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IMPLEMENTATION OF UNION DIRECTIVES IN THE MATTER OF ROMANIAN CRIMINAL LAW. STUDY ON EXTENDED CONFISCATION

M.P. CHICHIȘAN

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Miron-Paul CHICHIŞAN
Oradea University
E-mail: paulchichisan4@gmail.com
ORCID ID: https://orcid.org/0000-0002-1921-8347

Abstract

Through this paper we propose to analyze a very controversial subject in the matter of criminal law institutions, extended confiscation, a mechanism of substantial law that was not found in the original form of the Criminal Code, but which has raised a legal discussion since its implementation.

In this context, the paper analyzes issues that have been interpreted differently by judicial doctrine and practice, the correctness of the transposition of the directive on extended confiscation in relation to European Union standards, the interference of this sanction with the guarantees of European Convention of Human Rights, the issue of the application of this sanction in relation to the application in time of the criminal law and with regard to certain crimes, but also the interference with other extra-criminal institutions that have a reparative role in the patrimonial plan.

Key words: *extended confiscation, European Directives, Criminal Code, guarantees of European Convention of Human Rights.*

INTRODUCTION

Many litigants have wondered over time what the role of this security measure would be, which would complement the special confiscation in the conditions where there would be at the same time the mechanism of the protective measures in the context where the suspect or the defendant would squander his wealth during the criminal process. We believe that at a conceptual level this measure is necessary and proportionate so that society can have confidence in the efficiency of judicial institutions.

If the persons about whom there is certainty that they would illegally obtain goods or values and the state would be in an objective impossibility to react, the preventive character that criminal law enshrines as a principle would be lost with certainty.

Thus, if the effects of the extended confiscation would not be perpetuated, most likely that at the national and union level, the crimes in the field of tax evasion, drug trafficking, or those in the field of defrauding the financial interests of the European Union would be perpetuated dramatic. Thus, the need for high social capital that continues to be enjoyed by judicial institutions, has grown considerably with the reassurance of citizens, that any wealth against which there is a legitimate suspicion that it might come from an act of a criminal nature will be repressed by means of the power judicial.

I. CONFISCATION EXTINCT IN THE CONFIGURATION OF THE ROMANIAN PENAL CODE

I.1 The history of the institution of extended confiscation in the Romanian criminal architecture

Even if the legislator did not concern himself with defining or integrating the nature of the safety measures, which are applicable in most criminal cases in Romania, the doctrine represented a landmark on which the judicial practice was based in the application of these sanctions both in terms of the Old Criminal Code, as well as the New Criminal Code.

Thus, safety measures are part of the category of criminal law sanctions, representing legitimate means by which the state constrains a person (adult, minor or even a legal entity) with a preventive character, with the aim of removing the possibility of committing new acts provided for by the criminal law (L.V. Leferache, 2021, p.336). The legal nature of these institutions, in accordance with the principle of the legality of criminal sanctions, is found in article 2 paragraph 2 of the current Criminal Code (A penalty cannot be applied or a security measure cannot be taken if it was not provided for by the criminal law at the date when it was committed.), and in the doctrine (L. M. Stănilă, 2021, p.230) another particularity was found that strengthens the argument that places safety measures in the category of criminal law sanctions, through the integration by the legislator of the measures of security in the material element of the offense provided for by art 288 of the Criminal Code (Non-compliance with criminal sanctions). However, the issue of the interference of this crime still remains under discussion regarding the inclusion or not of safety measures within the objective typicality of the act, following Decision 2/2019 of the Romanian High Court of Cassation and Justice issued through a mandatory Preliminary Judgment for the courts.

In the current legislative configuration, security measures are regulated in articles 107-112[1] of the Penal Code, being limited in number, unable to be applied by analogy, and each of them has a different legal regime, which makes it typical

in relation to the other security measures or complementary or accessory punishments.

