TUCA ZBARCEA
ASOCIATII

Preventive Guidelines

ON SUBSTANTIVE CRIMINAL LAW

These Guidelines aim at outlining those provisions of domestic criminal law that are relevant to the activity of our clients and potential clients:

- Norms governing corporate law and the economic activity in general;
- The regulation, from a criminal law perspective, of specific areas such as public procurement, employment, insolvency, taxation, etc.;
- The specific elements of the criminal liability of the legal entity, held liable either distinctly or jointly with the individual acting as its representative or agent;
- Solutions given by the doctrine and the courts to the topics in each section, keeping in mind that domestic jurisprudence is not a source of law (*i.e.*, it is not a binding precedent) and, on the other hand, that the court practice is often inconsistent. However, it is accepted that courts through a clear, accessible and predictable jurisprudence may gradually contribute to qualifying various criminal law notions.

This material is for reference only. It does not seek to provide legal advice, which may be requested according to each specific legal issue and may not be relied upon for any purposes whatsoever. For details and clarifications on any of the topics dealt in our Preventive Guidelines on Substantial Criminal Law, please do not hesitate to contact us.

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Preventive Guidelines on Substantive Criminal Law

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Preamble

These are troubled times we live in ... In terms of law, the contemporary fog translates into excessive regulation, legislative instability, incoherent court practice and other drawbacks that you are likely to have already encounter in your day-to-day operations.

On top of these shortcomings, in these past few years Romanian law went through much convulsion related to the enforcement and interpretation of criminal law and criminal procedure law.

All these hot topics of criminal law have also affected the domestic economic and business environment, companies and employers, shareholders, directors, officers, internal auditors, accountants and other management staff, as well as the day-to-day operations of companies and professionals that are critical for the business environment (lawyers, notaries, court bailiffs, official receivers, etc.).

In this context, and against the backdrop of economic stakeholders' growing natural concern to ensure full compliance of their business, Țuca Zbârcea & Asociații decided to meet you halfway with a set of preventive measures for a better management of the risk of collision with criminal law.

These Guidelines are not intended as an exhaustive and detailed presentation of all criminal law concepts which are relevant for the activity of economic operators; even less are they a treatise on regulations and proceedings in criminal procedure matters.

Our intention is to provide you with a basic tool, a kind of compass to guide your first steps in the regulatory tangle of criminal legislation.

Certainly, should you deem necessary, we are available to further assist you with workshops, work meetings, training sessions at our office or yours, depending on your specific needs.

Yours,

Țuca Zbârcea & Asociații Team

Florentin Țuca, Managing Partner

Liability of Legal Entities. A Few Considerations

Criminal Code: *Article 135*

(1) Legal entities, except for state and public authorities, shall have criminal liability for offenses committed in the performance of their object of activity or in their interest or behalf.

(2) Public institutions shall not be held criminally liable for offenses committed in the performance of activities that cannot be the object of private law.

(3) The criminal liability of the legal entity does not exclude the criminal liability of the individual participating in the criminal act.

Nota bene:

- In all cases, the criminal liability of the legal entity is determined by reference to the person(s) who actually committed the action that forms the material element of the criminal offense. In the absence of such relationship, it would be unjustified and arbitrary to hold the legal entity liable.
- As a general rule, the criminal liability of a legal entity may be caused by the actions of anyone acting on behalf of the company, which may include members of the management bodies, as well as other representatives, agents or even persons acting under the authority of the company although lacking an official position. Lacking a criminalized act committed by an individual, there the legal entity cannot bear any criminal liability[1].
- Starting from these principles, depending on the specific circumstances of the case,

1 See in this respect Decision No. 70/20016 of the High Court of Cassation and Justice – Criminal Division.

various situations may be encountered in practice where:

- ° *both the legal entity and the individual who committed the offense are held liable (e.g.,* for a workplace accident resulting in the death of several persons, liability may be shared between the person who misused the piece of work equipment and caused the accident, and the company's management bodies that did not provide adequate Health and Safety training);
- ° *the employee who committed the offense is held liable, but the legal entity is not (e.g.,* unbeknownst to the company the employee intentionally causes the discharge of toxic waste; however, the legal entity may be held liable if where it is found that the company was repeatedly negligent in supervising the employees' activity).

- According to Article 135 of the Criminal Code, criminal liability of a company does neither exclude, nor automatically trigger the liability of its management bodies.
- As a general comment, criminal liability is individual, which means that a person may only be held criminally liable for her own actions or omissions.
- Criminal offenses may be committed in various forms of criminal participation (instigation, authorship, aiding and abetting). A company officer could be held criminally liable as an instigator or accomplice, where criminal investigations establish his involvement in a criminal activity.

Day-to-Day Operations

A company's day-to-day operation entails a variety of private or public law relationships in which the legal entity must comply with the law in general and the criminal law in particular.

Companies are not always aware of the applicable legal provisions and, where they are aware, they sometimes deem such provisions apply to only particular circumstances or to only certain categories of legal entities or employees/contractors. The amendments brought by the new Criminal Code extend, *inter alia*, the scope of criminalization for certain acts, which means that rules that traditionally applied to only State/public institutions and agencies are now also applicable to the private sector.

New offenses, which did not exist in the previous Criminal Code, have been introduced and existing provisions have been amended.

At the same time, domestic criminal and extra-criminal law provides for offenses that may be committed by the management bodies of private-law legal entities (founders, directors, officers, executive officers, members of the supervisory board, legal representatives of the company). Such persons must therefore be aware of the boundaries of a lawful activity.

Criminal Code: *Article 238*

> *(1) The act of taking, disposing of or unlawfully using a movable asset belonging to another by the individual to whom the asset was entrusted based on a title and for a certain purpose, or the refusal to return such asset, is punishable by 3 months to 2 years of imprisonment or by fine.*

> *(2) The criminal law action is initiated based on a prior complaint filed by the victim.*

Nota bene:

- The criminal act can also be committed by **using the asset for another purpose** than the one for which it was entrusted based on a title;
- The unjustified refusal to return the asset is an offense only if it is preceded by the firm request of the titleholder and in the absence of any right of retention of the (temporary) holder.

Judicial practice:

- **There is no abuse of trust if an asset is entrusted in order to be used at work, in the workplace, during working hours or in order to be examined/tested for purchase** *(Supreme Court of Justice, Criminal Division, Decision No. 1197/2000; HCCJ, Criminal Division, Decision No. 2037/2002)*.
- **Assets entrusted in the course of employment in order to be used outside the workplace and of the working hours can make the object of an abuse of trust** – e.g., the company phone or car *(Suceava Court of Appeal, Criminal Division, Decision No. 345/2016)*.
- The court held that **it is not always necessary that the asset was actually handed over to the offender**. The court found that an abuse of trust also existed when, based on a power-of-attorney granted by a bank account holder, the attorney-in-fact who had the right to withdraw money unjustly took such money for himself *(Galați Court of Appeal, Criminal Division, Decision No. 1911/2012)*.
- An abuse of trust also exists **in relation to services involving the handover of movable assets (car repairs by workshops)**, if the workshop refuses to return the assets for failure to pay the price of their services and in the absence of any contractual provisions allowing the workshop to withhold the car until the price of the services is paid.
- An abuse of trust is also committed by a former employee **who refuses to hand over to the employer several assets he picked up on behalf of the employer and holds in his possession, on the ground that such former employee was not paid all the money owed him by the employer**; claims arising from the individual labour contract can only be raised by way of civil action, and the former employee has no right to refuse to hand over such assets to the employer *(Caraș Tribunal, Criminal Division, Decision No. 139/1981)*.

Criminal Code: *Article 239*

(1) The act of the debtor to dispose of, conceal, damage or destroy, in whole or in part, assets or values they own or to invoke fictitious acts or debts in order to defraud creditors is punishable by 6 months to 3 years of imprisonment or by fine.

(2) The same penalty applies to the individual who, knowing that he will not be able to pay, purchases goods or services thus causing damage to the creditor.

(3) The criminal law action is initiated based on a prior complaint filed by the victim.

Nota bene:

- This article contains a new provision mean to protect the creditor's interests against any act of the debtor seeking to render itself insolvent through actions which are within its control, such as: **disposal** (performing acts of disposal – e.g., sale, donation - whereby an asset is transferred from debtor's ownership, debt remission, etc.), **concealment** (physically placing an asset where it cannot be found/tracked/ identified by creditors), **damage or destruction** (seeking to reduce/remove the economic value of the tangible asset) of goods or valuables that could be subject to enforcement, or **invoking fictitious acts or non-existent debts** (presenting unreal legal situations meant to show diminished assets or the increased liabilities in order to avoid or defer payment – e.g., acknowledgment of a non-existent debt towards an alleged creditor).
- Acts from this category occur frequently – **closer attention must be paid to any type of transaction of a debtor!**
- **The acquirer's act of acquiring assets or services knowing that it will not be able to pay or comply with its other obligations**, is also an abuse of trust. For the offense to exist, **it is not necessary for the state of insolvency to be declared as such by an authority/court**: it is sufficient for the debtor to seek to cause its own insolvency in order to avoid enforcement from creditors.
- Nevertheless, the debtor which is unable to pay acquires assets or services may only

be held criminally liable where a loss or damage caused by such act is proven.

Judicial practice:

- An abuse of trust by defrauding the creditors was committed when a company director, upon the performance of an oil supply agreement entered into with the victim, despite the insufficiency of financial resources and the failure to pay for the acquired goods in due time, while being aware that the company would be unable to pay, continued to acquire Diesel fuel from the victim, to the detriment of which it disposed, from time to time, of company assets, thus causing damage to the victim *(Bihor Tribunal, Criminal Division, Criminal Sentence No. 347/P/2014)*.
- An abuse of trust by defrauding the creditors was held to exist when the debtor was certainly aware at the time of the transactions that it would not be able to pay the price of the assets/services *(Oradea Court of Appeal, Criminal Division, Decision No. 642/09.10.2015)*.

Criminal Code: *Article 242*

(1) The act of causing damage to an individual while managing or preserving his assets, committed by the individual tasked with the management or preservation of those assets, is punishable by 6 months to 3 years of imprisonment or by fine.

(2) When the act set out in par. (1) was committed by the receiver, the liquidator of the debtor's assets or by a representative or servant thereof, it is punishable by 1 to 5 years of imprisonment.

(3) The acts set out in par. (1) and par. (2) committed in order to obtain material benefits is punished by 2 to 7 years of imprisonment.

(4) The criminal law action is initiated based on a prior complaint filed by the victim.

Nota bene:

- This offense entails the damaging action or omission of a person with management duties (i.e., a *de facto* or *de jure* manager) or preservation/administration duties (a *de facto* or *de jure* administrator)[2] in relation to the victim's movable or immovable assets.
- Where the offense is committed by a public servant, the criminal law provisions on embezzlement apply.

Judicial practice:

- Fraudulent management was held to exist when the manager of a company (i.e., a store) failed to prepare management reports or prepared inappropriate reports or was late in submitting them to the accounting records or did not draft acceptance notes for the received goods, being found that he mismanaged and thereby caused damage to the company (*HCCJ, Criminal Division, Decision No. 1956/2005*).
- The offender must not necessarily be officially acknowledged to have the specific duties of a manager (e.g., under a management or mandate agreement): it is sufficient for his duties to allow and require him to manage and preserve the company's assets (*de facto* administrator) (*Alba-Iulia Court of Appeal, Criminal Division, Decision No. 542/02.05.2015*).

Criminal Code: *Article 244*

(1) Misrepresenting false facts as being true, or of true facts as being false, in order to obtain undue material gains for oneself or for another, where material damages have been caused, is punishable by 6 months to 3 years of imprisonment.

(2) Misrepresentation committed by using false names or capacities or other fraudulent means is punishable by 1 to 5 years of imprisonment. If the fraudulent means is in itself

2 Preservation means to ensure the security and to keep the assets under conditions which eliminate the risk of their deterioration or destruction, while management involves, in addition to the acts of preservation, the performance of any act which is necessary for an administration in line with the nature and purpose of the assets

an offense, the rules for concurrent offenses shall apply.

(3) Reconciliation removes criminal liability.

