THE APPLICATION OF THE SPECIALTY PRINCIPLE, CONCERNING THE SPECIAL SEIZURE IN ROMANIAN CRIMINAL LAW

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Abstract
This paper aims to be a comparative analysis of the special seizure as a safety measure, as it is regulated in Romanian special criminal legislation, and also a way to highlight certain discrepancies between the general and special criminal legislation. Special seizure, as a safety measure, may be disposed under Criminal Code regulations, as a general norm, but also under some stipulations included in special Criminal laws. Moreover, when there are such special stipulations, they have under the rules of specialty principle, priority in implementing to the general norm. In our opinion, in these cases, special seizure is also disposed under the Criminal Code provisions, as general norm, because the general terms nondescript by others field of incidence, are the ones who set by the Criminal law. In fact, in such cases, the special seizure is ordered under both Criminal provisions. In analysis of the paper, is made reference to the applicability of special seizure measure in matter of corruption offences, in customs, money laundering, illicit trafficking of drugs and fisheries and fish farming, and as a result of their presentation, we concluded that although is in question the specialty principle, mainly would find application the general norm in comparison with special norm. Moreover, corroborating the actually general norm with the provisions of the New Criminal Code, we believe the special seizure, should operate exclusively under the general law, or the provisions of the special norm, should be modified.

Keywords: *special seizure, corruption, drugs, fishing, money laundering*

Introduction

The Criminal reform of the Romanian judicial legislation and our country's accession to the European Union, are two reasons for a thorough reflection on the institutions of Criminal law and the role of the contemporary judicial system. One of these Criminal law settlement is ***special seizure.*** Initially, showed as a safety measure and traditional regulated by the Romanian criminal law, the special seizure increasingly raises several problems both in internal law and in international regulations.

After analysis of different countries legislation, emerges that special seizure is regulated differently, being considered both a safety measure, or a criminal sanction (punishment or complementary penalty). In some states, the special seizure has a mixed judicial nature, depending on the pursued purpose, being considered either as a safety measure or a punishment. These differences are important and interfere on the judicial status of these Criminal law settlements, having different consequences, and as appropriate, either a preventive character or repressive one, made by coercion. It should be noted from the outset, that in Romanian legislation, the true judicial nature of special seizure is a *criminal sanction,* not that a *sanction of Criminal law,* enrolling better in complimentary punishment category, than in category of safety measures.

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Usually, through the norms included in particular non-criminal laws, but that including penal provisions, has not been established a new category of goods liable for confiscation, other than those provided by article 118 of the Criminal Code, the provisions of these special laws are not only, just applications of the art. 118 of the Criminal Code in domain covered by special law.

These are *general provisions* on special seizure by equivalent, introduced at a time when this type of seizure was not provided in the general section of the Criminal Code, while being required by international judicial instruments, to which Romania is party. In case of incidence of special seizure, it will be applied under these provisions, and the provisions of art. 118 of the Criminal Code came to supplement them.

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It can be observed, that these provisions, innovative and derogatory to the general status of the special seizure since them introduction date, after changing the general status of special seizure by Law no.278/2006, has reached a coverage sphere more limited than the general provisions. Or, this was not the legislature's intention when introducing these provisions. Being particular offenses, that usually generate large profits for offenders, the legislature has intended to close any possibility that may remain with the proceeds of crime from their illegal activities. Or, actually, this purpose can be better achieved, based on the provisions *of the general part* of Criminal Code. However, there is the principle *specialibus generalia derogant,* which express the relationship between general and special law, in accordance with the special law derogates from the general one.

Also, some voids of law regulations, reflected in the inability to confiscation some certain assets, which served immediately after the committed offence, to ensure the offender escape or the retain of the obtained product, have resulted in legal practice, the controversial solutions, some of them, are unwarranted expansion of existing legislation and creating fictions to enable the confiscation of such goods, and others unable to confiscation. This controversy could be eliminated by regulating this assumption of special seizure stipulated in internal law.

Also, it should be noted the special seizure approach in Anglo-Saxon legislation. The traditional approach of serious offences means the offender capture, followed by the criminal trial intended to him, the conviction and reclusion. Recently, the offenders enriching, provide by of economic crimes or *drug trafficking,* has permitted to led to adding a new element, namely, the confiscation of crime products.

The special seizure in matters of corruption offences

In matters of corruption offences, it can be found special disposals as regards to the special seizure, as a safety measure, both included provisions in the Special Part of Criminal Code, and in special legislation. Para. 3 of art. 254 of the Criminal Code, provides that money, values or any other goods that have been the object of bribery, shall be confiscated, and if they could not be found, the convict is obliged to pay their equivalent in money.

By provisions of para. 4 by art. 255 of Criminal Code, the regulations previously indicated, relating to the confiscation is extended on bribery even if the offer was not followed by acceptance. In the situation of connection the bribery with special causes to remove the criminal nature of the crime, or unpunished, regulations provided by para. 2 and 3 by art. 255 of the Criminal Code, the money, values or other assets are returned to the person who gave them.

