New Trends in Addressing Corporate Crimes: Internal Investigations

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Abstract

The new provisions on the liability of legal entities have brought about a significant gain for criminal justice: companies could now be fined or subjected to penalties, often more severe than fines, i.e. dissolution, temporary suspension of activity or prohibition of participation in public tenders. Faced with sanctions that have the ability to alter the ultimate essence of a corporate milieu, alongside and outside the criminal justice process, internal control procedures have been put in place in order to take away a potentially criminal matter from the state supervision. These processes, neutrally called - internal investigations - have the capacity to be the genuine content of a new criminal practice, adopted by all major law firms that provide advice to large corporations.

This study seeks to identify the main features of this type of investigation, the convergence of elements belonging to different areas (criminal law, labor law, corporate law etc.), the divergence from classical investigative procedures and the potential insurgence against human rights.

Keywords: *internal investigations, new criminal practice, emergence, convergence, divergence, insurgence*

1. Emergence

Criminal liability of corporations is a hot topic worldwide[1]. The Romanian legislator criminalized the deeds of legal entities for the first time in 2006 and fully addressed the topic by adopting the new Penal Code, enforced in February 2014. According to the Prosecutor's General Office Report of 2018[2], out of 807 corporations which were investigated, only 242 were indicted (compared to the maximum level of 487 corporations indicted in 2016)[3].

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[1] Alexandru Ambrozie, Diana Dobra (2019), *Criminal liability of corporations – Global vs. Romanian approach*, available at https://rlw.juridice.ro/15919/criminal-liability-of-corporations-global-vs-romanian-approach.html (accessed on 02.11.2019).

[2] Available at http://mpublic.ro/sites/default/files/PDF/raport_activitate_2018.pdf (accessed on 02.11.2019).

[3] Prosecutor's General Office (2018). *Criminal Investigations Statistical Data*:

Year	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
orporations under investigations	287	288	421	527	1054	1238	2073	1008	1037	807
Corporations indicted	23	29	106	127	187	358	319	487	346	242

According with the legal provisions in force, liability of the corporations applied to:

i) Any crime regulated in the Criminal Code / special acts containing criminal provisions, e.g. active and passive corruption, misrepresentation, fraudulent management, bankruptcy or insurance fraud, breach of fiduciary or trust, diversion of public tenders or diversion of funds, computer fraud, failure to report offences, tax evasion, unfair competition, conflict of interests, embezzlement, counterfeiting of currency, bonds, payments instruments or documents, money laundering etc.;

ii) Any capacity, e.g. main offender, abettor, accomplice;

iii) Any act committed by the management / representatives / employees / agents acting *de jure* or *de facto* (no employment contract needed);

iv) Any act committed in the performance of the corporations' business or in their interest or on their behalf, irrespective of any benefit moral or material;

v) Independent criminal liability of corporation in relation to the liability of the natural person involved.

With these coordinates in mind, it is easy to conclude that an imminent risk of serious criminal liability occurs for any corporation, which entails criminal sanctions such as: fine, under a maximum of LEI 3,000,000 (approx. EUR 630,000), judicial supervision, temporary suspension of one or more business lines, permanent closure of premises, prohibition of participation in public tenders, dissolution.

The application of such sanctions seems a terrible instrument able to cause an alteration of the corporate milieu. How to escape such an almighty repressive power? Or, if this is not possible at all, how to gain cooperation credit, in order to relax the sanction's burden? The answers are not facile since they imply acting *intra legem*, not *contra legem*. The idea is to have access to a protection against the law by legal means and procedures very much alike what is called legal avoidance in the field of tax evasion. One solution is to look out the dichotomy *intra / contra legem*, which leaves no much room for action. Latins knew that acting *praeter legem* refers to a procedure that is not regulated by law and therefore not illegal, but still efficient as a strategy able to compose a self-defense against the criminal law or judicial power.

