Confiscation of Criminal Assets in Romania

Dan Moroșan
Florin Streteanu
Daniel Nițu

A. Substantial aspects on confiscation (types of confiscation present in the Romanian national legal systems)

I. Confiscation

First and foremost, confiscation in Romania is regulated through several instruments, the most important, substantial wise, being the Romanian Criminal Code – therefore confiscation has a predominant criminal nature. In the following lines, all the existing types of confiscation present in the national legal landscape will be presented, as well as each of their particular features. The institutions of criminal nature are criminal confiscation, extended confiscation and non-conviction-based confiscation. In the last part of this first section, an overview will be made with regard to administrative confiscation and confiscation on the basis of Law no. 55/1996.

1. Criminal confiscation

Confiscation (otherwise known as criminal confiscation or special confiscation) is regulated in the Romanian legal framework in the Criminal Code, being an institution with tradition. Currently, the legal regime is regulated in Title IV, Chapter II, at art. 112 of the Criminal Code (adopted in February 2014), beforehand being regulated similarly in the Criminal Code of 1968, in art. 118.

Per its legal nature, beforehand and now, confiscation is a security measure, being applied alongside the compulsion to undergo medical treatment, admission to a medical facility, prohibition to become employed or to practice a certain profession and extended confiscation. Since its nature is that of a security measure, *confiscation can become applicable only against a person who committed an unjustified offense under criminal law*. Which regard to the concept of unjustified offense, two elements need to be fulfilled in order to be able to order a security measure: (1) the perpetrator must commit an act provided by criminal law and (2) the act must be performed unjustifiably, respectively without the application of any of the regulated justifiable causes (legitimate defense, state of necessity, exercising a right or meeting an obligation and the consent of the victim). If any of these cases are present, security measures cannot be ordered.

Having this condition in mind, it is important to note that in the wording of article 107 of the Criminal Code, *security measures seek to eliminate any state of hazard and prevent the commission of offenses provided by criminal law* and *security measures may also be taken in case no penalty is applied to the offender*. Having analyzed the article, one can observe that the purpose of security measures in the Romanian legal system (and commonly) is the elimination of a source of hazard – on the one side, and the prevention of the commission of other offenses, on the other side. No further explanation is thus needed in this sense, being self-evident the conditions under which a security measure may be ordered and the procedural standard that must be attained so as a security measure to be pronounced against a certain individual. Turning back to the applicable legal provision concerning confiscation, the law states the following:

Art. 112 of the Criminal Code

(1) The following shall be subject to special confiscation:

a) assets produced by perpetrating any offense stipulated by criminal law;

b) assets that were used in any way, or intended to be used to commit an offense set forth by criminal law, if they belong to the offender or to another person who knew the purpose of their use;

c) assets used immediately after the commission of the offense to ensure the perpetrator's escape or the retention of use or proceeds obtained, if they belong to the offender or to another person who knew the purpose of their use;

d) assets given to bring about the commission of an offense set forth by criminal law or to reward the perpetrator;

e) assets acquired by perpetrating any offense stipulated by criminal law, unless returned to the victim and to the extent they are not used to indemnify the victim;

f) assets the possession of which is prohibited by criminal law.

(2) In the case referred to in par. (1) let. b) and c), if the value of assets subject to confiscation is manifestly disproportionate to the nature and severity of the offense, confiscation will be ordered only in part, by monetary equivalent, by considering the result produced or that could have been produced and the asset's contribution to it. If the assets were produced, modified or adapted in order to commit the offense set forth by criminal law, they shall be entirely confiscated.

(3) In cases referred to in par. (1) let. b) and c), if the assets cannot be subject to confiscation, as they do not belong to the offender, and the person owning them was not aware of the purpose of their use, the cash equivalent thereof will be confiscated in compliance with the stipulations of par. (2).

(4) The stipulations of par. (1) let. b) do not apply to offenses committed by using the press.

(5) If the assets subject to confiscation pursuant to par. (1) let. b) - e) are not to be found, money and other assets shall be confiscated instead, up to the value thereof.

(6) The assets and money obtained from exploiting the assets subject to confiscation as well as the assets produced by such, except for the assets provided for in par. (1) let. b) and c), shall be also confiscated.

Having observed the structure of the legal provision, before analyzing each of the conditions that need to be met in order to confiscate, we believe that it is essential to answer one fundamental question: is the imposition of confiscation, as regulated by art. 112 of the Criminal Code mandatory or is it optional? The answer seems rather simple if one considers the legal nature of the institution and paragraphs. 1 let. a-f. of art. 112 of the Criminal Code.

According to the aforementioned provision, confiscation shall be applicable to (1) assets produced by the commission of any criminal offense, (2) assets used or intended to be used in the commission of the offense, (3) assets used immediately after the commission of the offense in order to escape or to ensure the retention of proceeds, (4) assets given to bring about the commission of the offense or to reward the perpetrator, (5) assets acquired by perpetrating the offence and (6) assets the possession of which is prohibited by criminal law.

As it can be seen, there are 6 categories of assets that can be confiscated. However, since confiscation is a security measure and the categories are expressively enumerated without any supplementary clarifications, the inference is that confiscation is compulsory to be ordered, since the purpose of a safety measure is to eliminate hazard and prevent the commission of further offenses. The law thus presumes that if the asset falls within one of the categories presented above, it constitutes a source of hazard. As an example, a pot *per se* used in the commission of an offense is not dangerous given its nature; however, since it has been used in the commission of the offense, the law presumes it is a source of danger and the court must therefore order its confiscation.

Regarding the persons against whom the order to confiscate may be imposed, an analysis must be made in each hypothesis provided. As a general rule, the concept of *committing an offence* relates in the Romanian legal framework to all the participants to the offence, regardless of their input. As such, confiscation may be ordered against the perpetrator himself, the instigator and the accomplice (even in the modality of improper participation, under certain conditions).

Starting with the first hypothesis provided, the Criminal Code imposes the issuing of a confiscation order if the assets are produced by the commission of any criminal offense. In legal doctrine[1], it was stated that such assets must be considered those that did not have an existence before the commission of the offense, being a consequence of the commission. Other authors have extended the understanding and stated that even though the asset existed beforehand, it will still be considered an asset produced by the commission of the offence insofar as the modification of the asset resulted from the commission of the offense[2]. As examples of assets preexisting, the authors described the situation of goods introduced by contraband, medicine containing illicit substances and so on. Per the classic examples, assets produced by the commission of the offense could be new coins, falsified credit titles, falsified instruments of payment, falsified check, counterfeited tickets and so on.

The second situation concerns the case of assets that were used or intended to be used in the commission of any criminal offense. The provision was subject to debate both in legal practice and in doctrinal research, several opinions being presented. However, legal scholars[3] consider that confiscation can be ordered with respect to all assets that were used in the commission of the offense, irrespective of their input. Moreover, considering assets destined to be used, legal practice[4] has stated that since they were not used in the commission, such assets can be confiscated only insofar as they were transformed, prepared, modified or adapted for the commission of the offense. In this sense[5], even though some debate existed beforehand, it is now relatively clear that confiscation on the basis of letter art. 112 par. 1 let. b) can be rendered only

[1] see M. Vasile, *Confiscarea specială și expulzarea în dreptul penal român*, ed. Universul Juridic, București, 2012, p. 91

[2] see I. Lascu, *Confiscarea specială ca măsură de siguranță. Condiții generale reglementate de Noul Cod* Penal, Dreptul, no. 12, 2005, p. 207

[3] see V. Dobrinoiu, I. Pascu, M. A. Hotca, I. Chiș, M. Gorunescu, C. Păun, N. Neagu, M. Dobrinoiu, M. Constantin, *Noul cod penal comentat. Partea generală*, ed. a-III-a, ed. Universul Juridic, București, 2016, p. 645

[4] see Supreme Court, S. Pen., Dec. nr. 3933/2003, în RDP nr. 1/2006, p. 171.

[5] see D. Nițu, *Modificările aduse în materia confiscării de prevederile legii nr. 278/2006*, Caiete de Drept Penal, nr. 3/2006, p.46

for the commission of offenses that have an intentional basis and not offense characterized only by negligence (used, destined to be used, for the commission).

Limit-wise, confiscation relying on this article can be rendered only for assets that pertain to the offender or to a third party who knew the purpose of their use and not for offenses committed through press. Concerning the concept of a third party that knew, the respective party will be qualified, according to Romanian legislation as an accomplice or instigator, the institution not being applicable to *per se de bona fide* third parties. As such, confiscation will be render on the basis of participation to the offense. The second limit, respectively the inability to confiscate if the offense was committed through press, relates to the right to be informed and the very serious effect that confiscating the technical instruments of a press institution can have[6].

The third case relates to assets used immediately after the commission of the offense to ensure the perpetrator's escape or the retention of the proceeds obtained. This is a new motive so as to order confiscation; the regulation being lobbied for by the judiciary. In this sense, the assets, as in the previous case, must pertain to the offender or a third party that knew the purpose of their use. As such, there is no *bona fide* third party affected, the person who knew being sanctioned either as a coperpertrator, accomplice or instigator. As well, if the instrument is given by a participant to the initial offense, it must be confiscated as well on the basis of let. b of art. 112 of the Criminal Code.

The fourth case concerns assets given to bring about the commission of an offense set forth by criminal law or to reward the perpetrator. In this sense, no special issues seem relevant, the following conditions being required: (1) the assets need to be offered with the scope of determining the commission of the offense or the reward the perpetrator, (2) the assets need to be given voluntarily (3) the deed for which the assets are given needs to be a crime provided by criminal law, committed unjustifiably. Per legal doctrine[7], several judicial decisions were criticized because in situations as the one described above, confiscation was ordered on the basis of art. 112 let. e) (assets acquired by the commission of the offense), stipulating that the key difference between the two is that in the case of the latter, the assets found in the possession of the offender were acquired by the commission of the offence and they were not given so as to reward or to influence the commission of the offense. As such, the consummation of the crime as well as the obtaining of the asset is an effect of the commission of the offense on the basis of let. e) of art. 112 of the Criminal Code.

The fifth hypothesis concerns partly the situation described above, respectively the confiscation of assets acquired by perpetrating any offense stipulated by criminal law. This would be the most used basis for confiscation, as for many common offenses, confiscation is rendered (theft, robbery, fraud and so on). The main limitation in this case is the exclusion of confiscation if the assets are returned to the victim and to the extent they are not used to indemnify the victim. As such, confiscation can be ordered only in cases when the victim is not known, or he or she did not have any civil claims against the offender. In the remainder of cases, usually the asset is given

[6] Ibidem

[7] see M. Basarab, V. Paşca, C. Butiuc, G. Mateuț, *Codul penal comentat. Vol. I., Partea generală*, ed. Hamangiu, Bucureşti, 2007, p. 601

back to the victim, or if it was destroyed or modified, the value of the asset is returned to the victim.

Finally, the sixth situation regard the case of assets the possession of which is prohibited by criminal law. Without dwelling too much on the situation, confiscation is compulsory and the rationale for its ordering is relatively straightforward. In this sense, the first condition would be that the assets are held contrary to criminal law provisions and secondly, that they be subject to a special regime, regulated by norms of a criminal nature. To clarify this, according to article 173 of the Criminal Code, a provision of criminal law is defined *as any criminal stipulation included in organic laws, emergency ordinances or other regulatory acts which, at the date they were adopted, had legal power*. Such assets could be: weapons, ammunition, explosive substances, toxic substances, drugs and so on.

Regarding the special limits that operate with regard to the institution of confiscation, these would be, according to article 112 par. 2-6: (1) partial confiscation (2) value-based confiscation and (3) confiscation of assets obtained from the exploitation or use of assets subject to confiscation.

Concerning the possibility to confiscate only partially, several preliminary observations are due.

The first observation that needs to be issued is that partial confiscation applies only for *assets used in any way or destined to be used for the commission of the offense* and for *assets used immediately after the commission of the offense to escape or to keep the proceeds obtained*. The rationale behind this limitation is relatively simple and it concerns the intensity of the state of hazard that is produced by the assets in question. In the rest of the cases, respectively in the cases of (1) the assets produced by the commission of the offense, (2) assets given so as to commit or reward the commission of the offence, (3) assets acquired by the commission of the offense and (4) the assets the possession of which is prohibited by criminal law, the intensity of the state of hazard in higher than in the previous cases[8].

The second observation is that if the assets in question (used, destined to be used or used to escape or keep the proceeds) were produced, modified or adapted in order to commit the offense, the possibility to partially confiscate does not exist. The difference in regime relates to the difference in malice that exists between a person that uses a licit asset in order to commit an offense versus a person that modifies or adapts set asset in order to be useful in the commission of the offense.

Finally, the third observation is that partial confiscation will operate by monetary equivalent, meaning that the assets in question will be initially evaluated and after the evaluation, (1) considering the result produced, (2) the result that could have been produced and (3) the assets contribution to the result or potential result, confiscation will be ordered.

[8] As an example, it would be irrational to confiscate only partially the assets given in order to hurt a certain person or just a part of the whole quantity of drugs used in the commission of an offense. For further explanations see D. Nițu, *Modificările aduse în materia confiscării de prevederile legii nr. 278/2006*, Caiete de Drept Penal, no. 3/2006, p. 54

Considering the analysis *per se*, some authors have stated that even though the text seems to suggest a two-step approach – the first being the analysis of the disproportion between the nature and severity of the offense and the value of the asset, the evaluation will be done in a single process, as the degree of disproportion between the value of the asset and the nature and severity of the offense is very hard to quantify[9]. In this sense, the contribution of the asset towards the commission of the offense will have a prevalent role if the offense in question is of a patrimonial nature, being relatively simple to compare the two values and conclude. However, if the offense is one that cannot permit a value-based approach, the situation will be relatively difficult and the only solution in the evaluation phase will be to use the general criteria for the purpose of sentencing, provided in article 74 of Criminal Code[10].

