privilege exists in Serbian law through the concept of an 'attorney secret'.

Namely, the attorney is obligated to, in accordance with Attorney Bar statutes and Codex on Professional Ethics, keep as a professional secret all information that was conveyed to the attorney by the client, or which he/she became aware of in any other way during the course of the preparation, provision, or post-provision of legal services. The attorney needs to ensure that all of the persons employed in his/her office keep the secret as well. The attorney secret is unlimited timewise.

The Codex on Professional Ethics further states that the confidentiality privilege is a human right, an important element of professional and conscious representation and an irrevocable pre-condition of the independence and self-standing of the legal profession, which may be limited solely by law, Bar statutes and the Codex itself.

The above legal framework is protected in various procedural laws, e.g. civil, criminal, misdemeanour, administrative, etc. The exact mechanism of protection of the attorney secret and specific rights granted to attorneys in general, depend on each specific law; however, it is common for all these proceedings that the attorneys cannot be forced to reveal the facts which fall under the attorney secret.

The attorney secret encompasses not only information, but also the documents, case files and other written instruments, and also the attorney's office as well. A search in an attorney's office may be ordered solely by the court with regard to an exact case file, object or document, and must be done in the presence of an attorney appointed by the president of the Bar. Information and documents identified during the search, which are beyond the court's order, become inadmissible and cannot be used against the attorney's other clients.

As evidenced above, the attorney secret is focused on protecting the attorney from being obligated to reveal information and/or findings that he/she came across in the course of his/her duties; however, such secret does not encompass any documents and information handed over to the clients.

IN-HOUSE LAWYERS' PRIVILEGE

? Is there any privilege for in-house lawyers?

Legal privilege does not extend to in-house lawyers (i.e. lawyers employed in a company).

OTHER SERVICE PROVIDERS' PRIVILEGE

? Is there any privilege for other types of service providers?

? Can legal privilege be extended to them if they are sub-contracted by attorneys?

Other professions may also be subject to different confidentiality obligations, regulated under separate laws. However, this confidentiality framework is generally more limited when compared to legal privilege, and usually does not allow for confidential information to be kept away from the competent authorities.

There are no legal grounds for claiming that legal privilege extends to persons sub-contracted by an attorney, unless these persons are formally employed by the attorney.

DATA PROTECTION ISSUES

? What conditions must be met to allow investigators access to employees' e-mails/ other records potentially containing private information?

? Is the consent of the respective custodian necessary before any data collection starts?

? Are there any restrictions in relation to cross-border transfer of data collected during the investigation?

As Serbia is not an EU Member State, the GDPR is not directly applicable in Serbia[3] but will be implemented into Serbian legislation. Namely, the new Personal Data Protection Law, which generally implements similar data protection principles and standards as those prescribed under the GDPR, has been recently adopted (applicable as of 21 August 2019). Until then, all personal data processing must be compliant with the currently applicable Personal Data Protection Law, which is rather outdated.

Any personal data processing may only take place on one of the lawful grounds specified by the currently applicable Personal Data Protection Law. Namely, processing of employees' personal data within an internal investigation may only be based on the prevailing justifiable interests of the employer, in its role as the data controller. The issue here is that there is no guidance as to what may be deemed as justifiable interest of the employer; the Personal Data Protection Law provides that legitimate interest must be specified in the law, but the law itself does not further identify cases in which such justifiable interest exists. Thus, this is subject to the interpretation of the Serbian Data Protection Authority on a case-by-case basis, noting that this authority tends to interpret the law in a rather restrictive manner. Therefore, it is advisable that the employer, as the data controller, adopts and promulgates an employee privacy policy on a local level (i.e. the Serbian employer adopts and makes it available to employees in the Serbian language), to allow for a potential processing of personal data for investigative purposes and to minimize the risks associated therewith.

3 Except for Art. 3 para. 2 of the GDPR, which provides for extraterritorial applicability of the GDPR in certain cases.

In any case, when an internal investigation is based on the legitimate (i.e. prevailing justifiable) interests of the data controller, the data controller must perform a delicate balancing of its own interests against the interests or fundamental rights of the employees (e.g. right to private life and secrecy of communication). This balancing exercise should be well-documented. Furthermore, the extent of the processing must be strictly necessary to achieve the aim of the investigation and there should be no less invasive measures available. Data included in the investigation should be carefully selected prior to their review and no private information should be accessed within the investigation. Employees should also be informed that their personal data may be processed within the investigation, in the promulgated employee privacy policy (whereby the employees should be informed that their personal data may be subject to processing in case of an investigation of the employer and further transferred outside of Serbia) and/or in the employee's general consent to personal data processing (whereby the employees should be informed that their personal data may be, inter alia, further transferred outside of Serbia). The information provided to the employees must include, among others, the legal basis for the data processing, its purposes and the employees' corresponding rights.

