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Elements of Comparative Law on Extended Confiscation

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Abstract: Comparing the special seizure and extended confiscation measures, we consider that Romania, although later than the deadline indicated in the text of article 6, paragraph 3 of Decision 2005/212/JAI, has responded positively to the requirements of harmonization of national legislation with EU legislation. We believe, however, that this regulation on extended seizure has the effect of limiting the requirements of seizure of goods through crime, practically limiting the application of seizure in respect of goods originating from committing offenses.

Keywords: cross-border crime; safety measures; special confiscation; extended confiscation; goods subject to confiscation

Considering that other existing tools in the area, have not contributed effectively to ensure cross-border cooperation in the matter of seizure, and a number of Member States are not yet able to effectively confiscate the product of the offenses, the EU Council has adopted Framework Decision 2005 /212/JAI² on seizure of products, instruments and other goods in connection with the crime.

In the conclusions of the European Council in Vienna in December 1998, were requested greater efforts at EU level to combat international organized crime in accordance with an action plan detailing the best way to implement the existing provisions in the Treaty of Amsterdam on an area of freedom, security and justice³.

According to the Recommendation no. 19 of the Action Plan 2000, entitled “Prevention and control of organized crime: a European Union strategy for the beginning of the new millennium”⁴, it required a careful assessment to determine the need for a tool that, given the positive experiences of Member States and respecting their fundamental principles, to introduce the possibility of easing rules on the burden of proof in criminal, civil or tax area, on the source property owned by a person convicted for the membership in an organized criminal group (Hoffman, 2008, p. 80). Also, according to Article 12 of the United Nations Convention of December 12, 2000 against Transnational Organized Crime, states should adopt in their domestic legal systems, the measures necessary to allow seizure of proceeds of crime⁵.

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² Council’s Framework Decision 2005/212/JHA of February 24, 2005, J.O. no. 68, March 15, 2005, pp. 49-51.

³ J.O. number C19 of January 23, 1999, page 1.

⁴ J.O. number C 124 of May 3, 2000, page 1.

⁵ Law no. 565/2002 ratifying the United Nations Convention against Transnational Organized Crime, the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime and the Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organized Crime, adopted at New York in November 15, 2000, published in Official Gazette No. 813 of 8 November 2002.

In this respect, at European level, the legal instruments of the Council of Europe, against cross-border crimes, contain rules and establish effective standards in the fight against organized crime, with seizure of goods and tools for perpetrating these crimes.

The provisions of the Framework Decision no. 2001/500/JHA laying down provisions on money laundering, identification, tracing, freezing, seizing and confiscation of instruments and products of crime. To this end, Member States undertake not to introduce or maintain reserves in connection with the Council of Europe Convention on laundering, search, seizure and confiscation of proceeds of crime (Hoffman, 2008, p. 82) in terms of seizure, to the extent that punishment provided for the offense is a custodial punishment over one year.

The current EU legislative framework on the freezing and confiscation of proceeds of crime also contains Framework Decision 2003/577/JAI¹ which provides for mutual recognition of freezing; Framework Decision 2006/783/JAI², which contains provisions on mutual recognition of confiscation orders and Council Decision 2007/845/JAI³ on the exchange of information and cooperation between assets recovery offices, which obliges Member States to establish or designate national assets recovery offices as contact points to facilitate, through enhanced cooperation, identification as quickly as possible, at EU level, of goods coming from criminal activities.

Seeing that existing legal instruments in this area have not reached a sufficient cross-border cooperation regarding confiscation of proceeds and that there are still member states that have not implemented the provisions on confiscation, to the extent that the penalty provided by law for the offense is imprisonment more than one year, were introduced provisions of Framework Decision no. 2005/212/JHA in order to ensure the application of regulations on confiscation of crime and provisions on the burden of proof in relation to assets owned by a person convicted for an offense in connection with organized crime.

