Criminal Law

1. Can a legal entity be held liable under the current Criminal Code?

The Criminal Code (Articles 135 to 151) provides for the possibility of directly indicting the legal entity, which may be held liable for the actions of any of its bodies or representatives acting during its business, in its interest and/or on its behalf.

The Criminal Code also requires that collective entities have legal personality at the time of the crime in order to be liable under criminal law. In this view, the High Court of Cassation and Justice, Criminal Law Division, decided that an individual enterprise which is not a legal entity cannot be held liable under Article 135 of the Criminal Code (Decision No. 1/2016).

The State and public authorities do not fall within the category of persons that can be held liable under criminal law. However, public institutions are not generally exempt from criminal liability. The scope of exemption from criminal liability of these subjects is solely in relation to actions performed during an activity pertaining to the public domain, which cannot be equally carried out by private law entities.

The criminal liability of the legal entity may be cumulated with the that of the individual who perpetrated the crime. However, these two types of liability are not wholly interdependent.

Criminal fines are the only main penalty that can be applied to legal entities, based on the fine-days system. The amount corresponding to one fine-day, varying between RON 100 and RON 5.000, is multiplied by the number of days subject to the fine (between 30 and 600 days) – the general limits of the penalty will range between RON 3.000 and RON 3.000.000.

The law provides for progressive penalties for legal persons depending on the severity of the prison sentence given to individuals. Thus, the special limits of the days subject to the fine range between:

- 60 and 180 days, when the law stipulates only a penalty by fine for that offense;

- 120 and 240 days, where the law provides for a term of imprisonment of no more than 5 years, as such or as alternative to the fine;
- 180 and 300 days, where the law provides for a term of imprisonment of no more than 10 years;
- 240 and 420 days, where the law provides for a term of imprisonment of no more than 20 years; and
- 360 and 510 days, where the law provides for a term of imprisonment exceeding 20 years or life imprisonment.

It should be mentioned that when the offense committed by a legal entity was intended to create a monetary benefit, the special limits of the fine-days provided for by the law for the committed offense may be increased by one-third, without exceeding the general maximum of 600 fine-days. When determining the fine, the value of the monetary benefit obtained or sought shall be considered.

The Criminal Code also provides for a complementary penalty for the legal entity: judicial supervision (Article 144), where the convicted legal entity's operations are to be carried out under the supervision of a judicial proxy for a period of 1 to 3 years.

The other complementary penalties applicable to the legal entity are: dissolution, suspension of activity or of one of the activities of the legal entity for a period of 3 months to 3 years, closing of secondary offices for a period of 3 months to 3 years, prohibition to participate in public procurement procedures for a period of 1 to 3 years, publication of the conviction decision.

2. What main felonies against property by breach of trust are relevant to the business environment?

Title II (Crimes against property) of the Criminal Code – Special Part, Chapter III (Crimes against property by breach of trust) incriminates a series of acts in view of protecting those financial relations in society that involve an element of mutual trust between participants.

This category includes the abuse of trust (Article 238), the abuse of trust by defrauding creditors (Article 239), simple bankruptcy (Article 240), bankruptcy fraud (Article 241), fraudulent management (Article 242), appropriation of found goods or goods coming into the perpetrator's possession accidentally (Article 243), misrepresentation (Article 244), insurance fraud (Article 245), diversion of public tenders (Article 246) and the material exploitation of a vulnerable individual (Article 247).

The abuse of trust (Article 238) incriminates the acts of a person taking, disposing of

or unlawfully using a movable asset belonging to another by the individual to whom it was entrusted based on a title and for a certain purpose, or the refusal to return it. As an example, this provision is applicable when merchandise is sent to a recipient for maintenance and the latter refuses to return the goods.

Abuse of trust by defrauding creditors (Article 239) can be perpetrated: (i) either by the debtor transferring, concealing, damaging or destroying, in full or in part, his valuables or assets, or invoking fictitious documents or debts in order to defraud its creditors; or (ii) by the debtor acquiring assets or services in full knowledge of being unable to pay for them and thus causing the creditor to incur loss. In practice, we encounter numerous cases where debtors attempt to hide their valuable goods through fictitious transactions.

Simple bankruptcy (Article 240) consists of the failure to submit or the late submission of the request for the opening of insolvency proceedings by the individual debtor or by the legal representative of the legal entity debtor within six months the period of time provided by the law since the occurrence of the insolvency.