Note:

- **HCCJ - Ruling on points of law - Decision No. 30/2015:** *"Established that, in the case of a misrepresentation offense committed under the 1969 Criminal Code, which caused damage of under ROL 2,000,000, the change in the notion of "very serious consequences" in the Criminal Code does not trigger the effects provided at Article 4 of the Criminal Code and those provided at Article 3 par. (1) of Law No. 187/2012 for the enforcement of Law No. 286/2009 on the Criminal Code, and does not lead to the decriminalization of the misrepresentation offense".*
- **HCCJ - Ruling on points of law - Decision No. 9/2015:** *"1. In applying the provisions of Article 67 of Law No. 192/2006 on mediation and organization of the profession of mediator, the execution of a mediation agreement is a sui-generis cause which removes criminal liability, distinct from reconciliation; 2. A mediation agreement under Law No. 192/2006 on mediation and organization of the profession of mediator may be executed at any time throughout the criminal law process, until the court decision remains final".*

Nota bene:

- Although in a different form, **misrepresentation in agreements/in the performance of agreements remains punishable as a general provision**, applicable whenever there is no specific regulation e.g., when the acquirer of an asset/service is aware that he will not be able to pay for it, in which case Article 239(2), not Article 244, will apply.
- It is not necessary for the misrepresentation to have been decisive for the execution or performance of the agreement by the victim.
- Even though only reconciliation is expressly provided to remove liability, a mediation agreement will have the same effect according to HCCJ Decision No. 9/2015.

Judicial practice:

- Failure to comply with a civil obligation within the term provided in the agreement is

not automatically a criminal offense, if upon execution or during performance of the agreement no deceptive means were being used to convince the co-contractor that the obligations would be performed within the term and under the agreed conditions. The companies managed by the accused did not become insolvent as a result of misleading the victims (*HCCJ, Criminal Division, Decision No. 1279/2012*).

- The fact that a director obtained a bank loan for financing the company's operations and he used the money for another purpose instead, although the borrowing company was not active and he concealed the fact that the immovable asset mortgaged for the loan was already encumbered, and the loan was not returned in due time, was a misrepresentation offense (*Supreme Court of Justice, Criminal Division, Decision No. 3980/2001*).
- The issuance of a promissory note which bounces on the due date is not in and of itself a criminal act. However, when the beneficiary is misled or continues to be misled by the representation that the necessary amount of money does exist in the account, this does constitute misrepresentation, since the misled person would not have executed/performed the agreement if he had known the truth (*HCCJ, The 9-judge Panel, Decision No. 338/2004*).

Criminal Code: *Article 256*[1]

If the acts provided at Articles 228, 229, 233, 234, 235, 239, 242, 244, 245, 247, Articles 249 to 251 had very serious consequences, the special limits of penalty prescribed by law are increased by half.

Company Law No. 31/1990: *Article 271*

The founder, director, general manager, manager, member of the supervisory board or the managing board or the legal representative of the company who commits any of the actions below is punishable by 6 months to 3 years of imprisonment or by fine:

a) provides in bad faith false data regarding the incorporation of a company or its economic or legal condition, or fully or partly conceals such data mentioned in the public prospectuses,

reports and communications; b) provides to the shareholders, in bad faith, inaccurate financial statements or inaccurate data regarding the economic or legal conditions of the company for the purpose of concealing its actual status; c) refuses to submit the requested documents to the experts, in the cases and under the conditions stipulated by Articles 26 and 38, or prevents the experts, in bad faith, from acting on their duties.

Judicial practice:

- Submission of invoices registered in the accounting records without any legal basis and already annulled by the courts of law for the purpose of distorting the actual financial situation of the bankrupt company and thereby increasing revenues and gaining fictitious benefits is an offense provided under Article 271 lett. (b) of Law No. 31/1990 (*Dolj Tribunal, Criminal Sentence No. 248/6.06.2008*).
- The act of the general manager and sole director of a company who presented in bad faith to the shareholders in the General Meeting the management report on the financial-accounting results, the abridged balance sheet and the explanatory note on the preparation of the annual streamlined financial statements, **which did not contain information on the sale of an immovable asset by public auction and on the collection of proceeds resulting from the sale of such asset in order to conceal the true economic situation** of the company meets the constitutive elements of the offense provided under Article 271 lett. (b) of Law No. 31/1990 (*Constanța Court of Appeal, Criminal Division, Decision No. 20/P/17.01.2014*).

Company Law No. 31/1990: *Article 272*

(1) The founder, director, general manager, manager, member of the supervisory board or the managing board or the legal representative of a company who commits any of the actions below is punishable by 6 months to 3 years of imprisonment or by fine:

a) acquires, on the company's account, shares in other companies for a price of which he is aware that it is obviously higher than their actual value or sells, on behalf of the company, shares owned

by the company at prices of which he is aware that they are obviously lower than their actual value, for the purpose of obtaining a profit, for him or for others, to the detriment of the company; b) uses, in bad faith, company's assets or creditworthiness for a purpose contrary to its interests or for his own benefit or in order to favor another company in which he has a direct or indirect interest; c) borrows, in any way whatsoever, directly or through an intermediary, from the company he is managing, from a company controlled by such company managed by him or from a company controlling the company managed by him, an amount exceeding the limit provided under Article 1444 par. (3) lett. (a), or arranges for one of such companies to grant him a security for his own debts; d) breaches the provisions of Article 183.

(2) The act provided under par. (1) lett. (b) is not an offense if committed by the director, manager, member of the managing board or legal representative of the company within treasury operations performed between the company and other companies directly or indirectly controlled by or controlling the company.

(3) The act provided under par. (1) lett. (c) is not an offense if committed by a founding company, and the loan is taken from one of the companies directly or indirectly controlled by or controlling it.

Judicial practice:

- The fact that the company director paid ROL 100,000,000 to another company without any supporting documents and although there was no debt, and made payments to various individuals and legal entities but also kept for himself a part of the bank loan granted for financing company's operations, without documenting such operations in the accounting records, is an offense of using the company's assets in bad faith as provided under Article 272 lett. (b) of Law No. 31/1990 (*Cluj Court of Appeal, Criminal Division, Decision No. 108/R/2008 of 11 February 2008*).
- This offense cannot be committed by a person who is not the company's founder, director, general manager, manager, member of the supervisory board or the managing board or legal representative. A company shareholder cannot be held

liable under criminal law in this capacity for the offense provided under Article 272 of Law No. 31/1990 (*Bacău Court of Appeal, Criminal Division, Decision No. 228 of 27 March 2008*).

Company Law No. 31/1990: *Article 272[1]*

The founder, director, general manager, manager, member of the supervisory board or the managing board or the legal representative of a company who commits any of the actions below is punishable by 1 to 5 years of imprisonment:

a) disseminates false information or makes use of other fraudulent means resulting in the increase or decrease of the value of the shares or bonds of the company or other securities of the company for the purpose of obtaining a profit, for him or for others, to the detriment of the company; b) collects or pays dividends, in any way whatsoever, from fictive profits or profits that could not be distributed in the absence of the annual financial statements or contrary to what it results from such statements.

Company Law No. 31/1990: *Article 273*

The founder, director, general manager, manager, member of the supervisory board or the managing board or the legal representative of a company who commits any of the actions below is punishable by 3 months to 2 years of imprisonment or by fine:

a) issues shares of a lower value than their legal value or at a price lower than their face value, or issues new shares in exchange for contributions in cash prior to the full payment of the previous shares; b) makes use in the general meetings of shares not subscribed or distributed to the shareholders; c) grants loans or down payments on the company's shares or establishes security

interests in other conditions than as provided by the law; d) hands over the shares to the shareholder prior to their term or shares paid in full or in part, except for the cases established by law, or issues bearer shares that have not been fully paid; e) does not observe the legal provisions regarding the annulment of unpaid shares; f) issues bonds by infringement of the law or issues shares that do not include all elements required by law.

Company Law No. 31/1990: *Article 274*

The founder, director, general manager, manager, member of the supervisory board or the managing board or legal representative of a company who commits any of the actions below is punishable by 1 month to 1 year of imprisonment or by fine:

a) implements the resolutions of the general meeting regarding the modification of the company's legal form, its merger or de-merger or reduction of its share capital prior to the expiry of the terms provided by the law; b) enforces the resolutions of the general meeting regarding the reduction of the share capital without any enforcement against the members for the due payments or without them having been exempted under a resolution of the general meeting from subsequent payments; c) fulfils the resolutions of the general meeting on the change of the company's legal form, merger, de-merger, dissolution, reorganization or share capital decrease, without informing the judicial body or by infringing the prohibition set by such judicial body, if criminal prosecution proceedings have been initiated against the company.

Company Law No. 31/1990: *Article 275*

(1) The director, general manager, manager, member of the supervisory board or managing board is punishable by no less than

1 month and no more than 1 year of imprisonment or by fine if he:

a) breaches Article 1443, even by intermediaries or simulated acts; b) fails to call the general meeting in the cases stipulated by the law or breaches the provisions of Article 193 par. (2); c) initiates transactions on behalf of a limited liability company before the full payment of the share capital; d) issues negotiable instruments representing shares of a limited liability company; e) acquires shares of the company on its account in cases forbidden by law.

(2) The penalty provided at par. (1) shall also apply to the shareholder that breaches Article 127 or Article 193 par. (2).

.....

Company Law No. 31/1990: *Article 276*

The internal auditor failing to call the general meeting if he is expressly required by law to do so is punishable by 1 month to 1 year of imprisonment or by fine.

.....

Company Law No. 31/1990: *Article 277*

(1) Any person accepting or fulfilling the duties of an internal auditor, in breach of the provisions of Article 161 par. (2), or any person accepting to be appointed expert in breach of the provisions of Article 39 is punishable by 3 months to 1 year of imprisonment or by fine.

(2) The resolutions passed by general meetings based on a report of an internal auditor or of an expert appointed in breach of Article 161 par. (2) and Article 39 cannot be annulled due to the breach of the provisions of such articles.

(3) The penalty provided at par. (1) shall also be applicable to the founder, director, manager, executive manager or internal auditor exercising his powers or duties in breach of the provisions of this law on incompatibility.

Company Law No. 31/1990: *Article 278*

(1) The provisions of Articles 271 to 277 shall also apply to the official receiver to the extent that they refer to obligations falling under the scope of his duties.

(2) The official receiver making payments to the shareholders in breach of Article 256 is punishable by 1 month to 1 year of imprisonment or by fine.

Company Law No. 31/1990: *Article 279*

(1) Shareholders or bondholders are punishable by 3 months to 2 years of imprisonment or by fine if they:

a) transfer their shares or bonds to other persons in order to be used for the purpose of reaching a majority in a general meeting, to the detriment of other shareholders or bondholders; b) vote in the general meetings, in the case provided under lett. a), as if they were owners of shares or bonds which are not theirs in fact; c) in exchange for an undue material benefit, undertake to vote in a certain manner in the general meeting or not to vote.

(2) Determining a shareholder or bondholder, in exchange for an undue material benefit, to vote in a certain manner in the general meetings or not to vote, is punishable by

6 months to 3 years of imprisonment or by fine.

Company Law No. 31/1990: *Article 280[1]*

A fictitious transfer of shares held in a company in order to perpetrate an offense or avoid or hinder a criminal investigation is punishable by 1 year to 5 years of imprisonment.

Note:

- **HCCJ - Ruling on points of law - Decision No. 18/2016**: "Interpreting Article 280[1] of Law No. 31/1990, the Court established that, if the offense for which criminal prosecution was initiated, which the defendant circumvented by fictitious transfer of the shares, was decriminalized, one of the standard conditions for retaining the existence of this offense is no longer met".

Company Law No. 31/1990: *Article 280[3]*

Any intentional use of the documents of a deregistered company in order to cause legal consequences is an offense and is punishable by 3 months to 3 years of imprisonment or by fine.

Specific Activities

PROCUREMENT / PUBLIC PROCUREMENT / DIVERSION OF FUNDS

In the domain of public procurement, Romanian law criminalizes both the acts committed in relation to the award procedures for public procurement contracts and unlawful conducts during the performance of such contracts.

Criminal law provisions were supplemented with rules concerning the unlawful obtaining of funds from the national budget (previously, only the obtaining of funds from the European Union budgets was criminalized) and a provision criminalizing bid rigging or hindering participation in tenders. The relatively recent practice indicates participants in public tenders employ a wide range of fraudulent schemes is in order to eliminate potential competitors thus altering both the competitiveness of the procedure and the award prices.