Reliance on an employee's consent (which can be given either as written consent or verbal consent, recorded in minutes) during the investigation might be problematic. The Serbian Data Protection Authority generally takes the standpoint that employees are almost never in a position to freely give consent, given their dependent position.

The cross-border transfer of data collected during an investigation outside of Serbia is free in case of transfer to countries that are signatories of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ("Convention"). Under the currently applicable Personal Data Protection Law, a transfer of personal data from Serbia to a non-Convention country (such as the USA) triggers an obligation to obtain the prior approval of the Serbian Data Protection Authority for such transfer (while the procedure for the issuance of the approval for the transfer by the DPA is not regulated).

As of 21 August 2019, personal data processing is based on the new Personal Data Protection Law. Therefore, processing of employees' personal data within an internal investigation could be based on the legitimate interests of the data controller. Again, the data controller should perform a delicate balancing of its own interests against the interests or fundamental rights of the employees (e.g. right to private life and secrecy of communication), and such balancing exercise should be well-documented. Furthermore, the extent of the processing must be strictly necessary to achieve the aim of the investigation and there should be no less invasive measures available. Data included in the investigation should be carefully selected prior to their review and no private information should be accessed within the investigation. Employees need to be informed in advance by the data controller that their personal data may be processed within the internal investigation. The information provided to the employees must include, among others, the legal basis for the data processing, its purposes and the employees' corresponding rights.

Reliance on employees' consent during the investigation could be problematic, as the Serbian Data Protection Authority will most likely keep its current standpoint that employees are almost never in a position to freely give consent, given their dependant position.

The cross-border transfer of personal data collected during an investigation outside of Serbia (as well as any further cross-border transfer to third countries or to an international organization) will be subject to the requirements provided under the new Personal Data Protection Law. In particular, companies must ensure that the data will be adequately protected even after their transfer to a third country. Available instruments include, inter alia, binding corporate rules and standard data protection clauses adopted by the Data Protection Authority.

INTERVIEWS

? Does an employee have an obligation to actively participate at the interviews organised by the counsel of the employer?

Yes. For an employee, this obligation may be inferred from the general obligation to prevent damages.

REPORTING DUTIES

? Is there any reporting duty towards enforcement authorities on the outcome of the investigation or any information obtained during the investigation?

? If yes, who is subject to the reporting duty and who is exempted?

The Serbian Criminal Code incriminates non-reporting of criminal acts or planned criminal acts, in certain cases, and a failure to report the act or a planned act, as explained below, constitutes a separate criminal act.

As an example, there is an obligation to report the planning of all criminal acts threatened with imprisonment of five years or higher, if reporting could have prevented the act or the attempt to commit it.

More importantly, there is an obligation to report all criminal acts which are threatened with imprisonment of thirty years or higher; further, all criminal acts which are threatened with imprisonment of 5 years or higher, if identified by an official or an authorized person in the course of his/her duties must be reported as well. However, defence attorneys will not be punished if they do not report a criminal act for which there is a reporting obligation.

In addition to the above, there are some other specific reporting duties in certain cases (e.g. AML).

This chapter was written by Marijana Zejakovic, Iskra Lazic and Aleksandar Ristic.

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SLOVAK REPUBLIC

WHISTLEBLOWING

? Is there any specific regulation related to whistleblowers?

? If so, is there any obligation to react to whistleblowing/to have a system in place for reacting to whistleblowing?

The Whistleblowing Act[1] ensures the protection of persons in an employment relationship who report a crime or other forms of anti-social behaviour. Furthermore, the Whistleblowing Act provides such persons with certain additional rights and obligations.

Employers with at least 50 employees are obliged to set up an internal system for handling reports of crimes and other anti-social activities (compliance hotline).[2] This also includes the duty to maintain a registry of reports (for at least 3 years following the report). As part of the internal system, employers are obliged to appoint a responsible person (an employee or an external person), specifically to handle the reports. Accordingly, employees may report not only crimes, but also other forms of unethical, discriminatory and wasteful behaviour.

Whistleblowers are protected during both the reporting and the investigation process. Employers cannot take any legal action against the whistleblowers without their prior consent; or without the approval of the Labour Inspectorate.

Non-compliance with the Whistleblowing Act can result in fines of up to EUR 20.000 issued by the Labour Inspectorate.

CIVIL LIABILITY

? In which situations is the decision to hold an internal investigation necessary to deflect civil responsibility of board members?