Also, in terms of receiving undue benefits, para. 2 of art. 256 of Criminal Code, provides that money, values or any other received assets shall be confiscated, and if they are not be found, the convict is obliged to pay their equivalent in money.

The special law with incidence on preventing and combating the corruption offences, namely, the Law no. 78/2000, are found explicit references on special seizure. Thus, in case of buying influence offence (regulated by Art. 6^1 of Law) it provides that money, values or other assets that have been object of crime, shall be confiscated, and if they are not found, the convicted must pay their equivalent in money (Pocora 2010). The money, values or any other assets are returned to the person who gave them in case of the perpetrator is not punished for the reason that he denounce the offense to the authority before the criminal authorities has been took notice for that offense. As a general provision, Art. 19 of Law no. 78/2000 provides that in case of committed offences against the European Communities' financial interests, the money, values or any other assets which were gave to determine offense committing (if they are not returned to the injured party and they could not served to them damages), should be confiscated. In case of unfounded assets, the convicted is obliged to pay their equivalent in money.

In case of corruption offences, the special seizure will be applicable under provisions of Special law, but also with observing the general regulations under Art. 118 of Criminal Code.

The Special seizure in matters of custom house

The settlement framework on custom house is provided by the Romanian Customs Code, Law no. 86/2006. To these, is added a reference to the special seizure by equivalent made through the art. 277 of Custom Code: when goods or other assets which made the object of the offense were not found, the offender is required to pay their equivalent in money. This regulation must be interpreted by reference to the art. 118 of Criminal Code, since Law no. 86/2006 has adopted. This is because is necessary to avoid controversy appeared at the time of confiscation by equivalent, and was preferred to refer explicitly to this in the special law (Boroi, Al., Voicu, C. 2007).

As regards the way how it make the reference to the regulations in matters of special seizure, we believe that when the measure is taken by nature, must be based on art. 118 of Criminal Code, but, if the seizure is made by equivalent, it must be reported to the provisions of art. 277 of Law no. 86/2006, because has a special norm character in relation to the provisions of the Criminal Code.

Referring to the special seizure as a method of fighting customs debt can create confusion about the judicial nature of this measure has. We believe that the nature is in this case, one which lies on the administrative law domain, and not the Criminal law. This is because the purpose for which the special seizure is took differently from that provided by the measure described above.

The Special seizure in matters of money laundering

Actually, In Romania, the money laundering domain is governed by Law no. 656/2002 on preventing and sanctioning money laundering and instituting some measures to prevent and combat terrorism acts. Reflecting to the exigencies manifested on special seizure through the international judicial instruments in this matter, art. 25 of the internal law, refers to the provisions of art. 118 of Criminal Code, on confiscation: "in case of money laundering offences and financing the terrorist acts, are applicable the provisions of art. 118 of the Criminal Code on special seizure".

Furthermore, as regards the provisions of art. 25, para. (2)-(6) of Law no. 656/2002 are specified as follows:

- Para. (2) - if the assets that are subject on special seizure are not found, shall be confiscated their equivalent in money or other assets acquired in lieu thereof;
- Para. (3) – the incomes or other financial benefits derived from goods referred by para. 2 shall be confiscated;
- Para. (4) –if the assets that are subject on special seizure could not be individualized to the assets acquired legally, shall be confiscated other assets ratable to the value of assets - subject to special seizure;

- Para. (5) - the provisions of Para (4) shall apply in accordance of other financial benefits and others incomes derived from assets - subject to special seizure, which could not be individualized to the assets acquired legally;

- Para. (6) – to ensure the enforcement of special seizure assets, is mandatory to take precautionary measures provided by the Criminal Procedure Code".

In case of committed crime by the legal entity, art. 23, para. 4 of Law no. 656/2002 it provides that in addition to the fine penalty shall apply, as appropriate, one or more of the complimentary penalties provided for in art. 53^1 let. 3 of the Criminal Code. Also, art. 22 para. $3^1$of Law no. 656/2002, it provides that that in case of a legal entity commits any kind of offense defined in the same law, in addition to the main penalty the legal entity may be subject to the complimentary sanction of assets confiscation, fated, used or produced by the offense. It is likely the legal provisions, about a sanction with different legal nature and base. If in case of special seizure we are dealing with a criminal penalty, in case of this sanction we are in a liability contravention field which is based on committing an antisocial fact less serious (Lascu 2005).

As can be observed, the special law with incidence to prevent and combat money laundering and financing the terrorism acts, is regulated in close terms to those of art. 118 of Criminal Code on matters of special seizure.

Moreover, the special seizure on money laundering is also regulated by international legal instruments, such as ***The Framework – Decision of Council, no. 2001/500/JAI,*** whose main objective was to ensure harmonization of laws as regard to incrimination money laundering and assets confiscation regulations, stating that coverage sphere of subject - offenses should be sufficiently broad in all Member States. Analyzing the provisions of this Framework - Decision, we can state that the EU does not act on different levels on general standards terms of cooperation established by legal instruments which emanating from other legal authorities. Rather, the assessed standards are considered as a benefit already won, and the role of the Decision being to advance on the line of cooperation especially in the field of interest.

