

**UNIVERSITY OF TIMISOARA
FACULTY OF LAW**

**UNIVERSITY OF PÉCS
FACULTY OF LAW**

**JOURNAL OF EASTERN-EUROPEAN CRIMINAL LAW
No. 1/2015**

**Edited biannually by courtesy of the Criminal Law
Departments within the Law Faculties of the West University
of Timisoara and the University of Pécs**



The Constitutionality of Safeguards on Extended Confiscation

Prof. dr. Tudorel TOADER*

Dean of the Faculty of Law

University „Al. I. Cuza” Iași,

Judge of the Constitutional Court of Romania

Dr. Marieta SAFTA**

Faculty of Law

University „Titu Maiorescu” Bucharest,

First Assistant Magistrate

Constitutional Court of Romania

Abstract

The extended confiscation has been recently enshrined in the Romanian criminal law. In the decisions delivered in this matter the Constitutional Court held that the norms of Criminal Code on extended confiscation are constitutional insofar they are not applied to acts committed and to assets acquired before the entry into force of Law no. 63/2012 amending and supplementing the Romanian Criminal Code and Law no. 286/2009 on the Criminal Code. This study offers an analysis from a constitutional point of view of safeguard on extended confiscation, especially from constitutional rules point of view which regulate the principle of non-retroactivity of the law, except for the criminal law or the more favourable non-criminal law, the right to property, respectively the presumption of lawful acquirement of property and the standard of proof required in order to reverse this legal presumption, analysis founded also on the case law in this matter.

Keywords: *extended confiscation, constitutional review, the principle of non-retroactivity of the law, except for the criminal law or the more favourable non-criminal law, the presumption of lawful acquirement of property, the right to property.*

1. Introduction

The extended confiscation has been recently enshrined in the Romanian criminal law¹.

The different opinion expressed both on the regulation² and the implementation aspects, the rules governing the extended confiscation have been several times referred

* E-mail: ttoader@uaic.ro.

** E-mail: marietasafta@yahoo.com.

¹ By Law no. 63/2012 amending and supplementing the Romanian Criminal Code and Law no. 286/2009 on Criminal Code, published in the Official Gazette of Romania, Part I, no. 258 of 19 April 2012.

² Some authors even claim the uselessness of the regulation (see M.A. Hotca – *Unconstitutionality and uselessness of provisions regulating on extended confiscation* – www.juridice.ro), while other authors claim its usefulness starting from the peculiarities of the scope, aimed by the Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and

to the Constitutional Court, determining an approach which emphasizes the evolving nature on the interpretation of the constitutional rules, as well as the delivery of certain interpretative decisions which have circumscribed the reference text within the limits of the Basic Law.

This study offers an analysis from a constitutional point of view of safeguard on extended confiscation, especially from constitutional rules point of view which regulate the right to property, as well as the principle of non-retroactivity of the law, except for the criminal law or the more favourable non-criminal law.

2. Regulation on the concept of extended confiscation

2.1. History

In an historic approach, we consider as particularly relevant on the regulation of the concept of extended confiscation in Romania, the Constitutional Court's Decision no. 799/2011 on the bill regarding the revision of the Constitution of Romania³, namely its reasons on the presumption of lawful acquirement of property, governed by Article 44(8) in the Constitution. This decision has continued and developed a constant case-law of the Constitutional Court, pronounced in the exercise of its power of review on the initiative to revise the Constitution [Article 146 a) the second sentence of the Basic Law], review of laws before promulgation [Article 146 a) the first sentence], as well as the settlement of exceptions of unconstitutionality of laws and ordinances [Article 146 d)] by which it has ruled that the presumption of lawful acquirement of property is one of constitutional guarantees of the right to property.

Referring in this context only to constitutional review of initiatives to revise the Constitution, emphasizing the consistency of the Constitutional Court in order to ensure this guarantee, we shall highlight three decisions delivered by the Court in this matter.

