

THEMIS COMPETITION 2016

SEMI-FINAL A

Confiscation according to Directive 2014/42/EU

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Introduction

The principle of justice and the effective prevention of unlawful activities demands that crime should not pay. It is unacceptable that a person who has gained wealth through such illicit means is allowed to enjoy the fruits of his criminal activities. During the last few decades, significant efforts have been made in order to develop fair and efficient rules enabling authorities to freeze and seize assets derived from crime.

The purpose of this paper is to analyze and elaborate on the relevant European Union confiscation legislation and to tackle several potential issues that derive from it. Our presentation is split into two chapters, the first one focusing on the novelty factor of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, as well as on several key issues identified by the team while the second chapter will tackle particular aspects of the relevant Romanian legislation. As a conclusion, improvement and *de lege ferenda* proposals will be presented, regarding the 2014 Directive.

On a European Union level, the first attempt at developing legislation in the field of confiscation was the Framework Decision 2001/500/JHA¹. However, this instrument proved to be inadequate because of the large discretion given to the Member States. Four years after its entry into force, they were still unable to effectively apply proper measures. According to Recital 9 of the 2005/212/JHA, the existing instruments in this area have not to a sufficient extent achieved effective cross-border cooperation with regard to confiscation, as there are still a number of Member States, which are unable to confiscate the proceeds from all offences punishable by imprisonment for more than one year.

The issues highlighted above were prime reasons for the entry into force of two newer European Union legal instruments, Framework Decision 2005/212/JHA² on confiscation of

¹Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime OJ L 182, 5.7.2001, pp. 1–2.

²Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property OJ L 68, 15.3.2005, pp. 49–51.

crime-related proceeds, instrumentalities and property and Framework Decision 2006/783/JHA³ on the application of the principle of mutual recognition to confiscation orders, respectively.

Although these two documents addressed many of the issues found in the preceding framework decision, especially by clarifying the existing definitions and frameworks, the amount recovered from proceeds of crime in the European Union seem insufficient compared to the estimated proceeds. Studies have shown that, although regulated by European Union and national law, confiscation procedures remain underused⁴. The existing instruments in this area have not to a sufficient extent achieved effective cross-border cooperation with regard to confiscation⁵. The latter decision's recitals provide insight into the importance of good international cooperation on the enforcement of confiscation-related acts. To be more precise, it is of vital importance that a Member State recognizes and enforces confiscation orders from another Member State on its territory. It presupposes confidence that the order is taken in compliance with the principles of legality, subsidiarity and proportionality.

The latest European legislative document that tackles the issue of confiscation is Directive 2014/42/EU⁶ on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. It has benefitted from the new provisions of the Lisbon Treaty, especially those regarding the possibility of adopting new legal acts with a qualified majority. It is also a logical consequence of the Stockholm Program from 2010 and also of the conclusions of the Justice and Home Affairs Council with regard to confiscation and recovery of criminal proceedings. Regarding the former, it has been stated that "the [European] Union must reduce the number of opportunities available to organized crime as a result of a globalized economy, in particular during a crisis that is exacerbating the vulnerability of the financial system, and allocate appropriate resources to meet these challenges effectively"⁷. The European Council has

³Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders OJ L 328, 24.11.2006, pp. 59–78.

⁴Directive 2014/42/EU Recital 4.

⁵ 2005/212/JHA Council Framework Decision, Recital 9.

⁶Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.4.2014, p. 39–50.

⁷ The Stockholm Programme - An Open and Secure Europe serving the Citizen, The Council of the European Union, Brussels, 16 October 2009, p. 33.

called upon the Member States and the Commission to improve, among others, judicial cooperation, especially on the issue of mobilizing and coordinating exchanges of information about potential criminal activity.

The innovations of Directive 2014/42/EU

All of the European legislative acts regarding confiscation have a common origin, the fight against cross-border organized crime. The opening recitals⁸ of both Framework Decisions, as well as the opening recital⁹ of the Directive make direct references to this same goal.

This latest European legislative act¹⁰ has been created for several reasons, some of which are expressly stated in its contents, of which the following are noteworthy: the aim to amend and expand the provisions of Framework Decisions 2001/500/JHA and 2005/212/JHA¹¹, the aim to clarify the notions of proceeds and property¹², the need for a better level of national legislative harmonization with regard to extended confiscation¹³, the need to confiscate goods which have been transferred to third parties¹⁴ and also to offer adequate guarantees to the aforementioned individuals¹⁵. Last but not least the Directive 2014/42/EU stated the need for the adoption of legislation that enables member states to apply confiscation measures even after a definitive sentence of conviction.

