

EUROPEAN CRIMINAL BAR ASSOCIATION – LISBON 1 OCTOBER 2016
NAVIGATING PITFALLS OF CROSS-BORDER INTERNAL INVESTIGATION
PANEL

CONDUCTING INTERNAL INVESTIGATIONS: EVIDENCE AND CONFIDENTIALITY

By Vladimir Hrle, LL.M.

Collecting Evidence

In cases of parallel investigations (internal and external – by the authorities), counsel has the right to seek information from a company, organ and other organisation and these are obliged, in accordance with the law, to provide the required information to the counsel. During internal investigation (i.e. for the purposes of detecting fraud/corruption), counsels may collect evidence and materials, i.e. to: i) talk to a person who can provide them relevant case data and obtain from that person written statements and information, with their consent – i.e. taking interviews or depositions; ii) enter private premises or areas (with the consent of their holder) which are not open to the public, a dwelling or premises linked with a dwelling; iii) take over from a legal or natural person (with their consent) objects and instruments and obtain information possessed by that person.

These rights are generally reserved for a local counsel, meaning that an internal investigation of a foreign company should always be coordinated this way.

Confidentiality - Legal Privilege

The law does not contain a specific provision that all communications between lawyer and client should be regarded as privileged, and consequently not subject to disclosure. This communication should be protected in principle (as there are general provisions in professional advocacy law and by-law), but there are no mechanisms to prevent the authorities to obtain this information and potentially use it as a reference point for directing the case. The same goes for reports and interviews.

This evidence could not be, however, used in proceedings and consequently a court decision should not be based on it. For these purposes, the judge for preliminary proceedings should issue a ruling on excluding these from the file immediately, or no later than the conclusion of the investigation.

Also, companies should not rely on the protection offered by business secrecy legislation - such protection is exempted by the same legislation, meaning that certain data can be obtained by the authorities if they directly relate to the perpetration of the offence.

The Public Prosecutor assess whether any data/object is related to the commission of a particular offence and consequently whether these could be temporary seized. If the responsible person in the company (i.e. director) refuses to provide the objects that could serve as evidence in the proceedings, he/she could be charged with monetary fines. Also, the Public Prosecutor might find that this action constituted the elements of some other offence (i.e. if someone by force or threat of force prevents an official in discharge of duty undertaken within his competencies).

Personal data of the employees are protected from unauthorised access by third parties, provided that such access is related to labour rights and obligations. Therefore, if an employee is under criminal investigation, he/she could not rely on the provision of the labour legislation.