Turning towards the issue of value-based confiscation, two observations are essential, given the context.

The first one is that the institution is applicable in all situations, with the exception of the situation provided in art. 112 para. 1 let. a), where the assets produced by the commission of the offense are always to be confiscated.

The second observation is that an apparent difference in regime seem to apply, since for the case of *the assets used or destined to be used in the commission of the offense* and the *assets used in order to escape or retain the proceeds of the offense*, a special provision exists. The rationale behind this legislative technique relates to the limitations that exist concerning letter b) and c) of art. 112 para. 1 on the one side, and the fact that partial confiscation is applicable only in these instances, on the other side. Regardless, the general reasons for which value-based confiscation is to be applicable remain the same. As such, value-based confiscation should apply in all situations where the assets subject to the measure do not exist in the moment when the order was issued. The situation is applicable even when the assets subject to confiscation have been transferred to another third party, insofar as the third party is qualified as *de bona fide*. If the asset is transferred to the third party, and the person in question knew that the asset originated from the commission of an offense, value-based confiscation will not be applicable, the asset in question being confiscated directly (if it still exists).

Finally, concerning the confiscation of assets obtained from the exploitation or use of assets subject to confiscation, the legal provisions of article 112 state that it will be applicable in all cases, with the exception of those provided in par. 1 let. b) and c). The rationale behind the rule, as it was introduced in 2006, is that the offender should not remain with anything from the commission of the offense. As such, it should be fair to confiscate the eventual profits that are realized by the assets that were produced or whose possession is prohibited by criminal law. With

[9]Ibidem.

[10] *Establishing the length or amount of a penalty shall be made on the basis of the seriousness of the offense and the threat posed by the convict, all of which shall be assessed based on the following criteria: a)the circumstances and manner of commission of the offense, as well as the means that were used; b)the threat to the protected social value; c)the nature and seriousness of the outcome produced by the offense or other consequences of the offense; d)the reason for committing the offense and intended goal; e)the nature and frequency of offenses in the convict's criminal history; f)the convict's conduct after committing the offense and during the trial; g)the convict's level of education, age, health, family and social situation.*

regard to the relevant exceptions, the rationale behind them was that the assets in question pertain either to the perpetrator or the third party that knew their use, but their possession until the point of the commission of the offense was legal. As such, since their possession is not prohibited by any norm, it would be unjust for the court to confiscate profits made by legitimate use. A well know example is that of a car bought by the offender used in the commission of an offense and afterwards used by the offender as a taxi. In this case, it would be illogical to confiscate the sums of money produced by the use of the car in the taxi business on the basis that the same car was used to hit a person out of spite.

2. Extended confiscation

Extended confiscation was firstly devised by the EU legislator by means of Framework Decision 2005/212/JAI and it was further refined through Directive 2014/42/EU. For Romania and allegedly for most EU Member States, the institution is rather new, and it proved more challenging to implement than expected. In the national legal framework, the institution was first envisaged in the project of the New Criminal Code, before 2009[11], but it was eliminated during the parliamentary debate. However, it was regulated afterwards under the aegis of Law no. 63/2012 on amending and supplementing the Criminal Code and Law no. 286/2009 on the Criminal Code, with the purpose of transposing the aforementioned Framework Decision. The institution suffered several challenges alleging unconstitutionally,[12] but it was kept in the new Criminal Code in a very similar form. According to the legal text in force:

1) Assets other than those referred to in Art. 112 are also subject to confiscation in case a person is convicted of any of the following offenses, if such offense is likely to procure a material benefit and the penalty provided by law is a term of imprisonment of 4 years or more:

a) drug and precursor trafficking;

b) trafficking in and exploitation of vulnerable people;

c) offenses on the state border of Romania;

d) money laundering offenses;

e) offenses related to the laws preventing and fighting pornography;

f) offenses related to the legislation to combat terrorism;

g) establishment of an organized crime group;

h) offenses against property;

i) failure to observe the law on firearms, ammunition, nuclear materials and explosives;

j) counterfeiting of currency, stamps or other valuables;

k) disclosure of economic secrets, unfair competition, violation of the stipulations on import or export operations, embezzlement, violations of the laws on imports and exports, as well of the laws on importing and exporting waste and residues;

l) gambling offenses;

m) corruption offenses, offenses assimilated thereto, as well as offenses against the financial interests of the European Union;

n) tax evasion offenses;

[11] Compared to the regulated version, in the project, the institution was designed with no limitations concerning the list of offenses for which is was to be applicable.

[12] See Constitutional Court: Decision no. 78 of 11 February 2014, Decision no. 365 of 25 June 2014, Decision no. 11/2015.

a) offenses related to customs regulations;

p) fraud committed through computer systems and electronic payment means;

q) trafficking in human-origin organs, tissues or cells.

(2) Extended confiscation is ordered if the following conditions are cumulatively met:

a) the value of assets acquired by a convicted person within a time period of five years before and, if necessary, after the time of perpetrating the offense, until the issuance of the indictment, clearly exceeds the revenues obtained lawfully by the convict;

b) the court is convinced that the relevant assets originate from criminal activities such as those provided in par. (1).

(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 obtained income.

Observing the legal text, the conditions required to order extended confiscation become clear. As such:

(1) the offender must commit a triggering offense sanctionable by at least 4 years imprisonment;

(2) the offense must be likely to procure a material benefit;

(3) the solution for the commission of the offense must be a conviction;

(4) the value of the assets in the propriety of the convicted persons must clearly exceed the revenues obtained lawfully in a period of maximum 5 years;

(5) the court must be convinced that the difference in value originated from criminal activities similar to the ones for which conviction was decided.

With regard to the first two conditions, the national legal regime is fairly clear on the matter. As such, in order for extended confiscation to be ordered, first and foremost the offender must commit a list offense for which the penalty provided by law must be at least 4 years and the offense must be likely to procure a material benefit.

With regard to the list and the provided penalty, the first observation is that both criteria relate to the nature of the offenses *in abstracto*. In this sense, the court must simply observe if the triggering offense is provided in the list and verify if the punishment provided by law is of at least 4 years. Considering the latter condition, it is essential to see what the Criminal Code defines as a punishment provided by law. In this context, according to article 187 of the Criminal Code, by punishment provided by law, one should understand *the penalty stipulated by the text of the law incriminating the completed offense, not considering the circumstances for the aggravation or mitigation of the penalty*. As a conclusion to the ideas presented above, the

condition shall be met only insofar as the offense committed is sanctionable without any aggravation or mitigation circumstances applicable. As well, it is possible to convict the persons to a fine and still have the condition met, since it only relates to the punishment provided by law.

With regard to the likeliness to procure a material benefit, the condition is intimately linked with the types of offenses provided in the list, but it is however insufficient. This condition should be analyzed in a strict manner by the court that rules on the potential triggering offense, since, even though most of the offense relate to patrimonial gain, this is not the case for all of them. As presented in legal doctrine[13] the condition is to be analyzed *in concreto*, on a case by case basis. As examples, the offense of pandering was put forward, being stated that even though in most cases, the offense is committed in order to gain some financial benefit, this is not always the case, some individuals not following a patrimonial gain.

Turning toward the third condition, as stated in the legal text, the decision of the court in order to trigger the possibility to confiscate extensively must be a conviction. The procedural solutions that meet this requirement are (1) the conviction by which the court orders the execution of the penalty (life imprisonment, imprisonment, or a fine) and (2) the conviction by which the court suspends the service of the sentence under supervision. Both are valid solutions that permit the ordering of extended confiscation, but in the case of the suspension of service of the sentence, the penalty applied *in concreto* must be imprisonment in a term of maximum 3 years. Per the solutions that do not permit the issuing of an extensive confiscation order, these are (1) acquittal, (2) the postponement of penalty enforcement and (3) the waiver of sentence enforcement. Without providing more detail on the manner, it is sufficing to say that these solutions are possible for some of the offenses provided in the list in article 112^1 of the Criminal Code and the attitude of the judge will, in this case, render extended confiscation impossible to order, if the triggering offense was seen as not dangerous enough so as to warrant a conviction.

Concerning the fourth condition, it was a topic of debate, both from a constitutionality standpoint and in the sense of material implications (what is an asset in this context, how should the reference period be calculated and how is the revenue analyzed with regard to the lawfully obtained assets).

With regard to the constitutionally of the provisions, The Constitutional Court settled the conflict in a first stage, being challenged with an unconstitutionality claim concerning art. 118^1 par. 2 lit. a) of the Criminal Code. The main criticisms regarded the violation of the constitutional provisions of art. 16 par. 1 of the Constitution, regarding the equality of citizens before the law and art. 15 par. 2 regarding the rules concerning the retroactive application of criminal law. The claim relied as well on the provisions of art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (*nullum crime sine lege principle*). By Decision no. 78 of February 11, 2014, the Court held that art. 118^1 par. 2 lit. a) is constitutional insofar as it applies only to the acts committed under the new legislative solution, namely after 22 April 2012. A second exception concerning unconstitutionality was raised with regard to the same text but, in addition to the arguments presented above, there was a different state of affairs (the goods were acquired before the regulation of extended confiscation) and the text was reported to be unconstitutional in relation to art. 44 par. 8 of the Constitution - text governing the presumption

[13] F. Streteanu, *Considerații privind confiscarea extinsă*, Caiete de Drept Penal, no. 2/2012, pp. 23-24

of the licit nature of the acquisition of property. By Decision no. 365 of June 25, 2014, the Court held that the text invoked is constitutional, since the presumption in Art. 44 is a relative one that allows for overthrowing by other presumptions and evidence, and the text of art. 118^1 par. 2 let. a) is constitutional only to the extent that confiscation does not apply to assets acquired before the entry into force of Law no. 63/2012. Concerning the constitutionality of the text of the New Criminal Code, a last exception of unconstitutionality was raised for the same reasons and by Decision no. 11/2015, the Constitutional Court held that art. 112^1 par. 2 let. a) is constitutional insofar as it is not applicable to assets and acts committed prior to the entry into force of Law no. 63/2012.

Turning towards the material implications of the provision, the first aspect that needs to be clarified is the meaning of an asset in the case of extended confiscation. We believe that the situation is identical with the one in the case of criminal confiscation. Therefore, assets will be considered any movable or immovable goods that pertained to the defendant, any sums of money received, services for which he or she paid for or were offered free of charge, as well as any other assets that have an economic value (credit titles, shares in a joint stock company and so on). Concerning the assets that will not be calculated in this endeavor, it is evident that the assets confiscated or returned to the victim per the triggering offense will not be calculated, as well as any other assets that were forcefully removed beforehand as a consequence of any prior convictions and ordering of criminal confiscation.

In this context, with the purpose of shedding light on the so-called third-party confiscation, it is worth mentioning that the provision stipulated in article 112^1 par. 3 do not permit third-party confiscation. The provision simply states that when calculating the difference in worth – legally obtained vs subject to extended confiscation, the court or the investigative bodies must also look at assets transferred by the convicted person to a family member or to a legal entity over which he or she has control. Moreover, in our view, the provision is simply exemplificative since it would be surreal to believe that other means of circumventing this limitation do not exist. As such, a good friend could be used so as to extract sums of money and if interpreting the text literally, it would be impossible to confiscate. As a final note, as provided in para. 5 of article 112^1, when calculating the worth difference between the legitimate income and the value of all the assets that the convict has as a proprietary, attention must be given both to the value upon acquisition and the expenses that the specific asset incurred. In this sense, as an example, if the asset was acquired at the sum of 2.000.000 EUR in January 2016 and the maintenance for the asset was 1.000 EUR monthly, if confiscation is decided in January of 2018, and the assets value is at the time of the sentencing 1.000.000 EUR, the total sum that needs to be considered when compared to the licit assets would be 2.000.000 EUR plus 24 multiplied by 1.000 EUR. As such, the total value of the asset in question when compared to the licit income since 2016 would be 2.024.000 EUR.

Concerning the reference period, respectively within five years before and, if necessary, after the time of perpetrating the offense, until the issuance of the indictment, the formulation was criticized by doctrine as being, on the one hand, unclear[14], and on the other hand, ineffective[15],

[14] M. Hotca, *Neconstituționalitatea și inutilitatea dispozițiilor care reglementează confiscarea extinsă,* published online *at* https://www.juridice.ro/199507/neconstitutionalitatea-si-inutilitatea-dispozitiilor-care-reglementeaza-confiscarea-extinsa.html.

since the term was seen as a regressive one that is calculated starting with the indictment. Others[16] have stated that the aforementioned opinion is erroneous, and the reference point is to be considered as the commission of the offense. It was deemed that the latter view can be the only one compatible with the intent of the legislature, since otherwise, as well stated, the institution would be useless.

Finally, concerning the last condition, respectively that the court must be convinced that the difference in value originated from criminal activities similar to the ones for which conviction was decided, the key issue is the establishment of the incumbent standard of proof. The provision was the most discussed in legal doctrine, being of essential importance.

Starting with the legal requirements, as a rule, according to article 103 of the Code of Criminal Procedure, *(1) Pieces of evidence do not have a value pre-established by law and are subject to the free discretion of the judicial bodies, based on the assessment of all pieces of evidence produced in a case. (2) In deciding the existence of an offense and on a defendant's guilt, the court decides, on a justified basis, on the basis of all the assessed pieces of evidence. Conviction is ordered only when the court is convinced that the charge was proven* ***beyond any reasonable doubt****.* As it can be seen, the general standard of proof required in criminal proceedings is that of beyond any reasonable doubt.

