

## EXTENDED CONFISCATION. THEORETICAL AND PRACTICAL ASPECTS

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### ABSTRACT

*Among the most important changes in the criminal legislation made by Law no. 228/2020 for the amendment and completion of some normative acts in the criminal field to transpose some directives of the European Union published on 02.11.2020 in the Official Monitor of Romania are those that provide modification of the institution of confiscation of products, instruments and assets related to the crime, known as extended confiscation. Thus, the unjustified wealth of a person sentenced to a minimum of 4 years in prison can be confiscated, and the prosecutor, if he has suspicions about its illegal nature, will have the obligation to place a protective seizure on it. The changes brought to the criminal legislation had in mind the transposition into the domestic legislation of the provisions of Directive no. 2014/42/EU aimed at freezing and confiscating the instruments and products of crimes committed in the European Union.*

**Keywords:** European Union; illegal nature; Directive no. 2014/42/EU

### 1. Background

In the Romanian penal system, the institution of extended confiscation was regulated for the first time by Law no. 63/2012 for the amendment and completion of the Criminal Code of Romania and Law no. 286/2009 on the Criminal Code, which transposed the Council's Framework Decision 2005/212/JAI of 24.02.2005 regarding the confiscation of products, instruments and assets related to the crime.

At the time of the adoption of this internal normative act, the European regulation intended for transposition offered the Member States the opportunity to choose

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between several sets of minimum requirements by which to implement this institution.

By Law no. 63/2012 for the amendment and completion of the Criminal Code of Romania and Law no. 286/2009 regarding the Criminal Code, the Romanian legislator opted for one of these sets of minimum requirements, namely the confiscation conditional on conviction, the conviction of the court that in a previous determined period the convicted person acquired the goods from criminal activities of any kind, as well as ascertaining the disproportionate nature of the value of the assets compared to the legal income of the convicted person, adding the condition of proving the disproportion between the property of the convicted person and his legal income.

Later, however, the EU legislative framework was deemed insufficient, with Commission reports showing that the existing regimes of extended confiscation and mutual recognition of freezing and confiscation orders are proving to be ineffective, and existing differences in Member States' law are an obstacle to enforcement procedures confiscation. These realities determined the review and expansion of the existing community provisions, with the adoption of Directive no. 2014/42/EU of the European Parliament and of the Council of April 3, 2014, on the freezing and confiscation of the instruments and products of crimes committed in the European Union, the content of which was found in the new Criminal Code and the new Criminal Procedure Code of Romania. New interventions to the Criminal Code and the Code of Criminal Procedure were necessary to transpose the aspects of the new directive that were not found in national law.

## **2. Analysis**

The provisions of Law no. 228/2020 for the amendment and completion of some normative acts in the criminal field to transpose some directives of the European Union provide for the expansion of the scope of extended confiscation, in the sense that the range of crimes for which this measure can be applied has been increased.

It is thus appreciated that the fight against crime can be carried out in a much more effective manner if, in addition to the institution of special confiscation, the institution of extended confiscation is also applied not only to a list of crimes (as provided for in art. 1121 of the Criminal Code, prior to the amendment ), but of all crimes, if the facts were susceptible to the procurement of a material benefit and the maximum punishment provided by law for them is 4 years or more.

Thus, the field of application of this measure has been expanded compared to the previous form of art. 1121 (1) Criminal Code, which consists of: crimes related to drug and precursor trafficking; crimes regarding the trafficking and exploitation of vulnerable persons; crimes regarding the state border of Romania; the crime of money laundering; crimes from the legislation regarding the prevention and combating of pornography; offenses under counter-terrorism legislation; the establishment of an organized criminal group; crimes against patrimony; non-compliance with the arms, ammunition, nuclear materials and explosives regime; forgery of coins, stamps or other values ; disclosure of economic secrets, unfair competition, non-compliance with provisions regarding import or export operations, misappropriation of funds, crimes regarding the regime of import and export, as well as the introduction and removal of waste and residues from the country; gambling offences; crimes of corruption, crimes assimilated to them, as well as crimes against the financial interests of the European Union; tax evasion crimes; crimes regarding the customs regime; fraud crimes committed through computer systems and electronic means of payment; trafficking in organs, tissues or cells of human origin.