For the purposes of article 1 of the Framework Decision no. 2005/212/JHA through proceeds of crime means any economic advantage coming from committing the crime, may consist of any good. Tool of the offense means any property used or intended to serve, in any way, in whole or in part, to commit a crime. According to article 2 of the Framework Decision, each Member State shall take the necessary measures to confiscate, in whole or in part, instruments or proceeds of offense for which the penalty provided by law is imprisonment exceeding one year or other goods of an equivalent value to them. In terms of tax offenses, Member States may use procedures other than those criminal to confiscate the proceeds of the offense.

In article 3 are provided extensive powers in relation to allowing Member States to seize, in compliance with the requirements of paragraph 2, in whole or in part, goods belonging to persons convicted of certain offenses expressly provided. It is about crime committed by an organized criminal group, as it is defined in Joint Action no. 98/733/JHA of 21 December 1998, concerning the criminalization of participation in an organized criminal group, established for the purpose of committing certain offenses. There is, also, this obligation, where terrorism offenses, as defined in the Framework Decision no. 2002/475/JHA³, to the extent that such offenses are of such a nature that it can generate financial returns, and the punishment provided by law for the offenses is imprisonment with a maximum between 5 and 10 years, except for money laundering that come from terrorism, the maximum of which should be at least 4 years.

¹ Document published in JO L 196, 2.8.2003, p 45, available online at www.europa.eu.

² Document published in JO L 196, 2.8.2003, p 59, available online at www.europa.eu.

³ Document published in JO L 196, 2.8.2003, p 103, available online at www.europa.eu.

The effective application of these provisions, in paragraph 3 of article 3, is provided that Member States must take into account the possibility to set the power to confiscate, according to the provisions of paragraph 1, item 2, in whole or in part, property acquired by close relatives of the convicted person or a legal entity controlled by the convicted person or its close relatives.

Also, achieving proposed by this Framework Decision, Member States may use other procedures than criminal ones for confiscation of goods, all measures to comply with this Framework Decision, will be taken by Member States by March, 15 2007, according to article 6 on the implementation of the provisions of framework Decision no. 2005/212/JHA¹. In all cases in which it is necessary to apply the provisions of the Framework Decision is necessary to respect fundamental rights and principles set out in article 6 of the Treaty establishing of the European Community.

In **France**, the principle of legality is the arrangement governing the safety measures, not being involved the existence of guilt, along with the principle of protecting human dignity, with respect for equality before the law of criminal offenders (Pradel, 1991, p. 224). General sanction of forfeiture, applies to all goods whose origin cannot be justified by a person convicted of an offense or an offense punishable by at least five years in prison and had made a profit directly or indirectly. Thus, the Circular of December 22, 2010 concerning disclosure of the specific provisions of Law no. 2010 - 768 of July 9, 2010², aimed at cross-border enforceability criminal seizures, were carried out a series of specifications including the provisions applicable in France following the transposition of Council Framework Decision 2005/212/JAI on Confiscation of Crime instruments and property related with the crime through Law no. 2007-297 of March 5, 2007³ on the prevention of delinquency.

This law amended and supplemented the legislative provisions relating to confiscation, provided in articles 131-21⁴ of the French Criminal Code so that French legislation in the matter of confiscation, to be in perfect agreement with this decision. Thus, according to these provisions are applied to all movable and immovable property, irrespective of their nature, divided or undivided, who served in the offense or were intended to commit the crime, sentenced the owner or owner subject to the rights of bona fide on which is available free⁵.

In Book V - enforcement procedure, Title I - About criminal judgments performance, in Chapter III - International cooperation on enforcement of confiscation orders, in article 713-1, paragraph 3 of the French Procedure Code⁶ are listed goods subject to confiscation extended, as provided in the

¹ By Commission report made under Article 6 of the Framework Decision 2005/212/JHA (COM/2007/0805 final), it was determined that 16 Member States have sent their texts (Belgium, Bulgaria, Czech Republic, Germany, Denmark, Estonia, Finland, France, Hungary, Ireland, Lithuania, Malta, Netherlands, Poland, Romania, Sweden), 10 of which were almost fully transposed the Framework Decision (Belgium, Czech Republic, Germany, Denmark, Estonia, Finland, France, Hungary, the Netherlands, Poland), except, in many cases, Article 1 and sometimes minor provisions compared with the general spirit of the Framework Decision and six Member States have transposed the Framework Decision in part (Bulgaria, Ireland, Lithuania, Malta, Romania, Serbia). Five Member States (Estonia, Italy, Latvia, Luxembourg, and Portugal) said that their legislative acts are under development. Finally, six Member States (Austria, Cyprus, Spain, Slovakia, Slovenia, the United Kingdom) have not yet communicated their national measures to the Commission, according to data available online in www.eur-law.eu.