Recital 11 of Directive 2014/42/EU states the goal of clarifying the notion of “criminal proceedings” in such a way as to include proceedings directly acquired through criminal activity, as well as all direct benefits derived from it, including the reinvestment or transformation of

⁸ Paragraph 6 of the 2001/501/JHA Framework Decision; Paragraph 1 of the 2005/212/JHA Framework Decision.

⁹ Paragraph 1 of the 2014/42/EU Directive on the freezing and confiscation of criminal instrumentalities and proceedings.

¹⁰ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

¹¹ Directive 2014/42/EU, Recital 9

¹² Directive 2014/42/EU, Recitals 11 and 12

¹³ Directive 2014/42/EU, Recital 19

¹⁴ Directive 2014/42/EU, Recital 24

¹⁵ Directive 2014/42/EU, Recital 33

direct proceedings. Former EU legislative acts¹⁶ defined “proceedings” in a different manner. The Directive defines the notion as “any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits”. This definition is much more detailed and aims to eliminate inconsistent or extensive interpretation, in order to ensure an effective and efficient fight against crime and also to prevent the successful hiding or loss of criminal proceedings. It enables a proper tracing of economic advantages derived from crime, no matter whose hands it ends up in.

Recital 12 of Directive 2014/42/EU mentions the extension of the definition of “property that can be subjected to freezing and confiscation”. After analyzing the legislative evolution of the aforementioned concept, we conclude that this purpose was not achieved. Although the Directive intended to include legal documents or instruments evidencing title or interest in such property, such as, for example, financial instruments, or documents that may give rise to creditor claims and are normally found in the possession of the person affected by the relevant procedures, the definitions set forth by the older legal texts did not expressly exclude these types of property¹⁷, quite the contrary.

Directive 2014/42/EU brings an innovation in the field of confiscation in the European Union, by regulating under the provisions of art. 4 par. 2 some situations in which a confiscation measure can be imposed without the existence of a conviction.

Non-conviction confiscation has many advantages that could potentially turn it into one of the most potent tools in the arsenal of European law-enforcement structures and agencies.

First and foremost, the fact that a criminal conviction is not required for its application provides an immense advantage when it comes to freezing and seizing assets derived from illicit and unlawful activities. Because of this particular trait, it cannot be thwarted by immunities, the

¹⁶ Strasbourg Convention of 1990, art. 1 a “Proceeds means any economic advantage from criminal offences”; Framework Decision 2005/212/JHA art. 1 “Proceeds means any economic advantage from criminal offences”.

¹⁷ Framework Decision 2005/212/JHA art. 1 “and also legal documents and instruments evidencing title or interest in such property”; The 1990 Strasbourg Convention, art. 1 b) “and also legal acts and documents evidencing title or interest in such property”.

inability to extradite, the absence of the accused or insufficient evidence on the criminal standard.

Secondly, non-conviction based confiscation allows for asset recovery where the death or absence of the suspect would make it impossible.

Thirdly, it allows for confiscation where an individual has been acquitted by a criminal court, perhaps through a perverse verdict or because the evidence, although probative, fell short of the criminal standard of proof.

Last but not least, non-conviction confiscation complements the system of post-conviction confiscation and is an integral part of the comprehensive approach to asset recovery and repatriation¹⁸.

This unique, *sui-generis*, civil confiscation provided by art. 4 par. 2 of the Directive is seen as a compromise between the states in favor of adopting a Union level civil forfeiture and the ones against adopting it. Thusly, the second hypothesis of art. 4 provides situations where you can apply a confiscation order in the course of the criminal proceedings, but without the need for a conviction ruling. The system proposed by the European Directive is then different from general “civil asset forfeiture”, as confiscation is considered to be taken against a person (so it is not an *actio in rem*). If the person had been able to stand in trial, then a criminal conviction could have been applied¹⁹. Therefore, according to art. 4 par. 2 of the Directive, in order to apply this type of confiscation, some conditions must be met, which will be discussed later in this presentation.

The difference between what the initiators of the proposal for the Directive wanted and what has finally been adopted in the field of civil forfeiture can be clearly seen by lecturing and comparing the draft proposal²⁰ for the Directive and its final form, from which endeavor we can identify a number of key differences.

¹⁸*Impact study on civil forfeiture*, Council of Europe, 2013, p. 4.

