

EXTENDED CONFISCATION – SAFETY MEASURE REGULATED IN THE NEW CRIMINAL CODE

Mihai Adrian HOTCA*

Abstract

Extended confiscation is a safety measure introduced in Romanian criminal law in 2012. Romania's Constitutional Court has ruled several decisions in which a question has been raised of whether the legal provisions on extended confiscation are constitutional or not. In the present paper we analyze the extended confiscation in relation to the decisions of the Constitutional Court.

Keywords: *safety measure, criminal sanction, constitutionality, retroactivity, no retroactivity.*

1. Introduction

By means of Law no. 63/2012, art. 112¹ which regulates the safety measure of the extended confiscation¹ was introduced in the Criminal Code of 2014. According to art. 112¹ of the Criminal Code in force:

„(1) Other assets than those referred to in art. 112² are also subject to confiscation if the person is convicted for committing any of the following offenses, if the offense is likely to grant the respective person any material benefit and the penalty provided by the law is the imprisonment for 4 years or more:

- a) offenses of drugs and drug precursors trafficking;
- b) offenses on trafficking and exploitation of vulnerable persons;
- c) offenses on the state border of Romania;
- d) the offense of money laundering;
- e) offenses of the legislation on preventing and fighting pornography;
- f) offenses of the legislation on fighting terrorism;
- g) the establishing of an organized crime group;
- h) offenses against the patrimony;
- i) the failure to comply with the regime of arms, ammunition, nuclear and explosive materials;
- j) the counterfeit of coins, stamps or other values;
- k) the disclosure of the economic secret, unfair competition, the failure to comply with the provisions on the import or export operations, embezzlement, offenses on the import and export regime, and on the waste insertion in and removal from the country;
- l) offences on the games of chance;
- m) corruption offenses and assimilated offenses, as well as offenses on the financial interests of the European Union;
- n) offenses of tax evasion;

- o) offenses related to customs regime;
- p) offenses of fraud committed by means of computer systems and electronic payment means;
- q) organs, tissues or human cells trafficking.

(2) The extended confiscation shall be ordered if the following conditions are met in the same time:

a) the value of the assets acquired by the convicted person 5 years in advance, and as the case may be, following the moment of the offense, until the date of issue of the document which initiates the proceedings, clearly exceeds the lawful income;

b) the court ascertains that the respective assets were gained from criminal activities of the kind of those referred to in par. (1).

(3) In order for the provisions of par. (2) to be applicable, the value of the assets transferred by the convicted person or by a third party to a member of the family or to a legal entity the convicted person controls, shall be taken into account.

(4) According to this article, *assets*, shall also mean amounts of money.

(5) When establishing the balance between the legal income and the value of the acquired assets, the value of the assets on the date of their acquiring and the expenses borne by the convicted person and by the family members, shall be taken into account.

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

(7) The assets and money obtained from the operation or use of the assets subject to confiscation, as well as the goods produced by them, shall also be confiscated.

(8) The value of the confiscated assets shall not exceed the value of the assets acquired throughout the term provided for by par. (2), which exceeds the lawful income of the convicted person².

Please note that the provisions of art. 112¹ of the new Criminal Code have a content which is similar to

* Professor, PhD, Faculty of Administrative and Social Sciences, "Nicolae Titulescu" University of Bucharest (e-mail: mihaihotca@gmail.com).

¹ Published in Official Journal no. 258 of April 19th, 2012.

² Art. 112 of the Criminal Code regulates special confiscation.

that of the provisions of art. 118² of the previous Criminal Code (1969), therefore, the application and construction of the new provisions in the field of the extended confiscation, shall be similarly construed and applied.

Following the enforcement of the provisions on the extended confiscation, the judicial practice had to solve several law issues on the enforcement on due time of the new regulations in the field of the extended confiscation.

One of the law issues which emerged in practice, concerns the possibility of applying the measure of the extended confiscation in what concerns the offenses committed prior to the enforcement of Law no. 63/2012.

The settlement of several unconstitutionality exceptions were referred to the Constitutional Court, and the constitutional court pronounced several decisions, 3 of them being more important, respectively Decision no. 78/2014³, Decision no. 356/2014⁴ and Decision no. 11/2015⁵.

By means of Decision no. 1.470 of November 8th, 2011⁶, the Constitutional Court, by reference to the criteria for the distinction between the criminal law regulations and the criminal procedure regulations, showed that the subject, the scope and the result of the regulation in question, are those which prevail in establishing this difference and not the placement of these regulations in the Criminal Code or in the Code of Criminal procedure, placement which does not represent a criteria for their distinction.

2. The provisions on the extended confiscation shall not be applied to the offenses committed prior to the enforcement of Law no. 63/2012

By means of Decision no. 78/2014, the Constitutional Court ruled on the question whether the provisions of Law no. 63/2012 apply to the offenses committed prior to the enforcement of this law.

According to the provisions of Decision no. 78/2014: „the provisions of art. 118¹ par. 2 letter a) of the Criminal Code of 1969 shall be constitutional if they allow a more favorable criminal law”.

In what concerns this decision, the Constitutional Court noted the following: „the review of the Constitutional Court shall take as its starting point the claims of the authors of the exception according to whom the provisions of art. 118² par. 2 letter a) of the Criminal Code of 1969 affects the principle of application of a more favorable criminal law and the equality of the citizens before the law by being retroactive, namely they are applicable in a discriminatory way to the offenses committed under the old law.