Criminal Code: *Article 246*

The act of removing a bidder from a public tender, by coercion or corruption, or engaging in a collusion between bidders to distort the award price is punishable by 1 to 5 years of imprisonment.

Nota bene:

- The previous codes did not include this offense hence there is scarcely any court practice; this however is likely to change in the near future ad bid rigging accusations seem quite frequent.
- Coercion, corruption and collusion between participants (in a broad sense, i.e. including stakeholders that did not actually participate) cover all situations of bid rigging as a result of the participants', or potential participants' conduct.

Criminal Code: *Article 306*

(1) Use or submission of false, inaccurate or incomplete documents or data, to receive the approvals or the guarantees required for the award of funding obtained or guaranteed from public funds, if it results in the unjust award of such funds, is punishable by 2 to 7 years of imprisonment.

(2) The attempt is punishable.

Note:

- **HCCJ – Ruling on final appeals in the interest of law – Decision No. 4/2016**:
  "In order to ensure a consistent interpretation and enforcement of Article 18[1] par. (1) of Law No. 78/2000 on the prevention, discovery and punishing of corruption acts, of Article 215 par. (1), (2) and (3) of the 1969 Criminal Code, and of Article 244 par. (1) and (2) and Article 306 of the Criminal Code, respectively, the Court rules that:
  The act of using, within the contracting authority, through an action of the author, inaccurate documents or statements, which resulted in unjustly obtaining funds from the European Union budget or from the budgets managed by or on behalf of the EU, as well as funds from the national budget, meets the constitutive elements of the offense provided at Article 18[1] par. (1) of Law No. 78/2000 on the prevention, discovery and punishing of corruption acts, regardless of whether the more favourable criminal law is the previous law or the new law".

Nota bene:

- While newly introduced in the Criminal Code, this offense derives from the misrepresentation offense, similar to the offense regulated under Article 18[1] of Law No. 78/2000. The wording "false, inaccurate or incomplete data" is so broad as to practically make *ab initio* any submission of non-compliant documents any omission to submit a necessary document a potential prohibited conduct.

Criminal Law: *Article 307*

(1) Diversion from their original designation of money or material resources allocated to a public authority or public institution without observing the legal stipulations is punishable by 1 to 5 years of imprisonment.

(2) The same punishment shall apply to diversion, without observing the legal stipulations, of funds obtained or guaranteed from public funds.

(3) The attempt is punishable.

Judicial practice:

- The act is committed with indirect intention including when ordered payments fail to comply with the legal provisions concerning, for instance, the age of the debts which could have been paid from these sources (*Timișoara Court of Appeal, Criminal Division, Decision No. 1321/2015*).

Law No. 78/2000 on the prevention, discovery and punishing of corruption acts: *Article 18[1]*

(1) Use or submission in bad faith of false, inaccurate or incomplete documents or statements, if the act results in unjustly obtaining funds from the European Union budget or from the budgets managed by or on behalf of the EU, is punishable by 2 to 7 years of imprisonment and the interdiction of certain rights.

(2) The penalty provided at par. (1) shall apply to knowingly omitting to provide the data required under the law in order to obtain funds from the general budget of the European

Union or from the budgets managed by or on behalf of the EU, if the act results in unjustly obtaining such funds.

(3) If the acts provided at par. (1) and (2) had very serious consequences, the special limits of penalty prescribed by law are increased by half.

Note:

- **HCCJ – Ruling on final appeals in the interest of law – Decision No. 4/2016**:
  "In order to ensure a consistent interpretation and enforcement of Article 18[1] par. (1) of Law No. 78/2000 on the prevention, discovery and punishing of corruption acts and Article 215 par. (1), (2) and (3) of the 1969 Criminal Code, and Article 244 par. (1) and (2) and Article 306 of the Criminal Code, respectively, the Court ruled that:
  The act of using, within the contracting authority, through an action of the author, inaccurate documents or statements, which resulted in unjustly obtaining funds from the European Union budget or from the budgets managed by or on behalf of the EU, as well as funds from the national budget, meets the constitutive elements of the offense provided under Article 18[1] par. (1) of Law No. 78/2000 on the prevention, discovery and punishing of corruption acts, regardless of whether the more favourable criminal law is the previous law or the new law".

Nota bene:

- The general budget of the European Communities and the budgets managed thereby or on their behalf include the income and expenses sections, and the unlawful act affects the expenses of the Community budget or the budgets managed by the European Union.
- The criminal offense may also refer to subsidies and grants managed from the general budget of the European Communities and the budgets managed by the Communities or on their behalf, paid from the European Agricultural Guarantee Fund and the Structural Funds (the European Social Fund, the European Regional Development Fund, the European Agricultural Fund for Rural Development, etc.), the Development Fund and other funds not included in the budget and which are managed on their own behalf by Community bodies, such as the European Environment Agency. These funds subsidise all Community policies (agriculture,

fisheries, transport, nuclear energy, the economic, monetary, fiscal, social, development, protection, cultural, environment policy, etc.)

- In practice, the execution or performance of any agreement financed from such funds may be subject to an accusation which relies on this provision.
- The material acts of this criminal offense may consist in actions (over-invoicing, fictitious expenses, bid rigging, performances in favour of oneself, forged documents regarding compliance with procedures and the capacities of the persons accessing the funds, etc.) or omissions (failure to submit documents that would indicate that the specific requirements were not met, omission to notify the occurrence of a situation which changes the data considered when the funds were granted, etc.)
- This accusation is very frequent (i.e., whenever, for instance, a supply agreement, a works agreement or a service agreement financed from such funds is amended or is not performed as initially agreed).

Law No. 78/2000 on the prevention, discovery and punishing of corruption acts: *Article 18²*

(1) Changing, in breach of the legal provisions, the purpose of the funds obtained from the general budget of the European Union or from the budgets managed by or on behalf of the EU is punishable by 1 to 5 years of imprisonment and the interdiction of certain rights.

(2) Changing, in breach of the legal provisions, the purpose of an earned legal benefit, if the act results in the unlawful decrease of resources from the general budget of the European Union or the budgets managed by or on behalf of the EU, is punishable by the penalty provided at par. (1).

(3) If the acts provided at par. (1) and (2) had very serious consequences, the special limits of penalty prescribed by law are increased by half.

Law No. 78/2000 on the prevention, discovery and punishing of corruption acts: *Article 18[3]*

(1) The use or submission in bad faith of false, inaccurate or incomplete documents or statements, resulting in the unlawful decrease of resources which must be transferred to the general budget of the European Union or the budgets managed by or on behalf of the EU is punishable by 2 to 7 years of imprisonment and the interdiction of certain rights.

(2) The penalty provided at par. (1) shall apply to knowingly omitting to provide the data required under the law, if the act results in the unlawful decrease of resources which must be transferred to the general budget of the European Union or the budgets managed by or on behalf of the EU.

(3) If the acts provided at par. (1) and (2) had very serious consequences, the special limits of penalty prescribed by law are increased by half.

Law No. 78/2000 on the prevention, discovery and punishing of corruption acts: *Article 18[4]*

The attempt to commit the offenses provided at Articles 18[1] to 18[3] is punishable.

Law No. 78/2000 on the prevention, discovery and punishing of corruption acts: *Article 18[5]*

The breach due to negligence by an economic operator's manager, director or decision-making or controlling person of a professional

duty by failing to carry it out or by faultily carrying it out, if it results in the perpetration by a subordinate who acted on behalf of such economic operator of any of the offenses provided at Articles 18[1] to 18[3] or in the perpetration of a corruption or money laundering offense in relation to the European Union funds is punishable by 6 months to 3 years of imprisonment or by fine.

TAXATION

More and more types of accounting records / operations with taxation effect are deemed tax fraud or at least abusive conduct. Almost any inspection report of the tax authority is accompanied by criminal complaints on grounds of tax evasion.

Being aware of taxation offenses allows a risk assessment before preparing the financial-accounting documents which are then included in the tax records and the avoidance of investigations with consequences for the legal entity and the individuals concerned.

Law No. 241/2005 on the prevention and control of tax evasion: *Article 3*

Taxpayer's act of not restoring, intentionally or culpably, the destroyed accounting records within the term provided in the control documents, is an offense and is punishable by 6 months to 5 years of imprisonment.

Law No. 241/2005 on the prevention and control of tax evasion: *Article 4*

A person's unjustifiable refusal to submit to the competent bodies the legal documents and assets, in order to hinder financial, fiscal or customs verifications, within no more than 15 days as of the summons, is an offense

and is punishable by 1 to 6 years of imprisonment.

Law No. 241/2005 on the prevention and control of tax evasion: *Article 5*

Hindering in any way the competent bodies from entering as permitted by the law in offices, on premises or lands, in order to conduct financial, fiscal or customs verifications, is an offense and is punishable by 1 to 6 years of imprisonment.

Law No. 241/2005 on the prevention and control of tax evasion: *Article 7*

(1) Unauthorized holding or circulation of special-status tax stamps, bands or standard forms is an offense and is punishable by 1 to 5 years of imprisonment and the interdiction of certain rights.

(2) Deliberate printing, use, holding or circulation of forged special-status tax stamps, bands or standard forms is an offense and is punishable by 2 to 7 years of imprisonment and the interdiction of certain rights.

Law No. 241/2005 on the prevention and control of tax evasion: *Article 8*

(1) Bad-faith determination of taxes, duties or contributions by the taxpayer, resulting in the unjust earning of money as refunds or returns from the general consolidated budget or compensations owed to the general consolidated budget is an offense and is punishable by 3 to 10 years of

imprisonment and the interdiction of certain rights.

(2) Association in view of committing the act provided at par. (1) is an offense and is punishable by 5 to 15 years of imprisonment and the interdiction of certain rights.

(3) The attempt to commit the offenses provided at par. (1) and (2) is punishable.

Law No. 241/2005 on the prevention and control of tax evasion: *Article 9*

(1) The following acts committed in order to circumvent the fulfilment of tax obligations are tax evasion offenses and are punishable by 2 to 8 years of imprisonment and the interdiction of certain rights:

a) hiding the asset or the taxable source; b) omitting, in full or in part, to record, in the accounting or other legal documents, the commercial operations conducted or the revenues earned; c) recording, in the accounting or other legal documents, expenses which do not rely on actual operations or recording other fictitious operations; d) alteration, destruction or hiding accounting documents, memories of taxation machines or of fiscal electronic cash registers or of other data storage means; e) keeping double accounting records, by using documents or other data storage means; f) circumventing financial, fiscal or customs verifications by failure to declare, fictitious declaration or inaccurate declaration in relation to the main or secondary offices of the verified persons; g) substituting, damaging or transfer by the debtor or third parties of the assets which were seized in accordance with the Tax Procedure Code and the Criminal Procedure Code.

(2) If the acts provided at par. (1) caused damage in excess of EUR 100,000, in national currency equivalent, the minimum and the maximum limit of the penalty provided by the law shall be increased by 5 years.

(3) If the acts provided at par. (1) caused damage in excess of EUR 500,000, in national currency equivalent, the minimum and the maximum limit of the penalty provided by the law shall be increased by 7 years.

Note:

- **HCCJ – Ruling on final appeals in the interest of law – Decision No. 21/2017**:
  "In order to ensure a consistent interpretation and enforcement of provisions concerning the legal classification of the act of recording, in accounting or other legal documents, expenses which do not rely on actual operations or recording other fictitious operations, if false tax invoices and receipts are prepared under the name of companies which do not recognize the transactions or which had, during operation, a fiscal conduct similar to "ghost" companies, in order to circumvent the fulfilment of tax liabilities; the relation between the tax evasion offense provided under Article 9 par. (1) of Law No. 241/2005 and the offenses of forging deeds under private signature / use of false documents provided under Article 322 and Article 323 of the Criminal Code, the Court rules as follows: The act of recording, in accounting or other legal documents, expenses which do not rely on actual operations or recording other fictitious operations, by using forged tax invoices and receipts, in order to avoid the fulfilment of tax liabilities, is the tax evasion offense provided under Article 9 par. (1) lett. (c) of Law No. 241/2005 on the prevention and control of tax evasion".
- **HCCJ – Ruling on final appeals in the interest of law – Decision No. 19/2017**:
  "The Court admits the final appeal in the interest of law filed by Brașov Court of Appeal and it therefore rules that:
  When interim measures are taken in criminal proceedings, it is not necessary to indicate or to prove or to individualize the assets with regards to which the interim measure is established".
- **HCCJ – Ruling on final appeals in the interest of law – Decision No. 17/2015**:
  "In order to ensure a consistent interpretation and enforcement of Article 19 of the Criminal Procedure Code, the Court rules as follows:
  In criminal cases concerning tax evasion offenses provided by Law No. 241/2005,

the court, in resolution of the civil action, orders that the defendant convicted for the commission of such offenses pay the amounts representing the principal tax liability which he owes and pay the amounts representing accessory tax liabilities, in accordance with the Tax Procedure Code".