Thus, by Decision no. 85/1996⁴, the Court held that *"the presumption of lawful acquirement of property is one of constitutional guarantees of the right to property, in accordance with the provisions of Article 41 (1) of the Constitutions [currently Article 44 (1)], which states that the right to property shall be guaranteed. This presumption is also based on the general principle that any legal act or deed is lawful until proven otherwise, requiring, as concerns the wealth of a person, that unlawful acquirement be proven. [...]"* referring to the debates that accompanied the adoption of the 1991 Constitution theses, the Court also held that *"The legal certainty of the right to property on the assets that make up one's wealth is [...] inextricably linked to the presumption of lawful acquirement of property. Therefore removal of this presumption is tantamount to a suppression of a constitutional guarantee of the right to property."*

By Decision no. 148/2003⁵, adjudicating on the proposed text to be introduced in the Constitution, a text that established the cases of application of the presumption in question, stating that it does not apply in case of *"property obtained from criminal conduct"*, the Court held that this wording implies that it is meant to reverse the burden of proof on lawful acquirement, being provided the unlawfulness of wealth acquired

Property (see Fl. Streteanu, *Considerations on extended confiscation*, in *Studies of Criminal Law* no. 2/2012, page 11).

³ Published in the Official Gazette of Romania, Part I, no. 440 of 23 June 2011.

⁴ Official Gazette of Romania, Part I, no. 211 of 6 September 1996.

⁵ Official Gazette of Romania, Part I, no. 317 of 16 April 2003.

from criminal conduct. As in the other decision, the Court found unconstitutional the proposal for revision that was aimed, in essence, at the same objective, namely removal of the presumption of lawful acquirement of wealth, because it is tantamount to a suppression of a constitutional guarantee of the right to property.

Decision no. 799/2011 resumed the grounds set forth in the aforementioned decisions, also declaring that *"in the absence of such presumption, the owner of property would be subject to continuing uncertainty because, whenever someone would invoke the unlawful acquirement of the property, the burden of proof lays not with the one who makes the allegation, but with the owner of the property."* Likewise, the Court underlined those held in Decision no. 85/1996 abovementioned or in Decision no. 453/2008⁶, in the meaning that the regulation of this presumption does not prevent the investigation of unlawful acquirement of wealth, but in this case the burden of proof lies with the person making such allegation. Insofar the interested party proves that some assets, part of the wealth of the entire wealth of a person was acquired unlawfully, those unlawful assets or wealth can be confiscated subject to the law. However, in addition to those stated above, the Court held that *"the regulation of this presumption does not prevent the delegated or primary legislature to adopt, pursuant to Article 148 of the Constitution – Integration into the European Union, regulations to enable full compliance with EU legislation in the fight against crime. Moreover, this objective was also considered by the initiator of the proposed revision, especially with regard to Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, published in the Official Journal of the European Union no. L 68 of 15 March, which requires taking all measures necessary to comply with its provisions, particularly mitigating the reduction of the burden of proof regarding the source of goods held by a person convicted of a crime related to organized crime."*

Therefore, as a novelty among the initiative to revise the Constitution in 2003 and in 2011, it stands the adoption in the European Union of the Council Framework Decision 2005/212/JHA on confiscation of Crime-Related Proceeds, Instrumentalities and Property⁷. The adoption of this framework-decision was determined by the need for an instrument which, taking into account the best practices in Member States and with due regard to principles of law, would provide the possibility of introducing in criminal, civil or tax law, as the case may be, a reduction of the burden of proof regarding the source of goods held by a person convicted of a crime related to organized crime. The aim of the framework-decision is to ensure that all Member States have effective rules on confiscation of crime related proceeds, *inter alia*, in terms of burden of proof regarding the source of assets held by a person convicted of an offence relating organized crime; *"each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds."*⁸

⁶ Official Gazette of Romania, Part I, no. 374 of 16 May 2008.

⁷ Published in the Official Journal of the European Union L 68 of 15 March 2005, pages 49-51

⁸ According to Article 3 of the abovementioned act, denominated *Extended powers of confiscation*: *"(1) Each Member State shall as a minimum adopt the necessary measures to enable it, under the circumstances referred to in paragraph 2, to confiscate, either wholly or in part, property belonging to a person convicted of an offence:*

(a) committed within the framework of a criminal organisation, [...] provided that the offence according to the Framework Decisions referred to above,

Keeping the reasons which characterize the presumption provided for in Article 44(8) in the Constitution as a guarantee of the right to property, Decision no. 799/2011 of the Constitutional Court also offers an answer to the Romanian legislature's concern, determined by the adoption of the Framework Decision abovementioned and the obligations undertaken by Romania as Member State of the European Union. One year after the Constitutional Court delivered the decision mentioned above, a safety measure on extended confiscation was introduced into Romanian law by Law no. 63/2012 amending and supplementing the Criminal Code of Romania and by Law no. 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, no. 258 of 19 April 2012, being a law transposing the Council Framework Decision no. 2005/212/JHA of the European Union.