In accordance with the provisions of the article 107 of the Law 287/2009 the purpose of security measures is different from that of punishments. If in the case of punishments, we will refer to the repressive, sanctioning, educational, preventive effect, safety measures aim at two levels: removing a state of danger (characterized in the doctrine and as an immediate goal) but also preventing other criminal acts (characterized in the doctrine and as a mediated goal) (L.M. Stănilă, 2021, p. 231).

In the configuration presented by the drafting college of the Penal Code and assumed by the Parliament, the essence that the last Penal Code impregnated as an indissoluble source of the new legislative configuration was preserved. In other words, in the initial form of Law no. 286/2009 the main safety measures were kept: the obligation to undergo medical treatment, medical admission, the prohibition of occupying a position or exercising a profession as well as the ubiquitous special confiscation (with applicability in almost all criminal cases).

We note that, however, the legislator abandoned the transposition of two security measures from the old code into the same category of criminal sanctions, choosing to transpose them into the category of complementary measures (The security measure provided for in art. 112 paragraph 1 letter d of the Criminal Code 1969 can be found in art. 66 paragraph 1 letter l Penal Code; The safety measure provided for in article 112 paragraph 1 letter e CP 1969 can be found in article 66 paragraph 1 letter c Penal Code), thus we find that there is no perfect symmetry between the principles of applying this institution in the new approach promoted by the Romanian criminal law doctrine, which reduced this category of sanctions, still giving a realistic note. We can say that it is fully justified to integrate these sanctions into the category of complementary punishments for a logical reason: the safety measures are non-prescriptive and in principle are not applied for a fixed term (M.Udroiu,*General Penal Law* 2023, p.919), and in the case of complementary punishments, the judge is obliged to order a certain complementary punishment for a period of time. Moreover, safety measures can only be revoked by praetorian means, the judge being the exponent of the application and termination of these sanctions, or in the case of complementary punishments, they cease by the simple passage of time.

I.2 Extended confiscation – origins and applicability in the Romanian criminal law

As we stated, in the legislator's initial perspective, the extended confiscation was not included in the category of security measures. Thus, the notion of confiscation from my point of view could be seen in a narrow sense, only from the perspective of special confiscation, operating only with regard to the transfer into the state's patrimony only of goods intended or used or acquired

as a result or to facilitate a foreseen deed by criminal law, but also in a broad sense, including both special confiscation and extended confiscation. We could say that the place of extended confiscation in this category is justified because it also refers to the other factual situations of acquiring the patrimony illegally, not being conditioned only by the assets that were related to the commission of the respective act. Thus, the commission of a criminal act (obviously followed by the cumulative and necessary fulfillment of the other necessary conditions) is only a first step in being able to apply the institution regulated in art. 112^1 CP, unlike the unique condition of the application of the measure of special confiscation.

The origin of the institution of extended confiscation is a long line of binding Union acts for the member which forced the legislator to integrate this particularly important mechanism in the matter of criminal law substantial. The multitude of legal norms aimed at preventing and combating this criminal phenomenon encountered mainly in the matter of organized criminalized groups and white-collar criminality has led the European legislator to act accordingly and to mobilize both the European institutions by creating support bodies (Europol; OLAF; Eurojust; EPPO) but also of the member states to prevent this problem from perpetuating itself.

Even if each mentioned directive could represent a different topic of study, I think it is imperative to address a defining rule in this regard: Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instruments and proceeds of crimes committed in the European Union.

In the matter of Union acts, directives follow regulations in terms of importance, the significant difference being the possibility of the national legislator to make certain changes in the case of directives, once the effective implementation, they cannot be invoked before the courts as a sole legal basis, only after integration into the national legislation. In contrast to this, the regulations have a much more favorable framework that the Treaty of the European Union offered (in this sense art. 288 TEU). The regulations have direct applicability in national legislation (M.Pătrăuș, 2021, p.309; G.Fabian, 2023, p.188); they cannot undergo any kind of changes from the member states and can be invoked as direct rules before the courts (the most frequent case being Regulation 679/2016 on the Protection of Personal Data - GDPR of April 27, 2016 published in the Official Journal of the Union of Europe on 04.05.2016 through L119/1).

