

# Extended Confiscation. Repression and Beyond

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## Abstract

*In this study I would like to address a legal instrument used in the fight against economic crime. The stake for committing economic offences is the financial gain. An efficient penal policy against economic crime must aim at tracing, seizing and confiscating property derived from criminal activities. At the European level there is a constant concern for the elaboration and functioning of an efficient instrument, able to ensure the suppression of illegal gain. Legally speaking, there are several possibilities to achieve that goal: civil, administrative or criminal proceedings. My approach centers upon the presentation of the manner in which confiscation does actually work in criminal matters in Romania.*

**Key-words:** *confiscation – proceeds of crime – economic crime – Romania.*

Most European states have provided in their national criminal law the possibility to confiscate property derived from criminal activities. Romanian criminal law is no exception to that initiative, therefore in our Penal Code we have article 112 that refers to what is called *special confiscation*. The notion of special confiscation refers to the confiscation of goods acquired as a result of committing offences and it must be distinguished from the notion of *general confiscation*, which implies the total or partial confiscation of a person's patrimony, settled in our former criminal law and expressly prohibited by the 1991 Constitution. Presently, our Constitution sets out article 44 par. 8 according to which a patrimony that has been legally acquired cannot be subject to confiscation<sup>1</sup>.

At the European level, it has been deemed necessary to develop a new concept, namely *extended confiscation*. This refers to the possibility of a court of law to rule on confiscation *beyond* the traditional limits of repression. The implementation of such a new concept represents, in my opinion, a dramatic change in the context of *repression*.

Thus, there was adopted the Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property<sup>2</sup>, according to which each Member State shall take the necessary measures to enable confiscation at least (art. 3.2):

(a) Where a national court based on specific facts is fully convinced that the property in question has been derived *from criminal activities* of the convicted person during a period prior to conviction for the offence referred to in a list (art. 3.1) which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,

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<sup>1</sup> F. Ciopec (2015). *Confiscarea extinsă: între de ce și cât de mult?* [Extended Confiscation: Between Why and How Much?] București: C.H. Beck, p. 88-93.

<sup>2</sup> Published in the Official Journal of the European Union no. L68/49 of 15.03.2005.

(b) Where a national court based on specific facts is fully convinced that the property in question has been derived *from similar criminal activities* of the convicted person during a period prior to conviction for the offence referred to in to in a list (art. 3.1) which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,

(c) Where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of that convicted person.

The Framework Decision was supposed to be transposed into national law until the 15<sup>th</sup> of March 2007 but Romania fulfilled this obligation only in 2012<sup>3</sup> by the amendment of the Penal Code and the insertion of art. 112<sup>1</sup> which reads:

(1) There shall also be subject to confiscation other goods than the ones mentioned in art. 112, in case the defendant is convicted for an offense indicated in the list, if the offence may bring the defendant a valuable consideration and if the penalty provided by the law is imprisonment of 4 years or more.

(2) Extended confiscation shall be ordered if the following conditions are met:

a) The value of the goods acquired by the convicted person, during a period of 5 years prior to conviction, and, if the case, following the criminal activities, until the issuance if the indictment, obviously exceeds the gain that the person made by lawful means.

b) The court is convinced that the goods in question are derived from criminal activities similar to those indicated in the list.

In what follows I would like to refer to the conditions under which extended confiscation can be applied:

#### **a) Commission of an offence**

According to the Framework Decision, 'confiscation' means a *penalty or measure*, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property. Consequently, confiscation has a dual nature, the States being free to provide in their national legislation either one or the other of the two variants. Romanian criminal law has chosen for the second variant, namely confiscation as a safety measure, ordered by court in case an act provided by criminal law has been committed. As concerns extended confiscation, a higher standard is necessary, i.e. the act committed must qualify as an offence. It is this way that the reference related to conviction from art. 112<sup>1</sup> must be interpreted, since conviction cannot be ordered in the absence of an offence.