The Slovak Commercial Code[3] stipulates that board members are obliged to execute their powers with due care, which includes the obligation to exercise their powers with professional care and in accordance with the interests of the company and all its shareholders. In particular, they are obliged to obtain and take into account in their decision-making all available information as well as to keep in confidence confidential information and facts whose disclosure to third parties could cause harm to the company or endanger its interests or the interests of the company's shareholders. While exercising their powers, board members must not give priority to their own interests, the interests of only certain shareholders or the interests of third parties over the company's ones.

Board members who have breached their obligations while exercising their powers are obliged to jointly and severally compensate the damage caused to the company. However, members of the board of directors shall bear no liability for damage if they prove that they exercised their powers with professional care as well as in good faith and that they were acting in the company's interest.

Once a corporate director has a reasonable suspicion that the aforementioned duties have been breached by a board member, an internal investigation shall be initiated in order to prevent any further damages to the company. Conducting an internal investigation in case of suspicion is part of a corporate director's fiduciary duties.

1 Act No. 307/2014 Coll. on Certain Aspects of Whistleblowing, as amended, effective as of 1 January 2015.

2 Section 11 of the Whistleblowing Act.

3 Act No. 513/1991 Coll., Commercial Code, as amended.

CRIMINAL LIABILITY

? In which situations will an internal investigation decision be necessary to deflect criminal liability of board members?

As specified above, the Slovak Commercial Code implies board members' civil liability. In addition, criminal liability may be implied, e.g. the obligation to act with full professional diligence presumes liability rising from the management of extraneous assets.

A board member may also be criminally liable in more complex situations of suspicions of criminal activity within the company even without direct participation. The Slovak Criminal Code imposes criminal co-liability for aiding, abetting and non-hindering a criminal offence. For board members, criminal liability can be established in cases such as money laundering, credit fraud, insurance fraud, capital fraud and other white-collar crimes.

In summary, an individual may be held criminally liable for criminal offences executed in his or her capacity as board member. Internal investigations are therefore important for two reasons. First, to deflect such suspicions. Second, in case of reasonable suspicion to act with due care and in accordance with fiduciary duties. However, if a suspicion is proven correct, an internal investigation is not in itself sufficient for criminal sanctions; court proceedings are essential.

CORPORATE CRIMINAL LIABILITY

? Is there a corporate criminal liability in your country?

? If so, would a compliance system including internal investigation prevent/mitigate corporate criminal liability?

Legal entities are liable for offences of its statutory body,[5] its controlling or supervising body[6] or any other person entitled to represent the legal entity or decide for it[7] if the offence is committed in favour of the legal entity, on its behalf, via such legal entity or within the scope of its business.[8]

A legal entity is liable for criminal offences caused by acts of the aforementioned persons even if this was due to insufficient supervision or control by, or the negligence of the legal entity, and the persons acted within the scope of their authorisation.

Accordingly, failing to exercise the necessary supervision and control could lead to the criminal liability of legal entities. Running an internal compliance system – including investigations – could prevent such criminal corporate liability. Detecting such criminal actions, preventing any further damages and providing restitution for existing damages could represent an important mitigating factor (or be regarded as active repentance).

PARALLEL PROSECUTION OF COMPANIES AND INDIVIDUALS

? Can both individuals and companies be prosecuted for the same misconduct?

Yes. Both the company and the individual perpetrator may be prosecuted for the same misconduct.

5 e.g. managing director or member of the board of directors

6 e.g. member of the supervisory board

7 e.g. branch manager, proxy or other empowered person

8 Act No. 91/2016 Coll. on Criminal Liability of Legal Persons, as amended, effective as of 1 July 2016.

COOPERATION

? Would cooperation and voluntary self-disclosure be considered by the law enforcement authorities (in relation to both individual and corporate liability)?

Cooperation and voluntary self-disclosure will always be considered at least as a mitigating circumstance (i.e. leading to a smaller sanction or be regarded as active repentance). Failure to disclose a criminal act despite being aware of its occurrence constitutes a criminal offence per se under the Slovak Criminal Code.

Actively preventing further criminal actions and damages is an important mitigating factor for both individuals as well as legal entities.

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE ("LEGAL PRIVILEGE")

? Who can enjoy the protection of legal privilege?

? What information/data is protected by legal privilege, what is not and what are (if any) the exceptions from legal privilege?

? Does legal privilege extend to documents created by attorneys after they are handed over to the client?

The Advocacy Act[9] establishes legal privilege for attorneys. They are not obliged to reveal any information learnt in connection with the practice of law and shall treat such information as strictly confidential.[10] However, an attorney within the meaning of the Advocacy Act has to be registered with the Slovak Bar Association. Any other professionals providing legal advice do not fall under the Advocacy Act and shall not be subject to legal privilege.