Therefore, we can identify a first deficiency that the legislative bodies showed in relation to the numerous directives and framework directives that themselves regulated the issue of extended confiscation. In other words: it was not fairer in relation to the provisions of art. 6 of the European Convention on Human Rights regarding the right to a fair trial, for the European Union to resolve this issue through a Regulation, which would be binding for all states and which

would be transposed without the implementation procedure into national law? We believe that, by lege ferenda, the Union legislator could rethink this concept, especially in situations where new challenges in the field of criminal procedure and judicial cooperation in criminal matters lead to a rethinking of this concept, even under the control of a single body, given the fact that along with technological progress, cybercrime can converge towards the hiding or even the definitive theft of assets that the person referred to justice may "lose" to the detriment of the state, in the event that the prosecutor's office does not order the insurance measure in time of confiscation.

I.3 Implementation of extended confiscation in the new Penal Code

Given the fact that under the armor of special confiscation, the courts (including the judge of the preliminary chamber) could irreversibly pass into the state's patrimony certain assets that were intended, were used or were obtained as a result of the commission of crimes, there was no question of introducing in the General Part of the Criminal Code of an institution that has the character of restriction on the patrimony of persons about whom there is a minimal suspicion of the lawful character of the acquisition of wealth. Following the adoption of Law no. 286/2009 which initially did not provide for the place of extended confiscation in the category of safety measures, the legislator implemented through Law 63/2012 of April 17, 2012 a new article (112^1 in the configuration of the future Penal Code) thus transposing Council Directive 2005/212/JAI of February 24, 2005 regarding the confiscation of products, instruments and assets related to the crime (J.O.U.E series L no. 68 of March 15, 2005). We must not exclude, de facto, the repressive character of this safety measure, which can be very well analyzed from the perspective of a genuine punishment, as a result of the restrictions on property rights. (Silviu Daniel Socol, 2012, p.108).

Initially, the most significant debate in the doctrine regarding the initial form of article 112^1 was related to the fact that within it, the crimes that could be the subject of the application of this institution, were strictly and limitedly provided by law or not all the time the role of this safety measure was fulfilled. For example, in the case of a crime against bodily integrity, which was aimed at obtaining sums of money from third parties, from which it follows that the perpetrator was not the first offender, and the court is convinced that he is part of an organized criminal group, and the assets acquired cannot be justified, the application of this institution could not be possible, due to the condition of the type of crime.

Together with the amendments made by Law 228/2020, as a result of the transposition of Directive 2014/42/EU of the Parliament and the Council of April 3, 2014 on the freezing and confiscation of instruments and proceeds of crimes committed in the European Union (J.O.U.E L127/39 of 29.04. 2014), the conditions for the application of extended confiscation have changed, giving a

much more realistic tone to the interest of applying European norms. However, it is of interest to observe the proportionality that the intrusion into the fundamental rights of individuals could have from the implementation of a directive at the level of a national state (Elise-Nicoleta Vâlcu, 2022,369)

Thus, in the doctrine (M.Udroiu, 2023 *Penal General Law*, pp. 979-982) the new legislative set transposed by the mentioned norm was structured very correctly. The first condition that the judge must analyze is the special maximum of the punishment against which the legal classification was made in the case. This must be four years or older (aspects provided both in art. 5 paragraph 2 of Directive 2014/42 of the European Parliament and of the Council on the freezing and confiscation of instruments and proceeds of crimes committed in the European Union series L 127/39 of 29.04.2014 and in art 112^1 paragraph 1 of the Criminal Code). Obviously, the notion of punishment refers to the provisions of art. 187 of the current Penal Code which refers to the punishment in the basic form, the reasons for reducing or increasing the limits not being discussed. Even if there are not many articles that have a maximum of 4 years in the special part of the criminal code, this hypothesis should not be excluded out of hand since the extended confiscation is applied in all categories of criminal or non-criminal laws that contain criminal provisions.