- **HCCJ – Ruling on points of law – Decision No. 25/2017:**
  "The Court rules that the actions and inactions provided under Article 9 par. (1) lett. (b) and (c) of Law No. 241/2005 on the prevention and control of tax evasion, referring to the same company, are alternative variants of the acts, representing a single offense of tax evasion provided under Article 9 par. (1) lett. (b) and (c) of Law No. 241/2005 on the prevention and control of tax evasion".
- **HCCJ – Ruling on points of law – Decision No. 23/2017:**
  "In the interpretation of Article 33 of Law No. 656/2002 on the prevention and punishment of money laundering and Article 9 of Law No. 241/2005 on the prevention and control of tax evasion, if there is concurrency between the tax evasion offense and the money laundering offense, the safeguarding measure of special seizure of the money subject to the money laundering offense and resulting from the tax evasion offense needs not be taken concurrently with ordering the defendants to pay the amounts representing tax liabilities owed to the State as a result of perpetrating the tax evasion offense."

Nota bene:

- **The mere failure to pay the correctly determined and declared tax liabilities is not tax evasion**, except for "ghost companies", which are specially created and/or introduced in the commercial chain to amass debts to the budget that the wrongdoers never intend to pay.
- The most frequent alternative methods are those provided at lett. (a), (b) and (c). Most courts ruling on cases brought under lett. (a) – **hiding the taxable source** – hold that the constitutive elements of this offense do not exist if the person did not conceal the operations from which the income resulted (e.g., activities performed by individuals to transfer immovable assets and the alleged circumvention of VAT payment), it executed the legal documents before a notary public, it registered the acquired rights in the land book, it declared the goods to local authorities for taxation purposes, etc.
- Evasion by **non-registration of revenues** is usually understood as "underhand" undocumented sale, in full or in part. The recent practice of prosecutor's offices tends to include in this category the missing stocks or sales below cost, although there are no "earned revenues". Therefore, it is advisable to strictly comply with tax law requirements on how to register relevant elements.
- According to the definitions in Law No. 241/2005 and the jurisprudential

interpretations, including those of the Constitutional Court, **fictitious expenses and those which do not rely on actual operations** are such expenses which are **imaginary (do not exist)** or do not comply with **the state of facts or the legal circumstances**. Therefore, the offense may also be committed by registration of expenses for unprovided services, for the acquisition of goods which were not used to earn revenues, overstated expenses, and recently there is a tendency to extend this concept to interests, currency exchange differences, expenses with provisions, etc.

- **A distinct category** is VAT deductibility, where it is deemed that tax evasion exists whenever the right of deduction is abusively exercised – decrease payable VAT by exercising the right of deduction without having the right to do so. Tax authorities reclassify the operations, prepare inspection reports and notify the competent criminal law bodies, according to the obligations imposed under the Tax Procedure Code.

Tax Code: *Article 452*

(1) The following acts are offenses: a) manufacturing excisable products falling under the scope of the warehousing treatment provided in this section, except for a tax warehouse authorized by the competent authority; b) acquiring ethyl alcohol and bulk distilled spirits from other suppliers than warehousekeepers authorized for production or registered dispatchers of such products, according to this section; c) the supply of the energy products provided at Article 355 par. (3) lett. (a) to (e) from tax warehouses or places of acceptance in the case of registered consignees to buyers – legal entities, although the authorized warehousekeeper or the authorised consignee acting as consignor do not have a payment document to certify the transfer to the state budget of the value of the excise duties for the quantity to be invoiced; d) falsely marking the excisable products which are subject to marking or holding products marked in this manner in the tax warehouse; e) refusing in any way the access of competent control authorities for dawn raids in the tax warehouses; f) supply of energy product residues for processing to obtain excisable products, otherwise than as provided in this section; g) acquisition of energy product residues for processing to obtain excisable products, otherwise than as provided in this section; h) holding by

any person, outside the tax warehouse, or sale on the Romanian territory of excisable products which, according to this section, should be marked, but which are not marked or are inappropriately marked or bear a false marking, in excess of 10,000 cigarettes, 400 cigars of 3 grams each, 200 cigars of more than 3 grams each, over 1 kg of smoking tobacco, more than 40 litres of ethyl alcohol, more than 200 litres of spirits, more than 300 litres of intermediary products, over 300 litres of fermented drinks, other than bear and wine; i) use of mobile pipes, elastic hoses or other such pipes, use of uncalibrated tanks and placing before the meters faucets or taps from which unmetered amounts of alcohol or spirits may be extracted; j) release for consumption, holding outside a tax warehouse, transport inclusively under an excise tax suspensive regime, using, offering for sale or sale, on the Romanian territory, of the energy products provided at Article 355 par. (3) lett. (g) or similar products from the perspective of excise tax level, unmarked and uncoloured or improperly marked and coloured, save for the exceptions provided at Article 425 par. (2); k) failure to comply with Article 427 par. (5) and Article 430 par. (4); l) failure to comply with Article 427 par. (6) and Article 430 par. (5).

(2) The offenses provided at par. (1) shall be punishable as follows: a) by no less than 6 months and no more than 3 years of imprisonment, for the offenses provided at lett. (f) and (g); b) by no less than 1 year and no more than 5 years of imprisonment, for the offenses provided at lett. (b), (e) and (h) to (k); c) by no less than 2 years and no more than 7 years of imprisonment, for the offenses provided at lett. (a), (c), (d) and (l).

(3) After ascertaining the existence of the acts provided at par. (1) lett. (b) to (e), (g) and (i), the competent control body shall order the cessation of activity, the sealing of the plant in accordance with the technological procedures of plant sealing and shall submit the control document to the tax authority which issued the permit, with the proposal to suspend the tax warehouse permit.

Customs Code of Romania: *Article 270*

(1) Taking in or out of the country, by any means, goods or commodities, through other places than those designated for customs control, is an offense of smuggling and is punishable by 2 to 7 years of imprisonment and the interdiction of certain rights.

(2) The following acts are also smuggling offenses punishable according to par. (1): a) taking in or out of the country, through the designated customs control points, by avoiding customs control, the goods or commodities which must be placed under a customs treatment, if the customs value of such goods or commodities is higher than RON 20,000 for excisable products and higher than RON 40,000 for the other goods or commodities; b) taking in or out of the country, twice in a year, through the designated customs control points, by avoiding customs control, the goods or commodities which must be placed under a customs treatment, if the customs value of such goods or commodities is below RON 20,000 for excisable products and below RON 40,000 for the other goods or commodities; c) transferring in any way the commodities in customs transit.

(3) Collection, holding, manufacture, transport, takeover, storage, delivery, disposal and sale of goods or commodities which must be placed under a customs treatment, while being aware that they originate from smuggling or they are meant for the perpetration of smuggling, are assimilated to smuggling offenses and are punishable as per par. (1).

Customs Code of Romania: *Article 271*

Taking in or out of the country, without having the right to do so, weapons, ammunitions, explosives, restricted precursors to explosives, drugs, precursors, nuclear materials or other radioactive

substances, toxic substances, waste, residues or dangerous chemical materials is an offense of aggravated smuggling and is punishable by 3 to 12 years of imprisonment and the interdiction of certain rights, unless the criminal law provides for a higher penalty.

Customs Code of Romania: *Article 272*

The use at the customs authority of transport or commercial customs documents referring to other commodities or goods or to other amounts of commodities or goods than those presented at the customs is an offense of use of untrue deeds and is punishable by 2 to 7 years of imprisonment and the interdiction of certain rights.

Customs Code of Romania: *Article 273*

The use, at the customs authority, of forged transport or commercial customs documents is an offense of use of forged documents and is punishable by 3 to 10 years of imprisonment and the interdiction of certain rights.

Customs Code of Romania: *Article 274*

The acts provided at Articles 270 to 273, committed by one or more armed persons or two or more persons together are punishable by 5 to 15 years of imprisonment and the interdiction of certain rights.

Customs Code of Romania: *Article 275*

The attempt to commit the offenses provided at Articles 270 to 274 is punishable.

LABOUR AND SOCIAL PROTECTION

Criminal Code: *Article 287*

(1) The failure to enforce court orders, committed: (...)

d) by failure to enforce a court order reinstating an employee; e) by failure to enforce the court order regarding the payment of wages within 15 days of the date when the enforcement request was submitted by the interested party to the employer; f) by failure to enforce court orders on establishing, paying, indexing and recalculating pensions; (...)

is punishable by 3 months to 2 years of imprisonment or by fine.

(2) In the case of the acts listed under lett. d) through g), criminal law action shall be initiated based on a prior complaint filed by the victim.

(3) In the case of the act listed under lett. h), reconciliation removes criminal liability.

Nota bene:

- In all cases, it is necessary to meet the preliminary condition of having a final and enforced court order recognizing a right.

Criminal Code: *Article 349*

(1) Failure to take any of the legal labour health and security measures by a person who was tasked with taking these measures, where it results in the imminent danger of a labor accident or of an occupational disease, is punishable by 6 months to 3 years of imprisonment or by fine.

(2) The act set out in par. (1) committed with negligence is punishable by 3 months to 1 year of imprisonment or by fine.

Criminal Code: *Article 350*

(1) Non-compliance with the labour health and safety rules by any individual, if this results in the imminent danger of a labour accident or of an occupational disease, is punishable by 6 months to 3 years of imprisonment or by fine.

(2) The same penalty shall apply to the act of resuming the operation of installations, machines or equipment before removing all the deficiencies that caused their operation to be stopped.

(3) The acts set out in par. (1) and par. (2) committed with negligence are punishable by 3 months to 1 year of imprisonment or by fine.

Labour Code: *Article 264*

(1) The act of the person who repeatedly establishes for the employees hired under an individual labour contract wages which are below the minimum gross national wage guaranteed under the law, is an offense and is punishable by 1 month to 1 year of imprisonment or by criminal fine.

(2) The penalty provided at par. (1) is also applied for the offense consisting in one's unjustified refusal to submit, within no more than 15 days as of receipt of the second request, the legal documents required by the competent bodies, with a view to preventing verifications on compliance with general and special regulations on labour relationships, occupational security and health.

(3) The penalty provided at par. (1) is also applied for the offense consisting in hindering in any way the competent bodies from entering, as permitted under the law, in offices, premises, spaces, lands or transportation means which the employer uses in its professional activity, in order to conduct verifications on compliance with general and special regulations on employment relationships, occupational security and health.

(4) Hiring more than 5 persons, irrespective of their citizenship, without executing individual labour contracts, is an offense and is punishable by 3 months to 2 years of imprisonment or by fine.

Labour Code: *Article 265*

(1) Hiring a minor in breach of the legal age threshold or using such minor for activities in breach of the legal provisions on the employment of minors is an offense and is punishable by 3 months to 2 years of imprisonment or by fine.

(2) The punishment provided at Article 264 par. (4) is applied for one's hiring a person who resides unlawfully in Romania, while being aware that such person is a human trafficking victim.

(3) If the work provided by the persons referred to at par. (2) or at Article 264 par. (4) is able to endanger their life, integrity or health, this offense is punishable by 6 months to 3 years of imprisonment.

(4) For the offenses provided at par. (2) and (3) and Article 264 par. (4) the court may also decide to apply one or more of the following auxiliary penalties: a) total or partial loss of the employer's right to benefit of public services, aids or subsidies, including European Union funds managed by the Romanian authorities, for up to 5 years; b) interdiction of the employer's right to participate in the award of a public procurement contracts for a period of up to 5 years; c) full or partial recovery of public services, aids or subsidies, including European Union funds managed by the Romanian authorities, awarded to the employer for a period of up to 12 months before having committed the offense; d) temporary or final closure of the place(s) of business where the offense was committed or temporary or final withdrawal of a license for the performance of professional activity, if this is justified by the seriousness of the breach.

