

# Romania

## Mareş & Mareş



Dr. Mihai Mareş

### OVERVIEW

|     | Corporate Liability | Public Bribery | Commercial Bribery | Extraterritorial Applicability of Criminal Laws | Adequate Procedures Defense |
|-----|---------------------|----------------|--------------------|---|-----------------------------|
| Yes | X                   | X              | X                  | X   | X                           |
| No  |                     |                |                    |   |                             |

### QUESTION LIST

**1. Do any specific procedures need to be considered in case a whistleblower report sets off an internal investigation (e.g. for whistleblower protection)?**

Romania has adopted a special law for the protection of whistleblowers, in force since 2004, namely Law No. 571/2004. However, it applies only to personnel hired within public authorities, public institutions, and other budget units. Private-sector employees are not protected by this law.

Law No. 571/2004 offers protection before the discipline commission or other similar bodies, as follows:

- Whistleblowers benefit from the presumption of good faith, until proven otherwise.
- At the request of the whistleblower, following a warning act, disciplinary commissions or other similar bodies within public authorities or public institutions have the obligation to invite the press and a representative of the trade union or professional association.
- If the wrongdoer is a hierarchical superior, directly or indirectly, or has control, inspection or evaluation powers over the whistleblower, the disciplinary commission or other similar bodies will ensure the protection of the whistleblower by concealing their identity.

In case the whistleblower reports on corruption offenses, offenses assimilated to corruption offenses, forgery offenses, offenses committed in office or work-related offenses, and offenses against the financial interests of the European Union, the protection measures set out under Article 12 paragraph 2 of Law No. 682/2002 on the protection of witnesses shall be applied *ex officio*.

In labor disputes or in those regarding labor relations, the courts may order the annulment of the disciplinary or administrative sanction imposed on a whistleblower, if the sanction was applied following a report done by the whistleblower in good faith.

Regarding the protection of whistleblowers in the private environment, some degree of protection is currently offered indirectly under Romanian law. For instance, an employee cannot be dismissed solely on grounds of submitting a whistleblower report that set off an internal investigation. This is due to the fact that, pursuant to the Romanian Labor Code, there are strict conditions that must be met for a dismissal of an employee. Reporting misconduct is none of the conditions under this law.

The Whistleblowers Directive – Directive (EU) 2019/1937 – will result in a harmonization of the legal provisions governing whistleblowers until 2021 for all EU Member States, including Romania.

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**2. Do the following persons/bodies have the right to be informed about an internal investigation before it is commenced and/or to participate in the investigation (e.g. the interviews)?**

- a) **Employee representative bodies, such as a works council**
- b) **Data protection officer or data privacy authority**
- c) **Other local authorities**

**What are the consequences in case of non-compliance?**

- a) The only set of general provisions regarding internal investigations are to be found in the Romanian Labor Code, regulating the disciplinary investigation of an employee in case of disciplinary misconduct. There are also specific procedures for internal disciplinary investigations, particularized for specific professions. Disciplinary misconduct is a work-related act consisting of an action or omission committed by the employee, thereby violating the legal provisions, the internal regulation, the individual employment contract or the applicable collective labor contract, the orders and the lawful commands of hierarchical leaders. In case of an internal disciplinary investigation, the law requires that the employee be summoned in writing for an interview, by the person empowered by the employer to carry out the investigation. If the employer does not comply with this requirement, a decision of sanctioning the employee will be void. The only measure that may be ordered without carrying out a disciplinary investigation is the warning. There is no other obligation for informing other people or employee representative bodies. An employee who is being disciplinarily investigated has the right to request that a member of the trade union, of which they are a member of, participates in the interview. For any other type of misconduct, the law does not provide any regulations for conducting an internal investigation. Nevertheless, provisions regarding internal investigation for other types of misconduct may be provided by internal regulations of any legal person.
- b) The Romanian Law does not impose an obligation for a data protection officer or data privacy authority to be informed about the investigation. Nevertheless, in case the operator detects a data security breach, the Romanian Data Protection Authority must be notified.
- c) In accordance with Article 267 of the Romanian Criminal Code, if a public servant becomes aware of a criminal offense that is related to the work place where they carry out their job duties, the public servant must immediately refer it to the criminal prosecution body. Otherwise, the public servant may be subject to criminal liability punishable with imprisonment of three months to three years or with a fine, when committed willfully, or imprisonment of three months to one year or by a fine, when committed negligently. There is no such reporting obligation of an employee of a private sector company.

