EXTENDED CONFISCATION IN THE NEW CRIMINAL CODE

MIHAI ADRIAN HOTCA*

Abstract
Through Law no. 63/ 2012 for the change and completion of the Criminal code of Romania and of Law no. 286/2009 regarding the Criminal code, in the Romanian criminal law, it has been introduced a new safety measure, that is the ***extended confiscation.***
Within the current article, we will analyze the conditions regarding the enforcement of this safety measure.
We will also examine if the juridical norms that regulate the extended confiscation, as well as their concordance with the fundamental law – the Constitution.

Key-words: *extended confiscation, unconstitutionality, safety measures, criminal law penalty, Criminal code.*

Introduction

In the final part of Law no. 63/2012, it is specified that this „*transposes in the national legislation art. 3 of Council Framework Decision 2005/212/JHA of February 24th, 2005 on confiscation of crime-related proceeds, instrumentalities and property, published in the Official Journal of the European Union series L no. 68 of March 15th, 2005*".

In art. 2 of Framework Decision 2005/212/JHA, it is stipulated „(*1) Each member state takes 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.*

(2) In relation to tax offences, Member States may use procedures other than criminal procedures to deprive the perpetrator of the proceeds of the offence".

According to art. 3 paragraph (1) of Framework Decision 2005/212/JHA, each member state takes at least the necessary measures that would enable it, on the stipulated conditions, to confiscate, either wholly or in part, the property held by a convicted person for an offence of those mentioned within the current article.

According to art. 3 paragraph (2) of Framework Decision 2005/212/JHA, each member state takes the necessary measures to enable it to confiscate at least:

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 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 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;

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.

According to art. 3 paragraph (3) of Framework Decision 2005/212/JHA, Each Member State may also consider adopting the necessary measures to enable it to confiscate, 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

* Professor, PhD, "Nicolae Titulescu" University of Bucharest (mihaihotca@gmail.com).

a controlling influence. The same shall apply if the person concerned receives a significant part of the legal person's income.

In the recitals that accompanied the draft of Law no. 63/2012, it is shown that, although at present Romania benefits from a coherent and comprehensive legislative framework developed in accordance with the international standards in the field of crime- related proceeds, this framework has certain gaps reported to the European requirements in the field.

To be precise, at the level of the internal legislation, the above- mentioned Framework Decision is not totally transposed, as the transposition of art. 3 of the community act on the extended confiscation is missing from the national legislation. The measure of the extended confiscation has to be at least one of the three variants stipulated within article 3 paragraph (2) letters (a), (b) and (c) respectively. In all the cases, this allows the confiscation of the crime-related property that does not have a direct connection to the offence for which the person is convicted, more precisely, the direct connection between the offence that leads to the conviction and the property that is confiscated is not proved. It is a principle of the extended confiscation of the property of the convicted person. Letter (a) aims at that property if this derives from criminal activities during a period prior to conviction, while letter (b) aims at the property that derives from "similar" activities. With regard to letter (c), this aims at the disproportion between the value of the property and the level of the lawful income of the convicted person.

Further, it is pointed out that, on condition that the extended confiscation operates exclusively on criminal procedures, it aims at a list of particularly serious offences and it is applied exclusively to an already convicted person – the introduction of the extended confiscation is not incompatible with the presumption of the illicit character of the property in art. 44 item 8 of the Constitution of Romania, republished. This presumption is a relative one so that it will be turned around, depending on the case, by the administration of the evidences that create the belief of the court that the property held by the convicted person is obtained by committing offences.

In this context, the conditions stipulated within the draft and that have to be previously proved are enough to turn around the presumption without still infringing the mentioned constitutional principle.

The prosecutor would be then obliged to prove just the fact that a certain person, in a period of time, was involved in committing certain offences, such as, organized crime offences. For this reason, the judge can presume that the obtained property is the result of crime- related activities committed by the convicted person during a period prior to the conviction that is considered reasonable by the court. On this hypothesis, the task of the evidence regarding the illicit character of the obtained property would come to the convicted person. If the judge reaches the conclusion that the value of the held property is disproportionate to the lawful income of the convicted person, he can order their confiscation from the convicted person.

Further, it is specified that, in order to support those argued within the recitals, it can be invoked also the findings of the Constitutional Court that in Decision no. 799 of June 17th, 2011, made when delivering on the unconstitutionality of eliminating the presumption of the illicit acquirement of the property, pointed out also that the regulation of this presumption did not prevent the primary or delegated law giver to adopt in applying the provisions of art. 148 of the Constitution – Integration in the European Union regulations that should enable the full observing of the legislation of the Union in the field of the combat against crime.

In the end of the recitals, it is pointed out that the suggested normative deed pursues the transposition of art. 3 of Council Framework Decision 2005/212/JHA of February 24th, 2005 on confiscation **of crime-related proceeds, instrumentalities and property by observing at the same time the constitutional principles on the property right.**

The Constitutional Court delivered also on some attempts to review the same constitutional text.