Very similarly, bankruptcy fraud (Article 241) incriminates the act of committing fraud against creditors by: (i) falsifying, stealing or destroying the debtor's records or concealing its assets; (ii) claiming inexistent debts or recording undue amounts in the debtor's financial registers or statements; or (iii) where the debtor is insolvent, transferring assets. The main difference between abuse of trust by fraud and bankruptcy fraud lies in the identity of the perpetrator: in the case of abuse of trust, the perpetrator can be any debtor of an individual or a legal entity, while in the case of bankruptcy fraud the debtor must be a legal entity, while the perpetrator is, in most cases, a person holding a certain position in that legal entity, such as a director, manager, official receiver, or shareholder.

Fraudulent management (Article 242) is committed when the individual tasked with the management or preservation of another person's goods causes damages to said goods. This felony can also refer to the administrator or liquidator during the insolvency procedures.

Appropriation of assets found or into the perpetrator's possession by error (Article 243) can apply when certain goods have been accidentally sent to another receiver who refuses to return them.

The felony of misrepresentation (Article 244) applies to misleading contractors during the closing of an agreement, but the parties' reconciliation eliminates criminal liability.

The crime of insurance fraud (Article 245) covers any method by which a person tries

to commit fraud against the insurer for the purpose of gaining unfair benefits.

Similarly, the law incriminates diversion of public tenders (Article 246) in view of fighting increasingly frequent practices such as eliminating a participant from a public tender by fraudulent means, or agreements between participants intended to distort the final award price.

Some of the felonies against property by breach of trust are punished more severely if they produce very serious consequences. Thus, according to Article 256[1] of the Criminal Code, the special limits of punishment shall be increased by half in case of the offenses provided by Articles 239, 242, 244, 245, 247 of the Criminal Code.

3. What are the other relevant felonies related to the business environment?

Additional relevant offenses are set forth by special laws, such as Law No. 129/2019 on the prevention and sanctioning of money laundering, as well as for the introduction of measures to prevent and combat the financing of terrorism (Chapter X, Article 49), Law No. 241/2005 on the prevention and combating of tax evasion (Chapter II, Articles 3-9) or Law No. 31/1990 on commercial companies (Title VIII, Articles 271-281).

Article 49 of Law No. 129/2019 incriminates money laundering which can consist of: (i) changing or transferring goods known to derive from criminal activities so as to hide or dissimulate their unlawful origin or aiding and abetting the person who perpetrated the crime from which the goods resulted to avoid prosecution, trial or serving a sentence; or (ii) 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.

The High Court of Cassation and Justice (Ruling on points of law – Decision No. 16/2016) has ruled that *"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"*.

Tax evasion is incriminated under Articles 3 to 9 of Law No. 241/2005. It can consist of: (i) not restoring, intentionally or culpably, the destroyed accounting records within the term provided in the control documents; (ii) 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; (iii) hindering in any way the competent bodies from entering, as permitted by the law, offices, premises or lands, in order to conduct financial, fiscal or customs verifications; (iv) unauthorised holding or circulation of special-status tax stamps, bands or standard

forms; (v) 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; (vi) acts committed in order to circumvent the fulfilment of tax obligations, such as hiding the asset or the taxable source, omitting to record commercial operations, recording expenses which do not rely on actual operations, or altering/destroying/hiding accounting documents.

If the acts of tax evasion cause damages 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, and if the damages exceed EUR 500,000, the penalty limits shall be increased by 7 years.

Law No. 241/2005 was modified by Law No. 55/2021 which entered into force on 4 April 2021. The new provisions introduce leniency measures when the perpetrator has covered the damages caused to the state budget. If the person accused of tax evasion has paid the due amounts during the stages of criminal investigation or trial, and this value does not exceed EUR 100,000, the court can apply a fine, and if the damages do not exceed EUR 50,000, the criminal fine is mandatory (no prison sentence). Moreover, if the accused pays an additional 20% of the damages and the applicable penalties until a final decision has been reached, he or she will be exempt from punishment and the criminal trial will end. This rule applies for all the defendants even if they did not contribute to the payment.

Acts of unfair competition are incriminated under Article 5 of Law No. 11/1991. These may consist of: (i) use of a firm, logo or package which may create a likelihood of confusion with those legitimately used by another trader; (ii) commercial use of test results or other confidential information that was sent to the authorities in order to obtain permits for the sale of pharmaceutical products or chemical products for agricultural purposes; (iii) disclosure, acquisition or use of trade secrets by trusted persons or third parties; (iv) any commercial operations involving goods or services bearing false identification information.