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**3. Do employees have a duty to support the investigation, e.g. by participating in interviews? If so, may the company impose disciplinary measures if the employee refuses to cooperate?**

There is no explicit obligation of this nature under Romanian law in case of an internal disciplinary investigation. The employee that is summoned to an interview does not have a duty to support the investigation and they may participate in the interview or not. Also, they may provide information regarding the accusation brought against them, or not. However, if the employee unjustifiably refuses to adhere to their employer's instruction to appear, the company may impose disciplinary measures without having to perform the prior disciplinary investigation.

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**4. Can any labor law deadlines be triggered or any rights to sanction employees be waived by investigative actions? How can this be avoided?**

According to the Romanian Labor Code, following a disciplinary investigation, the employer can apply a sanction within 30 calendar days as of becoming aware of the disciplinary misconduct, but no later than six months from the date of the act.

Regarding the first time-period, of 30 calendar days, the Romanian Supreme Court established that the term will start to run from the date when the employer took note of what is written in the report following the disciplinary investigation.

Should any of the two time-periods lapse, the employer loses the right to sanction the respective employee.

**5. Are there any relevant data privacy laws, state secret laws, or blocking statutes in your country that have to be taken into account before**

**a) Conducting interviews?**

Data privacy laws or laws protecting classified information apply to any type of data processing, as the case may be.

The relevant legal framework applicable in Romania essentially comprises the following pieces of legislation:

- The Romanian Criminal Code: Articles 226 (violation of privacy), 302 (violating privacy of correspondence), 303 (disclosure of information classified as state secret), 304 (disclosure of information classified as professional secret or not public), 305 (negligence in storing information);
- Regulation (EU) 2016/679 – the General Data Protection Regulation ("GDPR");
- Directive (EU) 2016/680 – the Data Protection Directive (transposed in Romania mainly through Law No. 363/2018 regulating data protection and other pieces of domestic legislation);
- Law No. 129/2018 amending and supplementing Law no. 102/2005 regarding the establishment, organization and function of the National Supervisory Authority for the Processing of Personal Data, as well as for the repeal of Law No. 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data;
- Law No. 182/2002 regarding classified information.

**b) Reviewing emails?**

Private communication is protected under Romanian Law, and access to private communications is permitted only under the conditions set out by law, namely if it is approved in advance by a judge and enforced by the judicial bodies.

Otherwise, accessing an email without permission may constitute the criminal offenses of violating the privacy of correspondence (as per Article 302 of the Romanian Criminal Code) and of accessing a computer system illegally (Article 360 Criminal Code).

Criminal liability may be excluded and such private communication may be used without impunity if it was originally viewed accidentally and only if it proves the perpetration of an offense or if it serves a general interest (e.g. acts of public interest, meaningful for the community), of higher import than the potential damage caused.

In this context, when assessing the lawfulness of accessing professional emails used within an organization, the ownership of the information contained therein must be established as a first step; either it is deemed to belong to the employer or it is attributed solely to the employee.

**c) Collecting (electronic) documents and/or other information?**

Any and all processing of documents and/or data must take into account the applicable provisions of data privacy laws. In case of an internal investigation the company holds ownership over the equipment used and data/information processed by the employee under employment provisions. As such, the employer may

secure, collect and review such work data and work products, subject to an assessment of the applicable data privacy laws.

On the contrary, accessing/collection of documents or information exceeding the scope of work relations may only be permitted to state authorities, pursuant to special legal procedures (e.g. searches and seizures).