² Document available online at www.legifrance.gouv.fr.

³ *Ibidem*.

⁴ Amended by the provisions of Articles 16 and 17 of Law 2012 -409 of March 27, 2012, available online at www.legifrance.gouv.fr.

⁵ Article 131-21, paragraph 2, of the asset seizure occurs that served or were intended to commit the offense or the asset that is the product resulting from it except objects that can be returned. Among other things, it can occur on any movable object defined by law or regulation that punishes crime "available online www.legifrance.gouv.fr.

⁶ Article 713-1 of the Code of Criminal Procedure -,Decisions confiscation can take the transmission or delivery enforcement in another state are subject to confiscation by movable or immovable, tangible or intangible, and all legal documents or instruments evidencing title to or interest in a good, product or instrument constituting a crime; goods that are the product of a crime or that correspond to all or part of the value of the product; goods can be confiscated under the

provisions of the Framework Decision. Consequently, in case of committing the following crimes (counterfeiting currency, or transit stay supporting illegal, human trafficking, sexual exploitation of children and child pornography, drug trafficking and money laundering, as well as what constitutes an act of terrorism), a general confiscation which allows in all or part of the property of the author of these crimes, confiscation is broader than the three mechanisms provided by the framework decision of which at least one must be implemented.

Instead, press offenses can result in confiscation measures¹.

In **Belgium**, the criminal (Hennau & Verhaegen, 1995, p. 355) doctrine distinguishes between seizure and confiscation as punishment as a safety measure, as it relates to hazardous items to be withdrawn from circulation, even does not belong to the perpetrator.

The provisions of articles 42-43 quarter of the Sub - section III, entitled "Special confiscation", the Belgian Criminal Code² replied largely to requirements arranged by the provisions of the Framework Decision in the matter of extended confiscation, but to complement its requirements and ensure a perfect line, these provisions were supplemented with article 390 of Law 2006-12-27/32 Law, which introduces paragraph 1 bis in article 43 quarter, which lists all the offenses covered by extended confiscation³.

The Criminal Code⁴ of the **Netherlands** changed article 36 of the first section (Seizure, raising benefits they illegally acquired and compensation of damages) of Title IIA, meaning a partial reversal of the burden of proof regarding the origin of goods from illegal crimes. Besides that it is allowed confiscation of offenses for which a person was convicted, is permitted confiscation "probably from other criminal activities".

In **Germany**, according to the provisions §73 of the Criminal Code⁵, confiscation may be ordered in connection with the assets acquired in the case of an offense or resulted in an offense while taking the goods ordered by §74, refers to the passage of state property goods that have been produced or have been used in committing the offense. It can also take one of these measures in the form of cash equivalent, if the goods can not be seized or taken because they are not found (Otto, 1982, p. 4). Regarding the German legislature, we can say that the current provisions of the Criminal Code have been fully completed in accordance with the Framework Decision, besides special seizure measure, existing also provisions on extended confiscation.

Thus, the provisions of article §73 d, "**The seizure in the recovery of broad scope**", when is committed an offense provided by a law (so here is about also a special law to criminalize offenses), the court orders the seizure to recover things from the perpetrator or participant, and where they were obtained for or through crime. Provision in sentence 1 shall also apply in the case of a thing that lies not or does not belong to the perpetrator or participant only because the work that was produced for or

provisions of the legislation of other states which are instrumental goods which are not subject to or the product of a crime", available online at www.legifrance.gouv.fr.

¹ COM (2007) 0805 final, document available at www.eur-lex.

² Document available online at www.droitbelge.be.