On these grounds, a new criminal practice for all major law-firms which provide legal advice to corporations arose. The name of this new born area of practice is internal investigations. The strategy is chameleon-like: using neutral label for an effective and rather un-orthodox tool to provide legal havens for corporations. An internal investigation could comprise different and diverse procedures, such as: interviews of employees, confrontations, crime scene investigations, premises search, body search and computer search, expert reports, video, audio and photo surveillance, GPS location, phone or wiretapping, undercover agents etc.

Three dimensions of internal investigations are commonly addressed. *Primo*, the fertile convergence of many areas of practice into a whole brand-new approach. *Secondo*, the remarkable divergence of the features of this new tool in relation to the ambit of criminal justice. And finally, *terzo*, the inevitable insurgence of this procedures to human rights.

2. Convergence

All the procedures described above as being compatible with internal investigations are in fact imported from criminal procedure law. The idea is to copy all

these instruments and to replicate them in a so-called "neutral" way by depriving them of the 'criminal' flavor. These means must look the same, except for the repressive component. An average observer must not be able to discern the true origin of these tools. If depriving is not possible, then concealing could work instead.

This disguising could be aided by the disciplinary component of labor law. Labor law is targeted to settle the relationship between employer and employees by allowing the former to deal with two specific powers. One is the power to edict private norms applicable *intra muros* of the company under the form of an internal regulation policy (IRP). Nevertheless, these rules must respect all the existing superior norms, i.e. the company cannot enforce a norm which is contrary to a specific legal standard already applicable. Still, the power is effective to a great extent since it derives from the consensual nature of the employment agreement. The employee is free to accept the employment terms or to decline them. By accepting, the employee acknowledges the enforcement prerogative of the employer.

Any company is used to develop specific and clear IRPs in order to keep the focus on the lucrative business. This approach led to the emergence of a truly substantive law: compliance. As a consequence, a corporation has been allowed to legislate within its own yard and fully took advantages of that power. The very distinctive feature of this power resides in its unilateral character, meaning that the IRP is not negotiable as the employment agreement terms are. The employee has only a partial view of what he/she is doing. Bargaining on the wage or working hours, he /she leaves aside an important matter which remained to be regulated only by the employer. As a result, the company uses that uncensored power to impose specific obligations and prohibitions on employees and to assure that its liability could not be entailed by an act of an employee committed in the performance of the corporation's business or in its interest or on its behalf.

The company is interested to point out that specific conducts are prohibited, disclosed and punished before the liability of a company could be triggered by third parties. These specific conducts are not just linked with labor, but could envisage basically any matter within the company's business lines. Using one metaphor of the corporate law, compliance concerns all the elements that compose the corporate veil.

The second power is the possibility to enforce such private norms by conducting disciplinary investigations on employees in case of non-compliance. All recent labor codes integrated specific norms on conducting such investigations in order to balance the interests of the parties at conflict. A company cannot investigate a disciplinary breach at its own discretion, otherwise the procedure would be void.

Besides labor law and corporate law, other issues related with information and communications technology law arise.

In a recent case against Romania[4], the European Court of Human Right concluded that the Romanian courts, in reviewing the decision of Mr. Bărbulescu's employer to dismiss him after having monitored his electronic communications, failed to strike a fair balance between the interests at stake: namely Mr. Bărbulescu's right to respect for his private life and correspondence, on the one hand, and his employer's right to take measures in order to ensure the smooth running of the company, on the other.

[4] Case of Bărbulescu v. Romania, Judgment of 5 September 2017, www.hudoc.echr.coi.int, accessed on 02.11.2019.