**d) Analyzing accounting and/or other mere business databases?**

Analyzing private databases is only permitted pursuant to the procedures provided for by law (e.g. expert reports). Any professional accounting and/or business databases pertaining to labor relations between the employer and their employees generally constitute the property of the employer, thus being fully accessible to such employer.

**6. Before conducting employee interviews in your country, must the interviewee**

**a) Receive written instructions?**

There is no legal obligation to provide written instructions to an employee regarding legal circumstances or their rights. Nevertheless, the company internal regulation, which shall be made available to all employees, must contain specific provisions and information as to the disciplinary procedures enforced by such company.

**b) Be informed that they must not make statements that would mean any kind of self-incrimination?**

The Romanian Criminal Procedure Code provides that a suspect or a defendant will be informed about the right to remain silent during interrogations conducted by the judicial bodies. There is no corresponding obligation for other types of interviews, including interviews as part of an internal investigation.

**c) Be informed that the lawyer attending the interview is the lawyer for the company and not the lawyer for the interviewee (so-called "Upjohn warning")?**

There is no obligation for an Upjohn warning under Romanian law.

**d) Be informed that they have the right that their lawyer attends?**

According to Article 251 paragraph 4 of the Romanian Labor Code, during an internal disciplinary investigation, the employee, who allegedly committed the wrongdoing, has the right to defend themselves and to give the person empowered to carry out the investigation all the evidence and motivations they consider necessary. The same paragraph offers the employee access to a lawyer, upon request. However, there is no explicit legal obligation of the employer to inform their employees about that right. The company's internal regulation, which shall be made available to all employees, must however contain specific provisions in that regard.

**e) Be informed that they have the right of a representative from the works council (or other employee representative body) to attend?**

Article 251 paragraph 4 of the Romanian Labor Code provides the employee the right to be assisted, at their request by a representative of the trade union of which they are a member of in case of a disciplinary investigation. The company's internal regulation, which shall be made available to all employees, must contain specific provisions in that regard. However, there is no explicit legal obligation of the employer to inform their employees.

**f) Be informed that data may be transferred cross-border (in particular to the United States)?**

According to the provisions of Law No. 363/2018 as well as the relevant European legal provisions (GDPR), the data subject has to be informed of the purpose of data processing. This also includes any processing of personal data conducted during an internal investigation. The information process also has to include any references to where the personal data is transferred to and the rights of the data subject in relation to such processing.

In order to avoid any further approvals from the Romanian Data Protection Authority for transferring the personal data to the U.S., data subject consent for such transfer is compulsory. In all other cases, transfers of

personal data are based on a decision of adequacy from the European Commission or based on adequate guarantees.

**g) Sign a data privacy waiver?**

Under Romanian law, the employer is not obliged to ask the employee to sign a data privacy waiver. However, in practice, the employer will request such document to be signed for evidentiary purposes.

The right to the protection of personal data, which applies to all employees, implies the right to information regarding all relevant data privacy matters (such as the identity of the operator, the purpose of data processing, the rights of the persons concerned and the conditions for exercising them), the right of access to data, the right to rectification and erasure of data, the right to restriction of processing, the right to data portability as well as the right to opposition.

**h) Be informed that the information gathered might be passed on to authorities?**

There is no obligation for the employer to inform the employee of passing information to authorities under Romanian law.

**i) Be informed that written notes will be taken?**

There is no obligation for the employer to inform the employee that written notes will be taken under Romanian law.

**7. Are document hold notices or document retention notices allowed in your country? Are there any specifics to be observed (point in time/form/sender/addressees etc.)?**

There is no legal provision under Romanian Law for this kind of activity. Thus, such notices are allowed and are generally in the discretion of the employer.

**8. Can attorney-client privilege be claimed over findings of the internal investigation? What steps can be taken to ensure privilege protection?**

Attorney-client privilege may be claimed over findings of the internal investigation.

According to the Lawyer Profession Statute, the lawyer is required to keep professional secrecy on any aspect of the case entrusted to them.