In terms of Article 118² of the 1969 Criminal Code, as amended, extended confiscation shall be ordered where the following conditions are cumulatively met: the offence shall be one of those referred to in Article 118 (1) of the 1969 Criminal Code; the penalty provided by law for the offence committed shall be a term of imprisonment of 5 years or more; the offence shall be likely to procure a material benefit for the defendant; the value of the property acquired by the sentenced person, during the 5 years before and, if necessary, after the time when the offence was committed, and until the date of issue of the document instituting the proceedings, clearly exceeds the income obtained lawfully by the respective person; the court is convinced that these goods result from perpetration of the same type of criminal offences as those provided for in Article 118² (1) of the 1969 Criminal Code, which means that lawfulness of goods has not been proved.

- regarding offences other than money laundering are punishable with criminal penalties of a maximum of at least between 5 and 10 years of imprisonment;

- regarding money laundering, are punishable with criminal penalties of a maximum of at least 4 years of imprisonment;

And the offence is of such nature that it can generate financial gain.

(2) Each Member State shall take the necessary measures to enable confiscation under this Article at least:

(a) where a national court based on specific fact 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 paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively;

(b) where a national court based on specific facts is fully convinced that the property in question has been derived from similar activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 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 the convicted person.

(3) Each Member State may also consider adopting the necessary measures to enable it to confiscate, in accordance with the conditions set out in paragraphs 1 and 2, either wholly or in part, property acquired by the closest relations of the person concerned and property transferred to a legal person in respect of which the person concerned – acting either alone or in conjunction with his closest relations – has a controlling influence. The same shall apply if the person concerned receives a significant part of the legal person's income.

(4) Member States may use procedures other than criminal procedures to deprive the perpetrator of the property in question."

Currently, the concept of extended confiscation is regulated by Article 112¹ of the Criminal Code⁹. The new regulation takes over most of the provisions of Article 118² of the 1969 Criminal Code Codul, with a distinction in terms of penalty provided by law for committed crimes. The new one is more restrictive – 4 years or more, compared to the old rule when it was for 5 years or more.

2.2. Legal nature

According to Article 108 of Criminal Code, extended confiscation is a safety measure, along with obligation to undergo medical treatment, admission into a medical

⁹ „**(1)** Assets other than those referred to in Article 112 [A/N which regulates the special confiscation], are also subject to confiscation in case a person is convicted of any of the following offences, if such offence is likely to procure a material benefit and the penalty provided by law is a term of imprisonment of 4 years or more:

- a)** offences on drug and precursor trafficking;
- b)** offences on trafficking in and exploitation of vulnerable people;
- c)** offences on the state border of Romania;
- d)** money laundering offences;
- e)** offences related to the laws preventing and fighting pornography;
- f)** offences related to the legislation to combat terrorism;
- g)** establishment of an organized crime group;
- h)** offences against property;
- i)** failure to observe the law on firearms, ammunition, nuclear materials and explosives;
- j)** counterfeiting of currency, stamps or other valuables;
- k)** disclosure of economic secrets, unfair competition, violation of the stipulations on import or export operations, embezzlement, violations of the laws on imports and exports, as well of the laws on importing and exporting waste and residues;
- l)** gambling offences;
- m)** corruption offences, offences assimilated thereto, as well as offences against the financial interests of the European Union;
- n)** tax evasion offences;
- o)** offences related to customs regulations;
- p)** fraud committed through computer systems and electronic payment means;
- q)** trafficking in human-origin organs, tissues or cells.

(2) Extended confiscation is ordered if the following conditions are cumulatively met:

a) the value of assets acquired by a sentenced person within a time period of five years before and, if necessary, after the time of perpetrating the offence, until the issuance of the indictment, clearly exceeds the revenues obtained lawfully by the sentenced person;

b) the court is convinced that the relevant assets originate from criminal activities such as those provided in par. (1).

(3) In enforcing the stipulations of par. (2), the value of the assets transferred by a convicted person or by one-third party to a family member or to a legal entity over which that convicted person has control shall also be considered.