With regard to the persons responsible for the gathering of evidence, article 99 of the Code of Criminal Procedure states that (1) *In a criminal action, the burden of proof rests primarily with the prosecutor, while in a civil action it rests with the civil party or, as applicable, upon the prosecutor initiating the civil action. (2) A suspect or defendant benefits from the presumption of innocence, has no obligation to prove their innocence, and has the right not to contribute to their own incrimination*. Concerning the production of evidence, it is stated in article 100 of the Code of Criminal Procedure that *(1) During the criminal investigation, criminal investigation bodies gather and produce evidence both in favor and against a suspect or a defendant, ex officio or upon request. (2) During the trial, the court produces evidence upon request by the prosecutor, the victim or the parties and, in subsidiarity, ex officio, when it deems it necessary for the creation of its own conviction.*

As it can been seen, the general rule is that the standard is that of beyond all reasonable doubt, the burden of proof rests primarily with the prosecutor and during criminal investigation, the prosecutor must gather evidence both in favor and against the suspect or the defendant.

In the case of extended confiscation, the general rules do not apply specifically, the problem being one of fact (proving ties to criminal activities that were not proved and committed a long time before the proceedings) and of law (the Constitution provides the presumption of the licit nature of fortune).

In this sense, it was stated by one author[17] that the belief of the court, as a condition to order extended confiscation, must bring into consideration both the way in which the belief is

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[15] F. Streteanu, *Considerații privind confiscarea extinsă*, Caiete de Drept Penal, no. 2/2012, pp. 22-23
[16] A.A. Danciu, *Confiscarea extinsă*, Caiete de Drept Penal, no. 4/2013, p. 89
[17] L. Lefterache, *Confiscarea extinsă*, Curierul Judiciar, no. 7/2015, pp. 389-390

realized, as well as the way in which set belief is related to the presumption of the licit character of fortune. It was deemed as well that in this context, the problem of equality of arms must be respected per the evidence that can be requested so as to overturn the evidence brought forward by the prosecutors. The conclusion was that the two opposing presumptions that work in this situation are: (1) the legal presumption of the licit character of fortune and (2) the judiciary presumption that the assets in the case of extended confiscation originate from offenses similar to those provided in the list for which the person was convicted. The solution, with which we agree, was reached for plain purposes. As such, if the standard of proof would be the same as in regular proceedings (beyond all reasonable doubt), the normal consequence would be to order criminal confiscation and convict. But, the issue is that this was exactly the reason for which extended confiscation was introduced – so as to give the possibility to confiscate in situations that beforehand, it would have been impossible. Having set the context, the standard of proof must be that of balance of probabilities. It must be proved that it is more likely for the assets in question to originate from criminal activities and not from licit gains – reasons for which the use of presumptions is mandatory.

Turning back to the use of presumptions, the sole legislation that defines presumptions is the Civil Code of Procedure, which regulates legal presumptions and judicial presumptions[18]. Having observed the structure of the legal texts, the next question that needs to be answered is how this interplay of presumptions works and what should be considered the known fact – subject to be proven so as to presume that all or a part of the assets of the convicted person are derived from criminal activities. In trying to answer this question, as it was stated by legal doctrine[19] it is required that a link be established by the prosecution between similar offenses and the assets that exceed the value of the proven (by the prosecution) licit assets. In this sense, the assets in question must be individualized, but the offense that generated the assets does not need to be proved beyond all reasonable doubt.

However, elements such as: *the way in which the assets were obtained, the existence of signed contracts, the identity of the parties to the verbal or written contracts, the relationship between offenders, the existence of prior convictions, the financial situation of the defendant before and after, the financial profile, the frequency of prior convictions and the frequency of the obtaining of assets* and so on can be useful elements in proving, on a balance of probability, that the assets in question were most probably obtained by similar offenses as the one that generated the conviction. With regard to the equality of arms, in a nutshell, it is prescribed that the above-mentioned elements must be proven. If not, a presumption cannot be built on another presumption. In this sense, if a certain element – the existence of a simulated contract, for example, has been proven until a point by the prosecution, the defense must be given the opportunity to combat the evidence and prove that the contract was legitimate, and it was, for

[18] **Article 327** Notion: *Presumptions are the consequences that the law or judge takes from a known fact to establish an unknown fact*; **Article 328** Legal presumptions: *(1) The legal presumption exempts the person in whose favor he is established in all the facts considered by law as proved. However, the party that takes advantage of the presumption must prove the known, neighboring and related fact on which it is based. (2) The legal presumption may be removed by the contrary, unless the law provides otherwise.* **Article 329** Judicial presumptions: *In the case of presumptions left to the judge's wisdom and wisdom, he can only rely on them if they have the weight and the power to give birth to the probability of the alleged fact; they can only be received in cases where the law admits evidence with witnesses.*

[19] Ibidem

example, the consequence of business deal that was conclude beforehand. As a final note, we believe that the presumption system can work only insofar as the predicate offense is similar to the offenses for which extended confiscation is applied and the illicit nature is searched for[20]. Otherwise, a system of evidence, in opposition with the required similarity would allow for a very large margin of appreciation, the type of evidence and the link that can be created being unconvincing and the scope too wide.

Having in mind the aforementioned, a very clear decision was pronounced by the Constitutional Court of Romania, respectively Decision no. 650/2018[21]. According to this decision, the standard of proof in extended confiscation procedures must not be the one of beyond all reasonable doubt, since, if this standard of proof is reached, the applicable institution would be special confiscation. Moreover, in a very in-detailed argumentation, the Constitutional Court explained why the standard of proof of beyond all reasonable doubt must not be used, why the use of simple presumptions is acceptable given the existing relative constitutional presumption of the licit accumulation of fortune and why the whole mechanism should be envisaged as an interplay of presumptions with the goal of providing a fair balance, since the overarching interest is the deprivation of assets obtained illicitly though criminal activities.

Limit wise, extended confiscation provides for the possibility to confiscate the value of the assets identified as being the result of similar activities than those for which the conviction was render. Also, the maximum limit – value wise, can be reached when comparing the total value existing in the patrimony of the convicted person and the total licit value. Therefore, according to par. 8 of article 112[1], *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 obtained income*

3. Non-conviction-based confiscation

In what concerns non-conviction-based confiscation, the situation is rather peculiar in the Romanian legal framework, no specific institution being created, even after the adoption of Directive 2014/42/EU[22]. However, paradoxically, according to the Romanian authorities, the institution was deemed to be present in the Romanian legal order. In this sense, in the words of the Directive:

Where confiscation on the basis of paragraph 1 (criminal confiscation) is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic

[20] F. Streteanu, *Considerații privind confiscarea extinsă*, Caiete de Drept Penal, no. 2/2012, pp. 28
[21] See Constitutional Court of Romania, Decision no. 650/2018, available at the following internet page: https://www.ccr.ro/files/products/DEC_650.pdf
[22] 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 (*available online at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042*).

benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.

Turning towards the national legal order, one must look at criminal confiscation and extended confiscation – condition wise, in order to observe whether these institutions permit confiscation even without a conviction[23].

Concerning extended confiscation, the provisions of article 112[1] permit extended confiscation only insofar as a conviction is reached – conviction that needs to relate to the triggering offense that permits the working of the institution. As such, in a *per a contrario* rationale, it is impossible to have non-conviction-based confiscation in tandem with extended confiscation, even when the impossibility to convict is the result of illness or absconding of the defendant, as provided by Directive 2014/42/EU.

Regarding criminal confiscation, the situation is rather different, since for its ordering the only two requirements needed are the ones common to the ordering of any security measure, as provided by article 107 of the Criminal Code. In a nutshell, as shown above, in order to issue criminal confiscation (1) the perpetrator must commit an act provided by criminal law and (2) the act must be performed unjustifiably, respectively without the application of any of the justifiable causes provided by law. If the conditions are met, provided that a type of asset as provided by art. 112 is identified, the court must, according to the Romanian legal order, order confiscation without ever reaching a conviction.

Per the reasons for which a non-conviction decision can be reached, according to article 16 of the Code of Criminal Procedure[24], these can be several, and the prosecutor, during the investigative phase, must close the case or drop the charges, while the court must order an acquittal or a termination of criminal proceedings during trial.

As for the type of assets that can confiscated (according to article 112), no distinction exists. However, even though some could be incompatible with the reaching of a solution of non-conviction[25], the only one that will apply regardless of reason is that provided in article 112 para. 1 let. f (*assets the possession of which is prohibited by criminal law*).

Concerning the rest of the cases, the main idea is that confiscation should be ordered insofar as it is not incompatible with the reason provided for closing the case[26]. As an example, in

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[23] Since, as shown above, a new institution has not been created to deal specifically with this type of imposed confiscation.

[24] *a) the action in question does not exist; b) the action is not covered by the criminal law or was not committed with the guilt required by law; c) there is no evidence that a person committed the offense; d) there is a justifying or non-imputability cause; e) a prior complaint, an authorization or seizure of the body of competent jurisdiction or other requirement set by the law, required for the initiation of criminal action, is missing; f) amnesty or statute of limitations, or death of a natural-person suspect, or defendant occurred, or de-registration of a legal-entity suspect, or defendant was ordered; g) a prior complaint was withdrawn, for offenses in relation to which its withdrawal removes criminal liability, reconciliation took place, or a mediation agreement was concluded under the law; h) there is a non-penalty clause set by the law; i) double jeopardy (res judicata); j) a transfer of proceedings with a different country took place under the law.*

[25] This would the case when it is established that there is no evidence that a person committed the offense.

[26] In the context of dropping the charges, confiscation can be ordered regardless (the reason for dropping the charges relate to state of hazard of the offense).

the case of reaching the status of limitations, there are no obstacles in ordering confiscation on any of the regulated basis[27]. The reason is that reaching the statute of limitations for any criminal offense has the effect of rendering criminal liability mute. Therefore, rendering criminal liability mute has no effect on the two conditions that need to be met so as to order a security measure, since the main goal of security measures is to prevent further commission of offences and remove a state of hazard. In this sense, even though the statute of limitation is reached, the offender still committed an unjustified offense under criminal law, if so is proven until the statute of limitations is reached.

Another example would be in the case when the prior complaint required so as to start he criminal proceedings was withdrawn. Just as in the case beforehand, the offender still committed an unjustified offense under criminal law, but the solution must be to close the case. As such, the prosecutor must close the case and formulate a request to the Preliminary Chamber Judge to order confiscation. The preliminary chamber judge will decide on the request and if the conditions of article 112 of the Criminal Code are fulfilled, will order confiscation.

On the opposite side, if the act was committed in legitimate defense, the act is still one provide by law, but it is not unjustified anymore. Therefore, in this specific circumstance, the prosecutor should close the case and request confiscation only if a situation as that provided in article 112 par. 1 let. f) is present, otherwise refraining from requesting confiscation.

Considering the hypothesis provided strictly in the Directive, respectively the possibility to order confiscation when the suspect or accused was not present as a result of absconding or in case of illness, the two must be analyzed separately.

Considering the situation of absconding, the solution in the Romanian legal framework is that confiscation can be ordered, since even a conviction can be reached. According to article 364 of the Code of Criminal Procedure:

1) The case shall be adjudicated with the defendant present. It is mandatory to bring the detained defendant at the trial.

*(2) The court proceedings **may take place with the defendant absent**, if the latter is missing, flees justice or changed their address without informing thereupon the judicial bodies and, following the controls carried out, their new address remains unknown.*

*(3) The court proceedings **may also take place with the defendant absent if**, even though lawfully served the summons, the defendant provides no justification for their absence during the adjudication of the case.*

(4) Throughout the court proceedings, the defendant, including the case when deprived of liberty, may apply, in writing, to be tried in absentia, as represented by the retained or the publicly appointed counsel.

(5) When the court deems it mandatory for the defendant to be present, it may order the former's presence including with a bench warrant.

[27] Only insofar as evidence has been gathered before the status of limitations was reached.

As it can be seen, the possibility is regulated *expressis verbis*, the aforementioned provisions being complemented with the ones on citation[28] and in the investigative phase, with the provisions of article 309 par. 5 of the Criminal Code which state that *the criminal investigation body shall continue investigations even in the absence of the defendant, when the latter is absent without justification, is avoiding responding to summons or is missing.*

With regard to the issue of medical condition, the situation is different in the sense that confiscation cannot be ordered and *a fortiori*, neither a conviction. The relevant provisions, in the investigative phase (article 312 of the Code of Criminal Procedure) and during trial (art. 367 of the Code of Criminal Procedure), state essentially that *when based on a medical expert report, the court finds that the defendant is severely ill, which prevents him from participating at trial, the court, in a report, shall order the stay of proceedings until the health of the defendant will allow him to take part at the trial.* Observing the formulation of the legal text, it can be seen that a stay of the proceedings will be ordered until the defendant regains his or her health, making it impossible to order confiscation in this context.

4. Other types of confiscation

Besides criminal confiscation, extended confiscation and non-conviction-based confiscation – all of a criminal nature[29], there are two more types of confiscation measures present in the Romanian legal landscape. Of the two, only one is strictly speaking a different type of confiscation, while the other – confiscation imposed on the basis of Law no. 115/1996 on the declaration and control of property of dignitaries, magistrates, civil servants and of persons with leading positions is a hybrid version.

Starting with confiscation on the basis of Law no. 115/1996, the legal instruments was created so as to impose on dignitaries, magistrates, civil servants and some persons with leading position, the duty to declare their fortune, and in cases of discrepancies, to permit the control and subsequent confiscation of property.