#### **b) Existence of a state of danger**

As any safety measure, extended confiscation aims at preventing a state of danger that consists in the commission of new acts provided by criminal law. The reason of extended confiscation resides in making the gain derived from criminal activities unavailable for offenders. In this case the state of danger is more serious, due to the fact that financial gain is used both to finance future criminal activities and to ensure impunity for the offences already committed.

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<sup>3</sup> Act no. 63 of 17<sup>th</sup> April 2012, published in the Official Journal no. 258 of 19.04.2012.

### **c) Nature of the committed offence**

Unlike special confiscation, extended confiscation does not enjoy general applicability, being limited to the offences that meet the requirements provided by the law. Conviction for an offence which does not meet these requirements cannot entail extended confiscation. There are three legal requirements:

1. The offence must be enumerated in the list expressly set out in art. 112<sup>1</sup>. Most the offenses are economic by nature: money laundering, tax evasion, offences related to customs, illegal gambling, unfair competition, misappropriation of funds, offences against the patrimony, etc. Romanian law has extended the list of offences as compared to that settled by the Framework Decision which provides only for counterfeiting of currency, money laundering, trafficking in human beings, sexual exploitation, child pornography, drug trafficking and terrorism.

2. The penalty provided by the law should be imprisonment of 4 years or more.

3. The offence must be susceptible of bringing the offender some valuable consideration.

The logic of these requirements is debatable since I consider that it would have been more appropriate that the penalty limits refer to the sanction effectively applied by the court and not to the sanction provided by the law. Thus, extended confiscation could be avoided in case of convictions for offences which have been sanctioned with a minimal penalty by the courts, although the law provides higher limits of penalties.

### **d) Acquirement by the offender of goods whose value is obviously higher than the value of goods obtained by lawful means**

*Firstly*, it should be stated that the law refers both to movable and immovable assets obtained during the reference period, as well as to amounts of money. The law does not state if the services which the convicted person benefitted from are taken into account. My opinion is that they should be, since these services are of economic value (tourist services, beauty services, etc.), therefore can be assimilated to the notion of goods.

*Secondly*, when assessing the nature of the acquired goods, there shall not be taken into account the assets acquired by criminal activities, since they are subject to special confiscation.

*Thirdly*, there shall be taken into account the value of the goods transferred by the convicted person to a family member or to a legal entity controlled by the convicted person. The Romanian Penal Code, in article 177, defines the notion of family member as being: a) the ascendants and descendants, brothers and sisters, children of the former, as well as the persons, who, by adoption, have become such relatives; b) the spouse; c) the persons who have established relations similar to those between spouses or between parents and children, in case they live together. It is irrelevant if the transfer has been for free or in exchange of a valuable consideration. If it has operated for free, the court shall take into account the value of the goods in question, and not the price obtained for those goods, which can be much lower than their real value. In fact, a low price is precisely an expression of the intent to dissimulate the real value of goods. The goods shall be assessed by reference to the moment when they were acquired and not by reference to a later moment (i.e. that of conviction). The current value of a luxury car, bought five years ago, shall be much lower than its sale price. It is also debatable if there should be taken into account the goods transferred to a person that does not have family or other ties with the convicted person (i.e. a friend). In order to prove that the goods in

question belonged in fact to the convicted person and only fictitiously to the interposed person (friend), any evidence can be adduced.

*Fourthly*, in determining the disproportion between the lawful income and the value of goods acquired by the convicted person, the court shall also take into account the expenses made by the convicted person and his family members.