The second cumulative condition in the case of establishing the incidence of this security measure is related to the material benefit that the offender could obtain or has obtained by committing the act in question.

Thus, the condition of classifying the crime in one of the 17 categories of crimes mentioned in the original form is replaced, the condition being that in essence the act provides the perpetrator with a material benefit. We believe that we could start two important discussions: on the one hand, the analysis of the purpose / motive of committing the act, and secondly, the situation of crimes with anticipated consummation.

In most cases, crimes do not require proof of a motive or a special purpose to commit the crime in order to retain the typicality of the act. However, we should not exclude the possibility of investigating the purpose for which a crime was committed (committing a crime against the person in order to obtain some sums of money), thus, we consider that the requirements are satisfied in the matter of including this condition and regarding the case history of crimes that through itself does not give the perpetrator an actual material benefit (as in the case of crimes against patrimony).

The second particularly interesting situation is related to the situation of crimes that are consummated in advance (M.Udroiu,**Special Penal Law**, 2023, p.1023; S.Bogdan/D.A.Șerban, 2023, p.313) such as giving/taking bribes or trafficking/buying influence, when the mere acceptance or claim of patrimonial benefits even if they are not followed by the actual remittance of the bribe,

consumes the crime in advance, so that liability can be incurred criminal charge against that person.

In appearance, the impossibility of applying extended confiscation alongside the special one, given the specificity of the two safety measures that cannot overlap, would converge towards the application of only special confiscation due to the legal provisions (for example, art. 289 paragraph 3 Criminal code provides that any goods or values received are subject to confiscation). However, we could say that the subsequent analysis by the court of the proportionality of the value of the assets of the public official or of the briber or trafficker of influence or third parties connected with them in relation to their income should not be excluded in order to determine whether it would be possible to apply the extended confiscation mechanism . Even if the crimes of corruption are not crimes of result, but only of danger to the good development of service relations (B.Bodea/R.Bodea, 2018, p.408), it can be found that in in the event that there would be a clear disproportion between the earnings of the respective official and his patrimony, the court can relatively presume that they were obtained as a result of the defective performance of the service relations.

Based on the above, we appreciate that the provisions of art. 5 paragraph 2 of the directive (which rules in the category of crimes and active and passive corruption in the public/private environment).The third condition in the analysis of the admissibility of the application of extended confiscation, is the condition of the existence of a conviction. This criterion represents a unique exception in relation to the other safety measures present in the criminal code, against which not even a solution to establish the guilt of the person should be necessary, as they can be ordered even after a solution of classification or acquittal .

Thus, the condition of conviction is a criterion taken from Article 4 of Directive 2014/42/EU that allows the establishment of this measure even in the case of conviction in absentia. At the same time, the solution of renouncing the application of the penalty or postponing the application of the penalty is not considered a conviction, situations in which it is not possible to order this safety measure (L.V. Lefterache, 2021, pp.357).

The problem that Article 5 paragraph 1 of the Directive constituted a real challenge for the legislator, since the rules provided for in that article stipulated that the court can apply the measure of extended confiscation when it has based on the circumstances of the case, including the factual elements and the available evidence, has the certainty that the assets that could be subject to extended confiscation are produced through criminal activities. This should not link the court to the crime or the legal object protected by the incrimination norm, but to refer strictly to the causal relationship between the obvious difference in the value of the goods and the existence of criminal acts that represented the method of acquiring them. The exposed aspect is even better concretized by a fairly recent

case supported at the High Court of Cassation and Justice, Criminal Section by Decision 129/A/2019 of March 30, 2019. In the case, the defendant, who was convicted on the basis of art. 367 of the Criminal Code (Creation of an organized criminal group), was given the security measure of extended confiscation because the court, in relation to the goods he owned, concluded that they were obtained as a result of the commission of crimes, since he did not have a job that would produce the income in order to legally obtain them. From here we can conclude a very important aspect: that the burden of proof, provided for in art. 99 Code of Criminal Procedure belongs in the first phase to the prosecutor's office, which will have to prove that there is no legal connection between the income and the assets in the patrimony, subsequently the defendant must reverse the burden in his favor by proving that the assets were obtained lawfully, even if he would not currently have income (accepting an inheritance, receiving donations, selling real estate, etc.).Last but not least, and perhaps the aspect that caused the most problems in the application of these institutions, is the temporal criterion of obtaining goods.