The Court considers that States should ensure that, when an employer takes measures to monitor employees' communications, these measures are accompanied by adequate and sufficient safeguards against abuse. In particular, the authorities should determine the following[5]:

- Whether the employee has been notified of the possibility that the employer might take measures to monitor correspondence and other communications, and of the implementation of such measures. For the measures to be deemed compatible with the requirements of Article 8 of the Convention, the notification should be clear about the nature of the monitoring and be given in advance;

- The extent of the monitoring by the employer and the degree of intrusion into the employee's privacy. In this regard, a distinction should be made between monitoring of the flow of communications and of their content. Whether all communications or only part of them have been monitored should also be taken into account, as should the question whether the monitoring was limited in time and the number of people who had access to the results;

- Whether the employer has provided legitimate reasons to justify monitoring the communications and accessing their actual content. Since monitoring of the content of communications is a distinctly more invasive method, it requires weightier justification;

- Whether it would have been possible to establish a monitoring system based on less intrusive methods and measures than directly accessing the content of the employee's communications. There should be an assessment in the light of the particular circumstances of each case of whether the aim pursued by the employer could have been achieved without directly accessing the full contents of the employee's communications;

- The consequences of the monitoring for the employee concerned and the use made by the employer of the results of the monitoring operation, in particular whether the results were used to achieve the declared aim of the measure;

- Whether the employee has been provided with adequate safeguards, especially when the employer's monitoring operations are of an intrusive nature. Such safeguards should in particular ensure that the employer cannot access the actual content of the communications concerned unless the employee has been notified in advance of that eventuality`.

As a result, for the purpose of conducting internal investigations, within the limits designed by the European Court, a video, audio and photo surveillance, a GPS location and phone or wiretapping could be legally engaged.

Last, but not least, a corporation could use private detectives as undercover agents in order to investigate specific conducts of its employees. Nevertheless, private investigations law is equally present and involved in internal investigations.

3. Divergence

The ability of internal investigations to concentrate many practice areas in a `melting pot` is very strong. This new convergent instrument shaped *praeter legem* not only has it gained advantages, but it has caused issues as well. In the following section a survey on the most important challenging issues will be addressed.

[5] https://www.echr.coe.int/Documents/Press_Q_A_Barbulescu_ENG.PDF, accessed on 02.11.2019.

Internal investigations are a real shift in the legal practice of corporate crime. The emergence of this new criminal practice was determined by the need to surpass the fundamental weaknesses of classical procedure to deal with the corporate crime. As already mentioned before, applying a criminal sanction to a corporation is a terrible instrument able to cause an alteration of the very essence of the company's *raison d'etre*. Such effect is caused by three main disadvantages: lack of control, slowness and adverse publicity.

Lack of control or partial control comes from the monopoly of criminal justice which state is empowered with. Any procedure called `criminal` means the intervention of the judicial police and the public prosecutor and often, even if not always, of a competent judge. This implies a total or almost total submission of the investigations in the hands of the authorities. When the company is not under investigation (suspect / defendant), its position is reserved to be minor, meaning weak control over `what`, `how` and `when` is performed during the investigations.

The company is interested to develop a strategy able to free from these constraints by shaping an instrument which allows regaining full control. The idea was to change official agents with private investigators competent to do the same thing. This is a burst for the lawyers' profession since the most qualified private investigators are nobody but the lawyers themselves. Being an investigator in an internal affair of a company means the fulfillment of a constant dream of criminal lawyers: to take part offensively to the investigation of a crime. Most commonly, a criminal lawyer is a defense lawyer and always envied the powers of a public attorney. Shifting carriers for such a pleasure looked always a huge stake.

Using lawyers for internal investigations has changed everything. Lawyers are deeply accustomed with the sense and value of time and confidentiality. This approach had the effect of speeding the procedures on the one hand and the increasing of the non-publicity on the other. Slowness is history, and publicity the same. Additionally, bringing lawyers as chief investigation officers led to a different outcome. Lawyers are trained to deliver bargain solutions. The rigid nature of the official approach is now counter-balanced by negotiations. That feature is more likely to be accepted in civil law systems where the bargaining in criminal matters is more looked for than found. Moreover, internal investigations enjoy the advantage of no supervision state authority. The criminal area does not only evade from public agencies but also escapes any review. The bargaining solution reflects the 'win-win' philosophy and is unlikely to be subject to external supervision.