Thus, through Decision no. 85/1996[1], the Court delivered on an attempt to review the Constitution through which it was suggested the replacement of the text that regulated this presumption with another one with the following content: "The property the licit acquirement of which cannot be proved is confiscated ". On this occasion, the Court retained that the presumption of the illicit acquisition of the property is one of the constitutional guarantees of the property right in concordance with the provisions of paragraph (1) of art. 41 of the Constitution [current art. 44 paragraph (1)], according to which the property right is guaranteed. This presumption is based also on the general principle according to which any juridical act or deed is licit until proved the contrary, ordering, with regard to the property of a person, that its illicit acquisition should be proved. Retaining that through the review suggestion it is pursued the turning around of the task of the evidence regarding the licit character of the property, in the sense that the property of a person is presumed to be illicitly obtained up to the contrary evidence made by its owner, as well as the fact that the juridical security of the property right on the assets that make the property of a person is indissolubly connected to the presumption of the illicit acquisition of the property and the removal of this presumption has the significance of the suppression of a constitutional guarantee of the property right, the Court found the unconstitutionality of this suggestion.

Also through Decision no. 148/2003[2], the Constitutional Court delivered the verdict on the constitutionality of the legislative suggestion of modifying the same text, change that has in view the circumstance of the presumption of illicit acquisition of the property. The suggested text established that the presumption did not apply "to the property obtained as a result of the capitalization of the offence- related revenues ".

Through Decision no. 799/2011, the Constitutional Court stated "*that it delivered the verdict also on some attempts of reviewing the same constitutional text, attempts that aimed basically the same finality: the removal of the presumption of illicit character of the property acquisition from the Constitution*"[3].

Then, regarding the issue in question, the Constitutional Court stated: "*Applying the provisions of art. 152 paragraph (2) of the Constitution, according to which no review can be done if it has as a result the suppression of the fundamental rights of the citizens or of their guarantees,* ***the Court finds that the removal of the second thesis of art. 44 paragraph (8) from the Constitution, according to which "The licit character of the acquisition is presumed" is unconstitutional, because it has as effect the suppression of a guarantee of the property right, thus infringing the limits of the review stipulated by art. 152 paragraph (2) of the Constitution*** (s.n.).

The court underlines within this context the ones retained in its jurisprudence, for instance through Decision no. 85 of September 3rd, 1996, mentioned, or through Decision no. 453 of April 16th, 2008, published in the Official Gazette of Romania, Part I, no. 374 of May 16th, 2008, in the sense that ***the regulation of this presumption does not prevent the examination of the illicit character of the property acquisition, the task of the evidence coming to the one that invokes this character. As long as the interested part proves the illicit acquisition of some assets, of a part or of***

[1] Published in the Official Gazette of Romania, Part I, no. 211 on September 6th, 1996.

[2] Published in the Official Gazette of Romania, Part I, no. 317 on May 13th, 2003.

[3] It regards Decision no. 86/1996 and Decision no. 148/2003. Therefore, for instance, through Decision no. 148/2003, the constitutional says that „this way of drawing up is criticizable and can lead to conclusions pointing out that from the way of drawing up paragraph (7^1) suggested to be inserted, it results that it is pursued the turning around of the purpose of the evidence regarding the licit character of the property, stipulating the illicit character of the property obtained through the capitalization of the revenues resulted from offence. Therefore, referring also to its Decision no. 85/1996, the Court has established that also in this case it has been aimed the suppression of a constitutional guarantee of the property right, which is against the provisions of art. 148 paragraph (2) of the Constitution [current art. 152 paragraph (2)]. On the same occasion, referring to the way of drawing up the examination norm, the Court has noted that, if the text has pursued to allow the confiscation of the licitly obtained wealth, but that was built on an amount of money coming from offences, its drawing up was incorrect ".

the whole property of a person, on those illegally obtained assets or property it can be ordered the confiscation within the law" (s.n.).

Analyzing the considerations of the Constitutional Court, we notice that this rightfully considers the presumption regarding the licit character of the property acquisition of a person as essential (fundamental).

1.What is the nature of the extended confiscation?

Out of the content of the juridical norms stipulated within Law no. 63/2012, it can be established the **juridical nature of the extended confiscation**[4]**.** More precisely, this characterization of the extended confiscation results from the provisions of art. III and IV of Law no. 63/2012.

Thus, according to art. III of the same law: "*Whenever through special laws, Criminal code or Criminal procedure code, it is made reference to art. 118 of the Criminal code, the reference will be considered to be made to art. 118 and 118*^{2} *and whenever through special laws, Criminal code or Criminal procedure code, it is made reference to confiscation as a safety measure, he reference will be considered to be made to the extended confiscation*"[5].

The introduction of the extended confiscation in the safety measure category is necessary, we say, even in the absence of some legal provisions such as those quoted above, because the juridical norms that regulate it were introduced in Title VI of the Criminal code, called the "Safety measures".

A first consequence of this characteristic of the extended confiscation is the incidence in the completion of the special provisions, general provisions on the safety measures. Only in case there are derogatory provisions, these will be applied.

On the other hand, this juridical character of the extended confiscation makes the analyzed safety measure to be considered as **criminal law penalty**, juridical category to which belong the penalties and the educative measures, besides the safety measures.