(4) Sums of money may also constitute assets under this Article.”

(5) In determining the difference between the legitimate income and the value of the assets acquired, the value of the assets upon their acquisition and the expenses incurred by the convicted person and their family members shall be considered.

(6) If the assets to be seized are not to be found, money and other assets shall be confiscated instead, up to the value thereof.

(7) The assets and money obtained from exploiting the assets subject to confiscation as well as the assets produced by such shall be also confiscated.

(8) Confiscation shall not exceed the value of assets acquired during the period referred to in par. (2) that are above a convicted person's lawfully obtained income.”

facility, prohibition to hold a certain office or to exercise a certain profession and special confiscation.

As concerns the legal regime of safeguards, they are criminal offences, in the sphere of legal categories, in accordance with Article 2 of Criminal Code as they can be applied only to persons who have committed crimes, even if the perpetrator is not punished under Article 107 (2) and (3) of Criminal Code. In this regard, the Constitutional Court held that the scope of their application is not determined by the exposure to danger revealed by that crime¹⁰.

As it has been noted, in terms of the particularities of the analyzed measure¹¹, if for the other safety measures it is sufficient that the person has committed an offence under criminal law, for extended confiscation the person shall be convicted for the crime committed where the following conditions are cumulatively met: the offence shall be likely to procure a material benefit for the defendant, included in the limited enumeration provided for in Article 112¹ (a) and the law shall provide a term of imprisonment of 4 years or more for such crime. Likewise, extended confiscation is ordered if other two additional conditions are cumulatively met in relation to the sentenced person: the value of assets acquired during a certain period of time shall exceed a convicted person's lawfully obtained income, and the court shall be convinced that these assets result from perpetration of the same type of criminal offences as those provided by law.

2.3. Extended confiscation, substantiation and justification

In the decisions delivered in this matter¹², the Constitutional Court held, "the impugned provisions come to establish the measure of extended confiscation in the event of conviction for perpetration of offences which have a serious nature, posing a relevant social danger and which perpetration allows the accumulation of goods, the value of which manifestly exceeds the lawfully obtained income, and the judge is convinced that these goods result from perpetration of the same type of criminal offences."

The Court also referred to the Communication from the Commission to the European Parliament and the Council, COM (2008)766 final, holding the following: "in the Communication from the Commission to the European Parliament and the Council, COM (2008) 766 final, it stated that in order to fight against organized crime activities, offenders must be deprived of the proceeds of crime. Organised crime groups build international networks of high dimension and achieve substantial profits from various criminal activities. A very effective way to combat organized crime is confiscation and recovery of assets held by offenders, mainly oriented towards profit. Confiscation prevents the use of offenders' assets as a source of funding for other criminal activities, removes the danger to compromise confidence in the financial systems and to corrupt legitimate society. Confiscation has a deterrent nature as it reinforces the principle that

¹⁰ Decision no.78 of 11 February 2014, published in the Official Gazette of Romania, Part I, no. 273 of 14 April 2014.

¹¹ Sebastian Rădulețu, in T. Toader and others, *The New Criminal Code, Comments on Articles*, Hamangiu Publishing House, Bucharest, 2014, pages 212.

¹² Decision no. 356 of 25 June 2014, published in the Official Gazette of Romania, Part I, no. 691 of 22 September 2014; Decision no. 11 of 15 January 2015, published in the Official Gazette of Romania, Part I, no. 102 of 9 February 2015.

“crime does not pay”. This could help to eliminate negative patterns given by offenders to local communities. In some cases, confiscation measures for the proceeds of crime allow tracking the decision-makers within criminal organizations, which are rarely investigated and prosecuted. Thus, in the case of serious offences with high effects and consequences both nationally and transnationally, the Court notes the occurrence of a concept/principle according to which crimes should not result in profit/income – “Crimes does not pay”. Likewise, the doctrine held that the confiscation measure of property is nothing more than a criminal policy option and a means of repression and rehabilitation of those who commit such crimes. Such manifestation specific to organized crime should be included in this category. This confiscation falls into the category of *sceleris sceleris* and *productum fructum* and covers financial gains resulted from criminal activities.”