Other felonies regarding competition are provided for by Articles 5 and 65 of Law No. 21/1996 which imposes criminal sanctions for the act of any person who exercises the position of director, legal representative or who exercises in any other way any management positions, who deliberately creates or organizes deals between entities for any of the following activities: (i) establishing buying or selling prices; (ii) limiting or controlling production, commerce and technical development or investment; (iii) dividing markets or supply sources; (iv) applying unequal conditions for identical benefits; (v) condition the signing of contracts on the acceptance of additional unrelated services.

3. Which are the main provisions on corruption?

Acts of corruption are provided for by the Criminal Code - Special Part (Title V - Crimes of corruption and occupational crimes, Chapter I – Crimes of corruption) and by Law No. 78/2000 for preventing, ascertaining and punishing acts of corruption (Chapter III - Felonies).

The provisions of the Criminal Code on the felony of taking a bribe (Article 289) are meant to cover all the cases where a person, directly or indirectly, for oneself or for another person, claims or receives money or other undue benefits, or accepts the promise of such benefits, in relation to the fulfilment, non-fulfilment, expediting or protracting the fulfilment of any act concerning his professional duties, or in relation to the fulfilment of any act which is contrary to such duties.

The felony of giving a bribe (Article 290) refers to promising, offering or giving money or other benefits under the conditions described by the provisions on taking a bribe.

The felony of influence peddling (Article 291) consists in claiming, receiving or accepting promises of money or other benefits, directly or indirectly, for oneself or for another person, committed by a person having influence, or pretending to have influence on an official and who promises to determine such official to perform, not to perform or defer the performance of an act concerning his professional duties or to perform an act which is contrary to such duties.

Buying influence (Article 292) is the correlative felony for influence peddling. Such buying of influence is no longer punished only in the special cases provided by Anticorruption Law No. 78/2000 (the former Article 6^1, currently repealed). This covers a legislative gap which has often been highlighted by legal scholars.

For all the corruption offenses referred to in Articles 289 to 292 of the Criminal Code, a reduction of the limits of punishment by one third applies (as per Article 308) whenever the acts are committed by persons assimilated to civil servants, namely persons fulfilling, permanently or temporarily, with or without pay, a task of any kind on behalf of an individual who performs a service of public interest for which such individual was vested by the public authorities or who is subject to the public authorities' control or supervision as regards the fulfilment of such public service or within any legal entity.

At the same time, Law No. 78/2000 stipulates that acts of giving a bribe or influence peddling committed by a person exercising a public dignity function, by a judge or a prosecutor, by a criminal investigative body or a person who has been authorised to take notice and sanction misdemeanours committed by one of the persons referred to

in Article 293 of the Criminal Code, shall be sanctioned with the penalty provided for in Article 289 or Article 291 of the Criminal Code, the limits of which are increased by one third.

Anti-corruption Law No. 78/2000 provides for a set of felonies that are also considered acts of corruption, such as: setting a smaller value for the assets owned by public authorities or institutions or undertakings in which the State or an authority of the local public administration is a shareholder, granting illegal subsidies, using subsidies for other purposes than the purpose for which they were granted and acts of corruption perpetrated by the persons in charge with the supervision of undertakings.

Other offenses assimilated to those of corruption are: (i) the act of a person who, having the task of overseeing, controlling, reorganising or liquidating a private economic operator, carries out any task, intermediates or facilitates the conduct of commercial or financial operations, or participates with capital in such an economic operator, if the act has the nature of directly or indirectly creating an undue advantage; (ii) performing financial transactions as acts of commerce, incompatible with the duties of a person, or the conclusion of financial transactions, using the information obtained by virtue of his or her duties, if the purpose is to obtain for himself or another money, goods or other undue benefits; or (iii) the use, in any way, directly or indirectly, of information not intended to be advertised, or of permitting unauthorised persons access to such information if the purpose is to obtain for himself or for another money, goods or other undue advantage.

The act of the person who performs a managerial role in a party, in a trade union or owners' association or legal person without patrimonial purpose (such as a foundation), to use his influence or authority for the purpose of obtaining for himself or for another money, goods or other undue benefits also constitutes a felony under Law No. 78/2000.

Special emphasis is put on the crimes of corruption against the financial interests of the European Union seeking to undeservedly obtain funds from the EU general budget. Thus, the Criminal Code provides that offering false or inaccurate information in view of unfairly obtaining funds from the EU budget and illegally changing the purpose of such funds constitute crimes of corruption.

4. Which occupational crimes are provided by the Criminal Code and which perpetrators are held liable under criminal law?

Title V (Corruption and offenses in a public office) of the Criminal Code – Special

Part, Chapter II (Offenses in a public office) contains provisions meant to ensure the protection of workplace social relations, involving an appropriate conduct from the persons exercising their duties.