¹⁹<http://free-group.eu/2014/03/25/the-new-eu-directive-on-confiscation-a-good-even-if-still-prudent-starting-point-for-the-post-lisbon-eu-strategy-on-tracking-and-confiscating-illicit-money/>.

²⁰ Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, Brussels 12.03.2014.

Firstly, a noticeable difference can be observed when comparing the title of art. 4 from the Directive and art. 5 from the Proposal for the Directive, both regulating confiscation where there is no conviction. In the proposal, the title of the art. is *Non-conviction confiscation*, whereas in the Directive, the title is only *Confiscation*. It is possible that the reticence of member states regarding non-conviction confiscation ultimately led to the renaming of the article.

Secondly, the fact that non-conviction based confiscation appears in the second paragraph of art. 4 of the Directive and not as an individual article like in the original proposal speaks volumes regarding the stance on this particular subject by various Member States²¹.

Thirdly, the proposal's article regarding non-conviction based confiscation obliged states to adopt the necessary measures in order to ensure the confiscation of the proceeds and instrumentalities of the crime also in the event of the death of the defendant, a provision which was removed during the legislative procedure.

Last but not least, the final draft ultimately did not include a Recital from the proposal, in which the importance of civil confiscation in the European Union was pointed out and in which references were made to the differences between the member states national law regarding this sensitive matter²².

As we have previously stated, art. 4 par. 2 provides that confiscation not based upon a conviction can only be applied in a key number of situations and that several conditions must be met.

²¹ Transparency International, *Legislation meets practice. National and European Perspective on Confiscation and Forfeiture of Assets*, p. 73.

²² Preamble 12 of the Proposal for a Directive on the freezing and confiscating of proceeds of crime in the European Union: The issuance of confiscation orders generally requires a criminal conviction. In some cases, even where a criminal conviction cannot be achieved, it should still be possible to confiscate assets in order to disrupt criminal activities and ensure that profits resulting from criminal activities are not reinvested into the licit economy. Some Member States allow confiscation where there is insufficient evidence for a criminal prosecution, if a court considers on the balance of probabilities that the property is of illicit origin, and also in situations where a suspect or accused person becomes a fugitive to avoid prosecution, is unable to stand trial for other reasons or died before EN 16 EN the end of criminal proceedings. This is referred to as non-conviction based confiscation. Provision should be made to enable non-conviction based confiscation in at least the latter, limited, circumstances in all Member States.

First of all, it is stipulated that criminal proceedings must have been initiated in order to apply the confiscation order. This is a fundamental difference from the usual civil confiscation, where, importantly, the legal action is brought against the property that represents the benefit of the unlawful activity, and not against the person²³.

Secondly, it is stipulated that there are only two distinct situations in which the confiscation order can be applied in absence of a conviction, namely where the conviction is not possible due to an illness of the defendant or due to his absconding from justice. According to Recital 16 of the Directive, the term “illness” should be interpreted in the sense that of an inability of the suspected or accused person to attend the criminal proceedings for an extended period, as a result of which the proceedings cannot continue under normal conditions.

Thirdly, it is stipulated that the proceedings could have led to a conviction if one of the situations mentioned before had not happened.

Last but not least, the criminal offence of which he is accused is liable to give him direct or indirect economic advantages.

The situations in which a confiscation order may be applied without the existence of a conviction are too few in order for the European Union to assure that this form of non-conviction based confiscation will have a significant effect in the field of preventing the use of illicit obtained money in criminal activities.

Some member states have been reticent in adopting at a European Union level any form of civil confiscation due to the fact that some of their obligations with respect to the European Convention on Human Rights might come into conflict with applying this type of confiscation.

These problems regarding civil confiscation and human rights have been taken into consideration by the European Court of Human Rights in a number of cases.

To begin with, there have been some issues regarding non-conviction based confiscation and the *ne bis in idem* principle provided by art. 4 of Protocol 7 of the European Convention on

²³*Impact Study on Civil Forfeiture*, Council of Europe, 2013, p. 1.

Human Rights. Relevant ECHR cases in this matter are the cases of *Welch v The United Kingdom*²⁴ and *Butler v The United Kingdom*²⁵.

In *Welch v The United Kingdom*, the Court had to examine whether a confiscation order which was based upon a national law providing that after a person is sentenced for a drug related crime, the court may apply a confiscation measure in order to deprive the convicted person of the benefits obtained from such illicit activities and in determining this benefit, the national court could take into consideration any property obtained by him in a period starting from the date of his conviction or in a period of 6 years before the commencement of the criminal proceedings against him²⁶ was a penalty in the view of the European Convention. In determining the size of the confiscation order, the court can take into consideration the degree of culpability of the convicted person²⁷. Furthermore if the person failed to pay he was liable to face a prison sentence of 2 years.