Thus, with the transposition of the directive into the Romanian Criminal Code, it was necessary for it to also refer to the Old Penal Code because, in order to respect the constitutional principle of the application of the more favorable criminal law, in the cases judged under the empire of the old Penal Code, the legislator had to to insert this new security measure in the old Code, there was a chance that many assets that were likely to be obtained illegally would not be capitalized due to the lack of provision in the criminal law.

From here, a precedent was created that was ultimately cut by two particularly important decisions of the Constitutional Court, which later represented an important support to be able to establish for which goods the matter of extended confiscation would be incidental, but especially for the date of the commission of the acts.

Starting from the principle that criminal law cannot retroactively apply to new facts or institutions, by Decision 356/2014 of the Constitutional Court, which ruled that the institution introduced by Law 63/2012 can only be applied to assets acquired after 22 April 2012, the date when the modification of the Old Penal Code and the New Penal Code entered into force (entered into force on February 1, 2014).

In other words, the judges from the CCR correctly established an aspect that escaped the legislator: what would be the predictability and accessibility of a criminal law under the conditions of art. 7 of ConvEDO to the extent that it would also have been applied to situations in which this institution was not regulated.

Following this decision, in the doctrine (M.Udroiu,*Penal General Law*, 2023, p.979) 3 hypotheses for the application of extended confiscation were highlighted: (i) for crimes committed and for assets acquired before April 22, 2012, this institution not applicable. (ii) for the acts committed and the assets acquired between April 22, 2012 and February 1, 2014, the extended confiscation

will be applied only if the maximum penalty limit would be over 5 years, according to the original form of the law (iii) for the acts committed and assets acquired after February 1, 2014, the matter of extended confiscation will apply only if the legal framework of the act will concern an act with a maximum limit of 4 years or more.

Thus, the last condition to be able to apply the sanction of extended confiscation is that the assets that are presumed to have been obtained following the commission of crimes are those obtained no more than 5 years before the date of the commission of the crime or even after the date of its commission. until the date of notification to the court.

II. EXTENDED CONFISCATION ORDERED ON THIRD PARTIES IN THE JURISDICTION OF THE EUROPEAN COURT OF HUMAN RIGHTS

Directive 2014/42/EU on the freezing and confiscation of instruments and proceeds of crimes committed in the European Union deals in particular with the issue of extended confiscation ordered against third parties.

In the regulation of special confiscation, this was possible in respect of cases where the goods either belonged to or were acquired by third parties, who either knew or could foresee the nature of their use. It is the case of the crime of concealment, regulated by art. 270 of the Criminal Code, which, however, does not provide, as in the case of corruption crimes, their special confiscation. Thus, we can consider that the special confiscation of said assets, in kind or equivalent, should necessarily be ordered by praetorian means.The issue of extended confiscation of third-party property, which we find in article 6, also addresses a right protected by art. 1 of Additional Protocol 1 of ConvEDO regarding the guarantee of the protection of property rights.

The ECtHR's jurisprudence in the matter gives a margin of appreciation in favor of the states, which can legislate in favor of the confiscation of some assets by the simple presumption that they would result from the commission of certain crimes (https://www.echr.coe.int/documents/d/echr/Guide_Art_1_Protocol_1_RONpoint334). However, a solution that the Court promotes in this regard, Gogitidze and others v. Georgia, is relevant, the court in The Hague reiterating in paragraph 105 the legitimate right of states to confiscate not only the assets acquired following the commission of the crime but also those transformed afterwards, with the purpose of rendering a membership of legality. Thus, the judges from Strasbourg reiterated the possibility of confiscating assets not only from the patrimony of the suspects in question but also from the patrimony of other persons without the need to use the criterion called bona fide (or good faith) in dispelling and masking their illicit role in the assets of those persons.