An attorney may be released from the duty of confidentiality by the client, and after the client's death or dissolution only by the client's legal successor. Should a client have several legal successors, release from the duty of confidentiality may only take effect upon the prior written consent of all legal successors. However, in case the attorney decides that any such release or disclosure would be detrimental or cause harm to the client, he or she shall not disclose the confidential information despite having been released from this duty by the client or legal successors.

Legal privilege is respected by the state in various procedural situations: e.g. if an attorney is obliged to testify, the testimony can be refused if this would lead to a breach of the confidentiality obligation.

The same principle is applied to the obligation of documents delivery or their seizure. To ensure it, a special proceeding is applied when attorneys' premises are searched: a Bar representative shall be present and documents may only be seized if this representative attests that they are not covered by legal privilege.

'Legal privilege' covers, therefore, any information/data received when providing legal services, regardless whether this is received from the client or from third parties. However, the privilege is tied to the person of the attorney (and his or her employees and subcontractors), not to the information or document itself; thus, the information or document which is protected when kept by the attorney is not protected in the hands of the client or an unrelated third party.

A stronger privilege covers legal services provided within the framework of defence in penal proceedings: in these cases even any communication between the attorney and the client is protected.

9 Act No. 586/2003 on the Legal Profession, as amended.

10 Section 23 of the Advocacy Act.

IN-HOUSE LAWYERS' PRIVILEGE

? **Is there any privilege for in-house lawyers?**

In-house lawyers not falling under the Advocacy Act (e.g. persons with legal education, but not registered Attorneys/Trainees) are typically subject to the same restrictions and confidentiality as other employees, as stipulated in their employment contracts.

OTHER SERVICE PROVIDERS' PRIVILEGE

? **Is there any privilege for other types of service providers?**

? **Can legal privilege be extended to them if they are sub-contracted by attorneys?**

Although other types of privileges exist (e.g. tax advisors' privilege), they are not relevant for our purposes. All such privileges fall within the client-provider relationship when providing regulated services; corporate investigations cannot be subsumed under any other type of regulated services than legal services.

As noted above, 'legal privilege' covers not only the attorney personally, but also any other person subcontracted by the attorney for providing legal services. This means that if other service providers (such as forensic or accountancy experts) are subcontracted in direct connection with a specific legal service, they can invoke legal privilege to the same extent as the attorney. However, the special protection of premises does not apply. Therefore, all relevant documents shall be kept in the attorney's premises.

DATA PROTECTION ISSUES

? **What conditions must be met to allow investigators access to employees' e-mails/ other records potentially containing private information?**

? **Is the consent of the respective custodian necessary before any data collection starts?**

? **Are there any restrictions in relation to cross-border transfer of data collected during the investigation?**

Any personal data processing may only take place on one of the lawful grounds specified by the GDPR. In particular, processing of employees' personal data within an internal investigation may only be carried out based on the legitimate interests of the controller. However, the controller shall perform a delicate balancing of its own interests against the interests or fundamental rights of the employees (e.g. right to private life and secrecy of communication).

Such balancing exercise shall be well-documented. Furthermore, the extent of the processing shall be strictly necessary to achieve the aim of the investigation and there must be no less invasive measures available. The data included in the investigation should be carefully selected prior to their review and no private information should be accessed within the investigation. The set-up of the right key words and sufficient training of the reviewers is essential here, too.

The employees should also be informed that their personal data may be processed within the investigation.[11] The privacy notice shall include, *inter alia*, the legal basis for the data processing, its purposes and the employees' corresponding rights.

11 Art. 13 et seq. of the GDPR.

Reliance on employees' consent during the investigation is problematic. The GDPR requires that the consent shall be 'freely given'. However, employees are almost never in a position to freely give the consent, given their dependant position.[12]

Cross-border transfer of data collected during an investigation outside the EU is subject to strict requirements. In particular, companies shall ensure that the data will be adequately protected even after their transfer to a third country. Available instruments include binding corporate rules and standard data protection clauses adopted by the Commission. In addition, companies in the USA may receive investigation data under the EU/US Privacy Shield. To participate, the companies shall sign up for the Privacy Shield with the U.S. Department of Commerce and fulfil the relevant personal data processing requirements.

INTERVIEWS

? Does an employee have an obligation to actively participate at the interviews organised by the counsel of the employer?

Yes, the obligation may be inferred from the general duty of employees to prevent damages, or from their tasks specified in the employment contract. Ignoring an order to be subjected to an investigation could be classified as a gross violation of working discipline.

In case of managing employees, this duty may be inferred from their obligation to ensure compliance with legal and internal regulations.

REPORTING DUTIES

? Is there any reporting duty towards enforcement authorities on the outcome of the investigation or any information obtained during the investigation?