Conditions on which the extended confiscation can be ordered

1.1. Condition presentation

Analyzing the provisions of art. 118^2 of the Criminal code and those of art. 111 of the Criminal code, we consider that the analyzed safety measure can be ordered only if the following conditions are met cumulatively:

- capacity of offender of the doer;
- conviction of the offender;
- conviction for having committed one of the limitative offences stipulated by art. 118^2 of the Criminal code;
- value of the property obtained by the convicted person 5 years prior and, if the case, after the committing of the offence, up to the issuing of the document instituting the proceedings, obviously exceeds the revenues licit obtained by this one;
- conviction of the court that the property subject to the extended confiscation comes from offences of the nature of those for which the offender is convicted;

[4] For the analysis of the provisions regarding the extended confiscation introduced in the Romanian legislation through Law no. 63/2012, see also: *M. Gorunescu, C. Toader*, Confiscarea extinsă – din contencios constituțional în contencios administrativ şi fiscal spre contencios penal, in Law no. 9/2012; *F. Streteanu*, Considerații privind confiscarea extinsă, in Criminal law notebooks no. 2/2012, page 11.

[5] According to art. IV in Law no. 63/2012: „Whenever through special laws, Criminal code and Criminal procedure code, it is made reference to art. 112 of Law no. 286/ 2009 regarding the Criminal code, the reference is made to art. 112 and 112[1] and whenever through special laws, Criminal code and Criminal procedure code, it is made reference to confiscation as a safety measure, the reference is considered as made also to the extended confiscation".

- by ordering the safety measure to remove a danger and to prevent the committing of new deeds stipulated by the criminal law.

From of the content of the provisions of art. 118^2 and that of art. 111 of the Criminal code, it results the **personality principle of the safety measure of the extended confiscation**, which means that the penalty cannot be given to persons that have committed only simple illicit deeds that are not stipulated by the criminal law. Moreover, through derogation from the general rule existing in the field of the safety measures according to which these can be given also to persons that commit the deeds stipulated by the criminal law (no matter if they are or not offences), with regard to the extended confiscation, in order not to able to be ordered, the deed has to be an offence and it should be delivered the conviction of the person to whom the measure is ordered.

Also, the measure of the extended confiscation cannot be ordered to other persons, that have not committed offences, than the convicted person irrespective of the relationship between these persons and the persona of the offender, because the criminal law penalties are applied only to the persons that have disregarded the criminal norms of incrimination and are carried out also by these.

Besides the juridical considerations, the personality principle of the criminal law penalties is very important for any law system, because it is unnatural and non- educative that a criminal law penalty could be ordered to persons that have not had an involvement in committing an offence.

1.2. Condition analysis of the extended confiscation

2.2.1. Capacity of offender of the doer

The condition for taking the measure of the extended confiscation is that the deed committed by the person in question should be an offence, requirement that presumes the capacity of **offender of the person** in connection to whom it is to be taken. This condition results from the provisions of art. 118^2 paragraph (1) of the Criminal code according to which other property than the one mentioned by art. 118 of the Criminal code is also subject to confiscation if the person is convicted for having committed one of the offences listed within this paragraph.

The requirement that the deed should be an offence will not be considered as met unless one of the causes that cancel the criminal character of the deed is incident. In such a case, the taking of the measure of the extended confiscation is excluded *de plano*.

Considering the above mentioned, the general provisions on the safety measures stipulated by art. 111 paragraph (2) of the Criminal code – *according to which the safety measures are taken considering the persons that have committed deeds stipulated by the criminal law* – are not to be applied with regard to the extended confiscation.

The general rule stipulated by art. 111 paragraph (2) of the Criminal code is not incident in the case of the extended confiscation, because art. 118^2 paragraph (1) of the Criminal code derogates from the general rules applicable to the safety measures.

It results from here that, as long as the deed is not an offence, it cannot be ordered the extended confiscation. For instance, the extended confiscation cannot be taken in the case of an irresponsible person (according to art. 48 of the Criminal code), that has committed a deed of those mentioned within art. 118^2 paragraph (1) of the Criminal code

2.2.2. Conviction of the offender

Another condition to be able to order the measure of the extended confiscation is that the offender should be convicted. According to art. 118^2 paragraph (1) of the Criminal code, other property than the one mentioned in art. 118 is also subject to confiscation, if the person in question is **„convicted".**

Considering the derogatory character of the provisions stipulated by art. 118^2 of the Criminal code, the provisions of art. 111 paragraph (3) of the Criminal code, according to which: „The *safety*

measures cannot be taken if the doer is not punished (...)", will not be applied with regard to the measure of the extended confiscation, because the deed is not enough to be an offence, but it has to be met also the requirement that the person having committed the offence – offender – should be convicted.

Indeed, not in all the case in which a deed is an offence, the person having committed it is convicted. Among the situations that prevent the delivery of a conviction to the person having committed an offence, there are also the causes that remove the criminal responsibility. For instance, the prescription of the criminal responsibility.

According to art. 345 paragraph (2) of the Criminal procedure code, the conviction is delivered if the court finds that the deed exists, is an offence and has been committed by the defendant. Considering the provisions of art. 345 paragraph (3) of the Criminal procedure code, we will say that the situations in which the conviction of a person is delivered imply both the meeting of the conditions stipulated by art. 345 paragraph (2) of the Criminal procedure code, as well as the inexistence of the cases stipulated by art. 10 of the Criminal procedure code (situations in which the discharge or the termination of the criminal trial are delivered).

According to art. 345 paragraph (3) of the Criminal procedure code, the discharge or the termination of the criminal trial are delivered according to art. 11 pct. 2 of the Criminal procedure code

And, according to the provisions of art. 11 pct. 2 of the Criminal procedure code, during the trial, the court delivers:

a) the discharge in the case stipulated by art. 10 lit. a)-e);

b) termination of the criminal trial in the case stipulated by art. 10 lit. f)-j).