The persons that have this duty according to complementary legal provisions[30], are, *inter alia*: the President of Romania, members of Parliament, members of the Government, secretaries and sub-secretaries of state (as well as those assimilated to them), magistrates, county and local councilors, mayors, civil servants working within the central or local public authorities, persons with leading positions, from directors, including upwards, within autonomous registers of national or local interest, to companies with majority state capital, the State Property Fund, the National Bank of Romania, banks with state capital (total or of a majority).

Turning towards the control of the fortune, it is stated that if between the declared wealth at the date of investiture or appointment and the one acquired during the exercise of the position,

[28] Art. 257 and the following of the Code of Criminal Procedure.
[29] Arguably in the view of the ECtHR as well.
[30] Art. 1 of Law no. 176/2010 on integrity in the exercise of public office and dignity, amending and completing Law no. 144/2007 regarding the establishment, organization and functioning of the National Integrity Agency, as well as for the modification and completion of other normative acts.

a significant difference[31] exists and there is definite proof that the goods and values could not be obtained from the legal proceeds realized or by other licit ways, the wealth is subject to control.

The control described above is realized in tandem and it has, since 2010[32], been divided – competence wise, with the National Integrity Agency[33] who has jurisdiction so as to provide for an administrative control. Concerning the administrative control, after an adversarial procedure is finalized, an evaluation report is submitted (in cases of discrepancies) to the potential competent authorities so as to enact judicial control. Per the authorities involved, these can be (1) the investigative criminal authorities – requesting criminal or extended confiscation, (2) the fiscal authorities, (3) the disciplinary wealth investigation committee constituted by the basis of Law no. 115/1996 and (4) the authorities competent to impose administrative sanctions for public officials[34]. As a final remark, art. 19 of Law no. 176//2010 states that the conclusions of the reports *will be obligatorily assessed by these institutions, including the proposals, and the necessary measures will be taken as a matter of urgency and above all, according to the legal competences*.

Turning back to the control realized by the wealth investigation committee, it will render a decision based on the report, but with the participation of the persons accused, and it can issue three types of solutions: (1) send the case to the court of appeal within the jurisdiction of which the person whose assets are subject to control (2) close the case – when it finds that the assets are justified (3) suspend the control and refer the case to the competent prosecutor's office, if a link is suspected between the existence of the assets and any criminal offenses.

Concerning the last two solutions, the situation is covered either by the rendering or not of a criminal / extended confiscation order. However, concerning the first case, it is provided in article 17 and the following that the Court of Appeal will be notified with the case and it could render one of three different decisions, based on an adversarial procedure with the possibility to introduce evidence. As such, the Court can: (1) order the confiscation of assets or an equivalent sum of money if it finds that part of the fortune is unjustified, (2) order the closing of the case, if no evidence is presented arguing the unjustified provenance or (3) send the file to the competent prosecutors' office if evidence of the commission of a criminal offense is present. Concerning the nature of the confiscation in this case, we believe that it is very similar to the administrative confiscation presented below. However, when compared to the jurisprudence of the ECtHR, after the latest Grand Chamber Decision[35] on the topic, confiscation in this sense should be regard as a criminal penalty, triggering the protection provided in art. 7 of the Convention.

[31] By significant differences, according to art. 18 of Law no. 176/2010, is it considered the difference of more than EURO 10,000 or its equivalent in lei between the wealth during the exercise of public positions and the revenues from the same period.

[32] According to Law no. 176/2010, regarding the Integrity in exercising the function of Public Officials, published in the Official Gazette, no. 621 of 2 September 2010.

[33] Established under Law no. 144//2007 regarding the Establishment, Organization and Operation of the National Integrity Agency, published in the Official Gazette, no. 535 of 3 August 2009.

[34] For details concerning the authorities responsible, see art. 26 of Law no. 176/2010.

[35] See G.I.E.M and others v. Italy (GC), no. 1828/06, 34163/07 și 19029/11.

Regarding administrative confiscation, the institution is regulated by a general norm, respectively Government Ordinance no. 2/2001[36]. Administrative confiscation is considered, according to art. 5 para. 3 of the Ordinance as a complementary sanction, alongside closure of the unit, blocking the bank account and suspension of the activity of the economic operator.

Per the situations in which administrative confiscation must be ordered, the legal instruments states that confiscation must be applied to assets intended for, used or resulting from misdemeanors (also knowns as contraventions, minor offense, administrative trespasses). For reasons of consistency, the inferences made when analyzing criminal confiscation remain valid, as to the meaning of use, intended use and resulting from the commission of illicit acts.

Turning towards the compulsory nature of the measure, article 5 para. 5 of Government Ordinance no. 2/2001 states that the applied sanction must be proportionate to the legitimate aim pursued and the degree of hazard that the misdemeanor entails. As such, it seems that confiscation is applicable only insofar as the agent responsible with the execution of the measure considers so[37].

Moving on to the persons that can apply the sanctions, according to art. 24 of Government Ordinance no. 2//2001, the person empowered to impose the primary sanction can also order the confiscation of assets destined to be used, used, or resulting from contraventions. In all cases, the determining agent shall describe in the report the goods subject to confiscation and shall take any necessary conservation measures provided for by law, making the appropriate entries in the report. As well, it is provided that *the investigating officer has the obligation to determine who owns the confiscated goods and if they belong to a person other than the offender, the report shall, if possible, mention the owner's identification data or state why the identification was not possible*[38].

As final remarks, administrative confiscation can be provided in any legislative act that entails the application of administrative sanctions[39], the application being conditioned of it being provided for each administrative misdemeanor. However, it is essential to state that it can be applied only insofar as the general norm is respected. Value-based confiscation is applicable where the assets subject to the order are not found and when ordered, confiscation can be challenged alongside the report by which the primary sanction was ordered, either by the proprietary of the asset or the offender, if he or she is the proprietary. The complaint is ruled upon by a judge and the challenge suspends the execution of the measure.

II. Third party confiscation

[36] Government Ordinance no. 2/2001, published in the Official Gazette no. 410 of 25 June 2001.

[37] For more detail, see F. Mihăiță, *Drept contravențional. Aspecte privind măsura complementară a confiscării mijlocului de transport prevăzut de OUG nr. 12//2006,* Revista Forumului Judecătorilor, no. 3//2009, available at http://www.forumuljudecatorilor.ro/wp-content/uploads/Art-12-forumul-judecatorilor-nr-3-2009.pdf.

[38] The provision was heavily criticized by legal doctrine, stating that the provision contravenes the jurisprudence of the ECtHR, a conviction being imminent. See O. Podaru, R. Chiriță, I. Păsculeț, *Regimul juridic al contravențiilor, O.G. nr. 2/2001 comentată*, ed. a III-a, ed. Hamangiu, București, 2019, pp. 76-79

[39] As examples, see art. 3 of Law no. 12/1990, art. 61 para. 1 of Government Ordinance no. 21/1992, art. 11 para. 1 of Government Emergency Ordinance no. 28/1999.

In what concerns third party confiscation, the institution is not regulated in the Romanian legal framework, even after the adoption of Directive 2014/42/EU[40]. Several ideas were put forward in the sense that third-party confiscation is regulated and should apply[41], but as we have showed beforehand, in the case of extended confiscation, the institution does not permit the confiscation of assets directly from third parties that are *de bona fide* or from third parties that did not commit an unjustifiable act provided by criminal law. The reason for this view, alongside the fact that the text of extended confiscation does not permit it, is that confiscation in all its forms is a security measure and as shown before, in order for a security measure to apply, the persons subject to the measure must have performed an unjustifiable act provided by criminal law that is proven beyond any reasonable doubt. Or, in the case of third parties, the standard of proof cannot be met if they are not considered offenders and certainly in the case of the *bona fide* third parties, there is no basis for ordering confiscation. Moreover, the ECtHR rendered several decisions in which non-conviction-based confiscation of third parties is incompatible with the Convention when the procedural and substantial requirements of art. 6, 7 and art. 1 of Protocol 1 are not met[42].

Having in mind the aforementioned, in the case of *mala fide* third parties, the mechanism that works is the Romanian legal framework is that it is considered that the third parties knew or ought to have known the illicit provenance of the asset and thus the contract between the offender and themselves is void as having an illicit cause (if the assets was transferred). The effect is that of absolute nullity of the contract and the retroactively return of the asset in the patrimony of the offender. After the return, the asset must be subject to confiscation.

However, even though the correct mechanisms are those presented above, the judiciary in the Romanian legal order have rendered several decisions that seem to contravene the aforementioned.

One seminal judgement is the one pronounced against Mr. O. Tender, a notorious business man. Mr. Tender was convicted for fraud, incitement to abuse of service, constituting an organized crime unit and money laundering. In the decision, the Court confiscated regardless of the owner and from third parties without providing a *mala fides* attitude and without identifying precisely the assets, the owners, the guarantees provided by other third parties and so on. Another important judgement that caught the eye of the press is the judgement pronounced against Mr. D. Voiculescu, a famous business man and politician. Mr. D. Voiculescu was convicted for money laundering to 10 years of imprisonment. Considering confiscation, the Court confiscated from a company GRIVCO S.A the sum of 3515756,4 USD, arguing that Mr. Voiculescu was the sole beneficiary of the sums of money. In the same sense, the Court confiscated several important sums of money from relatives of Mr. Voiculescu. As such,

[40] 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 (*available online at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042*).

[41] see *Perspective asupra recuperării prejudiciului și confiscării, aspecte teoretice și de practică judiciară*, Freedom House, C. Chiriță, *Identificarea bunurilor în vederea confiscării speciale și extinse în cazul circuitelor de fraudare a TVA intracomunitar – studiu de caz, available at http://confiscare.lfwd.io/#book/ch04-00.*

[42] See G.I.E.M and others v. Italy (GC), no. 1828/06, 34163/07 and 19029/11, 28.06.2018, Varvara v. Italy, no. 17475/09, 29.10.2013, Sud Fondi v. Italy, no. 75909/01, 20.1.2009.

considering C. R. Voiculescu, the Court confiscated directly the sum of 2.984.358,3 RON, respectively the value of the shares owned in another company – SC ICA S.A, which were donated by Mr. D. Voiculescu. With regard to another person, respectively C.M Voiculescu, the Court confiscated directly the sum of 2.984.358,3 RON, respectively the value of the shares owned at SC ICA S.A, which were as well donated by Mr. D. Voiculescu. Regarding the same person, the Court confiscated all the sums that were received as a shareholder of the company GRIVCO S.A, since 2006, shares that were donated by Mr. D. Voiculescu, as well as other sums of money received through a lease contract.

It is worth mentioning that all transactions in these cases were legally contracted through public notaries, being transparent and the Courts did not confiscate from the patrimony of Mr. D. Voiculescu, taking into the account the sums of money that were donated. The Court thus confiscated directly from the third parties that had no procedural quality in the criminal trial and without any relevant justification as to the sums *per se.*

As per the relevant conclusions for third-party confiscation, we would refrain to state that the Constitutional Court of Romania adopted a Decision recently in which it stated black on white that third party confiscation cannot be accepted in the Romanian legal framework as it is, the practice that established this phenomena being wrong – Decision 650/2018[43].

B. Procedural aspects

In the following lines the procedural aspects of asset freezing and confiscation orders will be discussed. In essence, the focus will be on the legal basis, the authorities that can request and impose the freezing / confiscation order, as well as other procedural conditions and limitations.

I. Freezing

Starting with the freezing of assets, the institution is regulated in Title V, Chapter III, art. 249-256 of the Code of Criminal Procedure. The general rule is regulated by art. 249 and it states:

(1) The prosecutor, during the criminal investigation, the Preliminary Chamber Judge or the Court, ex officio or upon request by the prosecutor, during the preliminary chamber procedure or throughout the trial, may order asset freezing, by a prosecutorial order or, as the case may be, by a reasoned court resolution, in order to avoid concealment, destruction, disposal or dissipation of the assets that may be subject to special or extended confiscation or that may serve to secure the penalty by fine enforcement or to pay court fees or to compensate damages caused by the committed offense.

(2) Asset freezing consists of freezing movable and immovable assets, by establishing distraint upon such.

(3) Asset freezing guaranteeing the enforcement of a penalty by fine may be ordered only against a suspect's or defendant's assets.

[43] See Constitutional Court of Romania, Decision no. 650/2018, available at the following internet page: https://www.ccr.ro/files/products/DEC_650.pdf

(4) In case of special or extended confiscation, asset freezing may be ordered only against assets belonging to the suspect or defendant or to other persons owning or holding the assets that are to be forfeited.

(5) Asset freezing intended to the repair damages caused by the offense and to guarantee the payment of court expenses may be ordered against the assets of the suspect or the defendant and of the person with civil liability, up to the concurrence of their probable value.

(6) During the criminal investigation, the preliminary chamber procedure and the trial, the asset freezing listed under par. (5) may be ordered also at the request of the civil party. Asset freezing taken ex officio by the judicial bodies set out in par. (1) may also be used by the civil party.

(7) The asset freezing ordered under the terms stipulated by par. (1) is mandatory if the victim lacks mental competence or has a limited mental competence.

(8) Neither the assets belonging to a public authority or institution or to other public-law legal person nor the property exempted by law can be seized.

As it can be seen, asset freezing - procedural wise, differs depending on the procedural framework in which it is ordered and the reason for ordering it, the legal regime being different in each case. However, the sole constant is that asset freezing is optional, and it may be ordered only insofar as the reasons presented above are present, with one exception – if the victim of the offense lacks mental competence or has a limited mental competence. Of course, without hijacking the purpose of the paper, it is worth noting that the status of the victim must be proven on the same standard of proof used in all criminal proceedings.