The European Court, although not discussing the applicability of the *ne bis in idem* principle, determined that this type of confiscation is a penalty in the sense of art. 7 of the ECHR. In its judgment, it took into account the discretion of the trial judge in setting the amount, the consequence in the situation of his failure to pay, the sweeping statutory assumptions regarding the property which passed through his hands in a certain period and the fact that the confiscation order is directed against the proceeds obtained and not the actual enrichment of the convicted person²⁸. The Court also took into account the purpose of the confiscation, which in this situation was punitive²⁹, according to the national case-law.

On the other hand, in a similar case, the European Court of Human Rights found that a confiscation order is not a criminal sanction. In *Butler v The United Kingdom*, the relevant national law, namely Section 42 of the Drug Trafficking Law, provided that a customs officer can confiscate any cash imported or exported in or out of the country if he has reasonable grounds for believing that the money is intended for drug trafficking. The Court found that the forfeiture in question is a preventive measure and cannot be compared to a criminal sanction,

²⁴*Welch v The United Kingdom*, Ap. 17440/90.

²⁵*Butler v The United Kingdom*, Ap. 41661/98.

²⁶*Welch v The United Kingdom*, Ap. 17440/90, par. 12.

²⁷*Idem*, par. 13.

²⁸*Idem*, par. 33.

²⁹*Idem*, par. 23.

since it was designed to take money out of circulation, money which was presumed to be tied to international drug trade³⁰. Furthermore the Court considered that the applicant had not been tried and convicted for any criminal offence. In this situation, unlike the case in *Welch v The United Kingdom*, there was no penalty in case of the failure to submit to the confiscation order and there was no conviction order upon which the confiscation order had been imposed.

As we have seen above, non-conviction based confiscation is not considered a penalty if it has a preventive role rather than a punitive one. The confiscation provided by art. 4 par. 2 clearly does not have a punitive purpose because the situations where this type of confiscation would be possible are when the accused cannot be convicted due to his death, illness or flight³¹.

Some EU member state courts have come to the same conclusion, that the *ne bis in idem* principle is not infringed when applying a confiscation order along a criminal punishment. In *Walsh v Director of the Assets Recovery Agency*, the Northern Ireland Court of Appeal stated: “The primary purpose is to recover proceeds of crime; it is not to punish the appellant in the sense normally entailed in a criminal sanction”³².

Secondly, the right and principle of innocent until proven guilty, according to art. 6 par. 2 of the Convention has also been invoked as a means to challenge the legality of a confiscation order.

Art. 6 par. 2 only applies to criminal procedures, so it is vital to determine whether applying a confiscation order without a conviction is, according to the ECHR, a criminal procedure.

The criteria for determining whether a sanction falls under criminal or civil law in light of art. 6 of the ECHR have been laid down in the *Engel v The Netherlands*³³ ruling, where the European Court of Human Rights stated that three criteria must be taken into account in this matter.

³⁰ *Butler v The United Kingdom*, Ap. 41661/98, p. 9.

³¹ Proposal for a Directive on Confiscation, p. 9.

³² *Walsh v Director of the Assets Recovery Agency*, 2005, NICA 6, para. 39; Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Grey, *Stolen Asset Recovery, A Good Practice Guide for Non-conviction Based Asset Forfeiture*, Ed. Star, 2009, Washington DC, p. 31.

³³ *Engel and others v The Netherlands*, Ap. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

Firstly, there is the manner in which the domestic state classifies the procedure, with a simple classification as a civil procedure not being sufficient if, in light of the other aspects, it is in fact a criminal procedure.

Secondly there is the nature of the conduct in question classified objectively.

Lastly, there is the severity of any possible penalty.

In *Phillips v The Netherlands*, the national section 2-5 of the 1994 Act provided that a confiscation order shall be made in respect of a person sentenced for a drug related crime for an amount equal to the proceeds of the drug offence and taking into consideration any property obtained since its conviction or for a period of 6 years before the commencement of the criminal proceedings. The Court came to the conclusion that a confiscation order based on this provision did not constitute a new charge against him and, as a consequence, art. 6 par. 2 was not applicable in this case.