? If yes, who is subject to the reporting duty and who is exempted?

In case the investigation does find evidence of a criminal offence and this is not reported, the individual and the company may be criminally liable for failure to report the criminal offence under the Slovak Criminal Code. Only attorneys are exempt from this duty under legal privilege as noted above. However, this exemption does not extend to in-house lawyers as specified above. Therefore, it is advisable that an attorney leads any such investigation in case of reasonable suspicion of a criminal offence.

The criminal offence shall be reported to the police or other competent authority in the criminal proceedings.

12 As opined by the EU Data Protection Working Group.

This chapter was written by Katarina Bielikova and Dalibor Palatický.

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SLOVENIA

WHISTLEBLOWING

? Is there any specific regulation related to whistleblowers?

? If so, is there any obligation to react to whistleblowing/to have a system in place for reacting to whistleblowing?

There are specific regulations in place providing for a whistleblower protection in cases of public sector corruption. A limited authority is vested in the Commission for the Prevention of Corruption to enforce the protection of whistleblowers employed in private sector entities and to provide support to such whistleblowers towards their employers. Apart from this, there is no comprehensive law that regulates the status, rights and protection of whistleblowers and corresponding obligations of private sector entities. Certain provisions of generally applicable legislation (e.g. the Criminal Code) contain specific provisions that offer legal protection for whistleblowing activities, while still other generally applicable provisions of mandatory law (i.e. the required diligence in the conduct of business pursuant to the Companies Act, the prohibition of retribution and discrimination and the corresponding duty to safeguard under the Employment Relationships Act) may trigger obligations for management or supervisory bodies to conduct investigations and adopt appropriate measures if they are confronted with or come across information on a whistleblower.

CIVIL LIABILITY

? In which situations is the decision to hold an internal investigation necessary to deflect civil responsibility of board members?

Management and supervisory board members are bound to perform their duties with the diligence of a conscientious and honest businessman and are liable towards the company for any damages incurred due to any and all breaches of their duties, unless they prove that they acted in accordance with said standard of diligence. Thus, in all instances when management and supervisory board members are informed or otherwise aware of any (potential) illegalities or wrongdoings within the company that may result in any type of damages being incurred by the company, they must undertake appropriate measures in order to mitigate any potential risks for the company. Internal investigations (and subsequent steps taken pursuant with their findings) are in practice often regarded as an important or even decisive factor in the determination of whether or not management and supervisory board members have acted in compliance with the required standard of diligence.

CRIMINAL LIABILITY

? In which situations will an internal investigation decision be necessary to deflect criminal liability of board members?

White collar criminal offences (i.e. criminal offences against the economy or legal transactions pursuant to the Criminal Code) require that the criminal intent of the perpetrator be demonstrated. It means that any sort of negligence – including a negligent omission to investigate potential wrongdoings – should in principle not result in criminal liability for offences that have already been committed and where no action by the management board may influence or prevent the criminal offence.

Should however such an omission be intentional in relation to a specific criminal offence (i.e. the omission is intentionally aimed towards assisting the perpetrator), this may under certain circumstances constitute grounds for criminal liability.

With regards to non-specific types of criminal offences, the liability of board members may be established when the conduct of an investigation and subsequent adoption of appropriate measures could have prevented the

occurrence of a criminal offence (e.g. failure to investigate information regarding health and safety irregularities and adopt appropriate measures, resulting in death or injury).

CORPORATE CRIMINAL LIABILITY

? Is there a corporate criminal liability in your country?

? If so, would a compliance system including internal investigation prevent/mitigate corporate criminal liability?

Yes, companies may be held liable for criminal offences,[1] committed in the name and for the benefit of a company, if one of the following conditions is fulfilled:

- the criminal offence constitutes the execution of an illegal corporate decision, order or approval of its management or supervisory bodies;
- its management or supervisory bodies influenced the perpetrator or enabled the perpetrator to commit the criminal offence;
- it is the recipient of illegal proceeds or objects created through a criminal offence; or
- if management or supervisory bodies failed in their duty to supervise the legality of the actions of their subordinate employees.

If management or supervisory bodies voluntarily report the perpetrator before the criminal offence is discovered and/or order the return of illegal proceeds or repay damages, the sentence towards the company may be reduced beyond the mandatory minimums or even remitted. Therefore, the introduction of a compliance system including internal investigations may serve to deflect (insofar as it could prevent a failure in management or supervisory bodies' duties of supervision), or at least mitigate corporate criminal liability.

PARALLEL PROSECUTION OF COMPANIES AND INDIVIDUALS

? Can both individuals and companies be prosecuted for the same misconduct?

