



## THE EXTENDED CONFISCATION – A NEW SAFETY MEASURE IN ROMANIAN CRIMINAL LAW

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**Abstract** *This paper deals with recent legislative changes in law governing special confiscation occurred in Romanian criminal law. The authors sense the emergence of the “extended confiscation”, and notice the trend of the European legislator and, consequently, of the Romanian one to extend the sphere of confiscated goods as a result of committing criminal offenses.*

### Key words:

Safety measures, special confiscation, extended confiscation, confiscated goods, the new criminal code

### JEL Codes:

K40

### 1. Introduction

The safety measures are aimed at completing the assembly of criminal sanctions and mainly at preventing criminal phenomenon by removing some objective facts or facts related to the person of the offender, which would encourage the repetition of the criminal behavior. They represent both means of preventing new offenses under the criminal law and remediation, removal of a state of emergency. Safety measures are, along with penalties and educational measures, sanctions of criminal law, and thus, they have a coercive – repressive character (they are restrictive of rights). Among safety measures, the special confiscation occupies a distinct position. It is defined as a forcible and free transfer of ownership to the State of certain goods belonging to the person who has committed an offense under the criminal law, goods which being hold by the offender, due to their nature or because of their link with the crime, they represent a danger of committing new offenses under the criminal law. Traditionally, the confiscation covered the goods produced or acquired through the activity stipulated by the criminal law; the goods used to commit it; the goods given to the person to commit the act or to reward; the goods that cannot be legally owned.

### 2. The extended confiscation

By Law no. 63/2012, the provisions of the Criminal Code of 1968, but also the provisions of the new Criminal Code relating to confiscation, have been amended, being introduced a new institution: the extended confiscation as a new case in applying this

safety measure. Thus, according to Article 108 letter e and Article 112<sup>1</sup> of the Criminal Code, there are also subject to confiscation other goods than those described by the classical legislation if the person is convicted for any of the following offenses (21 categories of offenses are listed, from the most serious related to organized crime and the one with economic and financial content), if the act is likely to procure a material benefit to the convicted person and the penalty provided by law is 4 (four) years imprisonment or more. According to paragraph 2 of Article 112<sup>1</sup> of the Criminal Code, the extended confiscation shall be ordered if the following conditions are jointly met: if the value of goods acquired by the convicted person, within a period of 5 (five) years before, and, if appropriate, after the time the offense is committed until the time the court is addressed, clearly exceeds the revenues lawfully acquired by this person and if the court is certain that the goods in question derive from criminal activities as those described. In applying these provisions, the court will take into account the value of the goods transferred by the convicted person or by a third party to a family member, to persons with whom the convicted has established relationships similar to those between spouses or between parents and children, if they live together, to legal entities over which the convicted person has control. In order to establish the difference between lawful income and the value of assets acquired, the value of the assets at the date of acquisition and the expenses incurred by the convicted and persons described above, shall be considered. If the goods to be confiscated are not in place, money and goods up to their value shall be confiscated

instead. There are also confiscated goods and money obtained from the exploitation and use of the goods which are subject to confiscation. The confiscation may not exceed the value of goods acquired during the described period, which exceeds the level of the lawful income of the convicted person. The last article of this law expressly states that the legislative act “transposes in the national legislation Article 3 of the Council Framework Decision no. 2005/212/JHA of February 24, 2005 on confiscation of crime related-proceeds, instrumentalities and property”. The mentioned Framework Decision is among some progressive actions in “the EU and international acquis”, regarding the necessity to recover the goods obtained through economic crimes, corruption and organized crime (UN statistics show that in 2009 from the damage caused by such crimes - approx. \$ 2 billion - only 1% were recovered by confiscation). These actions can be summarized succinctly: Council of Europe Convention of 1990 on laundering, seizure and confiscation of the proceeds from crime; 2000 UN Conventions against transnational organized crime; 2003 UN Convention against corruption, ratified by the EU and Member States; FATF recommendations on confiscation and goods recovery means. Financial Action Task Force (FATF) and Groupe d'Action Financière (GAFI) is an intergovernmental organization founded in year 1989 at G-7 Paris Summit. Currently, FATF has 36 members and its purpose is to develop policies to combat money laundering and to combat the financing of terrorism. FATF issues recommendations to States in order to adopt certain policies and criminal justice actions to protect the global financial system from money laundering and financing terrorism phenomena. There were issued 40 recommendations which have become standards for combating money laundering. Some recommendations were endorsed by the European Parliament and the Council and they have been transposed in directives. In the matter of confiscation, FATF has issued recommendation no. 3, recommendation no. 38 and a document on best international practices to help jurisdictions to implement the two recommendations. It is released the concept „non-conviction based confiscation” (the confiscation ordered outside a criminal conviction): in accordance with recommendation no. 3 of FATF, the countries may adopt measures to order confiscation of property, instrumentalities or incomes of a person without suffering as well a criminal conviction. On March 14, 2014 the Council of Europe has adopted, on the initiative of Romanian MEP Monica Macovei, a new Directive on seizure and confiscation of proceeds from a crime. The Directive was adopted by the European Parliament at first reading on February 25, 2014. The main novelty brought by the rules of the Directive refers