*In the fifth place*, the disproportion between the value of the goods acquired during the reference period of 5 years and the lawful income should be *an obvious one*. In the absence of a legal definition for “an obvious one”, incompatible with *lex certa*, we must conclude that it is a matter of the margin of appreciation of the judge. It is clear that a difference of USD 20.000 in the case of a person who has a lawful income at the level of the national minimum wage represents an obvious difference, while this difference is diluted in the case of a person who has a legal gain of USD 10.000. However, it is possible that goods may be traded at a value higher than their market value, precisely in order to hide a fictitious transaction. The question is if under these circumstances the court shall guide itself by the market value or by the transaction value, which is higher? My opinion is that the amount of money obtained as a result of the transaction must be confiscated, because otherwise the defendant would benefit from a profit derived from the transaction, which is prohibited by the law. The principle in this matter should be: “Follow the money!”<sup>4</sup> Thus, the legal text states that there shall be subject to confiscation the goods and amounts of money derived from the exploitation or use of the confiscated goods.

#### **e) Reference period of 5 years**

The law refers to a period which goes 5 years back in time and continues in the present up to the issuance of the indictment. This option is not the most fortunate one, since it actually includes the entire duration of pre-trial investigation, when it is very unlikely that the defendant obtain valuable consideration related to his criminal activities. Therefore, it would have been more appropriate if the present moment was represented by the start of criminal investigation or the initiation of public prosecution at the latest. The period of 5 years cannot be taken into account if extended confiscation was applied for an offence that was committed before the entry into force of the law (April 2012). This is due to the fact that the principle of non-retroactivity of the penal law would be thus violated, and the Romanian Constitution expressly prohibits it<sup>5</sup>.

The Romanian legislator has expressly established a 5-year period, in order to prevent its establishment by a judge, as opposed to the Framework Decision which refers to a period “deemed reasonable by the court in the circumstances of the particular case” (art. 3 par. 2 a). The period of five years is correlated with the statute of limitations in tax-related matters.

#### **f) The court's conviction that the goods are derived from criminal activities**

This condition is extremely important, since it cannot result exclusively from the commission of an offence or from the disproportion between the value of goods and the lawful income. It means that the court must identify additional clues, able to strengthen

<sup>4</sup> F. Ciopec (2015). *Follow-the-Money! Criminal Confiscation in Economic Crime*. Journal of Eastern European Criminal Law 2, pp. 175-181.

<sup>5</sup> The Romanian Constitutional Court, Decision no. 15 of January 11<sup>th</sup> 2015, published in the Official Journal no. 102 of 09.02.2015.

its persuasion, elements that must be stated within the legal reasoning of the judgment. These clues (also presumptions) must be strong enough to instill probability that the goods are derived from criminal activities. The law provides that these activities must be similar to the offences enumerated in the list, and not close to those offences that entailed the conviction. This situation could generate difficulties in interpretation, since, once the defendant was convicted for an offence, it is difficult to understand how a court could form an opinion that the goods are derived from criminal activities that have nothing in common with the acts that led to conviction. Therefore, it is possible that extended confiscation be applied to goods which the court believes to be derived from criminal activities, distinct from those which entailed conviction, and for which no conviction was ruled.

Is this situation compatible with the presumption of innocence? Effectively, although the court does not judge these other criminal activities, based on the evidence of the case, it forms an opinion in the sense that these activities did exist in reality, were committed by the offender and were able to bring him a valuable consideration. Such elements are sufficient in order to enable the court to rule on extended confiscation, without disregarding the presumption of innocence. However, it is clear that the standard of proof is lower in such an instance.

Article 3 of the Framework Decision 2005/212/JHA, the legal text which was the base of national provisions on extended confiscation, was replaced, in the European order, by the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014<sup>6</sup> on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. All Member States had the obligation for transposition of the Directive into national law within the term of 4 October 2015, amended lately to 4 October 2016<sup>7</sup>. Romania does not comply yet with the transposition obligation, though some steps have been done in this direction<sup>8</sup>.

Art. 5 of the new European Act provides that: "Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a *criminal offence* which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, *such as* that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct".

Transposing the Directive means that extended confiscation will operate on a larger scale, by waiving to the exhaustive list of offenses for which it may be applied. The enforcement of the new regulation on national level will allow confiscation of proceeds of economic crime excepted from this measure, such as: embezzlement (art. 295 of the Criminal Code), 12 offenses stipulated in art. 452 of Tax Code or offenses related to the manipulation of capital market (art. 279 of the Capital Market Act no. 297/2004).