The court orders the discharge when [art. 10 paragraph (1) of the Criminal procedure code]:

a) the deed does not exist;

b) the deed is not stipulated by the criminal law;

b^1) the deed does not have the degree of social danger of an offence;

c) the deed has not been committed by the accused or defendant;

d) the deed is missing one of the constitutive elements of the offence;

e) there is one of the causes that cancels the criminal character of the deed;

The court orders the termination of the criminal trial when [art. 10 paragraph (2) of the Criminal procedure code]:

f) the previous complaint of the injured person, the authorization and the documents instituting the proceedings or other condition stipulated by the law necessary for setting into motion the criminal action are missing;

g) the amnesty, prescription or death of the doer or, depending on the case, the erasure of the legal person when it has the capacity of doer have occurred;

h) the previous complaint has been withdrawn or the parties have reconciled or have concluded a mediation agreement according to the law, in the case of the offences for which the withdrawal of the complaint or reconciliation of the criminal responsibility;

i) it has been ordered the replacement of the criminal responsibility;

i^1) there is a clause of non- penalty stipulated by the law;

j) there is force of res judicata. The prevention causes effects even if the definitively trialed deed was given a different legal framework.

When noticing the applicable legal provisions, we conclude saying that the court can not order the conviction of a person that has committed an offence, in the case when one of the causes that cancels the criminal responsibility is incident or in the other situations regulated by art. 10 lit. f)-j) of the Criminal procedure code, for instance, if the force of res judicata is incident.

2.2.3. Conviction for having committed one of the limitative offences stipulated by art. 118[2] of the Criminal code

Art. 118[2] paragraph (1) of the Criminal code stipulates that other property than the one mentioned by art. 118 is also subject to confiscation, in case the person is **convicted for having committed one of the following offences**, if the deed is susceptible to give him a material gain and the penalty stipulated by the law is 5- year imprisonment or higher:

a) pandering;

b) offences regarding the traffic of drugs and precursors;

c) offences regarding the trafficking in human beings;

d) offences at the state borders of Romania;

e) offence of money laundering;

f) offences in the legislation regarding the prevention and combat against pornography;

g) offences in the legislation regarding the prevention and combat against terrorism;

h) association to commit offences;

i) offence of initiating and setting up an organized crime group or of adhesion or support under any form of such a group;

j) offences against the patrimony;

k) offences regarding the infringement of the regime of weapons and ammunition, nuclear materials or of other radioactive and explosive materials;

l) counterfeiting of currency and other securities;

m) revealing of an economic secret, disloyal competition, infringement of the provisions regarding the import or export operations, embezzlement, infringement of the provisions regarding the waste and residue import;

n) offences regarding the gambling organizing and exploitation;

o) trafficking of migrants;

p) offences of corruption, offences assimilated to the offences of corruption, offences related to the offences of corruption, offences against the financial interests of the European Union;

q) offences of tax evasion;

r) offences regarding the customs regime;

s) offence of bankruptcy or fraudulent insolvency;

ş) offences committed through information systems and electronic means;

t) trafficking of human organs, tissues or cells.

If a person is convicted for having committed an offence that cannot be framed with the provisions of art. 118[2] of the Criminal code, the extended confiscation cannot be ordered. It has also to be met the requirement according which the deed *in concreto* (the one that has drawn the conviction) and not *in abstracto*, is susceptible to give the convicted person a **material gain**[6] and the **penalty stipulated by the law is 5- year imprisonment or higher.** For instance, in the case of the offence stipulated by art. 4 paragraph (1) of Law no. 143/2000, it cannot be ordered the measure of the extended confiscation, because the penalty stipulated by the law is imprisonment from 6 months to 2 years or fine.

2.2.4. Value of the property obtained by the convicted person 5 years prior and, if the case, after the committing of the offence, up to the issuing of the document instituting the proceedings, obviously exceeds the revenues licit obtained by this one

According to art. 118[2] paragraph (2) lit. a) of the Criminal code, the extended confiscation is ordered if the value of the property obtained by the convicted person 5 years prior and, if the case,

[6]See also *F. Streteanu*, quoted work, page 24.

after the committing of the offence, up to the issuing of the document instituting the proceedings, obviously exceeds the revenues licit obtained by this one.

In art. 118^2 of the Criminal code, there are more *specifications*, as follows:

- for the application of the provisions of paragraph (2), it is considered also the value of the property transferred by the convicted person or a third party to a member of the family, to the persons with whom the convicted person has established relationships similar to those between spouses or between parents and children, in case these live together with the convicted person, to the legal persons over which the convicted person holds control [art. 118^2 paragraph (3) of the Criminal code];
- through property it is understood also the amounts of money [art. 118^2 paragraph (4) of the Criminal code];
- when establishing the difference between the licit revenues and the value of the obtained property, it will be considered the value of the property when obtaining it and the expenses made by the convicted person and the persons stipulated by paragraph (3) [art. 118^2 paragraph (5) of the Criminal code];
- if there is property subject to confiscation, in its place it is confiscated money and property up to their value [art. 118^2 paragraph (6) of the Criminal code];
- it is also confiscated property and money obtained from the exploitation or use of the property subject to confiscation [art. 118^2 paragraph (7) of the Criminal code];
- the confiscation can not exceed the value of the property obtained within the period stipulated by paragraph (2) that exceeds the level of the licit revenues of the convicted person [art. 118^2 paragraph (8) of the Criminal code].