The professional secrecy applies to any information and data of any kind, in any form and on any support, as well as any documents drawn up by a lawyer containing information or data provided by the client or based on them for the purpose of providing legal assistance and whose confidentiality has been requested by the client.

In order to ensure privilege protection, any documents, information, or data regarding an investigation should be kept only at the professional headquarters of the lawyer – which can also be situated at the lawyer's domicile – or in areas approved by the Bar. Documents of professional nature are inviolable.

Also, for ensuring the professional secrecy, correspondence with a client or notes regarding the defense of a client are exempted from seizure and confiscation. Moreover, the lawyer-client relationship cannot be subject to technical surveillance measures unless strictly prescribed by law.

**9. Can attorney-client privilege also apply to in-house counsel in your country?**

In case the lawyer is an active member of the Bar and is not bound by an employee-employer relation but exercises the legal profession based on an agreement of legal services, the attorney-client privilege will apply under any circumstances in regard to the documents, data and information mentioned at question 8.

**10. Are any early notifications required when starting an investigation?**

As a general principle, we note that there is no legal obligation under the Romanian law for such notifications, unless they are necessary under respective financing or insurance contracts of the respective legal entity. As such, a case by case evaluation must be performed, as to the subject matter of the internal investigation, by reference to any stakeholders, including the below.

**a) To insurance companies (D&O insurance etc. to avoid losing insurance coverage)?**

To the extent that the internal investigation may generate any liability or claim under the employer's/employee's insurance policies, the specific notification obligations under the insurance policy must be thoroughly observed. Moreover, special attention should be paid to the timelines and deadlines provided by such insurance documentation, as their lapse may prevent a successful insurance claim.

**b) To business partners (e.g. banks and creditors)?**

Specific contractual provisions pertaining to the respective business partnership must be reviewed and analyzed in order to determine potential reporting obligations arising from an internal investigation.

**c) To shareholders?**

To the extent that the subject matter of the internal investigation may be interpreted as a potential trigger on the company's stock price, a thorough analysis should be performed as to whether the matter of the internal investigation should be notified to the regulatory/supervisory authorities and/or to the company shareholders (including the legal provisions on insider trading).

Specific criteria must be met in order for the internal investigation to be subject to the company's legal notification obligations. Nevertheless, if such conditions are met and the company fails to report it to the supervisory authority, its liability may be incurred.

**d) To authorities?**

There is no specific duty to inform criminal law authorities when conducting an internal investigation. Nevertheless, the company may find it in its best interest to immediately inform the prosecutor's office if and as soon as the internal investigation uncovers acts that meet the specific criteria of criminal offenses.

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**11. Are there certain other immediate measures that have to be taken in your country or would be expected by the authorities in your country once an investigation is started, e.g. any particular immediate reaction to the alleged conduct?**

If a company becomes aware of a breach of laws by the company or its employees, the company must take all suitable steps to end such behavior.

Also, as described above, a public official that gains knowledge of the commission of criminal actions pertaining to the workplace in which the said public official fulfills their duties has to immediately refer to the criminal prosecution body.

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**12. Will local prosecutor offices generally have concerns about internal investigations or do they ask for specific steps to be observed?**

The prosecutor's offices will not be concerned about internal investigations.

In any case, if a criminal offense has been committed and the prosecutor office learns about it, either *ex officio*, or through complaint or denunciation, there is an obligation for criminal proceedings to be initiated.

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**13. Please describe the legal prerequisites for search warrants or dawn raids on companies in your country. In case the prerequisites are not fulfilled, can gathered evidence still be used against the company?**

The domiciliary search warrant in Romania must be issued by a judge of a court of law and its content must comply with certain formal requirements.

The search can be conducted only by the prosecutor, or by criminal investigation bodies, accompanied, as applicable, by operative workers.

Searches cannot be initiated before 6.00 a.m. or after 8.00 p.m., except for in-the-act offenses, or when a search is to be conducted in a place open to the public at that time.

In case the legal prerequisites are not fulfilled, the evidence may be subject to exclusion, carried-out through the nullity sanction.