³ Article 43 four - without prejudicial article 43 bis, paragraphs 3 and 4, the advantages of property referred to in §2, the goods and values have been substituted and revenue from vested benefits found in possession of assets or persons may, at the request of the prosecutor of the King, to be seized or this person may be sentenced to pay a sum that the judge considers the corresponding value of the goods if this has been found guilty of committing crimes in the state of criminal participation, traffic poisonous substances, narcotic, drugs, disinfectants and antiseptics to the extent that refers to the import, export, manufacture, sale or offering for sale of the substances listed in this article ", available online at www.droitbelge.be

⁴ Document available online at www.lexadin.nl.

⁵ Document available online at www.gasetze-im-internet.de.

by committing a crime. This can be done if certain conditions are met (referred to in Article §74 Conditions of confiscation): those things are, at the final decision in the hands of the perpetrator or participant or things belonging to or concerned in terms of their characteristics and circumstances, constitute a danger to society or can be used to commit other crimes. Also, confiscation may be ordered when the offender committed the offense of misconduct¹.

In **Finland**, the Criminal Code² in Chapter 10, in addition to the provisions relating to special confiscation, in Section 3 “Extended confiscation of proceeds of crime from the commission of offenses” is provided that the total or partial confiscation of property by the State will then have when a person is found guilty of an offense for which the law provides a possible sentence of at least four years in prison for the attempted to such a crime is punishable, in the case of committing any of the offenses referred to in Chapter 32, sections 1 or 6, Chapter 46, Section 4, Chapter 4, Chapter 50, sections 1 and 4 of this Code, or Section 82 of the Law on alcohol consumption (459/1968), and on a person involved in committing to any offenses referred to in paragraph (1) above and on a person's behalf or that the offense was committed above, provided that the nature of the offense will produce financial benefits and there are reasons to believe that the goods originate partly or all of criminal activity, is not considered to be insignificant. The measure may also be applied against a legal person (private enterprise, company, corporation or foundation), but will not be ordered if the property was transferred before more than five years before the crime³.

In **Italy**, Legislative Decree 306/1992⁴, amended and supplemented by the law no. 501/1994, burden of proving the legal origin of the goods belonging to the defendant if the prosecution (prosecutor) states that the value of goods is manifestly disproportionate to the economic and financial resources of the defendant. In this case, the presumption is applied on all the assets of the defendant and only the proceeds of or related to the offense for which a person was convicted (Padovani, 1995, p. 445). During preliminary investigations, these assets can be seized as a preventive measure.

In relation to extended confiscation, provisions of article 322 of the Italian Criminal Code⁵, apply to a conviction or sentence, at the request of the parties, in accordance with Article 444 of the Criminal Procedure Code, the offenses referred to in articles 314-320, situation in which, the confiscated property belonging to a person who has committed a crime, including property or money given or received by a public official to perform duties⁶.

In **Spain**, for an easier application of confiscation, shall be a presumption that the property is derived from criminal activity if the property value is disproportionate in relation to the revenues lawfully on every person convicted of committing crimes within an organization or criminal groups. However, judges and courts may approve the seizure where it is a crime of negligence for which the law provides for a prison sentence of at least one year, may also have extended confiscation of offenses of

¹ § 74, “Seizure conditions. 1. If a crime was committed intentionally will be confiscated things which were obtained by the offense or who have served, or were intended to serve or prepare to commit a crime. 2. Forfeiture may be ordered only if: 1. those things are, at the moment of the final decision, in the hands of the perpetrator or participant or belonging to them or 2. those things, depending on their characteristics and circumstances, are a danger to society or can be used to commit other crimes. Available online at www.Gesetze-im-internet.de.

² Document available online at www.finlex.fi.

³ *Ibidem*.

⁴ Document available online at www.altalex.com.

⁵ Document available online at www.leggeonline.info.

⁶ *Ibidem*.

organized crime and terrorism, according to Article 127 paragraph 2¹ of Title VI, “Special confiscation” of the Criminal Code².