In the aforementioned case of *Butler v The United Kingdom*, the applicant filed a complaint to the European Court in which he argued that by having to prove that his money was not intended for drug trafficking *beyond a reasonable doubt*, while the public authorities only had to satisfy the standard of proof of a *balance of probabilities* for the same aspect, his right to be presumed innocent had been violated. The Government submitted that the applicant did not prove that the sum of money was obtained from his winnings at gambling. The Court found that the confiscation order did not constitute a new charge against him and as a consequence art. 6 para 2 did not apply.

In *Walsh v United Kingdom*, after the applicant was acquitted of the charges of dishonesty, the Asset Recovery Agency started proceedings in order to confiscate GBP 70,250, which were the proceeds of unlawful conduct according to national law. The confiscation order was not based upon the offences of which he had been acquitted, but on the fact that he had a persistent criminal activity over the years and could not justify its assets. The applicant contended that the confiscation proceedings were in fact criminal and as a consequence the presumption of innocence enshrined in art. 6 par. 2 of the ECHR was applicable.

The European Court dismissed his claim, arguing that there has not been any violation of art. 6 par. 2 of the Convention, because the proceedings were not criminal by nature. The reasons

for this are the following: national law classified the procedure as civil, although the confiscation was in relation to an acquittal; it was separate and distinct in timing, procedure and content; the purpose was not punitive, but to recover assets which did not lawfully belong to the applicant. The Court also took into consideration that there was no finding of guilt and that, in applying the measure, the judge at the High Court did not take into account the conduct of which the applicant had been acquitted³⁴.

Furthermore, several cases treat the situation in which civil confiscation has been said to come into conflict with art. 1 of Protocol 1 of the ECHR.

It is clear that a confiscation order which deprives a person of the proceeds and instrumentalities of his crime which are in his possession is an interference with art. 1 of Protocol 1.

The problem is if it serves a legitimate purpose and if it is proportionate.

The purpose of Directive 42/2014/EU is, according to Recital 1, the effective prevention and fight against organized crime. The Court found purposes similar to this as being legitimate in *Phillips v The United Kingdom*³⁵.

In the same case, the Court found that the confiscation of the proceeds of drug related crimes although amounted to a serious value, it was proportionate because the confiscation order only applied to the amount considered by the judge of representing the benefits the accused person obtained from the crimes³⁶. In light of this and the fact that the purpose of the confiscation order was very serious, the Court found out that the measure was proportional.

The Directive also provides rules on extended powers of confiscation, therefore making confiscation easier when a judge is convinced that the property in question has been obtained through crime.

Recital 19 of the 2014/42/EU Directive states that “In order to effectively tackle organized criminal activities there may be situations where it is appropriate that a criminal conviction be followed by the confiscation not only of property associated with a specific crime,

³⁴*Walsh v United Kingdom*, Ap. 43384/05, par. 1.

³⁵*Phillips v The United Kingdom* Ap. 41087/98, par. 52.

³⁶*Idem*, par. 53.

but also of additional property which the court determines constitutes the proceeds of other crimes”.

It is worth noting that extended confiscation is not a novelty. Framework Decision 2005/212/JHA provided three different sets of requirements that Member States could choose from in order to apply extended confiscation.

According to art. 3 par. 2 from the Framework Decision, Member States could choose among one of these options alternatively to apply an extended confiscation if:

a) a national court, based on specific facts, was fully convinced that the property in question is derived from criminal activities of the convicted person during a period prior to conviction for the offence which is deemed reasonable by the court in the circumstances of the particular case or, alternately,

b) a national court, based on specific facts, was fully convinced that the property in question is derived from similar criminal activities, which is deemed reasonable by the court in the circumstances of the particular case, or, alternately

c) if 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 is derived from the criminal activity of that convicted person.

Recital 19 of the 2014/42/EU Directive also emphasizes that, as a result of the wide range of discretion given to the Member States, in the process of transposing the Framework Decision, Member States have chosen different options, resulting in divergent views of extended confiscation in national jurisdictions. This divergence caused a serious impediment to the mutual recognition and hampered cross-border cooperation in relation to confiscation cases.

Therefore, it was necessary to harmonize the provisions on extended confiscation by setting a single minimum standard.