to the possibility to seize assets which are in possession or owned by third parties. The action will apply to offenders convicted of a crime of the following categories: active or passive corruption in the private sector and among officials of the EU institutions and Member States; organized crime and crimes related to it; child pornography; cybercrime and any crime punishable by more than 4 years. The Directive covers both confiscation as a consequence of criminal conviction as well as a form of confiscation without conviction, when a civil court is convinced that certain values derive from criminal activities. This form of confiscation shall be applied at the request of the State which must prove that there is a connection between the ownership of goods or values and the criminal offence committed, without requesting a criminal conviction of the offender. The Directive aims to cover also the proceedings determined by the absence of the defendant (death, illness, absconding from the investigation or the trial). A brief analysis of the provisions of the above Directive compared to provisions of Article 112<sup>1</sup> of the Criminal Code, reveals us aspects of differentiation, in the way that the Directive further provides two situations of extended confiscation compared to Romanian law: the confiscation applied to third parties (Article 6 of the Directive) – “Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation....” and confiscation without conviction ordered as the result of the absconding of the suspected or accused (Article 4 paragraph 2) – if the confiscation itself it is not possible due to “illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial...”

It is obvious that the mere description of confiscation without conviction reveals the impossibility of introducing it into the Romanian legislation without a prior amendment of Article 44 paragraph 8 of the Romanian Constitution, which presumes the legality of acquiring wealth.

The institution of the extended confiscation provided by the Romanian criminal law, offers us the following

observations: being an institution of public law, it is a mandatory procedure for the court of law; it is introduced by the Romanian legislator for a range of offenses (more than those considered by Framework Directive no. 2005/212/JHA referring to the fight against organized crime and terrorism), so it is likely to be applied to a large number of cases; it requires a laborious activity of the prosecution and the court which must verify, for the period of 5 (five) years before committing the crime and until the issuance of the indictment, the wealth of the sentenced, of the persons with whom he cohabited and of legal entities which, formally or informally, he controls. We consider that verifying the wealth, in order to apply this institution, involves checking all inputs and outputs of the assets of such persons, including the fruits of the goods which are subject to confiscation. In fact, it means a precise determination of the proportion of licit wealth and its comparison to the total wealth in order to confiscate the illicit part. Compared to the workload and existing qualified staff at this point in the criminal justice system in Romania, the question which arises is whether there is professional capacity (human resources and logistics) for the Romanian criminal courts to apply correctly this institution? We believe that as it is regulated by Article 112<sup>1</sup> of the Criminal Code, the extended confiscation does not conflict with the constitutional principle of presuming the lawful character of property acquired because it obliges the judge to order confiscation only where there is a strong conviction that some goods derive from criminal activity, therefore illegal (meaning that it involves proving the unlawful character of acquisition, thus the removal of the relative presumption enshrined in Article 44 paragraph 8 of the Constitution).

Law no. 28/2012, published in Romanian Official Gazette of March 22, 2012 amending and supplementing certain acts to improve the recovery of goods entered, under the law, in private ownership of the State, provides measures to speed up the execution of the lawful confiscation along with finding administrative offenses or goods seized for confiscation, in case of finding criminal offences. Consequently, according to Article 168<sup>1</sup> of law, during prosecution or trial, before a final decision, the prosecution or the court, at the request or with the consent of the owner of the seized goods, may order their cash in. The same action can be taken in the event of goods within the warranty about to expire, or perishable goods, animals, birds, flammable products, vehicles, other transportation means, even without the owner's consent. In these cases, the amounts resulting from the sale of goods shall be entered on behalf of the owner, at the disposal of the judicial body that ordered the seizure.

Currently, in Romania, the special confiscation may be ordered during trial, by the court of law and during the prosecution phase, according to Article 549<sup>1</sup> of the Criminal Procedure Code, by the judge of preliminary chamber, following the prosecutor's referral, who decided to close or waive the prosecution phase. The new Criminal Procedure Code has amended the unfair procedures set out in the old regulation according to which the prosecutor, along with termination of prosecution or closure, ordered the confiscation. The special confiscation is a safety measure, so a category specific to sanctions of criminal law which may be ordered, under international treaties that enshrine fundamental rights and freedoms of the individual, only by an independent and impartial court of law (see Article 10 of the Declaration of Human Rights, adopted by the UN General Assembly on December 10, 1948) "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". The same provisions are found in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Under Article 20 of the Romanian Constitution, the constitutional provisions on citizens' rights and freedoms shall be interpreted and enforced in accordance with the Universal Declaration of Human Rights, with the agreements and other treaties Romania is a party, or the prosecutor does not represent such a court.

### 3. Conclusions

The analysis of substantive law rules and procedural rules governing the matter of special confiscation, reveals us the dynamic of the legislation in relation to the evolution of the regulated social relations, the efforts of the European and Romanian legislators to keep up with the contemporary criminal phenomenon influenced by globalization, but also the need to strictly respect the rights and freedoms of citizens.

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