(5) If any of the offenses provided at par. (2) and (3) and at Article 264 par. (4) is committed, the employer must pay the amounts which represent: a) any outstanding remuneration owed to the unlawfully hired persons. The amount of the remuneration is supposed to be equal to the average gross wage, except for the case when either the employer or the employee may prove the contrary; b) the amount of all taxes, duties and social security contributions that the employer would have paid if the person had been legally employed, including the appropriate penalties for delay and administrative fines; c) expenses triggered by the transfer of outstanding payments to the country where the unlawfully hired person returned willingly or was returned under the law.

(6) If any of the offenses provided at par. (2) and (3) and at Article 264 par. (4) is committed by a subcontractor, both the main contractor and any interim subcontractor, if they were aware that the subcontractor hired foreigners who did not have the right to stay in Romania, may be ordered by the court, jointly with the employer or instead of the subcontractor employer or the contractor whose direct subcontractor is the employer, to pay the amounts provided at par. (5) lett. a) and c).

INSOLVENCY

Criminal Code: *Article 240*

(1) The failure to submit or the late submission, by the individual debtor or by the legal representative of the legal entity debtor, of the request for the opening of insolvency proceedings, within a period of time not exceeding by more than six months the period of time provided by the law as of the occurrence of the insolvency, is punishable by 3 months to 1 year of imprisonment or by fine.

(2) The criminal action is initiated based on a prior complaint filed by the victim.

Criminal Code: *Article 241*

(1) The act committed by the individual who, with a view to defrauding creditors: a) falsifies, steals or destroys the records of the debtor or conceals a part of the assets; b) invokes the existence of non-existent debts or makes entries in the debtor's books, in other documents or in the financial statement, of amounts that are not owed; c) transfers, in the event of the debtor's insolvency, a part of the assets, is punishable by 6 months to 5 years of imprisonment.

(2) The criminal law action is initiated based on a prior complaint filed by the victim.

Nota bene:

- **The requirement that the debtor is insolvent only applies for the scenario at lett. (c)** and not for the other scenarios. The ever growing current of opinion is that even for lett. (c) it is sufficient for the state of insolvency to exist *de facto* and not necessarily declared formally by court order.

INSURANCE

Criminal Code: *Article 245*

(1) The act of destroying, deteriorating, making unfit for use, concealing or transferring an asset insured against destruction, deterioration, wear and tear, loss or theft, in order to obtain, for oneself or for another, the insured amount, is punishable by 1 to5 years of imprisonment.

(2) The act committed by an individual who, for the purposes set out in par. (1), simulates, inflicts upon oneself or aggravates injuries or bodily harm caused by an insured risk is punishable by 6 months to 3 years of imprisonment or by a fine.

(3) Reconciliation removes criminal liability.

CORRUPTION OFFENSES

Criminal Code: *Article 289*

(1) The action of the public servant who, directly or indirectly, for himself or on behalf of others, solicits or receives money or other undue benefits or accepts a promise of money or benefits, in exchange for performing, not performing, speeding up or delaying the performance of an action which falls under purview of his professional duties or with respect to the performance of an action contrary to his professional duties, constitutes a violation of the law and is punishable by 3 to 10 years of imprisonment and the interdiction of the right to hold a public office or to exercise the profession or the activity in relation to which he committed the violation.

(2) The action provided under par. (1), committed by one of the persons provided under Article 175 par. (2), constitutes a criminal offense only when committed in relation with the performance or delaying the performance of an action related to their legal duties or related to the performance of an action contrary to such duties.

(3) The money, valuables or any other benefits received shall be subject to forfeiture, and when such can no longer be located, the forfeiture of the equivalent shall be ordered.

Nota bene:

- The public servant **must have the competence to perform, not to perform, to delay or to speed up the performance of the (legal or illegal) action for which he is bribed**; otherwise, he may be held liable for the offense of misrepresentation.
- **Theoretically, a legal entity cannot be the author of a bribe-taking offense**, but it is not excluded for such legal entity to be held liable under criminal law as an

accomplice or instigator.[1]

- This offense can also committed **where the public servant or another person did not actually receive/benefit from the undue money or benefits and regardless of whether the public servant performed the act or not**. Claiming or accepting the promise of money or other undue benefits is sufficient.
- **The reason that determined the public servant to take bribe cannot exculpate the perpetrator** (e.g., whether he needed the money to pay his bank instalments, lacking which the bank would have commenced enforcement proceedings against him).
- **The receipt of additional payments or unjustified donations in order to pay particular attention to certain persons** is also a criminal offense.

Judicial practice:

- The act of a **physician** of receiving from several persons money and goods **to give particular care to certain patients** (premature infants) was held to be a bribe-taking offense (*Supreme Court of Justice, Criminal Division, Decision No. 983/1996*).
- It was held that **a professor** is a public servant and may be held liable under criminal law for bribe taking, regardless of whether he works in a public or a private university (*HCCJ, Criminal Law Decision No. 97/A of 23.03.2017*).
- **An official receiver/insolvency practitioner** provides a service of public interest and therefore he may be held liable for taking bribe (*HCCJ, Criminal Division, Decision No. 50/A of 16.02.2015*).
- Undue money is a bribe **regardless of whether the moneys are received expressly as a gift or under the disguise of a "loan"** (*Supreme Tribunal, Criminal Division, Decision No. 5196/1971*).
- Claiming/receiving money by several public servants **in order to award and execute public procurement contracts with certain companies** which offered/gave money to obtain a "preferential" treatment is a bribe (*HCCJ, Criminal Division, Decision No. 386 of 30.01.2014*).
- The act of a judicial police officer to receive money from the director of a company to propose the non-commencement of criminal prosecution is also an offense (*HCCJ, Criminal Division, Decision No. 844 of 4.03.2010*).

1 There are opinions to the contrary, according to which the legal entity may be the author of an offense of bribe-taking, if the act is committed in the performance of its object of activity, in its interest or on its behalf.

Criminal Code: *Article 290*

(1) The promise, the giving or the offering of money or other benefits in the conditions provided under Article 289 is punishable by 2 to 7 years of imprisonment.

(2) The action provided under par. (1) does constitute offense where the bribe giver was constrained by any means by the bribe taker.

(3) The bribe giver is not punishable if he reports the action prior to the criminal investigation bodies being notified of the crime.

(4) The money, valuables or any other assets given shall be returned to the person who gave them in the case provided under par. (2) or given after the denunciation provided under par. (3).

(5) The money, valuables or any other benefits offered or given shall be subject to forfeiture, and when such can no longer be located, the forfeiture of the equivalent shall be ordered.

Nota bene:

- Any **individual or legal entity,** including a public servant, may be charged for giving a bribe, without any other conditionality as to their person.
- For this offense to exist, the money or benefits **should not be legally due to the public servant**; such money or benefits are deemed undue not only when the performance of the act is free of charge, but also when they exceed what is legally owed for the performed act or service.
- The promise/giving/offering of money or other benefits must be **serious, not made as a joke and therefore must be capable of corrupting**; when the money or benefits are too small, of no value (e.g., offering a cigarette, a glass of juice, a candy, a flower), this is not an offense of bribe giving.

- The giving of bribe **needs not be made spontaneously and exclusively at the bribe-giver's initiative**, and the reason why the bribe-giver committed the offense is not relevant.
- **Provocation from the bribe-taker does not amount to constraining** the bribe-giver and does not remove criminal liability.
- **The mere fact that the bribe-giver acknowledges his act when he is found to give bribe dos not equate denunciation and does not remove criminal liability**.
- The rule is that, regardless of whether the amounts or benefits are excessively large or small, proportionate or disproportionate to the service provided by the public servant, criminal liability is not removed. Nevertheless, **gifts of small value do not trigger criminal liability when they are given, offered, accepted and received only as a symbolic, polite gesture, not for the public servant to breach his professional duties**.

Judicial practice:

- A company was deemed to have committed this offense when the **shareholder/director offered and then gave money to a customs official to prepare the control documents in favour of the company, so as not to seize an amount of money from the company, not to cease the company's activity and not to apply a misdemeanour fine** (*HCCJ, Criminal Division, Decision of 28.03.2013*).
- **The person acting as the middle-man in the sending of money to the public servants of the contracting authority in order to ensure the proper development of the procurement contract** entered into with the company, is an accomplice to bribe giving (*HCCJ, Criminal Division, Decision No. 386/2014*).
- The existence of an offense of bribe giving is not conditional upon the reaction of the bribed public servant, meaning that **if the refusal to receive bribe is not firm enough, this does not eliminate/mitigate criminal liability for the bribe-giver** (*Brașov Court of Appeal, Criminal Division, Decision No. 6/1996*).
- **The offense of bribe giving may exist independently from the offense of bribe taking** (*Bucharest Court of Appeal, 1st Criminal Division, Decision No. 64 of 2.03.2012*).
- It is an offense **to offer a good (a computer) to the police officer in charge with the verification and seizure of a company's accounting records**, if there are no relationships likely to account for the exchange of gifts between company's representative and the criminal investigation body (*HCCJ, Criminal Division, Decision No. 1550/2005*).
- Where a **person who is in a higher position than the bribe-giver insists, for a long period and persuasively**, on requesting money/benefits, **inducing a state of**

apprehension in the bribe-giver, this is a form of duress that eliminates criminal liability for the person who gave bribe under these circumstances (*Brașov Court of Appeal, Criminal Division, Decision No. 648/2014*).

Criminal Code: *Article 291*

(1) Soliciting, receiving or accepting the promise of money or other benefits, directly or indirectly, for oneself or for another, committed by a person who has influence or who alleges that they have influence over a public servant and who promises they will persuade the latter to perform, omit to perform, speed up or delay the performance of an act that falls under the latter's professional duties or to perform an act contrary to such duties, is punishable by 2 to 7 years of imprisonment.

(2) The money, valuables or any other assets received shall be subject to forfeiture and when such can no longer be located, the forfeiture of the equivalent shall be ordered.

Nota bene:

- It is not **relevant whether the promise of the influence peddler is subsequently honoured or whether the act which falls under the duty of the public servant is performed or not**; if influence peddling envisages a public servant who does not have the competence to fulfil such act, the offense may be qualified as misrepresentation.
- **It is not necessary for the influence peddler to explicitly name the public servant who has the competence to perform or not to perform the act**; it is enough for reference to be made with regards to the State body, public institution or any other legal entity where the public servant works (e.g., influence peddling towards a public servant of the Town Hall of District 1 Bucharest or a public servant from company X).
- **It is not relevant how the influence peddler claims that he will use the undue money or benefits** (e.g., he can say that part of the received money will be given to the public servant to whom he may peddle influence), just as **it is not important for the existence of the offense whether the buyer of influence is aware or not of whether money/goods were claimed, received or accepted by the influence peddler for**

himself or for another person.

Judicial practice:

- If the perpetrator is a public servant and has competences in relation to the professional act for which influence is peddled, he **will be held liable both for bribe taking and influence peddling** (*HCCJ, Criminal Division, Decision No. 3690/2009*).
- The act of the person **who misled somebody into thinking that he had influence over the leader of a public institution (i.e., the National Customs Authority) to determine the latter to appoint a particular person as head of the H. Customs Office** and to receive subsequently, in several instalments, at different time periods, an aggregate amount of EUR 130,000 from the influence buyer, was held to be influence peddling (*HCCJ, Decision No. 1015/2014*).
- Influence peddling exists **independently from causing material damage** to an individual or legal entity (*HCCJ, Criminal Division, Decision No. 3420 of 25 June 2007*).
- Even if the peddled influence is not real, it must be **possible and believable**, and the influence buyer must have a **real interest (legitimate or not)** in relation to the act of the public servant (*Alba-Iulia Court of Appeal, Criminal Division, Decision No. 366 of 22 March 2016*).
- There is influence peddling when various amounts of money are claimed, representing a percentage from the value of certain works, **to secure the buyer's influence in winning tenders for the award of such works**, further to peddling influence towards public servants from the Ministry of Agriculture/Ministry of External Affairs. The same offense is deemed to exist when **a promise is made to peddle influence over an official receiver for the influence buyer to gain influence over immovable assets which are tendered** (*HCCJ, Criminal Division, Decision No. 1004/2014*).
- **If the act was performed without any influence peddling, and money or other benefits are still claimed**, this is not influence peddling, but misrepresentation (*Supreme Tribunal, Criminal Division, Decision No. 309/1970*).
- The invoking of influence by the influence peddler, directly or indirectly, **must be decisive in the receipt of the benefits** from the person interested in the (non) fulfilment of an act (*HCCJ, Criminal Division, Decision No. 676/2013*).