Starting with the persons competent to order asset freezing, they are the prosecutor in the investigative phase, by means of a prosecutorial order and the Court and the Preliminary Chamber Judge during trial, or during the Preliminary Chamber Phase. The order can be given *ex officio* in all cases, but it can also be requested by the investigative bodies or the civil party – during criminal investigation, or by the prosecutor or the civil party during the Preliminary Chamber Phase and throughout trial.

Having in mind the reasons for ordering the freezing of assets, these can be the risk of avoiding concealment, destruction, disposal or dissipation of the assets that may be subject to criminal confiscation or extended confiscation – on the one side, and the reason that the assets may serve to secure the payment of the fine penalty, the court fees or serve as compensation for damages caused by the commission of the offense - on the other side.

Turning towards the persons that can be subjected to the order, one must note that it is dependent on the aforementioned scope. Therefore, if freezing is ordered for the enforcement of a penalty by fine, the only persons that can be directly affected by the order are the suspect and the defendant. In other words, this legal approach permits the freezing of assets even if the criminal investigation is solely in the *in rem* phase and there is no official accusation against a person. Moving on, if the decision to freeze, irrespective of judicial phase, is ordered in order to guarantee the execution of criminal confiscation or extended confiscation, the subjected persons may be the suspect, the defendant and any third party that holds the asset on the basis of any title. In this phase, since confiscation is not yet operative, the legal framework permits that the measure affects third parties, as they can lodge a complaint against the measure, as we will see further on. With regard to the scope of repairing damages, the freezing order may affect the

suspect, the defendant and the person being held civilly liable. The reason for this approach is that the provisions of the Criminal Code of Procedure are in sync with the provisions of the Civil Code that permit under certain conditions, the obligation incumbent on a third party to repair damages provoked by another, if a special contractual, natural or legal relationship exists[44]. Finally, the last reason, respectively the guarantee by seizure of the obligation to pay court fees, is extremely similar if not identical in rationale with the one concerning the repairing of damages.

With regard to the rights and guarantees provided by law for the persons that can be subjected to the measure, the legal framework does not provide specific provisions that deal strictly with this procedure. However, depending on the procedural identity of the person (i.e. suspect, defendant, third party, person civilly liable), the law prescribes several rights. For example, in the case of the person civilly liable, he or she has at least the following rights in any criminal procedure: (1) to be informed of his / her rights; (2) to propose production of evidence by the judicial bodies, to raise objections and to make submissions; (3) to file any other applications related to the settlement of the criminal part of the case; (4) to be informed, within a reasonable term, on the status of the criminal investigation, upon explicit request, provided that they indicate an address on the territory of Romania, an e-mail address or an electronic messaging address, to which such information can be communicated; (5) to consult the case file, under the law; (6) to be heard; (7) to ask questions to the defendant, witnesses and experts; (8) to receive an interpreter, free of charge, when they cannot understand, cannot express themselves properly or cannot communicate in the Romanian language; (9) to be assisted or represented by a counsel; (10) to use a mediator, in cases permitted by law; (11) to have access to legal assistance.

Regarding the limits of assets freezing, one must look both at the applicable time frame and the type of assets that can be frozen. Asset wise – there are two limitations. The first one relates to the quality of the owner of the assets. As such, assets cannot be subject to a freezing order if they pertain to a public authority or institution or to other public-law legal person. The second limitation appear as natural and it entails that freezing cannot be ordered if the property subject to the order is exempted by law, irrespective of nature. Time-wise, even though an express time limit is not provided, it becomes apparent that seizure can function only insofar as the scope for which it had been ordered has not been attained. In other words, the order seizing an asset will cease when the fine is paid, confiscation is executed, the damages are repaired or when the court fees have been reimbursed.

Turning towards legal remedies, at an overview of the applicable legal framework, two solutions become relevant. The special procedure is that regulated in article 250 and 250^1 of the Code of Criminal Procedure, entitled *Challenging of asset freezing*. According to the legal instrument, two different challenges can be filed, depending on the person who ordered the seizure and the procedural framework in which the measure was ordered.

The first situation concerns the situation in which, in the criminal investigation phase, the prosecutor ordered, by a prosecutorial order, the freezing of assets. In this case, the suspect, the defendant and any interested party may challenge the asset freezing order within 3 days of the communication of the order or the enforcement date, before the Judge of Rights and Liberties of the court which would have jurisdiction to settle the case in first instance. The procedure does not

[44] For details see Book V, Chapter IV, Section IV of the New Civil Code – articles 1372 – 1374.

suspend enforcement and upon the challenge, the judge shall rule in chambers, by summoning the person who filed the challenge and any interested parties. The decision is final.

The second procedure now provided in art. 250[1] concerns the challenge of the order when issued during trial or the Preliminary Chamber Phase. It is worth noting that before 2016, this article did not exist, the former article permitting only the lodging of complaints reasoned on the manner in which the order was enforced. In a nutshell, the latter described article was subject to multiple complaints to the Constitutional Court of Romania (Decision no. 207 of 31 May 2015[45], Decision no. 497 of 23 June 2015[46] and Decision no. 543 of 14 July 2015[47]), all being repealed. The solution came with decision 24/2016[48] of the Constitutional Court, in which the judges reasoned against their former jurisprudence, stating that even though the decision on the merits can be appealed alongside the final decision on the culpability of the defendant, the remedy would not be applicable if the decision to freeze would be ordered during the appeal procedure, which has no ordinary remedy. As such, by means of Government Emergency Ordinance no. 18//2016[49], a new provision was introduced. According to the new wording, if during trial, or the Preliminary Chamber phase, a decision to freeze is ordered by the trial judge or the Preliminary Chamber Judge, the defendant, the prosecutor or any interested person may appeal against the order within 48 hours from the pronouncement, or, when applicable, the communication of the order. The complaint is to be ruled on by a judge from the superior court or the preliminary chamber judge from the superior court of the one that ordered the freezing of the assets. The complaint does not suspend the execution of the measure and it will be ruled upon within 5 days, in a public hearing, by summoning the person who filed the challenge and any interested parties.

Concerning the second procedure provided by law, it is regulated by means of art. 336 of the Code of Criminal Procedure, being a generally applicable one. The article states that:

Any individual is entitled to file complaint against criminal investigation measures and acts, if the latter have harmed their legitimate interests. The complaint shall be submitted to the prosecutor in charge of supervising the work of the criminal investigation body, either directly or at the criminal investigation body. Filing the complaint does not suspend completion of the measure or act that is the object of the complaint.

As it can be observed, the procedure in question does not deal specifically with issues of asset freezing, representing a general rule. The idea behind would be that if any person feels harmed in their legitimate interests, they can file a complaint before the prosecutor, during the investigative phase, if the measures in question ordered by the prosecutor, has harmed their legitimate interest. In essence, it is a request to revoke the measure and it can be realized only in the investigative phase. The practical utility of the institution, as shown in case law[50], at least theoretically, is to avoid on the one hand, the burdensome 3 days deadline in order to file the complaint according to art. 250 of the Code of Criminal Procedure, and on the other hand, to

[45] Published in the Official Gazette, Part I, no. 387 of 3 June 2015.
[46] Published in the Official Gazette, Part I, no. 580 of 3 August 2015.
[47] Published in the Official Gazette, Part I, no. 694 of 15 September 2015.
[48] Published in the Official Gazette, Part I, no. 256 of 12 April 2016.
[49] Emergency Ordinance no. 18/2016 for amending and completing Law no. 286/2009 on the Criminal Code, Law no. 135/2010 on the Criminal Procedure Code, as well as for the completion of art. 31 par. (1) of the Law no. 304/2004 on judicial organization, in force since 23 May 2016.
[50] Tribunalul Mehendinți, Dec. Pen. No. 374/2014, 23 June 2014.

afford a legal remedy to third parties that had no knowledge of the freezing of their assets. As a note concerning this last procedure, on the negative side, as shown by others[51], the instrument seems rather ineffective, since members of the Public Ministry are the ones that need to revoke the order and not an impartial judge. The author further details similar experiences when the orders, even though extremely disproportionate to the legitimate aim, were kept.

As a final consideration regarding the possibility to claim damages suffered by a wrongful freezing order, the solutions would be to turn towards the common provisions for claiming damages for wrongful illicit acts, respectively the Civil Code. No specific institution is created within the criminal landscape to deal with the issuing of wrongful freezing orders. However, there is a procedure for material and / or moral compensation in cases of judicial error or illegal deprivation of liberty, but, in our view, it is debatable whether it is applicable. To argue each of the possible solutions, a reading of art. 538 would be required. As such, according to the aforementioned legal provision:

A person who received a final conviction, irrespective of whether the penalty or custodial educational measure was enforced, is entitled to receive compensation from the government for their losses in the situation where a final acquittal judgment is returned following retrial of the case, nullification or quashing of the conviction judgment on grounds of a new or recently-discovered fact that proves a judicial error has taken place.

In establishing the extent of compensation consideration shall be given to the duration of unlawful deprivation of freedom, as well as to the consequences it caused for the person, their family or the person found in the situation described at Art. 538.

Compensation shall consist of a sum of money or the setting up of an annuity, or of the obligation that the government pays for the unlawfully detained person to be placed in the care of a social or medical care institute.

In selecting the manner and extent of compensation, consideration shall be given to the situation of the person entitled to it and the nature of loss they suffered.

Having read the legal provisions, the conditions that need to be met in order for this procedure to be applicable become clear: (1) a final conviction must be ordered against the defendant (2) a triggering final decision must be ordered in which the solution must be an acquittal after conviction (3) evidence of judicial error must be present.

In light of the aforementioned conditions, one must note that the link with the potential wrongful freezing order is weak, if not inexistent and the sheer difference in time between the issuing of the freezing order and the final acquittal would be, in most cases, staggering. As such, to qualify this procedure as one that would encompass damages suffered from a wrongful freezing order would be hard.

In the sense of the latter, it is important to note that the primary focus on compensations in this procedure rests with the conviction and the consequences that sprung with the solution. An interpretation could be given that if applied, it is not an exercise of analogy, but an extensive interpretation of the legal provisions and thus compensation should be covered, if acquitted. The consequences in the depreciation in value of the assets frozen and the inability to make use of

[51] T.C Godâncă Herlea, *Măsurile asigurătorii luate în cursul urmăririi penale asupra bunurilor persoanelor juridice*, Caiete de Drept Penal no. 3/2013, p. 56.

them would be the injury. However, without any steadfast case law, it is difficult to assess whether this interpretation is simply far-fetched, or it is simply a form of analogous reasoning.

II. Confiscation

As a preliminary note, it is important to observe that in the Romanian legal landscape, the procedural limb concerning confiscation orders is intimately intertwined with the substantial type of confiscation that is applicable. As such, procedurally, different regimes exist in the case of criminal confiscation and extended confiscation following a conviction, in opposition with that can be classified as non-conviction-based confiscation. Having said the aforementioned, the analysis will be dual, focusing on the peculiarities of each regime.

With regard to criminal and extended confiscation, since the required standard of proof was analyzed in the context of the substantial limb, the aspects that remain to be presented concern only the authorities that can request and impose confiscation, the enforcement of the security measures and the potential remedies available.

With regard to the authorities that can request confiscation, we believe that the measure can be requested by the prosecutor, or by any other party with competence to formulate requests with regard to the criminal action. As well, the court is obliged to impose confiscation *ex officio*, if the state of affairs is one that warrants the existence of a triggering element[52].

Concerning the issue of enforcement of the security measures, it is worth noting that confiscation is usually ordered when the final decision on culpability is rendered. In this sense, two new procedural solutions have been introduced by the New Criminal Code adopted in February 2014. As such, in the subsequent step after the rendering of culpability, respectively of sentencing, the Court may choose, depending of the offense committed, not to order the execution of the penalty, but to waiver the sentence enforcement or to order the postponement of penalty enforcement. An in-detail assessment of the two different solutions would exceed the limits of the present paper, but what is important to stay with is that criminal confiscation can be ordered if the two solutions are ordered, even though they are not, strictly speaking, decisions that imply the conviction of the defendant. In this sense, regardless of the procedural solution, confiscation can be ordered (being a security measure) and the moment in which it is ordered is within the final decision of culpability – identical with the classic solutions that criminal confiscation is rendered at the same time with the conviction.

In terms of extended confiscation, the measure can be ordered only in the case of a conviction, the existence of the decision being a condition for the ordering of extended confiscation[53].

Returning to the issue of enforcement, article 574, entitled *Enforcement of special confiscation and extended confiscation* describes the applicable procedure in case the court takes, by decision, the security measure.

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[52] As provided by art. 404 para. 4 of the Code of Criminal Procedure.

[53] According to art. 112^1 para. 1 of the Criminal Code, extended confiscation can be rendered only if a conviction is reached, among other conditions.

The general rule applicable is that when confiscation is ordered, the assets subject to the measure are surrendered to the competent authorities in order to be used or sold. As it is shown in the paper, the immediate effect of confiscation in the Romanian legal order is that the assets in question pass from the patrimony of the owner to the private property of the state[54]. One important issue that needs clarifying is that in the Romanian legal framework only freezing can be realized so as to pay for the fine penalty, repair damages caused to the victim or a third party or guarantee the payment of court fees. As such, confiscation *per se* is compulsory to be ordered only if the conditions set forth in art. 112 and 112^1 of the Criminal Code are fulfilled and the sole effect is the deprivation of property with regard to the offender and the passing of the property to the private property of the state.