A similar reasoning of certain similar measures can also be found in the case-law of other constitutional courts. Thus, ruling on the provisions of the Criminal Procedure Code of the Republic of Moldova on extended confiscation, the Constitutional Court of Moldova has recently held that the recovery of assets held by offenders is an effective way of combating organized crime and prevents the use of offenders’ wealth as a source of funding for other criminal activities¹³. Similarly, the Constitutional Court of South Africa¹⁴ held that the main purpose of confiscation is not punishing the offender, but rather ensuring that offenders do not enjoy the fruits / benefits resulted from the committed crime¹⁵.

3. The safety measure of extended confiscation in compliance with the presumption of lawful acquirement of property, enshrined in Article 44 (8) of the Constitution

Having examined the provisions which introduced the safety measure of extended confiscation, in relation to Article 44 (8) the second sentence of the Constituion on the presumption of lawful acquirement of property, the Court has firstly examined the invoked constitutional principle, the presumption of lawful acquirement of property and the standard of proof required to reverse this presumption.

3.1. Presumption of lawful acquirement of property is not an absolute presumption

The Court's approach found in its recent case-law gives expression to an evolutionary interpretation of constitutional concepts and rules, being also in connection with

¹³ Referral no.60a of 03.12.2014 on the constitutionality review of the provisions of Articles III (3), (4), (12) and IV (1) and (2) of Law no. 326 of 23 December 2013 amending and supplementing certain laws, <http://www.constcourt.md/>.

¹⁴ In South Africa, there are three categories of assets which may be subject to confiscation under criminal cases: the one which represents the direct result of the criminal activity (e.g., stolen assets), the indirect benefits of the criminal activity (e.g., assets acquired with money obtained from drug trafficking), and assets of lawful acquirement which represent the value of direct or indirect benefits of a person convicted, resulted from any criminal activity which courts find related to the crime for which the person is convicted (assets presumed to have been unlawfully acquired) – Prevention of Organized Crime Act no. 121 of 1998, <http://www.acts.co.za/prevention-of-organised-crime-act-1998/>.

¹⁵ Case S v Shaic and Others, 2008, available at <http://www.saflii.org/za/cases/ZACC/2007/19.html>.

the current developments at the level of relevant international courts in the light of Article 20 of the Constitution.

The Court invoked the theory of "living law concept; *diritto vivente*", widely accepted and implemented both at the level of Constitutional Courts and of the European Court of Human Rights (for example: Judgment of 7 July 1989 delivered in the Case *Soering v. The United Kingdom* - "The Convention is a living instrument which must be interpreted in the light of present-day conditions"; Judgment of 29 April 2002 delivered in the Case *Pretty v. The United Kingdom* - "The Court must take a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection. ".)

Likewise, the Court invoked in its case-law, embodied by Decision no. 1533/2011¹⁶, that "the fundamental rights enshrined in the Constitution have not an abstract existence, but they are exercised in connection and conjunction with the other constitutional provisions. Such functional interdependence determines both the framework where these rights are exercised and their specific material content ". Thus, constitutional provisions must be interpreted and applied in accordance with the other constitutional provision so as to promote internal consistency and harmony between its various provisions. Likewise, the provisions of the Constitution must be systematically interpreted by taking into account their scope, without turning any of them into an absolute one, until the removal of others equally important.¹⁷

In doing so, the Court held that the determination of the content of the presumption of lawful acquirement of property must be achieved in the light of the criteria defined by the Court. In this regard, the Court distinguished in the Basic Law two categories of rights:

- absolute rights (e.g. the right to life and the right to physical and mental integrity), which cannot be restricted in any circumstances by State authorities;
- and relative rights whose exercise can be restricted under certain conditions.

As concerns the right to property, the Court held that, by definition, in terms of content and scope of attributes, such right is not unlimited, but it is configured by the provisions of law, which set limits to the its exercise and which constitute the result of the combination between holder's individual interest and the collective or general interests¹⁸. Equally, the presumption of lawful acquirement of property represents one of the constitutional guarantees of the right to property. This presumption is grounded also on the general principle according to which all legal acts or actions are lawful until the contrary is proven, requiring, as concerns the wealth of a person, that unlawful acquirement be proven¹⁹. Consequently, as the right to property is not an absolute right because it may take certain limitations, it cannot be claimed that a guarantee of such right may have an absolute nature. To claim the contrary leads to a situation where the primary right becomes absolute by applying the presumption, although it may be subject to certain limitations, under some circumstances.

¹⁶ Published in the Official Gazette of Romania, Part I, no. 905 of 20 December 2011.