Criminal Code: *Article 292*

(1) The promise, the offering or the giving of money or other

benefits, for oneself or for another, directly or indirectly, to a person who has influence or who alleges to have influence over a public servant to persuade the latter perform, fail to perform, speed up or delay the performance of an act that falls under the latter's professional duties or to perform an act contrary to such duties, is punishable by 2 to 7 years of imprisonment and the ban from exercising certain rights.

(2) The perpetrator is not punishable if he reports the action prior to the criminal investigation bodies being notified of the crime.

(3) The money, valuables or any other assets shall be returned to the person who gave them if they were given after the denunciation provided under par. (2).

(4) The money, valuables or any other benefits given or offered shall be subject to forfeiture, and when such can no longer be located, the forfeiture of the equivalent shall be ordered.

Nota bene:

- The buying of influence exists and is punishable **irrespective of whether the person to whom money/benefits are promised, offered or given, complies or not with his promise to peddle influence over a public servant and even if there is no such promise from the influence peddler** (in the latter case, the offense of influence peddling is excluded, but not the offense of buying influence). Also, **it is not relevant whether the professional duty of the public servant was fulfilled or not**.
- **To promise, offer or give money or other benefits to a person who has or alleges to have influence over an arbitrator (called to settle an arbitration dispute) is not an offense of buying influence**, because, in the arbitration procedure, the parties themselves choose the arbitrator to settle their case and they also bear the arbitrator's fee or other expenses.

Judicial practice:

- It was held that the act of promising money, directly, to a person who alleged to have influence, via a Member of the Parliament, over the public servants of the Presidential Administration, in order to determine them to examine with priority and to endorse a convict's application for pardon, was an offense (*HCCJ, Criminal Law Decision No. 212/2014*).
- To promise and to give money to an advisor of the Vice President of a public institution having influence or alleging to have influence over the public servants from the institution, to determine them to perform or not to perform acts related to their professional duties concerning the monitoring of how the clauses of a privatization agreement are observed, constitutes an offense of buying influence (*HCCJ, Criminal Law Decision No. 1333/2013*).
- Offering/giving money/other benefits to a person, as consideration for the promise made by the latter to peddle influence over a senior commissar of the Financial Guard in order to stop the surveillance of a clandestine storage area belonging to the influence buyer is an offense (*HCCJ, Criminal Division, Decision No. 1809 of 27.05.2013*).
- If the directors of a company aid another person in promising money to a town hall secretary so that the latter would influence the members of the bid assessment commission to award a works public procurement contract so as to determine them to declare the bid of an association successful, such directors are accomplices to the offense of buying influence (*Bacău Court of Appeal, Criminal Law Decision No. 1049 of 27.10.2015*).

Criminal Code: *Article 293*

The stipulations under Article 289 and Article 290 shall apply accordingly to persons who, based on an arbitration agreement, are called upon to issue a ruling with respect to a case entrusted to them for settlement by the parties to that agreement, irrespective of whether the arbitration proceedings are carried out based on the Romanian law or based on another law.

Criminal Code: *Article 294*

Unless the international agreements that Romania is party to provide otherwise, the provisions of this Chapter shall also apply to the following persons: a) officials or persons who carry out their activity based on a labour agreement or other persons with similar duties in an international public organization that Romania is party to; b) members of parliamentary assemblies of international organizations that Romania is party to; c) officials or persons who carry out their activities based on a labour agreement or other persons with similar duties within the European Union; d) persons who exercise judicial functions within the international courts whose jurisdiction is accepted by Romania, as well as officials working for the registrar's office of such courts; e) officials of a foreign state; f) members of parliamentary or administrative assemblies of a foreign state; g) jurors within foreign courts.

Law No. 78/2000 on the prevention, discovery and punishing of corruption acts: *Article 7*

The acts of bribe taking or influence peddling committed by a person who: a) is a public official; b) is a judge or a prosecutor; c) is a criminal investigation body or has duties to find or punish misdemeanours; d) is one of the persons provided at Article 293 of the Criminal Code, are punishable as per Article 289 or 291 of the Criminal Code, the limits of which shall be increased by one third.

OFFENCES ASSIMILATED TO CORRUPTION

Law No. 78/2000 on the prevention, discovery and punishing of corruption acts: *Article 10*

The following acts, if committed to obtain for oneself or for another money, goods or other undue benefits, constitute offenses and are punishable by 3 to 10 years of imprisonment and the interdiction of certain rights: a) deliberately establishing a diminished value compared to the real market value of the goods belonging to the economic operators to which the State or an authority of the local public administration is a shareholder, committed during a privatization process or enforcement proceedings, judicial reorganization or winding-up or on the occasion of a commercial operation, or of the goods belonging to public authorities or public institutions, when selling them or in enforcement proceedings, committed by persons with management, administration, leading, enforcement, judicial reorganization or winding-up duties; b) granting subsidies in breach of the law or failing to supervise, according to the law, compliance with the stated purpose of the subsidies; c) using subsidies for other purposes than those they had been granted for, as well as using for other purposes the credits guaranteed from public funds or which are to be refunded from public funds.

Nota bene

- Lett. a) is applicable **to any type of disposal of assets from economic operators where the State or an authority of the local public administration is a shareholder**.

Law No. 78/2000 on the prevention, discovery and punishing of corruption acts: *Article 11*

(1) The act of a person who has the obligation to supervise,

to control, to reorganize or to wind up a private economic operator, and carries out any task, mediates or facilitates for it the performance of certain commercial or financial operations or participates with capital to such economic operator, if the act is of such nature as to bring him directly or indirectly undue advantages, is an offence and is punishable by 1 to 5 years of imprisonment and the interdiction of certain rights.

(2) If the act stipulated in paragraph (1) has been committed within a period of 5 years from the cessation of the task, it is punishable by 6 months to 3 years of imprisonment or by fine.

.....

Law No. 78/2000 on the prevention, discovery and punishing of corruption acts: *Article 12*

The following acts are punishable by 1 to 5 years of imprisonment, if committed to obtain for oneself or for another money, goods or other undue benefits: a) performing financial operations as trade activities, incompatible with the position, duty or task which is carried out by a person or contracting financial transactions using the information obtained by virtue of one's position, duty or task; b) using, in any way, directly or indirectly, information that is not meant to be public or allowing the access of unauthorized persons to such information.

.....

Law No. 78/2000 on the prevention, discovery and punishing of corruption acts: *Article 13*

The act of the person who has a leadership position in a party, trade union or employer's organization or in a not-for-profit legal entity, and who uses his influence or authority to obtain for himself or for another person money, goods or other undue benefits, is punishable by 1 to 5 years of imprisonment.

Law No. 78/2000 on the prevention, discovery and punishing of corruption acts: *Article 13[1]*

Regarding the offence of blackmail provided at Article 207 of the Criminal Code, if it involves one of the persons provided at Article 1, the special limits of the punishment shall be increased by one third.

Law No. 78/2000 on the prevention, discovery and punishing of corruption acts: *Art. 13[2]*

Regarding the offences of abuse in office or abuse of position, if the public servant obtained for himself or for another person money, goods or other undue benefits, the special limits of the punishment shall be increased by one third.

Law No. 78/2000 on the prevention, discovery and punishing of corruption acts: *Art. 15*

The attempt is punishable.

Law No. 78/2000 on the prevention, discovery and punishing of corruption acts: *Art. 16*

If the acts provided in this section qualify as more serious offences according to the Criminal Code or to special laws, they shall be punishable under the terms and with the punishments established under those laws.

PUBLIC OFFICE OFFENSES

Criminal Code: *Article 295*

(1) Acceptance, use or trafficking of money, valuables or any other assets managed or administrated by a public servant, on his own or on another person's behalf, is punishable by 2 to 7 years of imprisonment and the interdiction to hold public office.

(2) The attempt is punishable

Note:

- **HCCJ – Ruling on points of law in criminal matters – Decision No. 1/2015**: *"The Court rules that the provisions of Article 308 of the Criminal Code are a mitigated version of the offense of embezzlement provided under Article 295 of the Criminal Code. In calculating the period of prescription for criminal liability, the punishment provided under Article 295 of the Criminal Code by reference to Article 308(2) of the Criminal Code shall be taken into account."*

Criminal Code: *Article 296*

(1) Use of offensive language toward another person by the one carrying out professional duties is punishable by 1 to 6 months of imprisonment, or by fine.

(2) Threatening, assaulting or any other acts of violence committed in the circumstances provided under par. (1) shall be penalized by the punishment stipulated in the law for that crime, whereas the special limits shall be increased by one-third.

Criminal Code: *Article 297*

(1) The action of the public servant who, while exercising their professional responsibilities, fails to implement an act or implements it faultily, thus causing damage or violating the legitimate rights or interests of a natural or a legal entity, is punishable by 2 to 7 years of imprisonment and the interdiction of the right to hold a public office.

(2) The same punishment applies to the action of a public servant who, while exercising his professional responsibilities, limits the exercise of a right of a person or creates for the latter a situation of inferiority on grounds of race, nationality, ethnic origin, language, religion, gender, sexual orientation, political membership, wealth, age, disability, chronic non-transmissible disease or HIV/AIDS infection.

Note:

- By **Decision No. 405/2016**, the **Constitutional Court** admitted the objection of unconstitutionality and found that the provisions of Article 297 par. (1) are constitutional to the extent that the wording "*implements it faultily*" therein means "*implements it in breach of the law*". In grounding its decision, the Court stated that "*the failure to implement or the faulty implementation of an act must be analysed* **only by reference to professional duties expressly regulated by primary laws, i.e. laws and Government ordinances**".
- By **Decision No. 392/2017**, the **Constitutional Court** underlines that the lawmaker **has the obligation to provide**, in the criminal law provisions regarding the offense of abuse in office, **the value threshold of the damage and the degree of damage caused to the right or legitimate interest** as a result of the act. The lawmaker's failure to regulate these limits causes incoherence and instability, which are contrary to the principle of security of legal relationships as far as the clarity and predictability of the law are concerned.
- **HCCJ – Ruling on points of law – Decision No. 18/2017**:
  "The Court ruled that:
  For the purpose of criminal law, **the bank clerk** *employed by a fully private banking*

company, authorized and supervised by the National Bank of Romania, **is a public servant** *under Article 175 par. (2) of the Criminal Code".*

- **HCCJ – Ruling on points of law in criminal matters – Decision No. 26/2014**: *"The Court rules that the physician hired under an employment contract in a hospital unit of the public health system is a public servant under Article 175 par. (1) lett. b) second sentence of the Criminal Code".*

Criminal Code: *Article 298*

The breach by a public official of a professional duty by negligently failing to carrying it out or carrying it out improperly, if it results in damage or violation of the legitimate rights or interests of a natural or legal entity is punishable by 3 months to 3 years of imprisonment, or by fine.

Note:

- By **Decision No. 518/2017**, the **Constitutional Court** admitted the objection of unconstitutionality and found that the provisions of Article 298 are constitutional to the extent that the wording "*implements it faultily*" therein means "*implements it in breach of the law*".

Criminal Law: *Article 299*

(1) The action of the public servant who, for the purpose of performing or not performing, speeding up or delaying the performance of an act related to his professional duties or for the purposes of performing an act contrary to such duties, solicits or is granted sexual favours by a person who has a direct or indirect vested interest in that professional act is punishable by 6 months to 3 years of imprisonment and the interdiction of the right to hold a public office or to practice the profession or the activity in the exercise of which the action was committed.

(2) The solicitation by or the granting of sexual favours to a public servant who uses or takes advantage of a situation of authority or power over the victim, arising from the office held, is punishable by 3 months to 2 years of imprisonment, or by a fine and the interdiction of the right to hold public office or to practice the profession or the activity in the exercise of which the action was committed.