In **Romania**, pursuant to the provisions of Title II - Fundamental rights and duties of citizens in the Constitution of 1965, the provisions of article 1 paragraph 1 of Law no. 18/1968³ on the control of the origin of goods of individuals who have not been legally obtained, establishing the principle that “The acquisition of property otherwise than by lawful purpose is a violation of the principles of socialist ethics and equity and is prohibited” the law stated in paragraph 2 of the same article, that property acquired in violation of those provisions, or their cash value “will be passed into state ownership”. According to article 2 of the law, may be subject to control of the “origin of goods of any individual, whether data or indications that there is a clear disparity between the value of its assets and income lawful and justified legally acquired property. By justifying the wealth means the obligation of the person concerned to prove the legality of the means used for acquiring or developing property. The control was on the assets acquired in the last 15 years before referral, both existing assets of the person concerned and the alienated consideration or free of charge. If there were clear evidence that goods acquired before this period have illicit origin, was to be extended control over them.

After 1989, when the drafting of the Constitution in 1991 wanted a democratic legal framework based on respect for fundamental principles of the rule of law, in terms of ownership (Boroi, 2008, p. 377; Bulai, 1997, p. 629) as a result of experience gained as a result of the regulations adopted during the communist period, when private ownership was almost devoid of content, one of the main points of debate in the Constituent Assembly on the Thesis of the project of Constitution was to guarantee this fundamental regulation, mainly presumption of lawful acquisition of wealth (Safta, 2012). Thus, according to article 44, paragraph 8 of the Constitution, “*Legally acquired assets cannot be confiscated. Legality of acquirement shall be presumed*”. In order to eliminate the second thesis of paragraph 8 content of article 44 of the Constitution, there have been several initiatives⁴ in a constant jurisprudence, delivered in the exercise of its supervisory initiatives to revise the Constitution, the Constitutional Court ruled that the presumption of lawful acquisition of wealth is one of the constitutional guarantees of the right to property, and the conclusion of the three decisions was the same, namely unconstitutional initiatives to revise on the removing text which regulates the

¹ Article 127 paragraph 2, “If for any reason it is not possible confiscation mentioned in the previous paragraph, will be confiscation of an equivalent amount of other goods belonging to parties criminally liable for the act committed” available online at www.juridicas.com.

² Organic Law 10/1995, of 23 November, published in the Official Bulletin of the State no. 281 of November 24, 1995, available online at www.juridicas.com.

³ Published in the Official Bulletin no. 81 in June 24, 1968.

⁴ By Decision no. 85/1996, published in Official Gazette No. 211 of 6 September 1996, the Court held that the “presumption of lawful acquisition of wealth is one of the constitutional guarantees of the right to property, in accordance with paragraph 1 of Article 41 of the Constitution (now paragraph 1 of article 44), according to which ownership is guaranteed. This presumption is based on the general principle that any act or fact is legal until proven otherwise requires, in the estate of a person, unlawful acquisition should be proven. Therefore removing this assumption signifies suppression of constitutional guarantees of the right to property. “Decision no. 148/2003, published in Official Gazette No. 317 of April 16, 2003, ruling on the proposed text to be inserted in the Constitution text circumstance presumption in question, stating that it does not apply “to property acquired as a result of drawing income from crime”, the Court held that the this way of writing that seeks the overthrow of the burden of proof on the legality of the property, providing for the unlawful nature of the property acquired by capitalizing proceeds of crime. In these circumstances, the Court found unconstitutional the proposed revision that cover essentially the same objective, namely the removal of the presumption of lawful acquisition of property, as it signifies the suppression of a constitutional guarantee of the right to property. By Decision no. 799/2011, published in Official Gazette No. 440 of 23 June 2011, the Constitutional Court stated that “in the absence of such a presumption, the owner of property should be subject to ongoing insecurity whereas whenever they would invoke the illicit acquisition of that right, the burden would not return the making the statement, but the holder of the asset”. Since, according to article 152 paragraph (2) of the Constitution, “No review cannot be made if it results in the suppression of the rights and freedoms of citizens and their guarantees”, and the presumption of lawful acquisition of property constituting, according to the interpretation of the Constitutional Court, a guarantee of private ownership.

resumption referred. However, in decision no. 799/2011¹, the Court notes that² the regulation of this assumption does not preclude investigation of the illegal acquisition of wealth, and expressly stated that it does not prevent the legislature to adopt regulations in accordance with EU legislation in the field of fight against crime, in particular with reference to the framework Decision 2005/212/JAI³.

