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**Extended Seizure and Sale of Seized
Assets before Pronouncing a Final Conviction**

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Abstract: This study aims at emphasizing the controversies arising during extended seizure and during the sale of seized assets before pronouncing a final conviction. The study starts from the fundamental difference between special seizure and "extended", further corroborating Decision – Framework of European Council on assets confiscation, constitutional provisions that the "the property obtained legally will not be seized and the acquisition legality is presumed", the reverse of proof obligation and the phrase "court may confiscate the "other assets", is easily understandable and interpretable otherwise, that can be seize any property, from anyone, if the judge is "convinced" that they provide from illicit activities. The method used during the study is observation. It is required the establishment and use of some ways to protect innocent citizens by the possibility of reversing proof obligation. Therefore, we believe that regulations on extended seizure are designed to unavailable and confiscate properties illegally obtained, but they can leave to increase the Court competence, beyond the real belief and conviction.

Keywords: unavailable assets; property; serious crimes; conviction

1. Introduction

Starting from the fundamental difference between the special seizure and "extended", namely, that regarding to proven way of assets illicit origin which has to be confiscated, this study aims to highlight the controversies appeared during extended seizure. Corroborating the Decision - Framework of European Council on assets confiscation, constitutional provisions that the " *the property obtained legally will not be seized and the acquisition legality is presumed* ", reversing of prove obligation and the phrase "*the Court may confiscate "other goods"*", is easy to understand, and otherwise interpretable, that can be seize any property from anyone, if the judge is "convinced" that the property provide from illicit activities. This, also because any legal framework does not include the basic of judge conviction and ways of defense of individual against are carry these measures.

Asset forfeiture generally, is intended to unavailable assets, until a final Court decision of establishing the guilt, of conviction, after then they can be seized. The sale of seized assets before pronouncing a final conviction is found in a Law Project and provides the possibility of sale the assets by retaining the corresponding amount to the state, and if later, the defendant is found guilty, the amount is further remain to the state and if the individual is found not guilty, the amount will be returned to the owner of assets. In analyzing these situations, it

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appears both controversy and legal interpretations, if they can be considered as appropriate, adequate - for long term, or hasty – for short term.

Romania is the only state from EU which has not implemented the extended seizure in Criminal Code until now, due to voids of constitutional disposals. Moreover, extended seizure was proposed both by the Government and the Ministry of Justice as a Criminal Code amendment. It should be noted that, are not considered as object confiscation, the property obtained *through corruption* or *assets acquired by financial and economic crimes*. Thus, extended seizure is devoid of content. Usually, the phrase "*the seizure of illegal property*" is refers to property obtained through corruption or economic and financial crimes.

Therefore, on 6th July 2011 the Romanian Government adopted the text of a Law Project, which aims to stipulate the extended seizure and its implementation in Romanian legislation of Decision – Framework since 2005 (Decision – Framework no. 2005/212/JHA) on property confiscation, ways and assets related to crime. The Law Project adopted aims that extended seizure to include corruption crimes and economic and financial crimes.

A natural question that may arise is: Why was necessary to adopt such a late Law Project for amending the New Criminal Code¹ *which promotes extended confiscation* and it was not established by Law no. 286/2009?

2. The Difference between Special Seizure and Extended Seizure

Since the beginning of this study, it has made the distinction between special seizure which arise from the committed offense and extended confiscation, which refers not only to property obtained directly from namely offense for which exist a conviction.

Special seizure is the only safety measure with patrimonial character and it means the free and forced transition to the state property of certain assets which belongs to the person who committed an offense under the criminal law, which possession by the offender, due to its legal nature or their connection with the offense committed is dangerous for possibility of committing new offenses under criminal law (Bulai & Bulai, 2007)

3. Decision – Framework no. 2005/212/JHA– Basis of Extended Confiscation

Although this Decision was adopted after a relatively long period of a previous (Framework Decision no. 2001/500/JHA of Council on Laundering money, find out, sequesterate, seizure of means and crime results)², during its preamble are found the same arguments that led to its creation as an action way. It is indicates that instruments which exist in this area have are not contributed sufficiently to ensure an effective cross border cooperation in confiscation matters, whereas a various number of Member States are not yet able to seize crimes products relating to all crimes sanctioned by detention sentences longer than one year.

Thus, the purpose of the Decision-Framework is to guarantee that all Member States has effective rules on confiscation matters related with crime, among others, in terms of prove obligation regarding the origin of assets held by a convicted person for a crime relating to organized crime (Judicial and Prosecutorial Commission , 2010).

¹ Law no. 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, no. 510, 24 of July, 2009

² J.O. no. L 068 on 15th March, 2005, p. 49- 51.

Similarly to the previous Decision, "*the seizure*" is indicated to be a punishment or a measure ordered by a court as following a proceeding in relation to a crime or crimes, resulting in final a deprivation of namely asset.

Decision- Framework 2005/212/JHA provides that each Member State shall take necessary measures to enable it the seizure, in whole or in part, the ways or products as a crime result, which are punishable with detention sentence longer than one year, or property with a value corresponds to those products, and definitions given to used terms are identical to those already established.