Yes, both the perpetrator and the company may be prosecuted for the same misconduct (both for criminal as well as administrative offences). With regard to criminal offences, the liability of the perpetrator and the company are severable, meaning that the company can be found liable even if the perpetrator is not liable or was coerced by the company.

COOPERATION

? Would cooperation and voluntary self-disclosure be considered by the law enforcement authorities (in relation to both individual and corporate liability)?

With regard to corporate liability, as described above, cooperation and voluntary self-disclosure may constitute grounds for a remission or reduction in sentencing beyond mandatory minimums. Additionally, in such instances

1 Liability of Legal Persons for Criminal Offences Act.

special discretion is awarded to the prosecutor who may choose not to prosecute when the sentence may be remitted entirely under the law.

With regards to individual liability, the above discretion, as well as the possibility of remission or reduction of sentences beyond mandatory minimums is more restricted, however it would probably be regarded as a mitigating circumstance at the very least.

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE ("LEGAL PRIVILEGE")

? **Who can enjoy the protection of legal privilege?**

? **What information/data is protected by legal privilege, what is not and what are (if any) the exceptions from legal privilege?**

? **Does legal privilege extend to documents created by attorneys after they are handed over to the client?**

In civil proceedings, any persons representing the client under a power of attorney in proceedings before the court may refuse testimony on any matters that the client confided to them in relation to such proceedings. Furthermore, attorneys at law, registered with the Bar, may refuse testimony on any facts that were made known to them in the course of the performance of their profession, if they are bound to keep such facts secret under the applicable regulations.

However, this privilege does not extend to attorney-client communications, documents or other types of information media prepared for or exchanged with the client. The attorney is obliged to keep any such information confidential, but there is no specific legislation in place protecting such information in relation to state authorities or third parties in civil proceedings.

In criminal proceedings, there are two types of legal privilege. The privilege of attorneys, acting as defence counsels in criminal proceedings, is an extension of the defendant's right to defence and privilege against self-incrimination and is absolute. Defence counsels cannot be called to testify in relation to the defendant, their premises cannot be searched for the purpose of obtaining documents or information and their client communications cannot be intercepted.

Attorneys not acting as defence counsels for the defendant only have the privilege of refusing testimony (within the same scope as in civil proceedings). An attorney's premises may be searched for documents or information, but only in case it is not possible to obtain said documents or information through any other means. The search can only be conducted based on a court order, which needs to specify for which documents and information the search is to be conducted. A Bar representative must be present during the search. The Bar representative, as well as the attorney whose premises are the subject of a search, may file objections regarding documents seized, stating that they are not covered by the order. These documents are then immediately sealed and special procedures are in place for the examination of the objections by an independent judge.

However, if any attorney-client communications, documents or other forms of information media are seized, intercepted or obtained from the defendant directly or through third parties, they are not covered by attorney-client privilege.

IN-HOUSE LAWYERS' PRIVILEGE

? **Is there any privilege for in-house lawyers?**

No, there is no special privilege for in-house lawyers.

OTHER SERVICE PROVIDERS' PRIVILEGE

? **Is there any privilege for other types of service providers?**

? **Can legal privilege be extended to them if they are sub-contracted by attorneys?**

All service providers that have a statutory obligation to keep as confidential information they are provided with or come across in the performance of their profession (e.g. doctors, priests, bankers, psychologists, social workers, etc.) may refuse to testify in court or civil proceedings, unless statutory conditions for disclosure are met.

The legal privilege enjoyed by attorneys at law registered with the Bar is extended to any persons employed by these, (i.e. employed in a law firm), however there is no precedence or direct statutory basis for the possibility of an extension of the attorney's legal privilege to third party service providers.

DATA PROTECTION ISSUES

? **What conditions must be met to allow investigators access to employees' e-mails/ other records potentially containing private information?**

? **Is the consent of the respective custodian necessary before any data collection starts?**

? **Are there any restrictions in relation to cross-border transfer of data collected during the investigation?**

Monitoring and access to traffic data (i.e. data on the identity of the sender and recipient, subject of e-mail, etc.), as well as other records that contain personal data are governed by the provisions of the GDPR. Any personal data processing may only take place if the conditions for processing, as provided by the GDPR, are met and the rights of the individuals involved are respected. The processing of such data for the purposes of an internal investigations may only be based on legitimate and lawful interests of the controller, however such interests must be balanced against the fundamental rights and interests of the individuals concerned. Legitimate employer's interests may constitute lawful grounds for monitoring of communications even when balanced against fundamental human rights of employees.[2]

However, in determining the compliance of data processing for the purposes of internal investigations, the extent of the processing should be strictly necessary to achieve the aim of the investigation and no less invasive measures are available to the employer. In accordance with the Information Commissioner of the Republic of Slovenia, the employer should in any case determine the scope and purpose of data processing in advance, and such processing is in principle only allowable in rare and exceptional cases.