Criminal Law: *Article 300*

The conduct of the public servant who, while at work, performs an act that does not fall under his duties, if such results in one of the consequences provided under Article 297, is punishable by 1 to 5 years of imprisonment, or by fine.

Criminal Law: *Article 301*

(1) The conduct of the public servant who, while carrying out his professional duties, committed an act that resulted in a material gain for himself, his spouse, for a relative or an in-law, including those twice removed, is punishable by 1 to 5 years of imprisonment and the interdiction of the right to hold a public office for 3 years.

(2) Par. (1) shall not apply to the cases when the act or decision refer to the following situations: a) issuing, endorsing or adopting regulatory documents; b) exercising a right acknowledged by the law or in fulfilling an obligation required by the law, in compliance with the conditions and limitations provided by the law.

Note:

- **HCCJ – Ruling on points of law – Decision No. 6/2017**:
  "The act of the public servant who, while carrying out his professional duties, committed an act or participated in taking a decision that resulted in a material gain, directly or indirectly, for a person with whom he had commercial relationships, falls under the scope of Constitutional Court's Decision No. 603 of 6 October 2015, published in the Official Journal of Romania, Part I, No. 845 of 13 November 2015, being decriminalized irrespective of the date when the act was performed or the participation to the decision-making took place and irrespective of the date of the commercial relationships".

Criminal Law: *Article 302*

(1) Opening, stealing, destroying or seizing, without any right, the correspondence addressed to another person, as well as the unlawful revelation of the contents of such correspondence, even when it was sent open or it was opened by mistake, is punishable by 3 months to 1 year of imprisonment, or by fine.

(2) Unlawful wiretapping of phone conversation or communication or any electronic means of communication is punishable by 6 months to 3 years of imprisonment, or by fine.

(3) If the actions provided under par. (1) and par. (2) were committed by a public servant holding the legal obligation to observe professional secrecy and the confidentiality of information they are privy to, the punishment shall be 1 to 5 years of imprisonment and the interdiction of certain rights.

(4) The unlawful disclosure, broadcasting, presenting or transmitting to another person or to the general public the contents of a wiretapped conversation or communication, even when the perpetrator became aware of it by mistake or by chance, is punishable by 3 months to 2 years of imprisonment, or by fine.

(5) The following acts committed do not constitute offenses: a) if the perpetrator catches a crime in the act or contributes to providing evidence as to the perpetration of a crime; b) if the perpetrator catches acts of public interest, with significance for the life of the community, the disclosure of which yields public advantages much higher than the damage caused to the victim.

(6) The unlawful possession or manufacturing of specific wiretapping or communication-recording devices is punishable by 3 months to 2 years of imprisonment, or by fine.

Criminal Law: *Article 304*

(1) The unlawful disclosure of information classified as work secret, or which is not for the general public, by the person aware thereof owing to their professional responsibilities, if it affects the interests or the activity of a person, is punishable by 3 months to 3 years of imprisonment, or by fine.

(2) The unlawful disclosure of information classified as work secret, or which is not for the general public, by the person aware thereof is punishable by 1 month to 1 year of imprisonment, or by fine.

(3) If, as a result of the action provided under par. (1) and par. (2), a crime was committed against an undercover investigator, a protected witness or a person included in the Witness Protection Program, the punishment shall be of 2 to 7 years of imprisonment and if a crime against life was committed with direct intent, it is punishable by 5 to 12 years of imprisonment.

Criminal Law: *Article 308*

(1) The provisions under Articles 289 – 292, 295, 297 – 301 and 304 regarding civil servants shall apply accordingly to acts committed by or in connection with the persons who carry out, on a permanent or on a temporary basis, with or without a remuneration, a duty irrespective of its nature in the service of a natural person of those provided under Article 175 par. (2) or within any legal entity.

(2) In this case, the special limits of the punishment shall be decreased by one-third.

Criminal Law: *Article 309*

If the actions provided under Article 295, Article 297, Article 298, Article 300, Article 303, Article 304, Article 306 or Article 307 caused extremely severe consequences, the special limits of the punishment stipulated in the law shall increase by one-half.

Note:

- **HCCJ – Ruling on points of law in criminal matters – Decision No. 12/2015**: *"In the interpretation of Article 6 par. (1) of the Criminal Code, as regards the final punishments for offenses which caused very serious consequences according to the previous Criminal Code, the special maximum limit provided by the new law shall be determined, even if the value of the damage is below the value threshold provided under Article 183 of the Criminal Code, by reference to the aggravated version of the offenses listed exhaustively at Article 309 of the Criminal Code".*

INTELLECTUAL PROPERTY AND COMPETITION

Law No. 8/1996 on copyrights and connected rights: *Article 139[6]*

(1) The following acts are offenses and are punishable by 6 months to 3 years imprisonment or by fine:

a) making pirated goods for distribution purposes; b) placing the pirated goods under a final import or export customs treatment, a suspensive customs treatment or in free zones; c) any other means of introducing pirated goods on the domestic market.

(2) The punishment provided at par. (1) also applies to offering, distributing, holding, storing or transporting pirated goods, for distribution purposes.

(3) If the acts provided at par. (1) and (2) are committed for commercial purposes, they are punishable by 2 to 7 years of imprisonment.

(4) The punishment provided at par. (3) shall also be applicable for leasing and offering for lease pirated goods.

(5) Promoting pirated goods by using public announcements or electronic means of communication, by displaying or making public the product lists or catalogues or by any other such means is an offense and is punishable by 3 months to 2 years of imprisonment or by a fine.

(6) For the purposes of this law, pirated goods shall mean: all copies, regardless of their support, including sleeves, made without the consent of the owner of rights or of the person

duly authorized by him and that are executed, directly or indirectly, in whole or in part, from a product with copyright or connected rights or from their packaging or sleeves.

(7) For the purposes of this law, commercial purpose means aiming at earning, directly or indirectly, an economic or material benefit.

(8) The commercial purpose shall be presumed if the pirated good is identified at the headquarters, places of business, in the annexes thereof or in the means of transport used by the economic entities that have in their object of activity the reproduction, distribution, rental, storage or transport of products involving copyright or neighbouring rights.

Law No. 8/1996 on copyrights and connected rights: *Article 139[8]*

Making available to the public, including via the Internet or other computer networks, without having the right to do so, of works or products with connected rights or sui generis rights of the makers of databases or copies thereof, regardless of the support, so that the public may access them from any place and at any time individually chosen by them, is an offense and is punishable by 6 months to 3 years of imprisonment or by fine.

Law No. 8/1996 on copyrights and connected rights: *Article 139[9]*

The unauthorized reproduction on computer systems of computer programs in any of the following modalities: installation, storage, running or execution, display or transmission in the domestic network, is an offense and is punishable by 6 months to 3 years of imprisonment or by fine.

Law No. 8/1996 on copyrights and connected rights: *Article 140*

(1) The following acts committed without the authorization or consent of the owners of rights acknowledged by this law are offenses and are punishable by no less than one month and no more than one year or by a fine: a) reproduction of works or products involving neighbouring rights; b) distribution, rental or import, on the domestic market, of works or products involving neighbouring rights, others than pirated goods; c) broadcasting of works or products involving neighbouring rights; d) cable retransmission of the works or products involving neighbouring rights; e) making of derivative works; f) copying for commercial purpose of artistic performances or radio or television broadcasts; g) infringement of Article 134.

(2) Products involving neighbouring rights means fixed artistic performances, phonograms, videograms and own broadcasts or services of programs of radio and television broadcasting organizations.

Law No. 8/1996 on copyrights and connected rights: *Article 141*

(1) The act of assuming, without having the right to do so, in full or in part, the authorship of a work made by another author or to present it as one's own intellectual creation is an offense punishable by 6 months to 3 years of imprisonment or by fine.

(2) Reconciliation removes criminal liability.

Law No. 8/1996 on copyrights and connected rights: *Article 141*[1]

(1) Production, import, distribution, possession, installing, maintaining or replacing in any way the devices for the control of the access, either original or pirated, used for the services of programs with conditional access, is an offense and is punishable by 6 months to 3 years of imprisonment or by fine.

(2) The act of a person who unlawfully connects to or unlawfully connects another person to services of programs with conditional access is an offence and is punishable by 3 months to 2 years of imprisonment or by fine.

(3) Utilization of public announcements or electronic communication means for the purpose of promoting pirated devices for the control of access to the services of programs with conditional access, as well as exhibiting or presenting to the public in any manner, without having the right to do so, the information needed for making devices of any kind, capable of ensuring the unauthorized access to the said services of programs with conditional access, or intended for the unauthorized access in any way to such services, are offences and are punishable by 1 month to 1 year of imprisonment or by fine.

(4) Sale or rental of pirated devices for the control of access is punishable by 1 to 5 years of imprisonment.

(5) For the purposes of this law, pirated devices for the control of access means any device whose making was not authorized by the owner of rights acknowledged by this law in relation to a particular service of television programs with conditional access, made to facilitate access to that service.

Law No. 8/1996 on copyrights and connected rights: *Article 143*

(1) The act of the person who, without having the right to do so, produces, imports, distributes or leases, offers, in any manner, for sale or lease, or holds, for sale purposes, devices or components which allow the neutralization of technical protection measures or who provides services which lead to the neutralization of technical protection measures or who neutralizes such technical protection measures, including in the digital environment, is an offense and is punishable by 6 months to 3 years of imprisonment or by fine.

(2) The act of the person who, without having the right to do so, eliminates, for a commercial purpose, from the works or other protected products or changes on them any information in electronic form on the related status of copyrights or neighbouring rights is an offense and is punishable by 3 months to 2 years of imprisonment or by fine.

Law No. 8/1996 on copyrights and connected rights: *Article 143[1]*

(1) The person who, before commencement of criminal prosecution, denounces to the competent authorities his participation in an association or agreement in view of committing any of the offenses provided at Article 139[6], thus allowing that the other participants be identified and held liable under criminal law, is not punishable.

(2) The person who committed any of the offenses provided at Article 139[6] and who, during criminal prosecution, denounces and facilitates the identification and holding liable under criminal law of other persons who committed offenses related to pirated goods or pirated devices for the control of access, shall benefit from a decrease by half of the limits of the legal punishment.

(3) If the persons who committed offenses provided by this law repaired, until the end of the criminal investigation before the first instance court, the damage caused to the titleholder, the special limits of the punishment shall be decreased by half.

Law No. 11/1991 on controlling unfair competition: *Article 5*

The following acts are offences and are punishable by 3 months to 2 years of imprisonment or by fine: a) use of a firm, logo or package which may create a likelihood of confusion with those legitimately used by another trader; b) use, for commercial purposes, of the results of tests or other confidential information in relation to them, sent to the competent authorities in order to obtain permits for the sale of pharmaceutical products or chemical products for agricultural purposes, which contain new chemical compounds; c) disclosure, acquisition or use of commercial secrets by third parties, as a result of commercial or industrial espionage, if this adversely affects the interests or business of a legal entity; d) disclosure or use of commercial secrets by persons authorized by the legitimate holders of such secrets to represent them before the public authorities or public institutions, if this adversely affects the interests or business of a legal entity; e) use, by one of the persons provided at Article 175 par. (1) of the Criminal Code, of the commercial secrets of which such person became aware in exercising his professional duties, if this adversely affects the interests or business of a legal entity; f) any kind of manufacture, import, export, storage, offer for sale or sale of goods or services bearing false indications as to patents, plant varieties, marks, geographical indications, industrial designs or models, layout-designs, other types of intellectual property, such as the logo, the window dressing or the staff dress design, the advertising means and the like, the origin and features of the goods, as well as concerning the producer or trader, in order to mislead the other traders and beneficiaries.

For the purpose of par. 1 lett. (f), false indications as to the

origin of goods means any indications which may lead one to believe that the goods were manufactured in a particular place, territory or State. A product name which became generic and indicates in the business environment merely its nature is not considered a false indication as to the origin of goods, except for the case when the name is accompanied by an indication which could lead one to believe that the product has such origin.

Competition Law No. 21/1996: *Article 65*

(1) The act of any person who exercises the position of director, legal representative or who exercises in any other way any management positions in an undertaking, to create or organize, deliberately, any of the practices which are prohibited under Article 5 par. (1) and which are not exempted under Article 5 par. (2) is an offense and is punishable by 6 months to 5 years of imprisonment or by fine and the interdiction of certain rights[1].