Recital 21 of the 2014/42/EU clearly states that extended confiscation should be possible where a court is satisfied that the property in question is derived from criminal conduct. This does not mean that it must be established that the property in question is derived from criminal conduct. Member States may provide that it could, for example, be sufficient for the court to rely

on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities. In this context, the court has to consider the specific circumstances of the case, including the facts and available evidence based on which a decision on extended confiscation could be issued. The fact that the property of the person is disproportionate to his lawful income could be among those facts, giving rise to a conclusion of the court that the property derives from criminal conduct. Member States could also determine a requirement for a certain period of time during which the property could be deemed to have originated from criminal conduct.

It should be noted that, in contrast to the Framework Decision which required a fully convincing proof, the Directive states that it is sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities.

A fully convincing proof in this domain constitutes a sort of “*probatio diabolica*” for the judge and also deprives extended confiscation of any reason to exist, since by proving each criminal act from which certain assets result, we will reach also the author’s conviction for his crimes and therefore the standard confiscation of property thus obtained.

Art. 5 of the new Directive defines only one and binding way to apply the extended powers of confiscation.

An important aspect of extended confiscation, one that is vital in order to achieve substantial results in combating organized crime, is the ability to seize assets from third-parties. From a chronological perspective, framework decision 2005/212/JHA only recommended that Member States allowed for the confiscation of assets from only certain third parties, namely the closest relations of the person concerned and legal persons in respect of which the person concerned — acting either alone or in conjunction with his closest relations — has a controlling influence. Due to the fact that the transposition of this provision was not mandatory, only a few countries have actually implemented confiscation from third-parties.³⁷ The Member States’

³⁷REPORT FROM THE COMMISSION pursuant to Article 6 of the Council Framework Decision of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property (2005/212/JHA)- <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0805&from=EN>; Recital 24 of the Directive 2014/42/EU;

national provisions on third party confiscation are divergent. This hampers the mutual recognition of freezing and confiscation orders on assets transferred to a third party.³⁸

The Directive, on the other hand, clarifies this aspect and also makes it mandatory for Member States to allow confiscation from third-parties.³⁹ The Directive goes even further and requires that third-parties at least knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation. All of these aspects, however, have to rely on concrete facts and circumstances. *Bona fide* third-parties are expressly excluded and cannot be targeted by this measure.

Also, specific safeguards for the third parties are instated in recital 24, 33 and in art. 8. As a summary, they are the following:

Firstly, the third parties should have an effective possibility to challenge the circumstances of the case, including specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct.

Secondly, the right to be heard of the third party should be respected.

Thirdly, the freezing order should be communicated to the affected person as soon as possible after its execution. The aforementioned order must contain the reason or reasons for the order concerned.

Fourthly, persons whose property is affected by a confiscation order shall have the right of access to a lawyer throughout the confiscation proceedings relating to the determination of the proceeds and instrumentalities in order to uphold their rights. These persons shall also be informed of that right. *Bona fide* parties shall not be subjected to this measure. They are persons which did not know and did not have to know that the transferred or acquisition proceeds or property were undertaken for the purpose of eluding confiscation.

³⁸ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the freezing and confiscation of proceeds of crime in the European Union, 12.03.2012- http://ec.europa.eu/home-affairs/news/intro/docs/20120312/1_en_act_part1_v8_1.pdf

³⁹Art. 6 of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.4.2014.

Relevant legislation and case law in Romania

Extended confiscation has been added to the Romanian Criminal Code in 2012 and requires four conditions to be met:

First of all, the existence of a conviction for the committing of one of the crimes restrictively enumerated in par. 1⁴⁰, for which the law institutes prison as punishment of at least 4 years and which is capable of providing material benefits to the convicted.

Secondly, the law requires that the value of goods acquired by the convicted, over a period of 5 years before and, if that is the case, after the committing of the crime and up to the procedural moment of the reading of the writ of court, manifestly surpasses his lawful income.

Thirdly, the goods must not be among those targeted by the special confiscation safety measure.

Finally, the court must be convinced that the targeted goods come from crimes of a similar nature to the ones enumerated in the aforementioned restrictive list. In contrast, art. 5 par. 1⁴¹ of the Directive requires the goods to be derived from “criminal conduct”. Romania has opted to instate a more restrictive application of extended confiscation, by confining the criminal conduct to the limited list of crimes from art. 112¹.

⁴⁰Illicit trafficking in narcotic drugs and psychotropic substances, trafficking in human beings, crimes regarding the Romanian state border, laundering of the proceeds of crime, sexual exploitation of children and child pornography, terrorism, participation in a criminal organization, crimes against patrimony, crimes regarding gun, ammunitions, nuclear and explosive materials control, corruption and assimilated corruption, crimes against the financial interests of the European Union, gambling related crimes, counterfeiting and falsification of other values, crimes regarding commercial secrets, unfair competition, import/export related crimes, fraudulent misuse of funds, crimes related to the entrance and exit of waste and residues, tax evasion, customs regime crimes, computer-related fraud and organ or human cell trafficking.