**14. Are deals, non-prosecution agreements, or deferred prosecution agreements available and common for corporations in your jurisdiction?**

The Romanian Criminal Procedure Code allows for the conclusion of a plea bargain between the defendant and the prosecutor. This possibility is also available to legal entities, although less common in practice. The effects of such agreement are the reduction of the penalty limits provided by law for a particular offense by one-third in case of prison sentences or one-fourth in case of criminal fines.

In the trial phase, the admission to the charges may entail special, more expeditious proceedings, which also result in the reduction of the penalty limits as indicated above.

**15. What types of penalties (e.g. fines, imprisonment, disgorgement, or debarment) can companies or its directors, officers, or employees face for misconduct of (other) individuals of the company?**

A company can face either criminal or administrative penalties in Romania.

As far as criminal penalties are concerned, the primary penalty for companies is fines. Depending on the offense, companies may also face the following complementary penalties:

- Liquidation;
- Suspension of the activity, or of one of the activities performed thereby;
- Closure of individual company sites;
- Prohibition to participate in public procurement proceedings;
- Placement under judicial supervision; and/or
- Display or publication of the conviction sentence.

The directors, officers, or employees, as individuals, can face fines, imprisonment, or disciplinary measures, depending on the nature of the misconduct. Also, some of their rights may be restricted as part of the criminal sentencing system.

The criminal liability of a legal person does not exclude criminal liability of the natural person that contributed to the commission of the same act.

**16. Can penalties for companies, its directors, officers, or employees be reduced or suspended in case the company implemented an efficient compliance system? Does this only apply in case the efficient compliance system had already been implemented prior to the alleged misconduct?**

In the private sector, Romanian companies are not specifically legally required to implement compliance programs, but companies operating in certain fields (e.g. the banking industry) have such programs in place. Subsidiaries of foreign companies also usually opt to set up compliance programs in their code of conduct or other internal regulations.

The integrity and compliance programs implemented in the private sector are generally inspired by the provisions of Law no. 571/2004, which provides protection for whistleblowers in the public sector, or the integrity and compliance policies adopted by multinational companies or other private organizations.

From a criminal law perspective, the implementation of a compliance system is not a legal criterion for excluding penalties. These facts may be deemed as mitigating judicial circumstances at most. The competent judge will evaluate and decide whether this factor will be taken into consideration when assessing the individual penalty applied against the company, director, officer, or employee.

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**17. Please briefly describe any investigations trends in your country (e.g. recent case law, upcoming legislative changes, or special public attention on certain topics)?**

Currently, the public attention in Romania focuses on legislative proposals to amend the laws on the justice system. The most important topic currently under public scrutiny is the abolition of the Special Division for Investigating Justice-Related Offenses ("SIJ"), applicable since the end of 2018, because it triggered very severe criticism from the European partners as well as many protests and grievances coming from the national magistrates.

## CONTACT

### MAREȘ & MAREȘ

AVOCAȚI

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55-55 bis Carol I Blvd., 2nd District  
020915 Bucharest  
Romania

Tel.: +4 031 43 78 324  
Fax: +4 031 43 78 327  
www.mares.ro



**Dr. Mihai Mareș**

Managing Partner  
Mareș & Mareș  
T +4 031 43 78 324  
mihai.mares@mares.ro

Mihai is one of the founders and the Managing Partner of Mareș & Mareș, as well the partner in charge of the white collar crime department.

His practice focuses exclusive on criminal defense for senior executives, entrepreneurs, major industrial groups, financial institutions and large international and domestic companies, in a wide range of matters involving accounting, financial, securities and tax fraud; bribery, antitrust, or money laundry cases.

In addition, he advises clients in internal investigations and audits involving money laundering, fraud and other corporate misconduct. In international criminal law, Mihai acts in international corruption, freezing of assets, multi-jurisdictional investigations and extradition.

Mihai Mareș is member of European Criminal Bar Association and International Bar Association (Business Crime Committee), speaking regularly in local and international seminars related to white collar crime matters.

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