Returning to the issues concerning enforcement, it is provided, as a secondary rule, that if the confiscated assets are in the custody of law enforcement bodies or other institutions (frozen beforehand), the judge delegate in charge of enforcement must take the burden and communicate with these bodies, send a copy of the decision in which confiscation was ordered and afterwards, the bodies in question will hand over the assets to the competent authorities to be used or sold. As is can be seen, the sole difference between the first and second rule on executions is the prior status of the assets – while in the first situation, the person that needs to surrender the assets is the owner, while in the second, the institutions where the frozen assets are situated are responsible with the surrender. However, as evidence goes, the secondary rule would be in fact the most common practice in Romania, at least for criminal confiscation, since most assets subject to confiscation are beforehand frozen, either during the investigative phase, or during trial. As a note in addition, the same procedure as the one described above applies when the goods in question subject to confiscation are sums of money that were not deposited with banking units. The sole difference are the authorities involved, in the sense that the judge delegate in charge of enforcement is obligated to send the court decision to tax bodies, in order for them to enforce the decision, per the provisions referring to budgetary receivables.

Moving forwards, the last situation provided in article 574 deals with the case in which destruction of the assets that are confiscated is required. The provision only states that when destruction of seized assets was ordered, these shall be destroyed in the presence of the judge delegate in charge or enforcement and a report shall be filed, submitted with the entire case file. This provision is complemented with those provided in Law no. 318/2015 that regulated the functioning of the National Agency for the Management of seized Assets and Government Ordinance no. 14/2007 on the regulation of the manner and conditions for the capitalization of goods entered, according to the law, in the private property of the state (as shown below).

Concerning non-conviction-based confiscation, we will use partly the definition provided in the substantial limb, with the exception of the situation of ordering the waiver of the sentence enforcement or the postponement of penalty enforcement, since procedurally, the two follow the exact same legal regime as the one prescribed for classic criminal conviction-based confiscation.

[54] With regard to the procedure applicable afterwards, more details will be given when the management of seized and confiscated assets will be analyzed.

Turning towards the part of enforcement of the security measure, as in the case of extended and criminal confiscation, a special procedure is provided in art. 549^1 of the Code of Criminal Procedure. Per the article:

(1) In the situation where the prosecutor has ordered the case closed or dropped charges and requested the Preliminary Chamber Judge to order criminal confiscation or a document to be invalidated, the prosecutorial order to close the case accompanied by the case file shall be sent to the court that would have legal jurisdiction to try the case on the merits, after expiry of the deadline stipulated at Art. 339 par. (4)[55] or, as the case may be, at Art. 340[56] or after a ruling to deny the complaint.

(2) The Preliminary Chamber judge shall fix the time limit for settlement, depending on the complexity and particularities of the case, which may not be shorter than 30 days.

(3) The appointed term stipulates the notification of the prosecutor and cites the persons whose legitimate rights or interests may be affected, to whom a copy of the ordinance is communicated, considering that within 20 days from the receipt of the communication they can submit written notes.

(4) The Preliminary Chamber judge shall pronounce in a public hearing after hearing the prosecutor and the persons whose legitimate rights or interests may be affected, if present.

(5) The Preliminary Chamber judge may decide one of the following solutions:

a) rejects the proposal and dispenses, as the case may be, the return of the property or the lifting of the precautionary measure taken for confiscation;

b) accepts the proposal and orders the confiscation of the goods or, as the case may be, the dissolution of the document.

(6) Within 3 days from the communication of the conclusion, the prosecutor and the persons referred to in par. (3) can make a reasoned objection. The unmotivated challenge is inadmissible.

(7) The contestation shall be settled according to the procedure provided for in paragraph (4) by the preliminary chamber judge from the hierarchically superior court or, where the court seized is the High Court of Cassation and Justice, by the competent body according to the law, which can dispose of one of the following solutions:

a) dismisses the appeal as belatedly, inadmissible or unfounded;

b) admits the challenge, abolish the conclusion and revives the proposal according to para. (5).

Ab initio, what is deemed to be observed is that the provisions of article 549^1 have been challenged before the Constitutional Court for reasons of incompatibility with the European Convention of Human Rights. As such, by means of Decision no. 166/2015[57], the former wording of article 549^1 – which provided for a faster, in chambers hearing and without the summoning of the interested parties, was declared unconstitutional and infringing on the principles enshrined in the case-law of the ECtHR.

Turning to the present procedure, one must note that it is applicable only after a final solution is determined in what concerns the accusation. In the Romanian legal framework, after the prosecutor decides to close the case or to drop the charges, one of two situations can arise.

[55] The procedure is entitled: *Complaint against the prosecutor's acts.*
[56] The procedure is entitled: *Complaint orders for not starting a criminal investigation or to drop charges.*
[57] Published in the Official Gazette, Part I, no 264 of 21 April 2015.

The first one is that the deadline for the challenge against the solution expires (20 days) and then the solution becomes final. The other can entail the formulation of a complaint against the solution. The first step in this procedure concerns the analysis of the complaint by the superior prosecutor of the one who ordered the solution. The second, if the so called „remedy" procedure is unsuccessful, entails the formulation of a complaint with the Preliminary Chamber Judge. Finally, in this scenario, only after the complaint is rejected by the Preliminary Judge, the procedure regulated in article 549[1] becomes applicable. As such, what is essential to note is that in this procedure, the question of the legality of confiscation measures is not applicable, the object being, for the purposes of this paper, the legality of the solution ordered by the prosecutor by which he closes the case or drops the charges.

In what concerns the authorities that can request the imposition of the confiscation order in this case, it is expressively provided in the provisions of art. 315 of the Code of Criminal Procedure. According to the article, *the order to close a case comprises the information described (...), as well as obligations to: a) lift or maintain asset freezes; such obligation shall lawfully cease to apply if the victim does not file civil action within 30 days since the order to close the case was issued; b) return seized assets or the bail money; c) ask the Preliminary Chamber Judge to order criminal confiscation as a security measure; d) ask the Preliminary Chamber Judge to nullify a document totally or in part; e) ask the jurisdictional court of law as under the special law on mental health to rule for non-voluntary commitment; f) judicial expenses*[58].

As per the authorities that can impose the confiscation order, the situation differs, since the decision to confiscate is ordered by the Preliminary Chamber Judge and not the trial judge. It is important to note in this context that the Judge of Rights and Freedoms cannot order criminal confiscation, even though, according to art. 53 of the Criminal Code, the judge, *during the course of the criminal investigation, decides upon applications, proposals, complaints, challenges or any other motions referring to: a) preventive measures; b) asset freezing; c) temporary security measures; d) acts performed by prosecutors, in cases explicitly stipulated by law; e) approval of searches, of the use of special surveillance or investigation methods and techniques or of other methods of proof, under the law; f) anticipated hearing procedures; g) other situations explicitly stipulated by law*. The solution is further reinforced when one looks at the provisions of article 245 and 247 of the Criminal Code of Procedure which gives competence to the Judge of Rights and Freedoms solely with regard to temporary medical admission and the temporary compelling to undergo medical treatment, both being, as the name suggest, temporary security measures.

Concerning strictly the procedure, if the solution to drop charges or close the case is maintained or it becomes final and within the solution, the prosecutor requests the ordering of criminal confiscation, the proposal must be analyzed by the Preliminary Chamber Judge. Given the aforementioned intervention performed by the Constitutional Court, the Code of Criminal Procedure was modified, and the text as it is was introduced by means of Government Emergency Ordinance no. 18/2016[59] which provides for a time limit far exceeding the former

[58] The same obligations are provided in the case in which the prosecutor decides to drop the charges.
[59] Emergency Ordinance no. 18/2016 for amending and completing Law no. 286/2009 on the Criminal Code, Law no. 135/2010 on the Criminal Procedure Code, as well as for the completion of art. 31 par. (1) of the Law no. 304/2004 on judicial organization, in force since 23 May 2016.

one[60]; the procedure is public, and all interested parties are to be cited. The rationale behind the modification and the new deadline was the increasingly critical decisions pronounced by the ECtHR on the topic of deprivation of property and fair trial rights in the context of confiscation procedures[61]. The idea was that by fixing at least 30 days, the deadline will be sufficiently long so that any interested party that may have an interest in the assets that are to be confiscated can intervene and provide the court with adequate defenses, if applicable. Moreover, by having a public hearing and summoning any person whose legitimate rights or interests may be affected, the legislator tried to align with the European trend and provide some protection to interested parties, in the sense of the protection provided by art. 6 and art. 1 Protocol 1 of the Convention – the procedural limb. Solution-wise, the Preliminary Chamber Judge may either accept the proposal of the prosecutor and order the confiscation of the assets – if the conditions of article 112 of the Criminal Code – explained above, are fulfilled, or he or she can reject the proposal. In this latter case, the judge must dispense, if applied, any freezing of assets ordered on the basis of later confiscation. If the assets were not frozen during the investigative phase, the Preliminary Chamber Judge is obliged to order the return of the property to the rightful owner.

In what concerns the legal remedies applicable in this procedure, the persons mentioned above can file a complaint within a maximum of 3 days after the communication of the first decision. The procedure applicable in the appeal phase is identical with the first one, all the initially provided safeguard being in place. Per the solutions, the Preliminary Chamber Judge at the higher court - who rules on the appeal, can either dismiss it as belatedly, inadmissible or unfounded or admit the appeal and depending on the solution given at first instance, reverse it. The decision pronounced in the appeal procedure is final.

C. Mutual recognition aspects

In the following lines, the issue of mutual recognition of freezing and confiscation orders will be analyzed. *Inter alia*, we will try to answer whether there is a specific legal framework for the mutual recognition of such orders, which authorities are in charge on deciding on the request in the executing member state, the potential grounds for non-recognition, the possibility to postpone the execution of the orders, limits concerning the procedure, as well as the rights, guarantees and legal remedies available.

I. Freezing

As a preliminary observation, since the issue of mutual recognition of freezing orders can be qualified as a form of mutual assistance in criminal matters *largo sensu*, the mechanisms that regulate all mutual assistance issues in the Romanian legal framework are provided in Law no. 302//2004[62] on International judicial Cooperation in Criminal Matters. The legal regime is

[60] respectively at least 30 days.
[61] For example, ECHR, Sud Fondi SRL v. Italy, no. 75909/01, 20.1.2009, ECHR, Varvara v. Italy, no. 17475/09, 29.10.2013, ECtHR, Grande Stevens and others v. Italy, no. 18640/10 and others, 4.03.2014, ECtHR, Microintelect Odd v. Bulgaria, no. 34129/03, 4.3.2014, ECtHR, Paulet v. Great Britain, no. 6219/08, 13.5.2014, ECtHR, Gogitidze and others v. Georgia, no. 36862/05, 12.08.2015, ECtHR, Berland v. France, no. 42875/10, 3.09.2015, ECtHR.
[62] Published in the Official Gazette, Part I, no 377 of 31 May 2011.

regulated in Title VII, Section III, art. 219-232 of Law no. 302//2004, transposing Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

First and foremost, it is important to note that the form in which the procedure is regulated is very similar with the form of the Framework Decision, so as such, elements that are identical will not be dealt with (i.e. definitions, objective, the certificate and so on).

In what concerns the competent authorities, in terms of ordering a freezing order, the prosecutor, during the investigative phase and the court, during trial, can issue a freezing order. However, when it regards the execution of the order issued by another Member State, the competent authority during the investigative phase is the Prosecutors Office alongside the Tribunal and during trial, the Tribunal, both of which in whose constituency the assets subject to freezing are located. Complementary, when the freezing order refers to more than one asset located in the territorial jurisdiction of two or more authorities, the legislative instrument provides that the competence to recognize and execute rests with either the Prosecutors Office alongside the Bucharest Tribunal or the Bucharest Tribunal. As a supplementary note, if a procedure is already ongoing concerning the assets requested to be recognized and executed per freezing, or a final decision has been reached, the competence to order the recognition rests with the Tribunal or Prosecutors Office alongside the Tribunal, competent territorially, irrespective of the judicial phase. As an example, for this situation, even if the procedure is in the appeal phase before the Court of Appeal, if a recognition of a freezing order is requested, the competent authority in this case would be the Tribunal competent under the Court of Appeal.

Offense-wise, the procedure, according to article 223 of Law no. 302//2004 differs depending on the scope for which the freezing is requested: (1) for the purpose of gathering evidence and (2) for the purpose of latter confiscation. For the latter purpose, since the instrument does not provide which type of confiscation is possible to be requested as scope, we believe that both extended and criminal confiscation are suitable candidates. However, for certain offense, irrespective of their denomination in the issuing Member State, if provided legally with a prison sentence of at least 3 years in Romania, they will be subject to recognition and execution attached with a freezing order (without analyzing the criterion of double criminality). The offenses are:

1. participation to an organized criminal group; 2. terrorism; 3. human trafficking (including minors); 4. sexual exploitation of children and child pornography; 5. illicit trafficking in drugs and psychotropic substances; 6. illicit trafficking in arms, munitions and explosives; 7. corruption; 8. fraud, including that affecting the financial interests of the European Union within the meaning of the Convention of 26 July 1995 on the Protection of the European Communities' Financial Interests; 9. money laundering; 10. counterfeiting of currency, including counterfeiting of the euro; 11. facts related to cybercrime; 12. offenses against the environment, including illicit trafficking of endangered animal species and endangered plant species and varieties; 13. facilitation of illegal entry and stay; 14. murder, serious bodily injury; 15. illicit trafficking in human organs and tissues; 16. Abduction, unlawful deprivation of liberty and hostage-taking; 17. racism and xenophobia; 18. organized or armed theft; 19. illicit trafficking in cultural goods, including antiques and works of art; 20.the crime of deception; 21. racketeering and extortion; 22. counterfeiting and piracy of products; 23. falsification of official documents and use of forgery; 24. forgery of payment means; 25. illicit trafficking in hormonal substances and other growth factors; 26. illicit trafficking in nuclear or radioactive materials; 27. trafficking in stolen

vehicles; 28. rape; 29. intentional arson; 30. crimes under the jurisdiction of the International Criminal Court; 31. illegal seizure of ships or aircraft; 32. sabotage.

