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Criminal liability of corporations – Global vs Romanian approach

Criminal liability of corporations is a hot topic worldwide. From financial institutions to global corporations, almost daily we hear about a large corporation being investigated, signing a Deferred Prosecution Agreement or being convicted, usually for money laundering, tax evasion or bribery.

Even more, countries such as UK, Germany, Spain, or Canada have already strengthened or are considering strengthening corporate criminal liability.

While the general impression is that not many corporations are investigated or convicted in Romania, perhaps because their criminal liability was introduced only in 2006, the reality is quite different.

According to the last Public Ministry Report detailing its activity, in 2018 there were 807 corporations investigated, out of which 242 were indicted for the following crimes:

- I. Crimes against patrimony, such as bankruptcy fraud, fraud, fraud committed through computer systems and electronic means of payment,

diversion of public tenders (44 cases – up from 14 in 2017);

- II. Corruption and malfeasance offences, such as bribery, influence peddling, buying influence, embezzlement, abuse of power, diversion of funds (8 cases);
- III. Crimes provided by special laws, such as tax evasion and money laundering (157 cases).

At the first glance, in 2018 there were prosecuted fewer corporations than in the previous years (the peak was in 2016 when almost 500 corporations were indicted), which may support the impression that corporations are not usually prosecuted in Romania.

However, at a more cautious look, the number of corporations indicted in 2018 has grown significantly for crimes against patrimony and for corruption and malfeasance offences.

In light of this unprecedented investigations against corporations, we will briefly detail (A) the conditions under which corporations may be

criminally liable in Romania and (B) the related penalties.

In contrast with other countries which are considering nowadays strengthening the criminal liability of corporations, in Romania these conditions are already 360° comprehensive.

(A) Conditions under which corporations may be criminally liable

The corporations are criminally liable for offenses committed in the performance of their business **or** in their interest **or** on their behalf.

Given the broad terms used by the law and the various situations which may fall under the criminal law liability, the following questions have arisen:

- For which crimes can corporations be liable? - According to the Constitutional Court, not all crimes can be committed by a corporation, stating that only *corporate crimes* may entail their criminal liability. But, without defying the concept of *corporate crimes*, corporations may be in general liable (at least as an accomplice) for any crime committed by its employees, representatives or agents as long as the crime was committed in the performance of their business, or in their interest or behalf.
- Who can trigger the liability of corporations? - The liability of corporations may arise out of offenses committed by any

person acting in the interest or on behalf of the corporations or in the performance of their business, either based on a legal relation or even acting de facto (with or without an employment contract).

This condition implies that, in contrast with the *identification principle* held by countries such as UK or Canada - where it is important to establish that an individual who was “*the directing mind*” of the company committed the offence, in Romania it is applicable the principle of direct responsibility (which is more similar with the *doctrine of respondent superior*, held in the USA).

Thus, a corporation may be criminally liable for offences committed by any person acting in the interest or on behalf of the corporation or in the performance of its business, and not only by the governing bodies.

In a nutshell, the corporations may be criminally liable for:

- (i) any offence committed in the performance of their business by one of the governing bodies, or one of their employees or agents, even if the corporation does not enjoy any benefit (either moral or material); **or**
- (ii) any offence which generates a moral **or** material benefit for the corporation, even if

the crime was not committed in the performance of its business or on its behalf – e.g. money laundering, tax evasion; or

(iii) any offence committed on its behalf by any person legally invested to act in its name (e.g. directors, attorneys), even if the crime was not committed in the performance of its business or in its interest.

- How to determine if the corporation is guilty? - For a corporation to be criminally liable, the conditions concerning the relevant form of guilt must be met (intention or negligence).

In principle, whenever a crime requires the existence of intention, the corporation will be held liable in cases where:

- such intent can be proved at the level of the governing bodies or other high-level executives; or
- the commission of such crimes is a practice well-known and tolerated by the corporation.

In case of crimes of negligence, the corporation may be liable if it has not taken the necessary measures to prevent such crimes.

There are no specific lines detailing the measures that a corporation should apply in order to prove that it does not encourage or endorse such behaviour. Therefore, courts have a case-by-case approach taking into consideration the

industry where the corporation is acting, the possible risks etc.

While it is always recommended to implement compliance programs, in Romania they are even more necessary and should be even well-designed, integrated in the daily business, in an attempt to supplement the lack of official guidance.

(B) Related Penalties

Corporations may be subject to the following penalties:

- main penalty – fines ranging from 3,000 RON (approx. 635 EUR) to 3,000,000 RON (approx. 636,000 EUR);
- ancillary penalties - winding-up; suspension of one or more business lines for a term between three months and three years; placement under judicial supervision; display or publication of the conviction sentence.

We cannot speak about criminal liability of corporations without referring to the Deferred Prosecution Agreements, which are started to be regulated in Europe too.

Well, in Romania, there is no such mechanism and apparently no intention of the Parliament to regulate it. Even though many drafts of criminal legislation are being discussed, none of them refers to deferred prosecution agreements or anything similar.

In contrast with other jurisdictions (UK, France, USA, Canada), where

prosecutors and corporations may enter into deferred prosecution agreements (without any admission of guilt and without an actual conviction), the only type of settlement available in Romania is the guilty plea agreement entered into by prosecutors and corporations (or any indicted person) and endorsed by the court.

In exchange for a reduction of the penalty, the corporation pleads guilty with the following consequences (a) entering into a guilty plea agreement entails a recognition of guilt and (b) the guilty plea agreement triggers a conviction.

As one of the indirect consequences of a conviction is that, in principle, the corporation is excluded from public procurement tenders for five years after the judgement of conviction becomes final, the corporations participating in public procurement tenders should

carefully assess the long-term consequences of concluding a guilty plea agreement.

In order to reduce as much as possible the risk of being criminally liable, the corporations should carefully implement audit systems, compliance programs well-designed for their specific risk profile, as well as run internal investigations whenever there are signals of non-compliance.

Given the sensitivity of any internal investigation, especially if the conclusions will determine a potential criminal conduct, the corporations should ensure that only external legal counsels are involved in the investigations, in order to allow the corporation to benefit as much as possible from the [privileged nature](#) of the investigations' results.

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