¹⁷ See also Decision no. 586 of 20 December 2004, published in the Official Gazette of Romania, Part I, no. 155 of 22 February 2005.

¹⁸ Decision no. 492 of 21 November 2013, published in the Official Gazette of Romania, Part I, no. 54 of 22 January 2014.

¹⁹ Decision no. 453 of 16 April 2008, published in the Official Gazette of Romania, Part I, no. 374 of 16 May 2008.

Therefore, in the context of establishing that the presumption of lawful acquirement of property is not an absolute presumption, the relative nature of such presumption does not result in a reversal of the burden of proof and the principle of *actori incumbit probatio* remains fully applicable.

3.2. Standard of proof. The use of presumptions within confiscation proceedings

In relation to those held, the Constitutional Court further established the standard of proof required in order to reverse a legal relative presumption. Thus, the Court noted that, in terms of their proving power, legal presumptions may be relative (*iuris tantum*) and absolute (*iuris et de iure*). Relative presumptions do not establish absolute truths, removed from any possibility of discussion, correction or refutation, and, therefore, they can be combated by contrary proof. Through the non-admission of the possibility of their defeat, absolute presumptions create the image of absolute truths, immutable, acquired once and for all, and imposed on all by force of legislative utterances.

As for the extended confiscation, in order to establish the standard of proof, the Constitutional Court held that it shall not be assumed that the presumption of lawful acquirement of property can be reversed only by proof or by proving that the assets concerned results from the commission of offences. Should this be the approach, extended confiscation would be deprived of any reason to exist, because, if it is to prove each criminal act from which certain assets result, we will reach the author's conviction for these acts, and therefore the special confiscation of property thus obtained. Consequently, the measure of extended confiscation will be of no use. Therefore, a relative legal presumption may be reversed not only by proof, but also by simple presumptions.

Furthermore, the Court held that the use of presumption within confiscation proceedings is also recognized by the Strasbourg Court, but it must be accompanied by certain guarantees, which are intended to protect the rights of the defence. The European Court of Human Rights ruled that each legal system recognises the presumptions of fact or of law. As a matter of principle, the Convention clearly does not prohibit such presumption. However, the right of the applicants to respect for their property presupposes the existence of an effective judicial guarantee²⁰.

Thus, in the European case-law²¹, it emerges the need for the following guarantees:

- assessment must be made by a court within judicial proceedings which include public hearing;
- defendant should have access to the file / to communication in advance of the arguments of the prosecution body;
- the persons concerned must have the possibility to adduce evidence, to raise objections and to present the evidence they deemed necessary (whether documentary or oral evidence);
- presumptions on which prosecution body relies shall not be absolute, so that they can be reversed by the defendant.

²⁰ Decision of 5 July 2001, delivered in Case *Arcuri v. Italy*.

²¹ Judgment of 23 September 2008, delivered in Case *Grayson and Barnham v. The United Kingdom*, paragraph 45; Judgment of 5 July 2001, delivered in Case *Phillips v. The United Kingdom*, paragraphs 42 and 43; Decision of 5 July 2001, delivered in Case *Arcuri v. Italy*; Decision of 27 June 2002, delivered in Case *Butler v. The United Kingdom*.

The European Court ruled that the practical application of various national provisions allowing extended confiscation complies with the concept of fair trial, with the presumption of innocence, with the protection of property and includes confiscation within criminal penalties referred to in Article 7 of the Convention²².

Having examined the legal framework in the matter, the Court ascertained that that the provisions on extended confiscation, introduced into Romanian law by Law no. 63/2012, provide the guarantees deemed relevant in the case-law of the European Court. Thus, extended confiscation is ordered by a court on the basis of its own certainty that the property subject to confiscation originates from criminal activities, a certainty reached after undergoing public judicial proceedings in which the persons concerned have had access to the file and to the arguments of the prosecution body, as well as the opportunity to adduce evidence and to present the evidence they deemed necessary²³.

For the aforementioned reasons, the Court ascertained that the impugned legal provisions are in compliance with the provisions of Article 44 (8) of the Basic Law.