Turning back to the difference between the freezing disposition ordered for the purpose of gathering evidence and that for the purpose of ordering confiscation, the main debacle is that for the purpose of evidence gathering, article 223 para. 2 of Law no. 302/2004 provides that if the offense is not present in the above-mentioned list – the criterion of double criminality is applicable, irrespective of the denomination or the difference or constitutive elements requested in the issuing Member State. Confiscation based freezing on the other hand, provides that recognition and execution will be realized, if the offense is not one present in the list, if for the specific offence, in the executing Member State, the dispossession of the asset is possible. In this regard, per the definition given in article 219 of Law no. 302/2004, dispossession in this sense relates strictly to freezing orders and not the possibility of ordering confiscation.

Moving towards the applicable procedure, articles 225-228 of Law no. 302/2004 describe the steps that need to be taken so as an order to be recognized and executed by the Romanian authorities. The regime is partly different, as is the order requested to be executed in the investigative phase or the trial phase.

As a general principle, it is provided that the competent judicial authority, irrespective of the judicial phase, will recognize a freezing disposition ordered by a Member State of the EU without delay and without any supplementary formality and it will execute the order in the exact same manner as it would do if the order was issued by a Romanian authority. Per the steps required in the procedure, it is provided that a report shall be drafted concerning the execution, on the basis of the report submitted by the criminal investigation bodies that *de facto* executed the order and the report shall be transmitted to the issuing authority by means of any instrument that permits a written confirmation. If any supplementary coercive measures are required for execution, it is provided that the competent authorities shall make use of any and all instruments at their disposal, as would be the case when the order was issued internally.

The general limits of the above-mentioned procedure entail the presence of ground for non-recognition or a situation of postponement of recognition and, in the case of freezing orders by which it is required to respect certain standards of proof (substantial and procedural), the Romanian authorities are required to respect the express indications provided, only insofar as they do not infringe on the rights and guarantees provided in the Constitution. With regard to the latter limit, we believe that the cases in which a provision of the Constitution would be infringed are fairly rare, given that a common standard is applicable within the EU with respect to protecting fundamental rights[63] and not only. Moreover, by regulating this condition, it is evident that the express requests of the issuing Member State are to be checked not only with the Romanian Constitution, but also with the provision of the ECHR, as Romania is a member. Therefore, according to art. 20 para. 2 of the Constitution, entitled *International treaties concerning human rights*:

[63] For details see The European Charter for fundamental rights and freedoms, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT

(2) If there are inconsistencies between the covenants and treaties on fundamental human rights, to which Romania is a party, and the national laws, priority shall be given to the international regulations, unless the Constitution or the national provisions contain more favorable provisions.

Moving forward, as administrative aspects, before ruling on the recognition and execution of a freezing order issued by a Member State, the Romanian authorities must first check the formal requirements of the documents received and the issue of jurisdiction.

Article 226 of Law no. 302/2004 provides, as formal requirements, that if the Romanian authorities receive a freezing order required to be executed, they must check, within 24 hours of the receiving of the order (1) if it is accompanied by the standard certificate or any equivalent document[64] and (2) if the documents are translated. If no translation exists, the competent Romanian authorities must solicit the issuing Member State the issuing of the translation in a term of maximum 3 days. After this remedy procedure is concluded, if the translation is received, within 24 hours, the Romanian authority must check its competence. If the institution in question considers that it is not competent to rule on the request, it will send the order on the basis of the special legislation to the competent authority and inform the authorities of the issuing Member State. However, if competence cannot be determined given the improper description of the assets within the freezing order, the Romanian authorities will solicit clarification to the issuing Member State in a term of maximum 3 days. Per the character of the procedure, since it is purely administrative, it is confidential[65] and the maxim duration, if the translation is not submitted initially and the assets cannot be *ab initio* clearly identified, is of 8 days.

Concerning the situation when the order is requested to be executed in the investigative phase, as shown above, the competent Prosecutor from the Prosecutors Office alongside the Tribunal in the constituency of which the asset subject to freezing is situated, can order the recognition and execution of the freezing order by prosecutorial ordinance within 5 days after the concluding of the check incumbent in the formal preparatory phase.

The law is silent on the formal and substantial requirements that need to be fulfilled in what concern the prosecutorial order. As such, we believe that the general requirements provided in the Code of Criminal Procedure will be applicable, insofar as Law no. 302/2004 is *lex specialis* when compared to the Code.

With regard to the legal remedies available in this procedure, it is worth observing that only the prosecutorial order by which the request to freeze is approved and executed ca be challenged. The reason for this is self-evident, as in the case of refusal, the only motives for rendering such a decision are the ground for non-recognition, that will be presented below. Therefore, the refusal in such cases will be resolved in an inter-state exchange of information and not in a judicial procedure.

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[64] The issues concerning the substance of the certificate or the equivalent documents relate to grounds for non-recognition.

[65] In accordance with the provision of article 226, if the request is made to a Tribunal, the court has the obligation to fix a term that is no longer than 5 days since the decision, the distribution being made in accordance with the Supreme Council of Magistracy Decision no. 1375 of 17 December 2015, establishing the new rules on Internal Court Order.

Coming back to the issue at hand, according to article 227 para. 2 of Law no. 302/2004, after the rendering of the recognition, any interested party, including *bona fide* third parties, may challenge the order with a complaint addressed to the Tribunal in whose jurisdiction the Prosecutors Office that was competent to issue the recognition is situated, if they can prove that their legitimate interests have been inflicted. The deadline for the submission of the complaint is within 5 days of the communication of the order, while the submission of the documents must be realized within 2 days after they were solicited, and the court must render a decision within 5 days of receiving the dossier. The complaint is ruled upon in a public hearing, the lodging of the complaint does not suspend the execution, the admissible evidence are only new documents and the decision is final. As such, the court can either (1) dismiss the complaint as being formulated after the expiration of the deadline or inadmissible and maintain the contested order or (2) admit the complaint, abolish the contested order and revoke the freezing measure.

Per the motives based on which one can lodge the complaint, it is provided that the substantive reasons which lead to the freezing order cannot be invoked, being of the jurisdiction of the issuing state. As such, the only motives that can be invoke concern the formal requirements and motives for postponement and non-recognition, as well as any inconsistencies in respecting the prescribed procedure.

Concerning the issuing of the order during trial, article 228 of Law no. 302//2004 provides that the request is ruled upon by the Tribunal, in chambers, by a single judge. The decision can be challenged within 5 days after the communication / the delivery of the judgement by any interested party. The Court to rule on the challenge is the one superior to the Tribunal, respectively the Court of Appeal and the aforementioned dispositions applicable to the challenge during the investigative phase are to be applicable in this context as well. As deadlines, the dossier is sent to the Court of Appeal within 24 hours after the formulation of the challenge, the ruling must be ordered within 5 days and it does not suspend the execution of the freezing order.

Regarding the duration of the freezing order in this special procedure and the fate of the assets in question, the provisions of article 229 of Law no. 302/2004 state that the freezing order is to be maintained until the scope for its ordering has been fulfilled – confiscation or gathering of evidence. As such, even though a time-based deadline is not delineated, the maximum duration will be until the conclusion of the criminal trial (by closing the case, renouncing the charges, final conviction, acquittal).

However, as an exception, it is provided that the Romanian authorities can, according to the national legislation, impose the execution of the order for a shorter period of time. As well, if the competent authority chooses to revoke the measure, it is compulsory that the issuing authority be notified, with the possibility to make observations. This procedure is available originating from the opposite side as well, so that if the authorities from the issuing Member State decide to revoke the order, the Romanian authorities shall be informed. As a last specification, concerning the measure of confiscation and gathering of evidence – as reasons for the freezing order, the national provision state that the measures shall be executed according to the provisions regulating mutual cooperation on confiscation measures.

As per the grounds for non-recognition, these are compulsory, and they are four. The conclusion is drawn from the formulation of the Romanian legislation, which is different from the

wording of the Framework Decision, alongside with comparing the provisions with the ones regulating postponement. As such, the formulation in the case of non-recognition states "*cannot be refused with the exception of*" while in the case of postponement, the formulation is "*may postpone*".

Returning to the reasons for non-recognition, the first one concerns the quality of the certificate on the basis of which the request is made. As such, if the certificate is not present, it is incomplete, or it does not clearly match the request, the competent Romanian authority will refuse the recognition and execution. The second reason states that the recognition will be refused if the Romanian legislation provides for an immunity or a privilege that renders impossible the execution of the freezing order. The third reason provides that the recognition will be refused if it is immediately clear from the information provided in the certificate that the handling of the request for the criminal offense that is the subject of the criminal proceedings would be contrary to the principle of *ne bis in idem*.

In this last sense, we urge that the situation is not incompatible with the provisions relating to competence. As such, as shown before, the Tribunal would be competent to rule on the recognition of a freezing order, if the case is settled definitely. This does not preclude the court to rule firmly that the measure requested was issued already, a solution was given and thus the principle of *ne bis in idem* will be infringed if the order is recognized. Finally, the last reason for refusal relates to the criterion of doubly criminality, as explained above – with its particularities.

In the case of postponement, the wording of article 231 of Law no. 302/2004 is identical with that of the Framework Decision. In this sense, according to the provisions:

1. The competent judicial authority of the executing State may postpone the execution of a freezing order transmitted:

a) where its execution might damage an ongoing criminal investigation, until such time as it deems reasonable;

(b) where the property or evidence concerned have already been subjected to a freezing order in criminal proceedings, and until that freezing order is lifted;

(c) where, in the case of an order freezing property in criminal proceedings with a view to its subsequent confiscation, that property is already subject to an order made in the course of other proceedings in the executing State and until that order is lifted. However, this point shall only apply where such an order would have priority over subsequent national freezing orders in criminal proceedings under national law.

2. A report on the postponement of the execution of the freezing order, including the grounds for the postponement and, if possible, the expected duration of the postponement, shall be made forthwith to the competent authority in the issuing State by any means capable of producing a written record.

3. As soon as the ground for postponement has ceased to exist, the competent judicial authority of the executing State shall forthwith take the necessary measures for the execution of the freezing order and inform the competent authority in the issuing State thereof by any means capable of producing a written record.

4. The competent judicial authority of the executing State shall inform the competent authority of the issuing State about any other restraint measure to which the property concerned may be subjected.

Concerning the available legal remedies and guarantees, Law no. 302/2004 provides, as shown above, special procedures relating to the challenging of the recognition and execution of freezing orders, but the rights and guarantees of the persons with interest in the procedure are the same as those provided in the Code of Criminal Procedure. The latter statement is valid, given the procedural relation between Law no. 302/2004 and the Code of Criminal Procedure, this one being a *lex specialis* vs *lex generalis*. As such, if not specific provisions exist in Law no. 302/2004, it will be complemented by the provisions of the Code of Criminal Procedure, insofar as the general provisions do not overlap or go contrary to the provisions of Law 302/2004.

As a final remark in this regard, Law no. 302/2004 transposes almost identical the words of article 12 of the Framework Decision. As such, where the Romanian authorities are responsible for injuries caused by the execution of the freezing order, the issuing state is obliged to reimburse the sums paid in damages by virtue of the incumbent responsibility. The only exception provided concerns the case where the injury or part of it is exclusively due to the conduct of the Romanian authorities.

II. Confiscation

Concerning the issue of recognition of confiscation orders, the legal regime is regulated in Title VII, Section V, art. 248-268 of Law no. 302//2004, transposing Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

Regarding the definition of concept, since confiscation in Romania is regulated as a safety measure and the terms used in the proceedings can have different meanings[66], clear lines were required to be drawn so as to understand the extent to which the procedure is applicable. In this sense, the following definitions are provided:

"confiscation order" shall mean a final penalty or measure imposed by a court following proceedings in relation to a criminal offence or offences, resulting in the definitive deprivation of property; Property

"property" shall mean property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents and instruments evidencing title to or interest in such property, which the court in the issuing State has decided: (1) is the proceeds of an offence, or equivalent to either the full value or part of the value of such proceeds, (2) constitutes the instrumentalities of such an offence and (3) may be confiscated on the basis of extended confiscation powers under the law of the issuing State.

"proceeds" shall mean any economic advantage derived from criminal offences. It may consist of any form of property;

[66] Especially since the Proposed Regulation on Recognition of confiscation orders has not yet been adopted. SWD(2016) 468 final, {SWD(2016) 469 final

"instrumentalities" shall mean any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;

Concerning the institutions that have jurisdiction in order to execute a confiscation measure, the general rule is that it belongs to the Tribunal in whose constituency the property subject to confiscation is located. However, as in the case of the freezing order, several exceptions are regulated on the basis of either the location of the assets subject to confiscation or on the time of the request. Therefore, asset wise, if the confiscation order concerns:

1. *more movable assets, then jurisdiction will pertain to be Bucharest Tribunal;*
2. *one, or more than one movable asset and real estate, the jurisdiction lies with the Tribunal in whose constituency the real estate is located;*
3. *more than one real estate in the jurisdiction of different Tribunals, jurisdiction lies with the Tribunal in whose constituency the real estate has the highest value;*

With regard to the time aspect, it is provided that if more than one Member State issues confiscation orders for the same asset, jurisdiction lies with the Tribunal which was firstly noticed.

