

SCHOUPS

# Het risico op een strafrechtelijk onderzoek vermijden en beperken Eviter et limiter le risque d'une enquête pénale

3 May 2022





**Liesbeth Truyens**

+32 497 26 58 88

[liesbeth.truyens@schoups.be](mailto:liesbeth.truyens@schoups.be)



**Marie-Aude Deslandes**

+32 498 72 49 23

[marie-aude.deslandes@schoups.be](mailto:marie-aude.deslandes@schoups.be)

SCHOUPS

Antwerpen

De Burburestraat 6-8 bus 5  
2000 Antwerpen

Brussel

Regentschapsstraat 58 bus 8  
1000 Brussel

[www.schoups.com](http://www.schoups.com)  
t. +32 3 260 98 60



## Agenda

- I. Criminal liability of a legal person and attribution to a natural person
- II. How does an investigation start
- III. Common investigation acts and how to prepare
- IV. The professional secrecy of a company lawyer



Let's do this on the basis of a (real life) case study

- Company “Investor” holds a significant stake in company “Producer”
- Investor has a seat in the Producer’s board of directors
- Producer made payments to a listed terrorist organisation in Syria to ensure production at Syrian production plant
- Investigation re Producer, director and Investor

# I. Criminal liability of a legal person and attribution to a natural person

## 1. Criminal liability of a legal person

- Who?
  - ✓ all legal entities (whether public or private including joint ventures)
- Which offences?
  - ✓ all offences of the Belgian Criminal Code (including the unintentional offences) and of any special criminal law

- When? Only if the offence can be attributed to the legal entity.
  - ✓ Criminal conduct:
    - is intrinsically linked to the realisation of the legal entity's (real) corporate purpose (and not its statutory purpose)
    - is intrinsically linked to the defence of the legal entity's interests
    - has been committed on behalf of the legal entity
  - ✓ Criminal intent
    - intention to act (specific or general)
    - negligence
- No exclusion of the criminal liability of the physical persons who committed or participated in the offence (mostly the organs of the legal entity)

## 2. Attribution to a physical person

- How?

- ✓ material attribution
- ✓ legal attribution
- ✓ conventional attribution
- ✓ **judicial attribution**

- To whom?

- ✓ the organs
- ✓ the appointees or agents
- ✓ the actual director

At risk:

- Producer
- Director
- Investor
- Others?



## II. How does a criminal investigation start?

Preliminary inquiry (public prosecutor's office)	Judicial investigation (investigating judge)
<ul style="list-style-type: none"><li>• complaint is filed with the police or with the public prosecutor's office (by e.g. a competitor or an employee)</li></ul>	<ul style="list-style-type: none"><li>• complaint with civil party petition</li></ul>
<ul style="list-style-type: none"><li>• police finds harmful elements while investigating another case (e.g. during a house search)</li></ul>	<ul style="list-style-type: none"><li>• the public prosecutor refers a case to the investigating judge (whether in whole or for a 'mini judicial inquiry')</li></ul>
<ul style="list-style-type: none"><li>• <i>proactieve recherche/recherche proactive</i> for certain offences (including bribery)</li></ul>	<ul style="list-style-type: none"><li>• if the investigating judge decides to keep the case after a 'mini judicial inquiry'</li></ul>

## Differences between a case handled by a public prosecutor or an investigating judge

- the prosecutor has less extensive powers (but he has more powers when and as long as there is a situation of *flagrant délit/heterdaad*)
- only the investigating judge can order certain intrusive measures, such as:
  - house search
  - secret interception of private communications
  - network search
  - arrest warrant

### III. Common investigation acts

- Interrogation of the legal and natural persons
- House/Enterprise search
- Computer search
- Seizure
- ...

## Interrogation of the legal and natural persons

- Who is interrogated? What capacity?
- Witness? Suspect?
- What to do in case of an interrogation?
  - Preparation
  - Presence of a lawyer
  - During the interrogation

## House/Enterprise search

- Legal basis
  - ✓ art. 36-37, 89bis-90 Wb Sv
  - ✓ the law on house searches of 7 June 1969
  - ✓ art. 26, 27 and 29 WPA
- Who?
  - ✓ the police executes a house search:
    - at its own initiative (e.g. cry for help/fire/flooding) :
    - following the instructions of the prosecutors' office in case of *heterdaad/flagrant délit* or with the (written) consent of the persons having *werkelijk genot/la jouissance effective* over the place
    - executing a search warrant issued by the investigating judge (no mini-instruction possible)
- When?
  - ✓ there must be prior serious indications of an offence and indications that documents or other objects can be found at that place to reveal the truth; fishing expeditions are illegal

- What is protected by law
  - ✓ house, i.e. the place including the appurtenances where a person lives or resides
  - ✓ all places where a person has a right to privacy (including professional places if the activities conducted there have a private character or confidential correspondence is stored and it is not accessible by the public)
- How is the search conducted?
  - ✓ Timing:
    - on the basis of a search warrant: between 5 am and 9 pm
    - otherwise: no time limits
  - ✓ Seizure of evidence



Rechtbank van Eerste Aanleg  
Kelzerstraat 20  
2800 MECHELEN

BESCHIKKING TOT HUISZOEKING

18.