Regarding the sphere of the property considered by the provisions of art. 118^2 paragraph (2) lit. a) of the Criminal code, in doctrine, it was judiciously shown that the property obtained or produced by having committed offences for which it was ordered the special confiscation or the restitution in favor of the civil party can not belong to the sphere of property that is to be subject to the measure of the extended confiscation and in the case of the property transfer by or to the persons listed by the legal test, the value that is to be considered is the one at the moment of its obtaining because the property of the convicted person is reported to be taken into consideration also that date[7].

In doctrine, it is discussed whether the property fictively transferred by the convicted person can be considered when ordering the measure of the extended confiscation. For instance, when a friend of the convicted person acquires a property on his name but with money received from the convicted. The found solution is that, if it reaches to a conviction for money laundering, that property is the object of the special confiscation and contrariwise, that property will be assessed as property obtained by the defendant[8].

2.2.5. Conviction of the court that the property subject to the extended confiscation comes from offences of the nature of those for which the offender is convicted

According to art. 118^2 paragraph (2) lit. b) of the Criminal code, the extended confiscation is ordered if the court is convinced that that property comes from crime- related activities as those stipulated by paragraph (1). It is the conviction of the court that the property subject to the extended confiscation comes from having committed an offence that is necessarily among those for which the defendant is convicted.

According to art. 3 paragraph (3) of Framework Decision 2005/212/JHA, the national court has to be „***fully convinced**, based on some specific deeds, **that that property is the result of some similar crime- related activities of the convicted person***".

[7] Idem, page 24 and 25.
[8] See also *F. Streteanu*, quoted work, page 25.

By comparing the two provisions, we find that the intern legislation talks about the *„conviction of the court",* while in the Framework Decision it is used the syntagm *„fully convinced"*. On these conditions, there is the inevitable question: Is there any content difference between the two provisions?

Our „conviction", „based on arguments", is that between the two analyzed provisions there are content differences considering that the opinion of the court can be made in two ways: based on evidences or on something else. Indeed, we consider that, in fact, art. 3 paragraph (3) of Framework Decision 2005/212/JHA establishes that **„the court has to be convinced"** and the intern regulation stipulates that the court **„has the conviction"**.

Also, although it might be said that the expression *„fully convinced"* has a redundant or superfluous meaning, from the juridical point of view, it means that at the file of the process there are (it has to be) evidences *„above any doubt"* that that property is the result of some similar crime-related activities of the convicted person. Art. 3 paragraph (3) of Framework Decision 2005/212/JHA states, in fact, that the court has to be „convinced" based on some administrated evidences that should create the certainty regarding the origin of the crime- related property.

Considering the above, we think that the legal provisions that set the analyzed condition are qualitatively inferior to those within art. 3 paragraph (3) of Framework Decision 2005/212/JHA.

2.2.6. By ordering the safety measure to remove a danger and to prevent the committing of new deeds stipulated by the criminal law

This condition results from the provisions of art. 111 paragraph (1) of the Criminal code, according to which the safety measures have as purpose the removal of a danger and the prevention of committing deeds stipulated by the criminal law.

Although this condition is not stipulated within Law no. 63/2012, regarding the nature of the extended confiscation, we consider that the requirement stipulated by art. 111 paragraph (1) of the Criminal code is applicable also with regard to this measure. If it were derogation from the incidence of the condition set by art. 111 paragraph (1) of the Criminal code or if we concluded that this condition was not applied, it would mean that the measure of the extended confiscation does not have the nature of a safety measure.

Through its nature, any safety measure is taken **for the purpose of removing a danger and for preventing the committing of some deeds stipulated by the criminal law**. If it does not have this purpose, it means that the penalty that we analyze cannot be considered a **safety measure.**

The preventive purpose is that of a safety measure, which means that if, when giving a penalty, it is disregarded the **necessity of removing an effective state of danger**, this should be considered **penalty,** but not a safety measure.

3.Conclusions

When applying the lawfulness principle of the criminal law penalties expressed in the adage *nulla sanctio sine lege praevia,* we consider that the safety measure of the extended confiscation can be applied only with regard to the offences committed after the coming into force of Law no. 63/2012[9].

Analyzing the provisions of art. 118^2 of the Criminal code from the point of view of their constitutional provisions, we find that they contravene some norms of the fundamental law.

[9] For details regarding the applying in time of the provisions regarding the criminal law penalties, see also *F. Streteanu*, Tratat de drept penal. Partea generală, vol. I, C.H. Beck Publishing House, Bucharest, 2008, page 251 and the following one. Regarding the applying in time of the provisions regarding the special confiscation, see also *D. Nițu*, Modificările aduse în materia confiscării de prevederile Legii nr. 278/ 2006, in Criminal law notebooks no. 3/2006, page 66.

First, we consider that the constitutional and conventional provisions (stipulated in the European Convention on Human Rights) regarding the right to a fair trial as a result of the lack of clarity and predictability of the norms that regulate the extended confiscation are infringed[10].