Thus, the Romanian legislator noting that, compared to the European requirements in the legislation has some gaps⁴, has introduced in the provisions of Law no. 286/2009⁵ Article 3 of Framework Decision 2005/212/JAI, additions that should be provided in the national law by June 15, 2007 as required text of article 6 paragraph 2 of this decision. Basically, the measure can be arranged according to Article 118² paragraph 2 of the Penal Code, under certain conditions to be met. The first condition implies the existence of the analyzed quality of offender the person against whom is going to be taken extensive forfeiture, criminal who has committed certain offenses⁶. Another prerequisite to extended confiscation measure is the existence of a final judgment of conviction thereof. Another condition to be applied is that the value of extended confiscation of assets acquired by the convicted person, within a period of five years before and, if appropriate, by time of the offense, until the date when the document instituting the proceedings, beyond manifestly revenue it lawfully. For a proper appreciation of the value of property acquired by the person convicted, the legislature considered necessary to take into account the value of the goods (goods are considered and fees) transferred by the convicted person or a third of a family member or a legal person on which the sentenced person has control, according to paragraph 3, and in distinguishing between legitimate income and value of assets acquired will consider the value of the property at the date of acquisition and expenses incurred by the convicted person, his family members.

Also, according to paragraph 7, the confiscated property and money derived from the operation or use of confiscation and the goods they produce. On the other hand, may not exceed the confiscation of assets acquired during the period referred to in paragraph 2, which exceeds the level of the lawful income of the convicted person.

¹ Published in the Official Monitor no. 440 on June 23, 2011.

² Document available at www.ccr.ro.

³ Council Framework Decision 2005/212/JAI of February 24, 2005, J.O No. 68, March 15, 2005, pp. 49-51.

⁴ Reason at Law no. 63/2012, available at www.cdep.ro.

⁵ Published in the Official Monitor no. 510 on July 24, 2009.

⁶ Article 118² paragraph 1 Criminal Code, states that are subject to seizure and goods other than those referred to in article 118, if the person is convicted of any of the following offenses, if the offense is likely to procure a material benefit and penalty provided by law is imprisonment for five years or more: a. pimping; b. traffic in drugs and precursors; c. offense of trafficking in persons; d. offenses Romanian state border; e. the offense of money laundering; f. crimes legislation on preventing and combating pornography; g. crimes law on preventing and combating terrorism; h. combination for offenses; i. offense of initiation or establishment of an organized criminal group or accession, or support in any form such a group; j. crimes against property; k. offenses relating to breach the regime of weapons and ammunition, nuclear or other radioactive materials and explosives; l. counterfeit currency or other valuables; m. economic disclosing secrets, unfair competition, breach of the provisions on import and export operations, embezzlement, breach of the provisions regarding the import of wastes and residues; n. offense on the organization and operation of gambling; o. trafficking of migrants; p. corruption offenses, offenses assimilated to corruption, offenses related to corruption, offenses against the financial interests of the European Union; q. offenses of tax evasion; r. offenses related arrangements; s. crime of fraudulent bankruptcy; and others offenses committed through computer systems and electronic payment means; t. trafficking in organs, tissues or cells of human origin.

Conclusions

The escalation of the phenomenon of organized crime required legislative measures to be in line with European Union legislation, specifically, if extended confiscation, in accordance with Decision 2005/212/JAI.

Even though with some omissions in the original text of the decision (missing and transposition of article 4 of Decision, according to which “each Member State shall take the necessary measures to ensure that parties affected by the measures laid down in Articles 2 and 3, provide effective remedies for their rights “), the implementation of these measures should be carried out in compliance with the Constitution, which establishes the necessary safeguards to ensure compliance with fundamental rights and freedoms, including the right to the peaceful enjoyment of all acquired assets. But as long as there are no procedures for implementation and guarantees of the right to defense, this law can lead to misinterpretation and improper application.

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