In fact, the ECtHR jurisprudence itself, otherwise quite permissive in my opinion, states that it is not necessary to have a criminal charge in order to prove

the illicit character of the origin of a person's assets. Thus, in several cases (Raimondo v. Italy; Riela and others v. Italy; Sun v. Russia or Air Canada v. the United Kingdom) the judges from Strasbourg kept its red line of presumption that in the absence of clear evidence from the plaintiffs, to prevail over the suspicions of the courts in relation to the manifestly disproportionate character of the acquisition of wealth, the states did not violate the provisions of the Convention, rejecting their requests.

The reasons that make us notice that all the courts that guarantee the respect of all fundamental human rights in Europe are quite permissive in this regard is the content of Article 6 paragraph 1 of the Directive which provides that "based on certain elements of fact and concrete circumstances, including of the fact that the transfer or acquisition took place free of charge or in exchange for an amount of money significantly lower than the market value of the goods" member states have the right to order the extended confiscation of the goods of a third person suspected of concealed or would have helped to lose the traces of the respective illegally acquired goods. Given the fact that the provisions of the Criminal Code do not impose a certain minimum standard of appreciation of the national judge, the question arises as to what would be the standard according to the Code of Criminal Procedure that would be effective in this case since we are talking about two different perspectives: the condition of the sufficiency of the evidence, promoted by ECtHR jurisprudence or the in dubio pro reo criterion towards which the union provisions provided in the doctrine would converge.

We consider that in this sense the rules provided by the directive should prevail, for several reasons: (i) on the one hand, the institution of extended confiscation is related to Directive 2014/42/EU, which represents the basis for its application in Romanian legislation; (ii) At the level tolerated by the ECHR, the state could have many more lost lawsuits, if there was a very loose margin of appreciation in the praetorian way, or in the situation where the judge would appreciate the standard imposed by the directive much more restrictively, automatically not there would be just as many complaints pending before the Court.

In the related cases C-845/19 and C-863/19, the Court of Justice of the European Union maintained the need to establish a strict criterion for assessing the proportionality of the intrusion of the extended confiscation matter in relation to possible third parties. The Court of Justice of the European Union recognizes (paragraph 33 of the mentioned decision) that by its essence, the directive represents an infringement on the fundamental rights and freedoms of the person, or such a sanction must be regarded with maximum speed and attention by the member states. In addition, it is necessary for the state to grant the right to an appeal to which the third party can appeal in the case of the disposition of this safety measure, as a concretization of the observance of the right to a fair trial and the right to an effective appeal. However, it is particularly important that the

jurisprudence of the Court of Justice of the European Union remains constant both in terms of the interests of the European Union, and especially of the fundamental rights of the citizens of the member states. (Ioana-Nely Militaru, 2022, p.195).

CONCLUSION

Safeguards are necessary sanctions in any rule of law. In the case of extended confiscation, the legislator, even if he was late in applying Directive 2014/42, judiciously transposed the provisions stipulated by the European normative act, not choosing to insert other provisions or amendments that could have changed the content and created new divergences in this matter.

It is essential for any state to find compensatory mechanisms to suppress and prevent criminal or illegal practices that violate the law, given that the need for high social capital and public trust in judicial institutions must remain as high as possible, in - a society in which criminal-economic groups find more and more methods of defrauding public interests. The ECtHR jurisprudence in this sense is very permissive, recognizing the fact that criminalizing and confiscating assets that are certain to come from criminal activities, does not represent a violation of the principles that defend fundamental human rights.

We consider that it would be appreciated at the level of the European Union, that all the directives and framework decisions implemented in the matter of extended confiscation be divided by a regulation that has similar content in all member states and that is not susceptible to interpretations, especially in the multitude of jurisprudence that comprised the Court of Justice of the European Union on this subject.

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