On the technique used, is indicate a list of offenses for which can be justified the measure adoption, but in all cases, each Member State shall take necessary measures to allow it that, under this Article, to seize at least:

- a) if a national court is fully convinced, based on specific facts, that namely assets are the result of criminal activity proceeded by a convicted persons during the previous period of conviction for the namely offense which is considered reasonable by the court, taking into account the case circumstances, or alternatively,
- b) if a national court is fully convinced, based on specific facts, that namely assets are the result of similar criminal activities proceeded by the convicted person during a period prior to conviction for the namely offense which is considered reasonable by the court, taking into account the case circumstances, or alternatively;
- c) if is established that property value is disproportionate relating to the legal incomes of the convicted person and a national court is fully convinced, based on specific facts, that namely assets are the result of criminal activity proceeded by the person convicted.

From analyzing the provisions of this Decision, are found that is no change in seizure matters, *but is made a generalization of possibility to apply such a sanction*. If a person is convicted for certain serious and very grave crimes, are not only seized the assets which were the crime subject, but also the assets obtained from similar activities for which is not pronouncing a conviction, if are specific facts through the court is convinced by them illicit obtaining (The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans, 2011).

The measure is not located strictly in money laundering matter, but is placed in a general framework, and can be used certainly, with other conditions compliance established by the legal way, as such.

Another important step during chronology of extended seizure establishing, is the publication in the Official Gazette of Romania of HG no. 1183/2008 for approval the prior thesis of Criminal Code which provides explicitly the obligation of committee to elaborate the Project for ensure implementation within it, Decision- Framework 2005/212/JHA of Council. One year later, was adopted without modification by the Romanian Government, the Criminal Code project as it was developed by the Ministry of Justice, on 25 of February, 2009. The project contains the explicitly regulation of extended seizure, as follows the implementation of Decision- Framework 2005/212/JHA (Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan, 2007).

4. Extended Seizure - within the Law Project for Amending and Supplementing the Criminal Code and Law no. 286/2009 on Criminal Code

On 6th of July the Law Project for amending and supplementing the Criminal Code and Law no. 286/2009, was approved by the Romanian Government Bill. The Project is ingeminates totally the initial form of Art. 113, called *extended seizure*. According to this legal text, seizure may be ordered "*If an individual is convicted for an committed offense for which the law prescribes a detention sentence longer than five years and which is liable to obtain a material benefit, the court may also order the confiscation of other assets, if the following conditions are carried out:*

a) the property obtained by the convicted person, in a period of five years before and, if is appropriate, after the moment of committed crime until the date of the criminal action movement, is really exceed the income obtained by it through illicit ways;

b) the court is convinced that namely assets come from illicit activities such as those which the sentence is pronounced. Also, is taking into account the value of property transferred by the convicted person or a third legal person on the convicted person has the control. A final provision is refers that the seizure could not exceed the value of assets during the period specified in paragraph (1) which exceeds the level of illicit income of convicted person."

By analyzing the texts mentioned above, it can be find out that extended seizure is relates only to those persons who are convicted for criminal offenses and who could not justify the property, it does not refer to all citizens which acquire properties legally, but only those who could not justify their property (Confiscation of illegally obtained property, 2011). It is also a natural and appropriate regulation. But what is void is provision according to which, the judge may order the measure if it has the "*conviction*" that the property is obtained from illicit activities. Moreover, is *not shown* during any *legal text contents the basis of judge conviction and the protection ways of persons against the measure is carried out.*

5. The Sale of Seized Assets before Pronouncing a Final Conviction

Regarding the *sale of seized assets* Art. 10 para.2 of GEO 14/2007 on regulate the manner and conditions of turn account the assets included under the law, in private property of the state, stipulates among other things that "The seized assets by the local public administration are returned to turn account legal bodies and the amount obtained from their sale will go to the local budget ". In this regard, was forwarded a *Law Project for amending and supplementing certain normative acts in order to improve the capitalization of assets entering under the law, in private property of the state*, which establishing fast procedures for recovery the amount of movable assets seized by sequestration during the criminal proceedings before pronouncing a final judgment as follows:

- to the property owner's request or when there is his consent or
- when there is no consent of the owner but, by passing time there is a risk that the value of seized assets to decrease significantly, or whenever their conservation would require additional costs for storage (i.e. Inflammable products, petroleum or cars).

In these cases, the amount resulted from the sale of assets shall be registered on the name of accused individual, defendant or civilly responsible person as results the judiciary order.

Also, during the criminal proceedings, is establish the possibility of criminal investigation body or the court who order the seizure to order immediately the destruction of tobacco processed if they not meet the legal requirements for marketing.

Taking into account both the effects of extended confiscation, and sale of seized assets before pronouncing a final sentencing it can be discuss the compliance or violation of the innocence presumption" which order that the proven obligation has to be at accusation and any doubt to be profitable to the accused" by the court and the legislature (Ramascanu, 2005). The solution may be adequate and appreciated in case of pronouncing a conviction judgment and does not require any debate. But the controversy may occur in case of pronouncing a non guilty judgment, or criminal proceedings cessation through the perpetrator death¹.

We believe these situations could not have solutions favorable to the non guilty presumption, being considered that the state's interest is to put good use of products by priority. Although the ownership right is inviolable, it is necessary to establish and use certain ways to protect the innocent citizens, their property to be guaranteed, but at the same time, in certain circumstances, when is talking about committed crimes, persons convicted for corruption, it can be reversed the obligation of proven and they can make the proof of property legally obtaining. Thus, we could say that our country is governed by European legislation implemented in the public interest and not in the politician interest. Thus, we believe that regulations on extended confiscation are designed to become unavailable and confiscate properties illegally obtained wealth, but, equally, we believe that there are the legislative voids, giving way to extend the court competence beyond on basis conviction or beliefs.

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