2 As confirmed in the Grand Chamber judgment of the ECHR in the case *Bărbulescu v. Romania* (application no. 61496/08).

The employees should also be informed that their personal data may be processed within the investigation.[3] The privacy notice shall include, inter alia, the legal basis for the data processing, its purposes and the employees' corresponding rights.

Processing data for internal investigation purposes on the basis of the consent of employees may potentially prove problematic, as the EU Data Protection Working Party is of the opinion that the GDPR precondition of the consent having a "freely given nature" is almost never satisfied in case of employment relationships.

With respect to the substance of any correspondence, it should additionally be noted that communication is constitutionally protected as confidential. In accordance with the constitution, this confidentiality may only be pierced through a lawful court order for criminal investigation or national security purposes. Thus, even a legitimate interest of the employer may not be sufficient for lawful access or monitoring of employees' communication content, as it does not meet the constitutional criteria. A violation of the confidentiality of communications also constitutes a criminal offence. The Information Commissioner of the Republic of Slovenia has issued an opinion that only when explicit and specific consent of the employee concerned for each e-mail or correspondence is obtained, may the employer potentially access the communication content.

Cross-border transfer of data collected during an investigation outside the EU is subject to strict requirements under the GDPR. Companies must ensure that the data will be adequately protected even after their transfer to a third country.

INTERVIEWS

? Does an employee have an obligation to actively participate at the interviews organised by the counsel of the employer?

While there is no direct legal requirement for employees to cooperate in internal investigations or to actively participate in interviews organised by the counsel of the employer, the provisions of applicable labour regulations do provide some indirect basis for such cooperation. Employees are obliged to follow lawful orders of employers. Additionally, employees are obliged to inform the employer of all circumstances that affect or may affect the performance of their contractual duties, as well as to refrain from taking any actions that may incur material or moral damages towards the employer.

REPORTING DUTIES

? Is there any reporting duty towards enforcement authorities on the outcome of the investigation or any information obtained during the investigation?

? If yes, who is subject to the reporting duty and who is exempted?

Yes, in certain circumstances. There is a general requirement to report any criminal offence with a statutory minimum sentence of 15 years in prison. Failure to do so constitutes a criminal offence in itself. Spouses, common law partners and close relatives are exempt from this duty, as well as defence counsels, doctors or priests of the perpetrator.

Additionally, there is a general requirement to report any criminal offence that is in progress and may be prevented if the offence in question carries a statutory minimum sentence of three years. Failure to do so constitutes a criminal offence as well. Only spouses, common law partners and close relatives are exempt from this duty.

3 Art. 13 et seq. of the GDPR.

Furthermore, there is a general obligation in place to report any suspicious transactions to the authorities.[4] The subjects of this reporting duty are broadly defined, but mostly include legal entities or natural persons involved in financial services, as well as attorneys and notaries.

4 Prevention of Money Laundering and Terrorist Financing Act.

This chapter was written by Ziga Dolhar and Simon Tecco.

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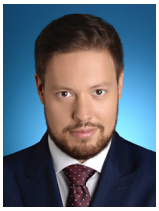

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UKRAINE

WHISTLEBLOWING

? Is there any specific regulation related to whistleblowers?

? If so, is there any obligation to react to whistleblowing/to have a system in place for reacting to whistleblowing?

There is no comprehensive law on whistleblowing in Ukraine. However, a draft law has already been prepared and is awaiting parliamentary consideration since 2016.

Certain Ukrainian statutes[1] do contain provisions stating that certain types of information (e.g. information on the violation of human rights, harmful activities of individuals and legal entities, etc.) may be disclosed irrespective of whether such information is privileged and confidential. In this case the right of the society to be aware of this information outweighs any potential harm resulting from the disclosure of such information.

CIVIL LIABILITY

? In which situations is the decision to hold an internal investigation necessary to deflect civil responsibility of board members?

This is not directly regulated by the law. However, company executives (board members, directors, etc.) may be held liable in case their actions or inactions result in losses to the company. Therefore, if it is proven that in a specific situation it would have been reasonable to hold an internal investigation, but the company executives have not done so, such persons may be held liable for their inaction.

CRIMINAL LIABILITY

? In which situations will an internal investigation decision be necessary to deflect criminal liability of board members?

As under "Civil Liability", it is not directly regulated by Ukrainian law when an internal investigation is necessary to deflect the criminal liability of a company executive. At the same time, in case there are clear indications of violations in a company and no investigation is conducted even though such an investigation is within the executive's competence, in a severe case (i.e. if the harm inflicted amounts to ca. EUR 3.000 or more) the executive could be held liable for "neglect of duty".[2]

1 E.g. Art. 11 of the Law of Ukraine "On Access to Public Information", Art. 29 of the Law of Ukraine "On Information", etc.