Offenses in a public office include embezzlement (Article 295), abusive conduct (Article 296), abuse in office (Article 297), professional negligence (Article 298), abuse of power for sexual gain (Article 299), abuse of position (Article 300), use of authority to favour others (Article 301), violating the secrecy of correspondence (Article 302), disclosure of state secrets (Article 303), disclosure of information classified as job secret or not public (Article 304), negligence in storing information (Article 305), unlawful monetary gain (Article 306) and diversion of funds (Article 307).

In some cases, occupational felonies involve the existence of a specific perpetrator, such as an official, who is defined as a person who permanently or temporarily, with or without pay: (i) exercises duties and responsibilities established in accordance with the law, for the purpose of fulfilling legislative, executive or judicial powers; (ii) holds any public office whatsoever; and (iii) exercises, individually or jointly with other persons, in an autonomous state enterprise or in another undertaking or legal entity which is wholly or in majority owned by the State, duties concerning the fulfilment of that entity's business object.

Under criminal law, an official is also the person performing a service of public interest for which he was vested by the public authorities or who is subject to the public authorities' control or supervision as regards the fulfilment of such public service.

The provisions referring to officials' felonies of embezzlement (Article 295), abuse in office (Article 297), professional negligence (Article 298), abuse of power for sexual gain (Article 299), abuse of position (Article 300) and disclosure of information classified as job secret or not public (Article 304) are also applicable to acts performed by, or in relation to the persons fulfilling, permanently or temporarily, with or without pay, a task of any kind for an individual who performs a service of public interest for which such individual was vested by the public authorities or who is subject to the public authorities' control or supervision as regards the fulfilment of such public service or within any legal entity. Moreover, these provisions also apply to individuals working within any legal entity. However, in these cases, the special limits of the punishment are to be reduced by one third. However, if the acts of embezzlement, abuse in office, professional negligence, abuse of position and disclosure of information classified as job secret have caused a material damage in excess of RON 2.000.000 (approximately EUR 420,000), the special penalty limits are increased by one half.

In the case of the offenses of abuse in office or abuse of position, Law No. 78/2000

provides that if the civil servant has obtained an undue advantage for himself or another, the special limits of the penalty shall be increased by one third.

5. How are the safety and integrity of computer systems and data protected under the Criminal Code?

Title VII (Crimes against public safety) of the Criminal Code – Special Part, Chapter VI (Offenses against security and integrity of computer systems and data) contains legal provisions meant to ensure the safety and integrity of computer systems and data.

Criminal law defines computer systems as any device or set of devices that are interconnected or in a functional relation, one or more of which ensure automatic data processing by means of a computer program; computer data means any representation of facts, information or concepts in a form which can be processed by a computer system.

The following acts constitute felonies: illegal access to a computer system (Article 360), illegal interception of computer data transmissions (Article 361), altering computer data integrity (Article 362), disruption of the operation of computer systems (Article 363), unauthorised transfer of computer data (Article 364) and illegal operations with devices or software (Article 365).

6. How is one's business premises protected under the Criminal Code?

The felony of trespassing in professional offices consists in the unauthorised entry in any of the offices where an individual or a legal entity works, or the refusal to leave such offices at the request of the person concerned (Article 225).

The new legal provisions protect both companies' premises and the premises of any private-law persons, the offices of public authorities, institutions and State bodies.

7. For which crimes can criminal liability be eliminated due to absence / withdrawal of the preliminary complaint, or to the parties' reconciliation?

For low-danger crimes, or in cases where the commencement of the criminal action is left at the discretion of the aggrieved party, in view of protecting their right to privacy, a criminal investigation can only commence upon filing a preliminary complaint (Article

295 of the Criminal Procedure Code). The absence or withdrawal of the preliminary complaint eliminates criminal liability.

A preliminary complaint is mandatory for the following criminal acts: trespass on professional premises (Article 225), abuse of trust (Article 238), abuse of trust by defrauding creditors (Article 239), simple bankruptcy (Article 240), bankruptcy fraud (Article 241), fraudulent management (Article 242) and violating the secrecy of correspondence (Article 302).

The term for filing a preliminary criminal complaint is three months from the date when the aggrieved party knew of the perpetration of the act.

Therefore, criminal liability cannot be attributed if the prior criminal complaint fails to comply with the 3-month period prescribed by law or with other formal conditions provided by the law, or if the aggrieved party withdraws their criminal complaint until a final judgement has been given – only in relation to offenses for which the formal criminal action is conditional on the introduction of a prior criminal complaint (Article 158 of the Criminal Code).