⁴¹ Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.

The new provision has been subjected to scrutiny⁴² by the Constitutional Court on the grounds of a potential breach of the principle of non-retroactivity. The Romanian Constitution considers criminal law to be an exception from the aforementioned principle, provided that they are more favorable. Also, our country considers that the application of the favorable criminal law refers to the ensemble law (global application) and not to individual legal institutions (autonomous institutions application). In that sense, extended confiscation in the former Criminal Code required that the law punish the crime with at least 5 years of prison and not 4, as is the case today. These aspects created a few problems when the application of this safety measure was considered. Out of these, we consider to be of relevance the fact that the safety measure cannot target goods acquired or acts committed prior to the date of entry into force of the new provisions, because that would be the case of a less favorable retroactive law. In other words, the full power of extended confiscation can only be achieved in Romania after 5 years have passed since the aforementioned date.

The Constitutional Court has also analyzed the conformity of extended confiscation with the Fundamental Law. It has based its argumentation on the relative character of the presumption of lawful acquiring of property. All rights contained within the Constitution can be absolute or relative, with the difference lying within their capacity to have exceptions and restrictions, and they all have to be interpreted in connection and conjunction with all other rights and provisions contained. In pas case-law, the Court has clearly stated that the right to property is relative, with possible exceptions such as the expropriation procedure supporting this claim. But, in order to preserve the relative quality of this right, the presumption of lawful acquiring of property needs to be relative as well. To claim the contrary would lead to a situation where the primary right becomes absolute by applying the presumption, although it may be subjected to certain limitations, under some circumstances⁴³. This is where extended confiscations comes into discussion. This presumption, however, may not be entirely suppressed, because that would lead to a state of continuous uncertainty for all owners of property. In the event that a person would invoke the unlawful acquiring of property, the burden of proof would be upon the owner. Furthermore, the Court held that the use of presumptions within confiscation proceedings is also recognized by the ECHR, but only if it is accompanied by certain guarantees, which are intended

⁴² Decision no. 356/2014, which targeted the corresponding of the former Criminal Code.

⁴³[http://www.drept.uvt.ro/documents/Journal_of_Eastern_European_criminal_law_1_2015_BT%20\(1\).pdf](http://www.drept.uvt.ro/documents/Journal_of_Eastern_European_criminal_law_1_2015_BT%20(1).pdf)

to protect the rights of the defense. The Court ruled that each legal system recognizes the presumptions of fact or of law. As a matter of principle, the Convention clearly does not prohibit such presumptions. However, the right of the applicants to respect for their property presupposes the existence of an effective judicial guarantee⁴⁴

Also of relevance are the remaining paragraphs⁴⁵, which circumstantiate the above conditions.

Par. 3 states that the targeted goods include those which have been transferred by the convicted or a third-party to a family member⁴⁶ or a legal person upon which the convicted exerts control. Romania has complied with Framework Decision 2005/212/JHA in this aspect, which, through art. 4 par. 3, requires member states to at least allow the confiscation of goods from the two previous categories. Directive 2014/42/EU, however, uses a much broader notion, that of “third-parties”. By interpreting recital 21 and art. 6 from the previous legislative act, extended confiscation should not be constrained when it comes to the kind of third-party which has received the goods and, in this sense, the Romanian relevant legislation complies with this new vision. The analyzed paragraph merely mentions some of the kinds of third-parties which should be taken into account and represents an extended transposition, one that goes beyond the minimal application imposed by the Framework Decision.

⁴⁴*Idem.*

⁴⁵ „(3) In enforcing the stipulations of par. 2, the value of the assets transferred by a convicted person or by one third party to a family member or to a legal entity over which that convicted person has control shall also be considered.

(4) Sums of money may also constitute assets under this Article.

(5) In determining the difference between the legitimate income and the value of the assets acquired, the value of the assets upon their acquisition and the expenses incurred by the convicted person and their family members shall be considered.

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

(7) The assets and money obtained from exploiting the assets subject to confiscation as well as the assets produced by such shall be also confiscated.

(8) Confiscation shall not exceed the value of assets acquired during the period referred to in par. (2), that are above a convicted person’s lawfully acquired income.”