211.

Kabinet  
van  
Onderzoeksrechter

BESCHIKKING TOT  
HUISZOEKING

haar kenniname

In geval van terugzending steeds de naam van  
voornoemde magistraat op de omslag vermelden

Dossier nr.:

Not. nr.:

Plichtnr.:

Wij, **[naam]**, toegevoegd rechter, wnd. Onderzoeksrechter in de Rechtbank van  
Eerste Aanleg te Mechelen,

Door andere ambtsplichten verhinderd en gelet op de spoed:

Gelet op artikelen 15 en 22 van de Grondwet, op de artikelen 35 tot 39, 62bis, 87 tot  
89bis van het Wetboek van Strafvordering en op artikel 1 van de wet van 7 juni 1969;

Geven opdracht aan de **Gerechtelijk Directeur van de Federale Politie**  
**Gerechtelijke Dienst Arrondissement Mechelen** en bij zijn ontstentenis de  
officier van gerechtelijke politie, hulpofficier van de Procureur des Konings bij  
deze dienst, drager van deze beschikking, met de bijstand van de openbare macht  
te gaan tot een huiszoeking in het pand gelegen te **[adres]**,  
over te gaan tot een huiszoeking in het pand gelegen te **[adres]**,

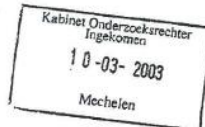
ten einde aldaar op te sporen en in beslag te nemen alle voorwerpen en/of  
documenten betreffende alle voorwerpen en/of documenten betreffende  
schennis, misbruik van vennootschapsgoederen.

De in beslag genomen voorwerpen op de griffie van deze Rechtbank neer te leggen,  
mits inachtneming van de ter zake bestaande richtlijnen.

Over te gaan tot elk ter zake dienend verhoor, namelijk omtrent de herkomst van de  
in beslag genomen voorwerpen, en tevens tot het inwinnen van alle inlichtingen die  
voor het onderzoek nuttig mochten zijn.

Deze verleend op **twintig februari tweedulzend en drie.**

De wnd. Onderzoeksrechter



## Practical tips with respect to house searches

- Don't give your consent
- Check the search warrant
  - ✓ which premises are identified?
  - ✓ has the offence been identified?
  - ✓ has it been duly signed by the investigating judge?
  - ✓ if specialized police units are present, check whether they have been named in the search warrant
  - ✓ police can be assisted by 'third parties' not named in the search warrant as long as these persons are not conducting the search
- The search must be limited to the object of the search warrant (the investigating judge is seized *in rem*)
- No right to be assisted by a lawyer – can be prohibited
- Be careful when answering questions (qualification as interrogation for which you have the right to be assisted)
- No “small talk” with the police
- Company lawyer (*bedrijfsjurist/juriste d'entreprise*)

## Computer search

- Search in an IT system (art. 39bis, §2 Sv)
  - ✓ searching the information that is stored on an IT system that can be seized
  - ✓ ordered by the public prosecutor
  - ✓ all external links must be cut-off (e.g. to mobile internet) before the search is conducted
- Network search (art. 88ter Sv)
  - ✓ the extension of the search in an IT system to another IT system connected with the first (e.g. searching dropbox from a computer)
  - ✓ must be ordered by the investigating judge (mini-instruction is possible)
  - ✓ can request assistance/information from people who know the IT systems (art. 88 quarter Sv)

## Practical tips with respect to computer searches

- Be aware of the amount of information that can be collected on off-line devices (e.g. all applications on your mobile phone, including e-mails)
- Is there a search warrant? Verify that the warrant is not a blank cheque
- If there is no search warrant, ensure that the mobile connections or connections to other IT systems are turned off
- Suspect can be ordered to give its passwords/pin codes
- After the search, the person in charge of the IT system must be informed of the search and receive a summary of the information that is copied/rendered inaccessible or deleted

## IV. Professional secrecy of company lawyer

- Company lawyer within the meaning of the law of 1 March 2000
- Covers advices rendered to the benefit of the employer within its legal activity
- Not applicable if the advices are made public by the employer
- Can rely on the professional secrecy during an interrogation



Q&A

SCHOUPS

Antwerpen

De Burburestraat 6-8 bus 5  
2000 Antwerpen

Brussel

Regentschapsstraat 58 bus 8  
1000 Brussel

[www.schoups.com](http://www.schoups.com)  
t. +32 3 260 98 60



# Bedankt voor uw aandacht



**Liesbeth Truyens**

+32 497 26 58 88

[liesbeth.truyens@schoups.be](mailto:liesbeth.truyens@schoups.be)



**Marie-Aude Deslandes**

+32 498 72 49 23

[marie-aude.deslandes@schoups.be](mailto:marie-aude.deslandes@schoups.be)

SCHOUPS

**Antwerpen**

De Burburestraat 6-8 bus 5  
2000 Antwerpen

**Brussel**

Regentschapsstraat 58 bus 8  
1000 Brussel

[www.schoups.com](http://www.schoups.com)  
t. +32 3 260 98 60