Another cause for the elimination of criminal liability is the parties' reconciliation (Article 159 of the Criminal Code), which may occur only for such felonies where the criminal action is commenced ex officio, and only where this possibility is expressly provided by the law. The parties' reconciliation is allowed in the cases of misrepresentation (Article 244), insurance fraud (Article 245) and appropriation of assets found or into the perpetrator's possession by error (Article 243).

8. What does "very serious consequences" mean, and which are the crimes with very serious consequences entailing an aggravation of criminal liability?

According to Article 183 of the Criminal Code, "very serious consequences" means damage to property exceeding RON 2.000.000 (approximately EUR 420,000) caused by a felony.

Where certain felonies which are provided for by the Criminal Code or by special laws cause very serious consequences, the penalty is harsher. For instance, the special limits of the penalties are increased by half in case of very serious consequences produced by occupational offenses such as embezzlement (Article 295), abuse in office (Article 297), professional negligence (Article 298), abuse of position (Article 300), disclosure of state secrets (Article 303), disclosure of information classified as job secret or not public (Article 304), unlawful monetary gain (Article 306) or

diversion of funds (Article 307), as well as by certain felonies provided for by special laws (Law No. 78/2000 on preventing, ascertaining and punishing acts of corruption, Law No. 191/2003 on water transport crimes, Law No. 535/2004 on preventing and suppressing terrorism and Law No. 204/2006 on optional pensions).

9. Which are the cases in which a person is not held liable for a criminal act?

There are cases where the lawmaker allows for the violation of lesser legal values to the ones considered of the highest importance; such as the case where an asset may be destroyed in view of saving someone's life. These are the cases where the law deems a certain act, which otherwise meets all the conditions of constituting a felony, to be legally justified, which eliminates the criminal liability for such an act.

The defences are self-defence (Article 19), the state of necessity (Article 20), the exercise of a right or fulfilment of an obligation (Article 21) and the consent of the aggrieved party (Article 22).

The exercise of a right acknowledged by the law constitutes a defence, hence it decriminalises acts perpetrated while making use of a public or private interest that is acknowledged or permitted by the law (such as while practicing a profession in accordance with the law, or while participating in sports competitions or in exercising immunities provided by law).

The fulfilment of an obligation required by the law is a legal justification decriminalising is the act perpetrated while performing an action required by the law for the purpose of fulfilling a legal duty (such as actions taken by the police or other coercive forces of the state with a view to maintaining public order or executing a warrant of arrest).

Consent of the aggrieved party decriminalises the unlawful action where the victim consented to the act that injured his property or interests.

The Criminal Code also provides for causes of impunity (Articles 24 to 31), where certain factual circumstances or mental states eliminate the author's guilt, such as the mental or physical incapacity of the perpetrator at the time of the act (irresponsibility, intoxication and the author's age of minority) or the occurrence of an unforeseeable, uncontrollable and unavoidable event (physical constraint, moral constraint, non-imputable excess and fortuitous case).

Besides these, there are also a few special causes of impunity provided for by law. For example, in the case of giving a bribe, the bribe giver who has been constrained by

any means by the bribe taker will not be punished. Similarly, the bribe giver will not be punished when he denounces the act before the criminal investigative body has been informed of it by other means (this case of impunity is also applicable to the buyer of influence).

10. Which are the rules for establishing and applying the main types of punishment measures in the case of concurrent crimes?

The Criminal Code contains rules for the establishment and application of the punishment for concurrent crimes. These rules apply to both "real" concurrency situations (where the same person perpetrated two or more crimes, by distinct actions or omissions, before a final ruling was passed to convict the perpetrator for any of the crimes in question, including where one of the crimes was intended to facilitate or conceal another crime) and "formal" concurrency (where an action or omission perpetrated by the same person constitutes more than one crime, due to the circumstances in which it was perpetrated or to its consequences). The rules refer to the establishing and application of the main punishments provided under Romanian criminal law, which are imprisonment for life, imprisonment for a duration ranging from 15 days to 30 years, and the criminal fine.

Generally, the Criminal Code provides for harsh main punishments for concurrent crimes, as concurrency is viewed as an aggravating circumstance. Upon establishing the punishment for each of the concurrent crimes, the court will apply the punishment as follows: (i) where imprisonment for life and one or more shorter imprisonment durations or criminal fines have been established, the life sentence shall apply; (ii) where all the punishments established consist of various durations of imprisonment, the court shall mandatorily apply the harshest of them plus one third of the duration of all the other durations compounded; (iii) where all the punishments established consist of criminal fines, the court shall apply the harshest of them, plus one third of all the other fines combined; and (iv) where an imprisonment sentence and a criminal fine have been established, both shall apply.