⁴⁶ According to art. 177 of the Romanian Criminal Code, family members are the ascendants, descendants, brothers and sisters, the children of the last two, as well as people who became such relatives through legal adoption. Also included are the husband and other people which have developed relationships similar to marriage or a parent-son relationship, if they are living together.

A series of issues arose in the matter of freezing property with a view towards possible confiscation. This precautionary measure can be instituted in Romania by the prosecutor or by the court. In the first case, any interested person may contest the measure itself or its enactment before a judge. In the second case, however, only the enactment may be contested. This proved to be problematic for third-parties in possession of goods targeted for extended confiscation, as they frequently found out about the potentially unlawful freezing measure only when it was effectively applied and would only be able to file a limited complaint or appeal the ruling. This was in stark contradiction with art. 8 par. 4⁴⁷ of the 2014 Directive, which demands that member states allow all persons whose property is affected to challenge the freezing order before a court. Fortunately, the Romanian Constitutional Court has had the opportunity to decide on the constitutionality of these provisions. It has declared them to be against the Fundamental Law and the ruling began producing effects on the 5th of March 2016.

Another issue is the lack of provisions that impose communicating the right to an attorney to third-parties whose property may be affected by the freezing. The Criminal Procedure Code of Romania⁴⁸ states that lawyers assist or represent the accused, the suspect, the victim, the civil party and the party which is liable in the civil lawsuit. The third-party interested in challenging the freezing order cannot be included in any of the aforementioned qualities. Therefore, art. 8 par. 7 of the 2014/42/EU Directive are not respected within the Romanian legal system.

⁴⁷ Member States shall provide for the effective possibility for the person whose property is affected to challenge the freezing order before a court, in accordance with procedures provided for in national law.

⁴⁸ Article 88 par. 1 of the Criminal Procedure Code of Romania, corroborated with articles 32 and 33.

Conclusions

Taking into account the beneficial effects we previously highlighted, it is our conviction that Directive 2014/42/EU is a remarkable step forward in the fight against organized crime by seizing any and all assets derived from criminal activities.

At the same time we consider that there is room for improvement regarding at least two aspects: confiscation from third-parties and non-conviction confiscation, and we would like to express our opinions regarding the way in which confiscation measures should evolve in the European Union.

As far as confiscation from third parties is concerned, a major issue is the fact that these persons, provided that freezing orders have not been given throughout the criminal trial, will only find out when the confiscation orders have been communicated to them. Art. 8 par. 6 does not state that this must be done as soon as possible, as opposed to the communication of the freezing order from par.2. Should this differentiation make its way into national laws unmodified, it could lead to abuse, by communicating the order in such a way as to hamper the third-party's right to an effective defense.

Also, the Directive should be modified to exclude the possibility for Member States to make third-party confiscation an alternative measure to direct confiscation. As recital 24 states, the practice of transferring goods to people not tied to the crime is common and increasingly widespread. All criminal proceedings and instrumentalities should be confiscated, no matter the hands in which they are, the accused or a non *bona fide* third-party, and should not involve a choice between the two.

Regarding non-conviction based confiscation, we consider that the situations in which this measure can operate are too few in order to be effective in a real manner.

Besides the illness and the flight of the suspected or accused person, we recommend that other events which have an effect of blocking the criminal prosecution should be prescribed as situations in which the confiscation of the proceeds and instrumentalities of a crime should be confiscated.

First and foremost, we recommend that the confiscation of the proceeds and instrumentalities of a crime should operate in the event of the death of the accused person, a situation which was provided by the proposal for the directive. The confiscation order can be executed against his successors. It would be immoral for other people, although not having any part in the crime, to use proceeds derived from a crime.

Secondly, we consider that another situation where non-conviction based confiscation ought to operate is when a person cannot be prosecuted due to his immunity from criminal prosecution. If he were to be left with the benefits obtained from a crime because he cannot be tried due to his legal immunity, those benefits could be reinvested in criminal activity without any consequences.

Last but not least, non-conviction confiscation should be applicable when the accused cannot be convicted because the accusation has not been proved according to the standard of beyond a reasonable doubt. In this case a smaller standard of proof such as the balance of probabilities should apply to the confiscation procedure.

Ultimately, the entire ensemble of provisions targeting the confiscation and freezing of proceedings and instrumentalities should be aimed towards increasing the efficiency of criminal prevention activities, by adapting it to the new context of cross-border crimes, but not without neglecting the fundamental rights of the accused, convicted or those of any other person negatively affected by the actions of the state.