4. Regulation on extended confiscation interpreted in compliance with the constitutional provisions of Article 15(2), enshrining the principle of non-retroactivity of law

4.1. Only the norms of substantive (substantially) criminal law may be subject to constitutional regulation on the retroactivity of criminal or more favourable non-criminal law, and not at all those of procedural criminal law. Delimitation of substantive criminal law rules of those of procedural criminal law

To respond to the challenge according to which the provisions subject to constitutional review allow retroactive application of the measure of extended confiscation, in breach of Article 15 (2) of the Constitution, as long as it applies to assets acquired up to 5 years before the entry into force of Law no. 63 / 2012, the Court firstly indicated the scope of this constitutional text in criminal matters.

The Court recalled that by Decision no. 78/2014²⁴ it ruled that: „ only the norms of substantive criminal law may be subject to the constitutional regulation enshrined by Article 15(2) on the retroactivity of criminal law or more favourable contravention and not at all those of procedural criminal law which shall be immediately implemented. The set of legal norms covered by the criminal law establishes the acts which are considered offences, the sanction which is to be adapted (enforced) as for the committed offence, the conditions under which the persons who commit offences may be held criminally responsible by the State, as well as the conditions under which the sentences are to be carried out and the measures which may be taken in case of committing criminal acts.

²² Judgment of 23 September 2008, delivered in Case Grayson and Barnham v. The United Kingdom, paragraph 45; Judgment of 5 July 2001, delivered in Case Phillips v. The United Kingdom, paragraphs 42 and 43; Judgment of 1 March 2007, delivered in Case Geerings v. The Netherlands, paragraph 44, as well as Judgment of 10 May 2012, delivered in Case Sud Fondi - S.R.L. and others v. Italy, paragraph 52; for an extended comment see also M. Armaşu, *Extended confiscation. Comparative analysis between the current regulation and the amendments required by Directive 2014/42/UE, from the point of view of the European Convention for Human Rights*, in Forum of Judges (issue 2/2014).

²³ An analysis and similar conclusions can also be found in Decision no. 4 of 23 February 2011 delivered by the Constitutional Court of Albania– full version of the decision, in English, is available in CODICES database of the Venice Commission, <http://www.codices.coe.int> - ALB-2012-1-001.

²⁴ Published in the Official Gazette of Romania, Part I, no. 273 of 14 April 2014.

Criminal law means a substantially or substantive rule of law with a legal content itself, namely a rule which establishes conducts, acts, actions of the subjects in a legal relationship, while the expression on the procedural law represents the category of the legal norms which comprise procedures, methods or means by which the substantially rules of law are enforced.”

Referring to the delimitation criteria of the criminal law norms of those of criminal procedure, the Court found, for example by Decision no. 1.470/2011²⁵, that “including these norms in the Criminal Code or in the Criminal Procedure Code is not a criterion in order to distinguish them.” Consequently, what prevails in establishing this nature consists in the regulatory nature, in the aim and in the result to which the norm concerned leads.

Having taken into account the criterion of regulatory nature of the norm, the Court ascertained that Article 118² (2) a) of 1969 Criminal Code is a norm on special confiscation which could fall within norms of substantive law and not within those of criminal procedure, as Article 2 of 1969 Criminal Code indicates that criminal law also provides measures which may be taken if offences are committed. However, the safety measure of extended confiscation is one of them. Equally, regarding the removal of an unsafe situation and the prevention of committing the acts laid down in criminal law, not even the criterion of the result to which the norm leads can be removed. Consequently, the Court concluded that the safety measure of extended measure is a norm of substantive criminal law.

4.2. The provisions on extended confiscation cannot be retroactive in relation to confiscation of assets acquired before their entry into force, even if the crimes for which conviction is ordered were committed after that date

Once it was established the meaning abovementioned, the Court held that the principle of retroactivity of law finds its justification and aims to ensure stability and security of legal relationship. Therefore, only a foreseeable norm can clearly determine the conduct of the subjects of law, the recipients of the law. It is precisely for this reason that the doctrine held that a law, once adopted, takes and must take legal effects only for future. This for the simple reason that the law addresses to the subjects of law and the deviant attitudes shall be allowed or forbidden and, of course, sanctioned. It is absurd that a subject of law may be made responsible for behaviors and a conduct that he might have had before the entry into force of a law regulating such conduct. The subject of law could not foresee what the legislature would govern, and his behavior is normal and natural if conducted within the legal order in force.