Therefore, the Court notes that the extended confiscation, by means of its effects, as shown above, although it is not conditioned by the criminal liability, involves an indissoluble connection with the offense. Therefore, it appears as a reason of removing the state of danger and preventing the committing of another criminal offense.

By reviewing the content of the entire regulation on the extended confiscation of the Criminal Code, the Court notes that the principle of a more favorable criminal law is applicable to this institution.

In what concerns the principle of equality of citizens before the law, the Court notes that it is possible that a co perpetrator to be judged under the rule of the old law and consequently, the safety measure of the extended confiscation not to be ruled, while such a measure is ruled for the other co perpetrator who is still under the court proceedings. Therefore, if the more favorable criminal law were not enforceable, the latter, compared to the first, would be discriminated under the legal treatment without any objection and reasonable justification.

In other words, the provisions on the extended confiscation are constitutional if they are applied only to the offenses committed under the influence of the new legislative solution which occurred on the enforcement of Law no. 63/2012, respectively, April 22nd, 2012”.

Under the grounds of this resolution of the Constitutional Court, it may be concluded that the provisions on the extended confiscation cannot be enforced against the persons who committed offenses prior to the enforcement of Law no. 63/2012.

In other words, the measure of the extended confiscation shall be applicable if the offense leads to conviction, and if the previous actions which resulted in the obtaining of the assets contemplated by the extended confiscation were committed following the enforcement of Law no. 63/2012.

Indeed, if the contrary had been admitted, the provisions of art. 15 of the Constitution would have been seriously disregarded, due to the fact that the rules governing the extended confiscation are subject to the substantive criminal law.

According to the provisions of Decision no. 356/2014: „It is absurd to claim a subject of law to be held liable for a conduct that it had prior to the enforcement of a law regulating such a conduct. The subject of law could not foresee what the legislator would regulate, and its behavior is normal and natural if conducted within the legal order in force”.

³ Published in Official Journal no. 273 of April 14th, 2014.

⁴ Published in Official Journal no. 691 of September 22nd, 2014.

⁵ Published in Official Journal no. 102 of February 9th, 2015.

⁶ Published in Official Journal no. 853 of December 2nd, 2011

1. The provisions on the extended confiscation shall not apply to the assets acquired prior to the enforcement of Law no. 63/2012

Another question of law which the Constitutional Court was invested to rule on was whether the measure of the extended confiscation may be applied on the assets acquired prior to the enforcement of Law. 63/2012.

Therefore, by means of Decision no. 356/2014, the Constitutional Court ruled the following: „*the provisions of art. 118² par. 2 letter a) of the Criminal Code of 1969 shall be constitutional unless the extended confiscation applies to the assets acquired prior to the enforcement of Law no. 63/2012, for the amendment and supplementation of the Criminal Code of Romania and of Law no. 286/2009 on the Criminal Code*”.

Furthermore, by means of Decision no. 11/2015, the Constitutional Court ruled the following: „*the provisions of art. 112² par (2) letter a) of the Criminal Code shall be constitutional unless the extended confiscation applies to the assets acquired prior to the enforcement of Law no. 63/2012, for the amendment and supplementation of the Criminal Code of Romania and of Law no. 286/2009 on the Criminal Code*”.

By means of the aforementioned decisions, the Constitutional Court provided a fair application of the provisions of the fundamental law, ruling that the rules on the extended confiscation cannot be retroactive in what concerns the assets acquired prior to their enforcement, even if the offenses for which the conviction is pronounced are committed following the respective date.

If the law provided otherwise, the principle of the non-retroactive law referred to in art. 15 par. (2) of the Constitution would be disregarded.

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Conclusions

By reviewing the content of art. 112¹ of the Criminal Code, the legal nature of the extended confiscation may be established⁷. These legal provisions and the provisions of art. 107 of the Criminal Code lead to the conclusion that the assessed safety measure is deemed by the legislator as a criminal law penalty, which also contemplates educational penalties and measures.

The regulations which establish this criminal legal institution, by means of belonging to the category of the criminal law penalties, also belong to the material (substantive) criminal law branch, the implementation of which is governed by the *tempus regit actum* principle.

The substantive criminal law consists of the total legal rules which establish the actions representing offenses, the penalties to be applied or taken in case of committing an offense, the conditions based on which the state can hold criminally liable the offenders, as well as the conditions under which the penalties are to be fulfilled and the measures are to be taken in case of committing criminal offenses. Criminal law means a substantive (material) rule of law with an actual legal content, namely a regulation establishing conducts or deeds (actions or non-actions) of the subject within a legal relation, while the criminal proceedings law or the procedural law includes the category of legal regulations of which content consists of procedures, ways or means by which the regulations of the substantive law are applied.

Under the principle of the non-retroactive criminal law, it is concluded that the regulations on the extended confiscation cannot be retroactive in what concerns the offenses committed and the assets acquired prior to their enforcement. In this case, the aforementioned criminal provisions shall not be applicable even if the offenses for which the conviction is ruled are committed following the respective date.

⁷ In order to review the provisions on the extended confiscation, introduced in the Romanian legislation by means of Law no. 63/2012, see: M. Gorunescu, C. Toader, Confiscarea extinsă – din contencios constituțional în contencios administrativ și fiscal spre contencios penal, în Dreptul nr. 9/2012 (*Extended confiscation - from contentious constitutional in contentious administrative and fiscal to contentious criminal in Law no. 9/2012*); F. Streteanu, Considerații privind confiscarea extinsă, în Caiete de drept penal nr. 2/2012, p. 11 (*Considerations on the extended confiscation in Criminal law records no. 2/2012*).

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