Thus, the stated purpose of the Framework - Decision it seems to ensure that all Member States have effective rules on confiscation of crime related assets, among others, as regarding the obligation of proof on the source of assets held by a convicted person for a crime related to organized crime. It is interesting that, to indicate the aimed offenses, is not using their name, but the technique to indicate the Community legal instrument relating them.

The Special seizure for illicit drug trafficking

The regulation in this matter is ensured by the Law no. 143/2000, to combat illegal drug trafficking and consumption.

Under provisions of art. 18 of Law no. 143/2000, the restrained drugs as regards the confiscation are destroyed, the counter-keeping is mandatory. However, there are, exempted from destruction: a) employable medication, which were sent to pharmacies or hospitals, after prior approval of the Directorate of the Ministry of Health Pharmaceutical b) employable plants and substances in pharmaceutical industry or other industry, relating to their nature, which were submitted to a public or private economic agent, authorized to use or export them, c) some appropriate amounts that will be preserved for teaching and research institutions or who have received by institutions with dogs and other animals to detect drugs, for training and maintenance practice, in according with legal provisions (Nistoreanu 2008).

In the same matter, G.O no. 121/2006 on the legal status of drugs precursors, defines in art. 22 and 23 some crimes on this regime. In art. 24 of G.O no.121/2006, it provides that in case of defined offenses, it can be order the confiscation of substances classified under the law. When substances have been classified offenses are not found, the offender is liable to pay their equivalent in money. As regards drugs, art. 26 of G.O no. 121/2006, it provides destruction of confiscated classified substances or handed in custody after the activity cessation and which could not be turn account.

The Special seizure in matters of fishing and fish farming

The legal act which provides the special rules in fishing and fish farming is G.O no. 23/2008.

In connection with these facts, art. 66, para. 1 of G.O no. 23/2008 it stipulates that "are able to confiscation the fishing tackle and fishing boats, animals, vehicles, firearms and any other goods that have been used to commit crimes". In the same article, but in different paragraph were included the provisions on confiscation as a criminal law sanction, but also as a contravention: "the assets derived of committed crimes and contraventions, consisting of fish, spawn, other living being and aquatic products will be confiscated" . In this situation, depending on the specific type of behavior which is specifically identified in the case, the applicable rules will be those in the Criminal law or Administrative law.

It is very interesting the technique used by the legislature, especially for poaching fish that can be both an offence, but also contravention. In cases of assets confiscation, under this legal act, it can be seems that the authorities have power of capitalization under the law, their money equivalent completing the state budget. In this way, even in matters of special seizure, it appears that we could not talking about the recovery assets, even in case if they are seized from a person who has acquired through illegal acts – for example, the authorized fishing tools are stolen, that are owned by a legitimate administrator of a fishing fund and are used for illegal fishing. We consider, however, that such a solution is not correct in terms of fulfilling the purpose of safety measures. This is because the danger that has to be combat is only by considering a person who committed a certain type of behavior. In a situation even more clearly, a person can steal a fishing boat owned by the fishing fund manager and using it to commit an unauthorized fishing. Under the special provisions contained in G.O no. 23/2008, this boat must be seized, valuable and the equivalent must be recovered for the state budget, this is clearly an unjust solution. For this reason, we consider is very important that the special rules that we are talking about it has to be in accordance with the framework rule of the Criminal Code.

Conclusions

This paper is not aimed to present all the rules which are contained in special legislation, and having regard measures of special seizure as a safety measure, but only to illustrate some of the ways in which they were shown and to highlight some non concordances that exist between the general and specific rules, relevant for this investigation.

In special legislation there are numerous references to the safety measure of special seizure. *For example,* as is easy to understand, such provisions are contained in legal acts which guarantee the legal regimes regulating as regards the possession and using of dangerous substances. Specifically, art. 19 para. 2 of Law no. 111/1996 on the safety, regulation, licensing and controlling nuclear activities: "the nuclear fuel illegally held will be seized, will become a public property of the state and will be handed to a custodian, specially named for that purpose". Seizure itself is done accordance with the provisions of art. 118 Criminal Code. All this, because as following disposals of special legal act: „the nuclear and radioactive equipments, them components, the nuclear fuel, radioactive products, including radioactive waste, the nuclear explosive devices or their components, which were subject of special seizure by a court order, in accordance with art. 118 of Criminal Code, provided by the guilty party, must be retained with the former owner expenses, in a safety place, under the seal of public authorities, in compliance with nuclear safety requirements, so as be safety for population life or health and for environment or property until the courts order regarding to them.

In our point of view, is necessary that all these have to be expressly repealed, because as we highlight during our analysis, some of them are just warnings on the general legal text of art. 118 of Criminal Code. In previously example, the special seizure has binding performed under art. 118 para. 1 lit. 1 let. f of Criminal Code, even if special legislation has not contained any reference to this text.

According to the specialty principle, corresponding to which the special rule have priority in relation to the general rule, we propose that the special legislation have to contain some rules with considering the measures of special seizure of assets, **to indicate more clearly which is the judicial nature of this confiscation.** Otherwise, there are very high risk of confusion between the special seizure as a Criminal law sanction and special seizure as a contravention sanction.

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