1 Article 5. - (1) All agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the Romanian market or a part thereof, are prohibited, and in particular those which: a) directly or indirectly fix purchase or selling prices or any other trading conditions; b) limit or control production, markets, technical development, or investment; c) share markets or supply sources; d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; (2) The ban provided at par. (1) does not apply to the agreements between undertakings or categories of agreements between undertakings, decisions by associations of undertakings or categories of decisions by associations of undertakings and concerted practices or categories of concerted practices, when they cumulatively meet the following conditions: a) they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers an advantage corresponding to the one achieved by the parties to such agreement, decision or concerted practice; b) impose on the undertakings concerned only such restrictions which are indispensable to the attainment of these objectives; c) do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the product market in question. (3) The categories of agreements, decisions and concerted practices which are exempted by application of par. (2) and the conditions and criteria for classification into categories are those provided in the regulations of the Council of the European Union or the European Commission on the application of Article 101 par. (3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions of the associations of undertakings or concerted practices, called block exemption regulations, which shall apply appropriately. (4) The agreements, decisions and concerted practices provided at par. (1) which meet the conditions provided at par. (2) or fall under the scope of the categories provided at par. (3) are deemed to be legal, without being necessary for the parties to notify them and for the Competition Council to issue a decision. (5) The burden of proof for a breach of par. (1) is incumbent on the Competition Council. The undertaking or association of undertakings claiming the benefit of par. (2) or (3) must prove that the conditions provided by such paragraphs are met. (6) Whenever the Competition Council applies the provisions of par. (1) to the agreements, decisions or concerted practices, to the extent that they may affect trade between Member States, it also applies the provisions of Article 101 of the Treaty on the Functioning of the European Union

(2) The person who, before the commencement of criminal prosecution, denounces to the criminal prosecution bodies his participation in the perpetration of the offense provided at par. (1), thus allowing that the other participants be identified and held liable under criminal law, is not punishable.

(3) The person who committed any of the offenses provided at par. (1) and who, during criminal prosecution, denounces and facilitates the identification and holding liable under criminal law of other persons who committed this offense, shall benefit from a decrease by half of the limits of the legal punishment.

(4) The court of law shall order the display or publication of the final court order of conviction.

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Law No. 84/1990 on trademarks and geographical indications:
Article 90

(1) The following acts, if committed without having the right to do so, constitute offense and are punishable by 3 months to 2 years of imprisonment or by fine: a) counterfeiting a trademark; b) marketing a product which bears an identical or similar mark to a mark which is registered for identical or similar products; c) marketing the products bearing geographical indications which indicate or suggest that the product concerned originates from another geographical region than its true place of origin.

(2) Counterfeiting a mark means to design or use, without the titleholder's consent, by third parties, in the commercial activity, of a sign: a) identical to the mark for products or services which are identical to those for which the mark was registered; b) which, given its identity or similarity to a mark or given the identity or similarity of the products or services to which the sign is applied to the products or services for which the mark was registered, would

create a likelihood of confusion for the public, including the risk of associating the mark to the sign; c) identical or similar to the mark for products or services which are different from those for which the mark is registered, when this became renowned in Romania and if by using the sign without grounded reasons one could take advantage of the distinctive character or the renown of the mark or the use of the sign would cause damage to the mark holder.

(3) Marketing means to offer the products or to sell or hold them for this purpose or, as the case may be, to offer or provide the services under this sign, as well as the import, export or transit of products under this sign.

(4) The acts provided at par. (1) are not offenses if committed before the mark publication date.

(5) In the case of the offense provided at par. (1) lett. a), reconciliation removes criminal liability.

POST-FACTUM OFFENSES

Criminal Code: *Article 267*

(1) The act of a public servant who, becoming aware of the perpetration of an offense criminalized by law in connection with the service where they work, omits to immediately notify the criminal investigation body, is punishable by 3 months to 3 years of imprisonment or by fine.

(2) If the act is committed from negligence, the penalty shall consist of 3 months to 1 year of imprisonment or a fine.

Criminal Code: *Article 269*

(1) The act of aiding and abetting a perpetrator, for the purposes of preventing or hindering the investigation in a criminal case, criminal liability, serving a sentence or a custodial sentence is punishable by 1 to 5 years of imprisonment or by fine.

(2) The penalty for the individual who has aided and abetted the perpetrator may not exceed the penalty provided by the law for the offense committed by the perpetrator.

(3) Aiding and abetting committed by a family member is not punishable.

Criminal Code: *Article 270*

(1) Whoever receives, acquires or converts an asset, or facilitates disposal thereof, knowing or foreseeing, following concrete circumstances, that the asset originates from the perpetration of an act criminalized by law, even without being aware of the nature of the crime, is punishable by 1 to 5 years of imprisonment or by fine.

(2) The penalty for the individual engaging in the receipt and sale cannot exceed the penalty provided by the law for the offense committed by the perpetrator.

(3) When this offense is committed by a family member it is not punishable.

Note:

- *According to Decision No. 2/2008, published in the Official Journal of Romania No. 859 of 19 December 2008, the High Court of Cassation and Justice admitted the final appeal in the interest of law declared by the General Prosecutor of the Prosecutor's Office of the High Court of Cassation and Justice, ruling that, if there was a first act of receipt and sale of stolen goods, followed by another action of the same perpetrator who promised to ensure the continued sale of other stolen goods, the perpetrator is an accomplice to simple or continuous theft, as the case may be, in actual concurrence with the offense of receipt and sale of stolen goods, even if the preliminary promise of receipt and sale of the goods was not fulfilled. The decision handed down in the final appeal in the interest of law has effects on the offenses as renumbered in the New Criminal Code (Article 48 of the New Criminal Code reproduces identically Article 26 of the Former Criminal Code). Since no essential amendments were brought to the interpreted provisions, the decision remains valid.*

Law No. 656/2002 on the prevention and punishment of money laundering and on setting up measures for the prevention and control of terrorism financing: *Article 29*

(1) The following constitute offenses and are punishable by 3 to 10 years of imprisonment: a) changing or transferring goods known to derive from criminal activities so as to hide or dissimulate their unlawful origin or to help the person who perpetrated the crime from which the goods resulted to avoid prosecution, trial or serving a sentence; b) hiding or dissimulating the true nature, the origin, the location, the availability, the circulation of or the ownership over the goods or the rights relating thereto, knowing that such goods derive from criminal activities; c) acquiring, holding or using goods known to derive from criminal activities.

(2) The attempt is punishable.

(3) If the act was committed by a legal entity, in addition to the fine, the court shall apply, on a case-by-case basis, one or more of the auxiliary penalties provided under

Article 136 par. (3) lett. a) -c) of the Criminal Code.

(4) Knowledge of the origin of goods or the purpose sought may be deduced from objective factual circumstances.

(5) The provisions of par. (1)-(4) shall be applicable regardless of whether the offence from which the good originates was committed on the territory of Romania or abroad.

Note:

- **HCCJ – Ruling on points of law – Decision No. 23/2017**:
  "In the interpretation of Article 33 of Law No. 656/2002 on the prevention and punishment of money laundering and Article 9 of Law No. 241/2005 on the prevention and control of tax evasion, if there is concurrence between the offense of tax evasion and the offense of money laundering, it is not mandatory to apply the safety measure of special seizure of the amounts which made the object of the money laundering offense and which result from the perpetration of the tax evasion offense concurrently with ordering the defendants to pay the amounts which represent tax liabilities owed to the State as a result of perpetrating the tax evasion offense."
- **HCCJ – Ruling on points of law – Decision No. 16/2016**:
  „The Court rules that:
  1. The actions listed under Article 29 par. (1) lett. a), b) and c) of Law No. 656/2002 on the prevention and punishment of money laundering and on setting up measures for the prevention and control of terrorism financing, republished, as further amended, i.e. changing or transferring, hiding or dissimulating, acquiring, holding or using are alternative modalities of the material element of the same offense of money laundering.
- *2. The active subject of the money laundering offense may also be an active subject of the offense from which the goods originate.*
- *3. The money laundering offense is autonomous, as it is not conditional on the existence of a conviction for the offense from which the goods originate".*
- **The Constitutional Court by its Decision No. 418 of 19 June 2018** declared the provision under lett. (c) unconstitutional as regards the perpetrator of the offense, who cannot at the same time be a perpetrator of the money laundering offense.

Nota bene:

- Money laundering activities must be part of an activity of reinserting the money into the economic circuit by "*placement*", "*layering*" and "*integration*". The "*placement*" stage would include the physical movement of gains from offenses (i.e., depositing the amounts at various banking institutions, exchanging the amounts into another currency, purchasing goods under the name of other persons or making deposits into the bank accounts of other persons and other such operations); "*layering*" means to separate the unlawful revenues from their source by creating complex financial transactions, capable of ensuring anonymity (e.g., using the accounts of ghost companies, forged import-export documents, electronic transfer to accounts from another jurisdiction, etc.), and "*integration*" means the return of the goods to the "*offenders*", their insertion in the economy (e.g., fictitious loans, forged accounting records, etc.)
- In principle, for an act to qualify as "*money laundering*", the direct intention qualified through the purpose involves the existence of factual circumstances to certify such goal: ready-made false documents executed in order to justify the transfers; purchase of goods under the name of other persons than those who actually paid the price; exchanging the money at exchange offices, not at the bank; depositing the money in the bank in low-value banknotes; transferring money via online postal orders, etc.
- **Nevertheless, in practice, money laundering charges almost always accompany charges which refer to crimes of result**.

Judicial practice:

- In a case, it was held that the money laundering offense consisted in the fact that the defendant, after withdrawing money (resulting from a misrepresentation offense) from the bank, exchanged the money into a foreign currency (i.e., Deutsche Marks) using a non-traditional financial institution (i.e., the money exchange office). He sent such money to the other defendants on the same day. Thus, the court held that one of the variants of money laundering offense was committed, i.e. the "*change of goods*", meaning "*the physical transformation, the change of the first appearance, keeping as a rule the intrinsic value of the object*" *(Criminal Law Decision No. 43/A/2009, final, handed down by Oradea Court of Appeal, Division for Offenses and Cases concerning Minors*).
- Money laundering was also considered to exist when several transfers of money gained unlawfully from offenses were made, from time to time, within the day-to-day operations of a company, so that such transfers would "*get lost*" among the regular

operations of the economic operator. In such case, small amounts were transferred, below the level provided by the law for reporting to the National Office for the Prevention and Control of Money Laundering (*Decision No. 2796/20.09.2013 handed down by HCCJ, Criminal Division*).

- The supreme court held that the money laundering offense existed when a sole shareholder and director of a company, who also was the *de facto* administrator of another ghost company, transferred various amounts of money from the account of legal entities from abroad, by fraudulent means (false invoices and agreements) issued under the name of the ghost company, in order to hide the fact that they originated from offenses. In proving the direct intention to commit a money laundering offense, the court considered the ready-made false documents which had been executed in view of justifying the transfers (*Criminal Law Decision No. 1135/2014, final, handed down by HCCJ*).
- In another case, the defendants' concern with hiding the unlawful sources of revenue was proven beyond any doubt by the existence of multiple dissimulation strategies, i.e. dispatching money under false documents, fragmenting and moving the money through several accounts opened under the name of several persons at various banks, without any justification, logic and economic reason, acquiring an impressive number of immovable assets under the name of relatives or close friends, followed by the resale thereof, sometimes at prices below acquisition and market prices (*Criminal Law Decision No. 609/19.02.2014 handed down by HCCJ*).
- The money laundering offense was also held against the defendant who, based on the same criminal decision, repeatedly, at short time intervals, using an identical or similar manner of operation, made fictitious payments, i.e. the equivalent value of goods, works and services against false invoices, he withdrew and shared/ transferred various amounts of money by online postal order, under the name of relatives and close friends, seeking to dissimulate the unlawful origin of the amounts of money arising from the offense of embezzlement (*Sentence No. 1066/F/2014, handed down by Bucharest Tribunal, 1st Criminal Division*).

TUCA ZBARCEA
ASOCIATII

Șoseaua Nicolae Titulescu nr. 4-8
America House, Aripa de Vest, etaj 8
Sector 1, 011141, București, România
T + 4 021 204 88 90
F + 4 021 204 88 99
E office@tuca.ro
www.tuca.ro