2 Art. 367 of the Criminal Code of Ukraine.

CORPORATE CRIMINAL LIABILITY

? Is there a corporate criminal liability in your country?

? If so, would a compliance system including internal investigation prevent/mitigate corporate criminal liability?

Corporate criminal liability does exist in Ukraine; however, it is not directly stated in the law whether having a compliance system in place or holding an internal investigation would prevent or mitigate corporate criminal liability. The introduction of an internal compliance system is mandatory for certain types of companies. Therefore, the absence of such a system could itself serve as a circumstance aggravating liability.

PARALLEL PROSECUTION OF COMPANIES AND INDIVIDUALS

? Can both individuals and companies be prosecuted for the same misconduct?

Yes. Companies are prosecuted in case of the misconduct of their executives who are also held liable.

COOPERATION

? Would cooperation and voluntary self-disclosure be considered by the law enforcement authorities (in relation to both individual and corporate liability)?

Yes. Cooperation and voluntary self-disclosure are regarded in the Criminal Code as mitigating circumstances (possibly resulting in a less severe penalty).

CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE ("LEGAL PRIVILEGE")

? Who can enjoy the protection of legal privilege?

? What information/data is protected by legal privilege, what is not and what are (if any) the exceptions from legal privilege?

? Does legal privilege extend to documents created by attorneys after they are handed over to the client?

Legal privilege extends to attorneys and persons employed by the attorney or attorney's office (assistants, trainee's, etc.).

The following information is protected by legal privilege:

- any information an attorney, attorney's assistant, attorney's trainee or a person employed by an attorney became aware of with respect to a client;
- any issues regarding which a client approached the attorney or the attorney's office;
- the content of the advice;

- any consultations, clarifications and documents drafted by the attorney;
- information stored on electronic carriers and other documents and data received by the attorney in the course of his/her attorney activities.

IN-HOUSE LAWYERS' PRIVILEGE

? Is there any privilege for in-house lawyers?

There is no specific privilege for in-house lawyers. However, in-house lawyers are subject to general proprietary information protection mechanisms provided by Ukrainian law. As a matter of practice, in-house lawyers who are certified attorneys (advocates) may conclude an agreement based on which legal privilege will apply to their relationship with their employer.

OTHER SERVICE PROVIDERS' PRIVILEGE

? Is there any privilege for other types of service providers?

? Can legal privilege be extended to them if they are sub-contracted by attorneys?

Legal privilege does not extend to third parties sub-contracted by an attorney, but only to attorneys and persons employed by the attorney or attorney's office (assistants, trainee's, etc.). For example, outside consultants, including lawyers who are not attorneys, are not covered by legal privilege.

DATA PROTECTION ISSUES

? What conditions must be met to allow investigators access to employees' e-mails/ other records potentially containing private information?

? Is the consent of the respective custodian necessary before any data collection starts?

? Are there any restrictions in relation to cross-border transfer of data collected during the investigation?

Electronic messages sent via company email accounts are subject to the general privacy right of correspondence of an individual.[3] The correspondence can only be used with the consent of the message originator and its recipients. In case the correspondence relates to the private life of an individual, its usage also requires the consent of such an individual.

Therefore, in practice, the use of corporate email accounts should be restricted to correspondence carried out in the employee's professional roles, or the employee should confirm and agree not to use corporate email for personal purposes, and thus the employer should not require consent for access to corporate email accounts used by the employee. The employer may have access to email/communication of its employees based on internal policies (and/or relevant provisions in the employment agreement). The employees should be made familiar with any such policy and the record of this should be documented. Cross-border personal data transfer may require consent of the data subject (i.e. the relevant employee).

3 As per the Constitution of Ukraine and the Civil Code of Ukraine.

INTERVIEWS

? Does an employee have an obligation to actively participate at the interviews organised by the counsel of the employer?

No, the employee does not generally have such an obligation, unless this obligation is provided for by internal regulations of the company.

REPORTING DUTIES

? Is there any reporting duty towards enforcement authorities on the outcome of the investigation or any information obtained during the investigation?

? If yes, who is subject to the reporting duty and who is exempted?

This is not specifically regulated by law. Even though the non-reporting of a crime which investigators (or other persons) became aware of during an investigation should not per se constitute a crime. Such non-reporting (combined with other actions of the person who has not reported the crime) may in certain cases be classified as a crime (e.g. a crime of "hiding a crime", etc.). It is therefore recommended to carefully consider each case and get advice on the recommended course of action.

This chapter was written by Taras Dumych and Sergii Zheka.

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