Currently, art. 1121 Criminal Code - Extended confiscation - provides:

- (1) Assets other than those provided for in art. 112 are also subject to confiscation, when a person is sentenced for an act likely to procure him a material benefit and for which the punishment provided by law is imprisonment of 4 years or more, the court is convinced that the respective goods come from criminal activities. The court's conviction can also be based on the disproportion between the legal income and the person's wealth.
- (2) The extended confiscation is ordered on the assets acquired by the convicted person in a period of 5 years before and, if necessary, after the moment of committing the crime, until the date of issuance of the act of notification to the court. Extended confiscation can also be ordered on assets transferred to third parties, if they knew or should have known that the purpose of the transfer was to avoid confiscation.
- (3) For the application of the provisions of paragraph 2, the value of the goods transferred by the convicted person or by a third party to a family member or a legal entity over which the convicted person has control will also be considered.
- (4) By goods, according to this article, it is also understood the sums of money.
- (5) When determining the difference between the legal income and the value of the assets acquired, the value of the assets at the date of their acquisition and the

expenses incurred by the convicted person and his family members will be considered.

(6) If the goods subject to confiscation are not found, money and goods are confiscated in their place up to their value.

(7) Assets and money obtained from the exploitation or use of the assets subject to confiscation, as well as the assets produced by them, are also confiscated.

(8) The confiscation cannot exceed the value of the goods acquired during the period provided for in paragraph 2, which exceeds the level of the lawful income of the convicted person.

By adopting this amendment, it will be possible in the future to order the security measure of extended confiscation for other crimes as well, such as: official crimes (embezzlement, abuse of office, usurpation of office, conflict of interest, illegal obtaining of funds), crimes regarding public health (infection of water, falsification or substitution of food or other products, sale of adulterated products, trafficking of products or toxic substances) - from the Criminal Code, the offenses included in art. 452 of the Fiscal Code (Law no. 227/2015); the crime provided by art. 279 of Law no. 297/2004 on the capital market.

Also, the requirements for the application of the institution of extended confiscation have been changed.

Directive no. 2014/42/EU imposed new rules on the EU states. Thus, by art.5 - dedicated to extended confiscation, in paragraph 1, a unique standard was imposed on the member states regarding the minimum requirements that must be met for this type of confiscation: "the member states adopt the necessary measures to allow the confiscation, total or partial, of the assets of a person convicted as a result of the commission of a crime that is likely to generate, directly or indirectly, economic benefits, when, based on the circumstances of the case, including the factual elements and available evidence, such as the fact that the value of the assets is disproportionate to the legal income of the convicted person, a court considers that the assets in question were obtained from criminal activities."

By referring to the previous form of art. 1121 para. 2 of the Criminal Code, finding this disproportion is a mandatory condition for extended confiscation; the conviction of the court in the sense that the assets are acquired from criminal activities similar to the one that attracted the conviction was not, however, sufficient to order the extended confiscation, it being necessary to prove a difference in value between the assets of the convicted and his legal income, as well as the finding that this difference makes actual wealth "disproportionate" to legal income.

Art.5 par.1 of the new Directive no longer provides for such a limitation; therefore, the court must be able to substantiate its belief that the goods come from criminal activities based on any circumstances, disproportionate considers the mentioned value, being only one of the circumstances, listed as an example, that could be taken into account by the judge.

Also, the European norm no longer imposes any condition regarding the criminal activity that is not the subject of conviction, which also determines the removal from the regulation of the condition according to which the previous criminal activity must be of the nature provided for in paragraph 1 of art. 1121 Code criminal.

From the perspective of the procedural-criminal law regulations, a new paragraph was introduced to article 249 of the Code of Criminal Procedure that regulates the insurance measures, which comes to complete the cases in which the taking of such measures is mandatory. Thus, in the case of goods that can be subject to special confiscation or extended confiscation, the taking of precautionary measures by the prosecutor to avoid the concealment, destruction, alienation, or evasion of these goods is mandatory. Specifically, the prosecutor will be obliged to the extent that he identifies assets susceptible to confiscation/which could come from criminal activities, during the criminal investigation phase, so prior to any judicial decision/analysis in this regard, order their non-disposal, as in the case of tax evasion crimes.

At the same time, because, if the measure of special confiscation was ordered directly by the decision by which the appeal was resolved, there was no appeal, a new article was introduced, which regulates the conditions in which an appeal can be made against the decision by which the court of appeal orders the security measure of special confiscation or extended confiscation directly on appeal. In this case, the defendant, the prosecutor, or the persons whose legitimate rights or interests may be affected may appeal, but only regarding this security measure.

The expansion of the scope of the extended confiscation is a positive fact, the judge being able to appreciate on a case-by-case basis without being limited to a list of crimes. The discussions in practice, however, concern the prosecutor's obligation to order security measures on these assets and implicitly, the impossibility for a judge to censure the opportunity to take this measure.