Among the unclear provisions, there are[11]:

- the expression „*obviously exceeds the revenues licit obtained by this one*" that is found within art. 118^2 paragraph (2) lit. a) of the Criminal code. The norm is unpredictable when applied because there is very large dose of arbitrage regarding the significance of the syntagm **„obviously exceeds"**[12] and the sense of the syntagm **„revenues licit obtained"**[13];

- the expression „*the court has the conviction that that property comes from crime- related activities*" at is found within art. 118^2 paragraph (2) lit. b) of the Criminal code. This is unpredictable when applied because it is not clear on what basis the court builds its **„conviction"** that the property comes from **„crime- related activities"**, if it considered also the „*value of the property transferred by the convicted person or a third party to a member of the family, to the persons with whom the convicted person has established relationships similar to those between spouses or between parents and children, in case these live together with the convicted person, to the legal persons over which the convicted person holds control*".

Second, the provisions of art. 118^2 paragraph (2) lit. b) of the Criminal code infringe the provisions of art. 124 of the Constitution, according to which:

„(1) Justice is made in the name of the law.

(2) Justice is unique, impartial and equal for all.

(3) Judges are independent and submit themselves only to the law".

We consider that the provision that regulates the condition that the court should have the „*conviction that that property comes from crime- related activities similar to those stipulated by paragraph (1)*" is unconstitutional because the judge should submit themselves **„only to the law".**

Besides, through Decision no. 171/2001, the Constitutional Court found the unconstitutionality of some similar provisions within art. 63 paragraph (2) of the Criminal procedure code in its forma previous to the modification through Law no. 281/2003, considering that the judges should submit themselves *„only to the law"* and not to *„their own conviction"*[14].

---

[10] In its jurisprudence, CEDO pointed out that the law had to meet certain qualitative conditions among which it was also the predictability (Order of November 22nd, 1995, delivered in the case of *S.W. vs. Great Britain* or Order of November 15th, 1996, delivered in the case of *Cantoni vs. France*). In this sense, the Court remarked that it could not be considered as „law" only a norm stated with enough precision in order to allow the citizen to control its behavior. Appealing, if needed, also to expert advice on the matter, it must be able to foresee in a reasonable degree to the circumstances of the case the consequences which could result from a particular action (Order of January 25th, 2007 in the case of *Sissanis vs. Romania*). Or, the law provisions that form the object of the current exception of unconstitutionality do not meet these exigencies. Thus, it is to be noticed that this right is a complex one that has more components and in which it is included *lato sensu* also the right to an efficient defense. (...) The judge himself is in trouble, being in the situation of opting between more possible variants in the absence of a clear representation of the applicable sanctioning regime (Decision of the Constitutional Court no. 573/2011, published in the Official Gazette no. 363 of May 25th, 2011).

[11] For the opinion that the provisions regarding the extended confiscation are constitutional, see also *F. Streteanu*, quoted work, page 15 and the following one.

[12] The word *obvious* can be understood in different ways and the applying modality becomes even more uncertain if it is considered also the provisions of art. 118^2 of the Criminal code, paragraph (8), according to which: „*The confiscation can not exceed the value of the assets obtained during the period stipulated by paragraph. (2) that exceed the level of the revenues of the convicted person*".

[13] It is not clear what the evidence means through which it is set the licit character of the revenues are.

[14] Through Decision no. 171/2001, the Constitutional Court found that: „in the Constituent Assembly, during the debates on the articles of the draft of the Constitution and Report of the Drawing up commission (published in the Official Gazette of Romania, Part II, no. 35 of November 13th, 1991 and no. 36 of November 14th, 1991 respectively), it was discussed the amendment suggestion regarding the completion of the final thesis of paragraph (2) of art. 123 of the Constitution with syntagm «[...] and their own conviction». After debates, the Constituent Assembly rejected with

At the time of declaring the unconstitutionality, the text declared unconstitutional had the following content: „*The assessment of each evidence is made by the criminal pursuit body according to* ***its conviction*** (s.n.)*, made after having examined all the administrated evidences and guiding itself by its conscience*"[15].

We ask ourselves how and on what basis the court can build the conviction that that property comes from crime- related activities. In the legal provisions it is not mentioned regarding how one should establish the „ illicit character" of the propertied submitted to the extended confiscation. According to art. 44 paragraph (9) of the Constitution: „*The property designed for, used and resulted from offences or contraventions can be confiscated only according to the law*".

Regarding the extended confiscation, the law has in view **the property „resulted from offences".** This results from the content of the provisions of art. 118^2 paragraph (2) lit. b) of the Criminal code, according to which: „*the court has the conviction that that property* ***comes from crime- related activities*** *similar to those stipulated by paragraph (1)*".

The expression *„property that comes from crime- related activities"* is equivalent to the syntagm *„property resulted from offences".* There is still no reasonable answer to the question: How does the court establish that certain property comes from the committing of offences like those listed within art. 118^2 paragraph (1), without being informed about such an item? Besides the formal aspect – the existence or inexistence of a document instituting the proceedings –the substantial nature aspect, the content of the rules of evidence based on which it is established that the property comes from crime- related activities and the effects of such an establishing respectively, is more important. If in a trial it is found that certain property has a crime- related origin, this means that the convicted person to whom it is to be ordered the extended confiscation, has committed one or more offences of those listed within art. 118^2 paragraph (1) of the Criminal code. In other words, although the court has been instituted with the trial of some **„crime- related activities"**, this can find that the convicted person has committed such activities and order the confiscation of the property that comes from these.