All these amendments are evidently divergent from the classical paradigm. However, there is a cost to be paid. Internal investigations are a camouflaging procedure, sourced in a criminal one, but being fast, confidential and transactional, they need to give up to an important component of criminal justice: the penalty. In fact, criminal justice is a public affair not so much because of its procedural dimension, but due to the power to inflict harsh penalties. Internal investigations prove to be an innovation only on the procedural side, leaving aside the penalties as the price for such innovation. Indeed, the `penalties` usually reached in internal investigations is warning (written or oral), suspension with or without salary, transfer to a different job, demotion, fine, dismissal far away from the deprivation of liberty, confiscation or prohibition of rights.

4. Insurgence

Shaped for the company's purposes and objectives, internal investigations are not human rights friendly when comes to the investigated subjects. This genuine insurgence against the renowned safeguards of fair proceedings is the consequence of the allegedly effective protection for the company. A low-profile approach to defense rights could affect the right to access to a counsel, the privilege against self-incrimination, the right of access to documents of the investigation file etc.

Some basic requirements have been settled[6] in order to preserve the defense rights:

- The employee may – if requested – consult his or her own legal counsel. The expense may even be borne by the company. The employee is summoned for the interview well in advance so that he or she will be able to adequately prepare.

- The employee is informed about the subject matter of the internal investigation, as well as its context. He or she is informed about the fact that the attorneys conducting the interview represent the company and not the employee and that, therefore, they may be pursuing other interests.

- The employee is notified that notes will be taken by the attorneys and that, under certain circumstances, contents of the interview may be forwarded to national of foreign authorities. The employee's legal counsel may be given the opportunity to inspect the notes.

- During the interview, the employee is treated altogether fairly. He or she must not be influenced in an unfair manner. The employee's freedom to determine his or her own will must not be affected. No improper pressure may be brought to bear on the individual`.

Internal investigators must be cautious about this dimension of their practice since it often takes place in parallel with an official one performed by public investigation authorities. The risk of overlapping procedures is clear and present and surely none of the company stakeholders would assume the adverse labelling which may lead to the idea that an internal investigation is just a `capitalist` instrument to evade the law.

5. Conclusions

Corporations are being scrutinized today as never before. There is a path for corporations to best protect themselves and that are internal investigations. As a guide[7] pointed out: `When a company is confronted with evidence or allegations of potential wrongdoing, the company is well served to respond deliberately and thoughtfully with appropriate discipline, remediation, and (in certain cases) perhaps even discussions with the government. Conducting an effective corporate internal investigation can benefit the company in a number of ways:

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[6] Sven H. Schneider, Mathias Priewer (2019), *German legislation and its impact on employees' rights in internal investigations*, available at https://www.financierworldwide.com/german-legislation-and-its-impact-on-employees-rights-in-internal-investigations#.Xi7aLmgzaHs accessed on 02.11.2019.

[7] JonesDay (2013), *Corporate Internal Investigations. Best practices, pitfalls to avoid*, available at https://www.jonesday.com/files/upload/CII%20Best%20Practices%20Pitfalls%20to%20Avoid2.pdf accessed on 02.11.2019.

- Revealing all of the relevant facts so that management and/or the board can make a fully informed decision as to how best to proceed;
- Stopping the conduct to prevent further violations;
- Memorializing the company's good-faith response to the facts as they become known;
- Insulating management and/or the board against allegations of complicity; and
- Promoting a culture of transparency and compliance throughout the organization.

Internal investigations emerge from due diligence[8] practice adapted to more sensitive issues like violation of certain company policies, or worst, the criminal law rules. This shift is not accidental, but has appeared as the effect of a new paradigm in criminal law, which is becoming more and more preventive than before.

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1. Ambrozie, A., Dobra, D., (2019). *Criminal liability of corporations – Global vs. Romanian approach*, available at https://rlw.juridice.ro/15919/criminal-liability-of-corporations-global-vs-romanian-approach.html (accessed on 02.11.2019).

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4. http://mpublic.ro/sites/default/files/PDF/raport_activitate_2018.pdf (accessed on 02.11.2019).

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[8] I am grateful to Dr. Magdalena Roibu for pointing me out this aspect.