Thus, the Court ascertained that the impugned legal norm cannot be retroactive in relation to confiscation of assets acquired before its entry into force, even if the crimes for which conviction is ordered were committed after that date. If extended confiscation applied to assets acquired before the entry into force of Law no.63/2012, the principle of non-retroactivity of law enshrined in Article 15 (2) of the Constitution would be violated.

In conclusion, the Court upheld the exception of unconstitutionality and ascertained that, “the provisions of Article 118² 2 (a) of the 1969 Criminal Code are constitutional insofar extended confiscation does not apply in relation to assets acquired before the entry into force of Law no. 63/2012 amending and supplementing the Romanian

²⁵ Published in the Official Gazette of Romania, Part I, no. 853 of 2 December 2011.

Criminal Code and Law no. 286/2009 on the Criminal Code”²⁶. Likewise, the Constitutional Court ascertained the constitutionality of the provisions of Article 112¹ 2) a) of the Criminal Code insofar extended confiscation does not apply in relation to assets acquired before the entry into force of Law no. 63/2012 amending and supplementing the Romanian Criminal Code and Law no. 286/2009 on the Criminal Code.²⁷

In order to deliver the latter solution, the Court held that “the provisions of Article 112¹ (2) a) of the Criminal Code contain a legal solution identical to that contained in Article 118² (2) a) of the 1969 Criminal Code, both texts being inserted into the legislation abovementioned by Law no.63/2012. Having taken into account that the object of this exception is identical to that of the exception of unconstitutionality of the provisions of Article 118² (2) a) of the 1969 Criminal Code, the norm on extended confiscation provided for in Article 112¹ (2) a) of the Criminal Code shall not exceed the time limit of the entry into force of Law no. 63/2012, as it shall not be ordered on the assets acquired by the sentenced person before the abovementioned date, being the main solution held in Decision no. 356 of 25 June 2014, analyzed above”. Therefore, the Court found that “the provisions of Article 112¹ (2) a) of the Criminal Code shall not exceed the time limit on the assets acquired before the entry into force of Law no. 63/2012, even if the offences for which the conviction is ordered were committed after that date; the contrary solution would violate the principle of non-retroactivity of law enshrined in Article 15 (2) of the Constitution”.

5. Conclusions

Having concluded on the analysed case-law, it should be noted the Constitutional Court’s option to deliver such interpretative decisions in this matter and in relation to the analysed criticisms aiming at not creating a void law which could have had damaging consequences. Thus, the impugned texts stay in the normative order and the unconstitutional interpretation in terms of Article 15(2) of the Constitution shall be removed. As a results, the norms of Criminal Code on extended confiscation are constitutional insofar they are not applied to acts committed and to assets acquired before the entry into force of Law no. 63/2012 amending and supplementing the Romanian Criminal Code and Law no. 286/2009 on the Criminal Code.

As for the particularly complex issues raised by the respect and guarantee of the right to property, taking into account the constitutional issues in relation to which the Constitutional Court has delivered decisions until now, with reference to extended confiscation, we consider it necessary to mention those identified by the Venice Commission final, in one of its opinions²⁸, by which it underlined the importance of a precise law in relation to evidence, which must be complied with by the authorities in order to carry out the confiscation of assets, in order to prevent that such confiscation constitutes an unjustified interference in the exercise of the right to property. This precision is a source of uniformity, ensures the legal certainty and foreseeability while

²⁶ Decision no.356 of 25 June 2014, published in the Official Gazette of Romania, Part I, no. 691 of 22 September 2014.

²⁷ Decision no.11 of 15 January 2015, published in the Official Gazette of Romania, Part I, no. 102 of 9 February 2015.

²⁸ Venice Commission – „*Avis interimare sur le projet de loi relative a la confiscation en faveur de l etat des biens acquis illegalement de la Bulgarie*” – adopted by the Commission in the 82nd plenary session, Venice, 12-13 March 2010; the report may be seen on the website www.venice.coe.int.

ensuring that provisions governing the confiscation proceedings starts from the legislature power and not from the judiciary one, being an indispensable aspect especially in countries affected by corruption.

We also consider the context and the commitment of Member States to implement the laws, regulations and administrative provisions necessary to comply until 4 October 2016²⁹ with Directive 2014/42 / EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and committed crimes in the European Union, and the legislative changes which are to be adopted in this regard in Romania.

²⁹ See Official Journal of the European Union L 127 of 29 April 2014.