The effects of an order through which it would be found that a convicted person has committed also other offences than the ones for which he has been sued are inadmissible in a lawful state because it is possible that other courts that would be instituted with the trail of the deeds from which comes the property that makes the object of the extended confiscation should not have a different opinion that that of the court that has ordered the extended confiscation. It will be raised the issue of the „authority" of an order through which it is found the committing of an „criminal- related activity" in the further cases the object of which is the proceedings of this „criminal- related activity".

Another important issue is that of *establishing a correlation between the provisions on the extended confiscation and those that regulate the special confiscation*. This correlation has to be underlined because it is necessary to demarcate the application field of the two penalties. From the reading of the juridical norms that establish the content of these safety measures results an unacceptable conclusion. Basically, all the hypotheses in which the measure of the extended confiscation could be applied are framed within the provisions of art. 118 of the Criminal code that regulates the special confiscation, which means that the provisions regarding the extended confiscation are useless because they have a redundant character.

---

majority of votes this amendment expressing in this way the will that the judges should be submitted only to «the law» and not to «their own conviction»".

[15] Regarding the provision that we consider as being unconstitutional, Prof. F. Streteanu points out that „the above- mentioned decision (Decision of the Constitutional Court no. 171/2001 – *n.n.*) has a whole different significance than it is tried to be attributed to it. We believe that the idea that was intended to be underlined by our constitutional administrative court is the one according to which the conviction of the judge should be the result of evaluating the administrated evidences and not a criterion in their evaluation".

To demonstrate, *we will place in the mirror the conditions of the two safety measures*:

- in order to be able to order the measure of the extended confiscation, it is necessary the condition that the deed should be an offence (quality of offender of the doer). In the case of the special confiscation, it is enough the condition of having committed a deed stipulated by the criminal law, which means that there is a species- gender type correlation;

- the conviction of the offender is a condition for the incidence of the extended confiscation, while in the case of the special confiscation this condition is missing; the measure could be ordered even in some of the cases where the deed is not actually an offence. In the case of these conditions there is also the same correlation (species- gender);

- the conviction for having committed one of the offences listed by art. 118^2 paragraph (1) of the Criminal code is a requirement for the extended confiscation, which makes this measure have a more limitary incidence sphere than the measure of the special confiscation that can be taken irrespective of the nature of the deed stipulated by the criminal law;

- the condition regarding the fact that the value of the property obtained by the convicted person 5 years prior and, if the case, after the committing of the offence, up to the issuing of the document instituting the proceedings, obviously exceeds the revenues licit obtained by this one, basically limits in time the application of the extended confiscation measure. For instance, it is possible that a person should have obtained the property that comes from the committing of offences more than 5 years prior to the committing of the offence for which he is convicted. In such a case, it cannot be applied the provisions regarding the extended confiscation, but, if the conditions stipulated by art. 118 of the Criminal code are met, the measure of the special confiscation can be ordered. It is noticed that, if there had not been the provisions regarding the extended confiscation, in all the case in which a convicted person would have obtained property from a criminal- related activity, this would have been to be confiscated irrespective of the period when it was obtained;

- the condition regarding the conviction of the court that the property subject to the extended confiscation comes from offences of the nature of those for which the offender is convicted [stipulated by art. 118^2 paragraph (1)], has to be considered as applicable *a fortiori* also in the case of the special confiscations, as long as it does not contravene the constitutional provisions;

- finally, in the case of both the safety measures – the special confiscation and the extended confiscation – by taking them, it has to be removed a danger state and to be prevented the committing of new deeds stipulated by the criminal law.

As a conclusion, from the above it results that the measure of the extended confiscation has as object only the **„property that comes from the committing of certain offences"**, while the measure of the special confiscation has as object the **„property designed for, used and resulted from offences"** (or from simple deeds stipulated by the criminal law – according to the drawing up of art. 118 of the Criminal code).

If this is the case, that is, if the law pursues to submit to the extended confiscation exclusively the property that comes (results) from the committing of offences, it means that the entire regulation regarding this penalty within Law no. 63/2012, is useless because there is no incidence hypothesis of this that could not be placed within the provisions of art. 118 of the Criminal code.

Considering the above, we think that the regulation regarding the extended confiscation is not only unconstitutional, but also useless because all the hypotheses in the application sphere are placed within the provisions of art. 118 of the Criminal code.

On the other hand, the provisions analyzed within this article can produce an effect contrary to the expected one because, regarding the offences listed within art. 118^2 of the Criminal code, through the passing of these provisions, the lawgiver did nothing but to limit the application of the confiscation measure regarding the property resulted from the committing of some offences (those that come from the offences stipulated by art. 118^2 of the Criminal code). Because of this, because through its regulation, it is limited the possibility of confiscating the property that results from the

committing of some deeds stipulated by the criminal law, the denomination of the extended confiscation measure is inappropriate[16].

No doubt that the provisions of Framework Decision 2005/212/JHA, according to which, in order to efficiently prevent and combat the cross- border organized crime, the efforts of the competent bodies have to concentrate on the tracing, freezing, seizing and confiscation of the proceeds related to the offence, transpose the principle that the „**crime brings** (it does not have to bring) **no gains"**[17].

As for us, we consider that the „place" of the regulation regarding the extended confiscation should not be that designed for the safety measures, but that for the penalties. Our support is based on certain provisions within the Constitution, in the Criminal code and in Framework Decision 2005/212/JHA.