As I stated above, in order to rule on extended confiscation, the court must be convinced that the assets are derived from criminal activities similar to those entailing the conviction. The court assessment is not *de lege lata* sufficient for extended

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<sup>6</sup> Published in the Official Journal of the European Union no. L127/39 of 29.04.2014.

<sup>7</sup> Corrigendum to Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014, published in the Official Journal of the European Union no. L138/114 of 13.05.2014.

<sup>8</sup> Draft Bill for Amending Criminal Code and Criminal Procedure Code of 12 August 2016, available at [http://www.just.ro/transparenta-decisionala/acte-normative/proiecte-in-dezbatere/?lcp\\_page0=3#lcp\\_instance\\_0](http://www.just.ro/transparenta-decisionala/acte-normative/proiecte-in-dezbatere/?lcp_page0=3#lcp_instance_0).

confiscation, since it must additionally be proved that there is a disproportionate difference between the wealth of the convicted person and his/her legal income. Calculating the difference is by far a delicate business. The new Directive no longer provides such a restriction; therefore, the court must be able to substantiate the conviction that the assets derived from criminal activity under any circumstances. The disproportionate difference mentioned above is only one of the circumstances, which could be considered by the judge.

Art. 4 of the Directive provides that: " 1. Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from *proceedings in absentia*. 2. Where confiscation on the basis of paragraph 1 is not possible, at least where such impossibility is the result of *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".

The situations envisaged by the Directive, which require Member States to regulate non-conviction based confiscation<sup>9</sup>, are only those where the conviction would not be possible *in absentia* proceedings, at least for cases where the defendant is unable to appear in court due to illness or when he evades trial. According to Romanian legislation, evading trial by the defendant legally served with summon does not prevent the ruling of a solution of conviction. In the same logic the termination, for any reason, of the criminal proceedings, does not preclude application of the security measure of confiscation.

The impossibility of the defendant to stand trial due to illness constitutes, according to the Romanian regulations, grounds for stay of criminal proceedings. In this matter, the draft bill proposes that judges take into consideration the possibility of continuing trial, by ordering the suspect or accused person to be heard at the place where he/she is located (hospital) or via video-link.

Finally, the Directive refers to the confiscation from a third party (art. 6): "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, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out *free of charge* or in exchange for an *amount significantly lower* than the market value"

While Member States respect the rights acquired on assets representing the proceeds of a crime by *bona fide* third parties, they foresee the application of the measure to *mala fide* third parties, i.e. the straw men to whom the defendant has formally transferred his/her criminal wealth in order to avoid confiscation while

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<sup>9</sup> J.P. Rui (2012). *Non-conviction based confiscation in the European Union* - an assessment of Art. 5 of the proposal for a directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union. ERA Forum 13, pp. 349-360.

continuing substantially to enjoy it. It is consequently now possible to confiscate assets owned by persons other than the defendant, and using dissimilar criteria (e.g. the property is a gift from the defendant; the third party knew of its criminal origin; the assets are under the defendant's effective control)<sup>10</sup>.

As a conclusion, we may state that the confiscation provided by article 112<sup>1</sup> of the Penal Code has an extended character from a triple perspective: that of the goods subject to confiscation (which can be other than those mentioned in article 112 of the Penal Code); that of the period taken into account by reference to the moment when the offence was committed, according to which there shall be examined the value of the goods acquired by the convicted person (5 years before the offence, and, if necessary, even after its commission, up to the issuance of the indictment); that of the persons by reference to whom there shall be analyzed the value of the acquired goods (the court shall also consider the value of the goods transferred by the convicted person or by a third party to a family member or to a legal entity controlled by the convicted person).

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<sup>10</sup> B. Vettori (2006). *Tough on Criminal Wealth. Exploring the Practice from Crime Confiscation in the EU*. Dordrecht: Springer, p. 8.