According to art. 44 paragraph (9) of the Constitution: „*The property designed for, used and resulted from offences or contraventions can be confiscated only within the law*". From these provisions, it results as clear as possible that, irrespective if it is special or extended, the measure of the confiscation can be taken only if the property in question is „designed for, used and resulted from offences or contraventions".

Therefore, any „extension" of the measure to other property of a convicted person infringes the constitutional provisions. Or, the property „*designed for, used and resulted from offences*"[18] enters the category of those listed within art. 118 of the Criminal code and the property „*designed for, used and resulted from contraventions*" can be the object of confiscation – complementary contravention penalty[19].

Compared to the content of art. 44 paragraph (9) of the Constitution, it can be said that certain provisions of art. 118 of the Criminal code are contrary to the Constitution. We have mainly in view, but not only, all the provisions that enable the confiscation of a property related to simple „deeds" or „ deeds stipulated by the criminal law". For instance, art. 118 paragraph (1) lit. a) that stipulates that the „*property obtained by having committed a* ***deed stipulated by the criminal law***" is subject to confiscation. Known that not all the deeds stipulated by the criminal law are offences, it means that the property obtained through deeds stipulated by the criminal law that does not achieve the content of an offence cannot be confiscated. For instance, the committing of a deed stipulated by the criminal law by a minor that has no discernment.

In our opinion, besides the provisions that enable the confiscation from simple doers, the provisions of art. 118 paragraph (1) lit. c) second thesis, according to which: „*When* ***the property belongs to other person,*** *the confiscation is ordered if the causing, modification or adaptation was made by the owner or by the offender with the knowledge of the owner*" are also „suspect" of unconstitutionality.

Considering the above relevant realities, especially the provisions of the fundamental law, we consider that, *de lege lata*, the regulation „of the extended confiscation" as a safety measure is an „ impossible mission".

On the other hand, if through „extended confiscation" we understand a safety measure, consisting in the transfer into the state property of a property resulted from the committing of offences, we can say that Framework Decision 2005/212/JHA was „transposed" into our Criminal

---

[16] Based on the content of the regulation, the corresponding name could be „limited confiscation".

[17] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0766.

[18] Of course, with regard to the extended confiscation, the law has in view only the assets „resulted from offences thing results from the content of the provisions of art. 118^1 paragraph (2) lit. b) of the Criminal code, according to which: „the court has the conviction that that property comes from crime- related activities similar to those stipulated within paragraph (1)".

[19] According to art. 5 paragraph (2) lit. a), one of the complementary contravention penalties is the „*confiscation of the property designed for, used and resulted from offences*". We notice that the formulation of the text is similar to that in the Constitution.

code a long time ago, since, in the hypotheses considered by art. 118 of the Criminal code, it is contained all the cases aimed by the provisions of this framework decision.

For instance, we render below the definitions given by art. 1 of Framework Decision 2005/212/JHA to some notions. Art. 1 of this document stipulates that, in the sense of the current framework decision:

- „proceed" means any economic advantage *from criminal offences*. This advantage can consist of any form of property;

- „property" includes *property of any description*, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property;

- „ instrumentalities" means any property used or intended to be used, in any manner, wholly or in part, *to commit a criminal offence or criminal offences*;

- „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.

The confiscation – safety measure – existing in our criminal law, remains in question the regulation of the confiscation „as penalty".

Therefore, if the lawgiver wishes to enlarge the spectrum of the criminal penalties in the case of the offences from the committing of which the convicted persons pursue to obtain or even obtain certain property, the current regulation has to be reconsidered.

Agreeing with the idea that the persons that commit offences from which they obtain patrimonial advantages should support also certain pecuniary penalties, *we consider that the solution is the one stipulated by the new Criminal code*.

We consider the provisions of art. 62 paragraph (1) of the new Criminal code, according to which: ***„If through the committed offence it was pursued the obtaining of a patrimonial gain besides the imprisonment it can be applied also a fine"***. Such a text can be introduced after paragraph (5) of art. 63 of the Criminal code.

In order to achieve its purpose, such a regulation should, however, be accompanied by at least two changes.

The first one aims to considerably increase the fine limits that at present no longer achieve the preventive- deterrent purpose specific to penalities. Compared to the criminal fine, in many situations, the contravention fine is much higher than the criminal one.

The limits of the criminal fine from our criminal code are, if not the lowest in Europe, certainly among the lowest. We believe that the fine could be from RON 10.000 to 1.000.000.

A second change should consist in the rewriting of art. 63^1 of the Criminal code, in the sense of stipulating the possibility of replacing the fine penalty with the imprisonment, irrespective if the two are alternatively stipulated or the fine is the sole penalty.

References

- F. Streteanu, Tratat de drept penal. Partea generală, vol. I, C.H. Beck Publishing House, Bucharest, 2008.
- M. Gorunescu, C. Toader, Confiscarea extinsă – din contencios constituțional în contencios administrativ şi fiscal spre contencios penal, in Legea nr. 9/2012.
- F. Streteanu, Considerații privind confiscarea extinsă, in Criminal law notebooks no. 2/2012.
- D. Nițu, Modificările aduse în materia confiscării de prevederile Legii nr. 278/ 2006, in Criminal law notebooks no. 3/2006.