Offense wise, as was the case in the situation of the freezing order, when the maximum sentence provided by law is at least 3 years and the offense is one provided in the list (the same list), the condition of double criminality is not to be verified, irrespective of the constitutive elements of the offense in the issuing Member State. For other offenses not provided in the list, the order to confiscate will be recognized (1) insofar as the act is qualified as on offense in Romania and (2) only if confiscation would be possible for the respective offense in Romania. Having observed that the provision does not relate to extended confiscation separately from criminal confiscation, the correct deduction, from our point of view, is that both are applicable. Therefore, if the order is issued for extended confiscation, then the executing authorities must check if extended confiscation can be applied. In the same manner, if criminal confiscation is required, the same analysis must be realized. Even though the process seems simple at first glance, we believe that in practice it will be relatively hard to assess a full pledge compatibility, since, Member States have implemented differently the institution (i.e. standard of proof requirement, triggering offense, time limits for evaluations and so on).

An intriguing issue is further regulated in article 252 which states that amnesty and pardon may be granted by both the issuing State and the executing State and the review of the confiscation order may only be ordered by the issuing State.

Considering the grounds for non-recognition, these are provided in article 262 of Law no. 302/2004. As such, there is only one compulsory ground for non-recognition, the others being optional.

Starting with the sole compulsory reason, this concerns the criterion of double criminality coupled with the possibility to order confiscation for the specific asset. As in the case of asset freezing, there is no need for identical constitutive elements or the same qualification in the issuing Member State.

Per the legal text, the recognition and execution of a confiscation order may be refused if:

1. the certificate is not attached to the request, is incomplete or it does not correspond to the confiscation order;
2. the execution of the confiscation order would be contrary to the principle of *non bis in idem*;
3. the Romanian legislation provides for an immunity of privilege that makes the execution of the confiscation order impossible;
4. the rights or any interested party, including *bona fide* third parties, make the execution of the confiscation order impossible;
5. the person concerned by the order was not present at trial in the issuing Member State, only insofar as several other conditions are not met[67];
6. the confiscation order was issued considering criminal proceeding which, under Romanian law, were committed at least partially on the territory of Romania, or were committed outside the territory of Romania, but the Romanian legislation does not permit the issuing of measures concerning those specific offenses;
7. the execution of the confiscation order will affect principles enshrined in the Constitution;
8. the execution of the confiscation order was prescribed according to the Romanian law, provided that the crimes are the responsibility of the Romanian authorities according to national criminal law;
9. the confiscation order was issued on the grounds of extensive confiscation powers which are incompatible with the provisions of the Romanian legislation in the matter. In this case, the confiscation order may be executed at least to the extent stipulated by the Romanian legislation.

As is the case with the freezing order, when the quality of the certificate is in question, the Tribunal may fix a deadline in which to request clarification or the completion of the inexact data. Moreover, as common rules concerning the communication with the issuing authorities from the other Member States, it is provided that any decision, regardless of the solutions, must be notified to the authorities of the issuing Member State as soon as possible, explaining the result and the motives for non-recognition.

Postponement of the execution of the confiscation order is possible according to the Romanian legislation. The reasons for postponement are optional and they were basically taken *expressis verbis* from the text of the Framework Decision. Therefore, per the legal text:

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[67] If the following conditions are met, then the execution of the order cannot be refused. As such, confiscation will be executed even if the defendant was not present at trial, if:

a) He or she was duly notified in writing, by written notice, handed in person or by telephone, fax, e-mail or by any other means, in respect of the day, month, year and place of appearance and the legal consequences in the event of failure to appear; or
b) having knowledge of the day, month, year and place of appearance, mandated his or her own chosen lawyer or appointed ex officio to represent it, and legal representation and defense before the court were effectively carried out by that lawyer; or
c) after having been personally handed down the conviction and has been informed that the case may be re-judged, or that the judgment is subject to appeal and that it can be checked on the basis of new evidence, and the possibility of admitting the appeal may be terminated, the convicted person either expressly renounced the retrial or the appeal, either did not request a retrial or did not declare the appeal in the prescribed period;

The court may postpone the execution of a confiscation order transmitted:

(1) if, in the case of a confiscation order concerning an amount of money, it considers that there is a risk that the total value derived from its execution may exceed the amount specified in the confiscation order because of simultaneous execution of the confiscation order in more than one Member State;

(b)in the cases of use of legal remedies by any interested parties;

(c)where the execution of the confiscation order might damage an ongoing criminal investigation or proceedings, until such time as it deems reasonable;

(d)where the property is already the subject of a national confiscation order.

In conjunction with the reasons provided above, Law no. 302/2004 provides that if postponement is ordered, the court is obliged to take all and any necessary measures for the purpose of a latter confiscation – it basically requires to order the freezing of the assets if national legislation permits. Moreover, the issuing authority is to be informed as soon as possible about the reason for the postponement, and in the case where postponement was ordered because of the use of legal remedies by interested parties and where it was ordered so as to avoid damaging an ongoing criminal investigation, a report must be drafted and sent. If possible, in the report, the total estimated duration of the postponement will be provided.

As a last provision in this context, immediately after the expiration of the reasons for postponement, it is provided that the court must take all required measures so as to execute the confiscation order and, at the same time, inform the issuing authority.

As special rules in this procedure, it is provided that if more than one confiscation orders have been requested to be executed against the same person (confiscation of sums of money that are insufficient for the execution of all orders) or concerning the same assets, several criteria will be considered so as to establish which order will be executed. These are: (1) the prior freezing of the assets, (2) the gravity and the place where the offense was committed and (3) the date of transmission of the orders.

Finally, in what concerns the rights of interested parties and the available legal remedies, Law no. 302/2004 does not regulate any procedural avenues that are to be applied. However, it does regulate the right of any interested person to claim damages if the execution of the confiscation order has produced injuries.

With regard to empirical evidence, given the request submitted to the National Agency for the Management of Seized Assets[68], it was provided that since 2015, only 6 confiscation orders were issued in order to be recognized by the Romanian authorities. Therefore, the following were confiscated:

1. 65.000 euros, confiscation order requested to be executed by Liege Court of Appeal;
2. two constructions and a parcel of land in Cluj, confiscation order requested to be executed by the Paris Tribunal;

[68] Answered by a document no. 2//806/2018, of 2.07.2018 issued by the General Manager.

3. one construction in Brasov, confiscation order requested to be executed by the Innsbruck Tribunal;
4. one construction and a parcel of land in Călărași, confiscation order requested to be executed by the Paris Tribunal;
5. one vehicle, confiscation order requested to be executed by Sofia Court of Appeal;
6. two vehicles, confiscation order requested to be executed by Sofia Court of Appeal.

D. Management and disposal aspects

In the following lines, an overview will be made with regard to the management and disposal of frozen and confiscated assets. From the outset, it is important to note that relatively recent, the entire legal framework concerning the management of the assets described above has changed, starting with the year 2015. In a nutshell, in the Romanian legal framework, there is no distinction between the institution that manages frozen assets vs. confiscated assets. As such, both dimensions will be analyzed together. However, at the end of this chapter, a section will be dedicated to third-party right or lack of in the proceedings.

I. Freezing & Confiscation

Essentially, since 2015, a new agency has been established so as to manage frozen and confiscated assets, respectively the National Agency for the Management of seized Assets.

The agency was created by means of Law no. 318/2015, which considered the best practices identified in other European states (FR, BE, NL, IT), the US and consequently transposed the obligation that Romania had according to article 10 of Directive 42/2014/EU. As well, the Agency is seen as a result of both the aforementioned and the Anti-Corruption Strategy 2012-2015. Per its mission, the ultimate goal of ANABI (NAMSA) is to ensure an increase in the execution rate of confiscation orders issued in criminal matters through effective administration of seized assets that are allocated to the Prosecutor's Office and judges. Correlatively, the agency, by its activities, increases the revenues to the state budget, as well as those for the compensation of the victims of crimes, including the state – when a civil party in the criminal trial.

Per the issue of financing, according to article 17 of Law no. 318/2015, the Agency is financed entirely from the state budget through the budget of the Ministry of Justice and expenditure incurred in the performance of the tasks of the Agency is borne by its budget. As well, it is provided that the Agency may receive donations, sponsorships and may access other sources of funding, in accordance with the incident legal provisions. In the same sense, article 272 of the Criminal Code of Procedure states that the expenditures necessary for the performance of procedural acts, the administration of evidence, the preservation of the material means of evidence, the fees of the lawyers, as well as any other expenses occasioned by the criminal proceedings are covered by the state in advance or paid by the parties.

Functions-wise, according to Law no. 318/2015, the Agency has the following functions:

a) to facilitate the tracing and identification of property arising from the commission of offenses and other property related to offenses and which could be subject to a provision of seizure or confiscation issued by a competent judicial authority in criminal proceedings;

b) to administrate assets, in the cases provided by Law no. 318/2015, consisting of movable goods disposed of in criminal proceedings;

c) to exploit (sell at auction), in the cases provided by Law no. 318/2015, movable assets seized in criminal proceedings;

d) to manage the integrated national computer system for the recording of claims arising from criminal offenses;

e) to support, under the law and according to best practices, the activity of authorities that deal with the administration of property that may be subjected to measures of seizure and confiscation in criminal proceedings;

f) to coordinate, evaluate and monitor at the national level, the implementation and enforcement of legal procedures in the field of recovery of claims arising from criminal offenses.

With regard to the functions provided above, several marks need to be made, as they are divided in classes of attributions that the Agency is to perform. In the order provided in the legal instrument, the classes of attributions are:

1. Attributions to facilitate the identification and tracking of assets that may be subject to precautionary measures during criminal court proceedings, special or extensive confiscation.

2. Attributions concerning the management of:
    a. Seized sums of money
    b. movable seized assets
    c. immovable seized assets

3. Attributions concerning confiscated assets

4. Attributions concerning the management of the integrated informatic system concerning the registry of claims arising from criminal offences

5. Other attributions

For the purpose of the present paper, only the attributions that relate strictly to the management of frozen and confiscated assets will be discussed.

With regard to the attributions concerning the management of seized sums of money, it is provided in article 27 of Law no. 318/2015 that the agency manages and keeps records of amounts of money (1) subject to seizure, (2) resulting from the capitalization of perishable good, (3) in special cases of exploitation of movable seized goods or (4) own to an interested party and subject to garnishment according to the provision of the Code of Criminal Procedure (art. 252 and the following). The management aspect essentially concerns the custody of the amount obtained through seizure or garnishment and the permanent monitorization of the fate of the trial.

In a nutshell, the Agency ensures that the sums seized or garnished are available when a final decision is made and according to the legal basis used by the judicial authorities, it either transfers the sums to the state (if confiscation is ordered), to the injured party (if the sum was garnished for this reason) or back to the offender (if acquittal or other similar decision is reached).

Turning towards the attributions concerning movable seized assets, the Agency acts as a custodian at the request of the prosecutor or the court and it temporarily deposits and manages only seized assets with a value – at the moment when seizure was ordered, of at least 15.000 EUR - equivalent in RON. After the taking into custody, the main function is to preserve the assets, but, under certain conditions (with the authorization of the prosecutor or the court, it can request the consent of the owner in order to capitalize the assets).

In this sense, according to art. 29 of Law no. 318/2015 and art. $252^1 – 252^4$ of the Code of Criminal Procedure, it is possible, in exceptional circumstances, to capitalize movable seized assets.

The rule within this exception would be that, with the authorization of the prosecutor or the court, the Agency would try to contact the owner of the goods and obtain his or her consent to capitalize the assets. If consent cannot be obtained, the assets can be capitalized (1) when, within one year from the distraint ordering date, the value of the seized goods has decreased significantly, i.e. by at least 40% compared to the time of enforcing the asset freezing, (2) where there is the risk of expiry of the guarantee or when the distraint was applied against live stock or birds, (3) when the distraint was enforced against flammable or petroleum products or (4) when the distraint was enforced against goods the storage or maintenance of which involves expenses disproportionate to the value of the property.

In the same sense, another exception is provided when the assets in question are motor vehicles that can be sold while they are only seized (1) when they were used, in any manner, in the commission of the offense and (2) if a time period of one year or more has passed since the date of ordering asset freezing.

Procedurally, the agency may propose, *ex officio*, to the prosecutor, the judge of rights and freedoms or the court, the initiation of the process of capitalizing the seized movable goods and the capitalization may be realized (1) by the Agency, by public auction, (2) by specialized entities or companies, selected in compliance with the legal provisions regarding public acquisitions, (3) through bailiffs, according to their own procedures or (4) by the tax authorities, according to their own recovery procedures – the General Manager of the Agency decides on the method of sale.

Turning towards the attributes that the agency has with regard to seized immovable assets, the legal instruments refrains in describing only that the National Agency for the Management of Seized Assets keeps records of the buildings on which seizure was ordered, based on the prosecutor's order or the conclusions of the judge. According to paragraph 2 or article 30 of Law no. 318//*2015, the prosecutor, the preliminary chamber judge or the court that ordered the seizure shall send to the Agency a copy of the ordinance or closure by which the seizure was ordered and a copy of the seizure record*. After the reception, the Agency shall communicate the

order to all and any interested public institutions by electronic mail and it shall pass any information relevant to the situation of the assets.

Concerning the attributes that the agency has with reference to confiscated assets, they can be qualified as attributes concerning (1) statistics, then (2) capitalization or transfer and finally, (3) destruction.

The first task that is provided is that the Agency keep records of the decision in which confiscation was ordered, on the basis of extended and special confiscation, as well as those communicated to the Romanian authorities by foreign courts. In this sense, the judge in charge of the execution of the security measure shall send a copy of the decision to the Agency, which is turn takes over the assets. The agency provides quarterly statics on the changes occurring in this domain, considering the final destination of the confiscated assets.

Having in mind the previous statement, the agency, according to art. 31, 34 and 35 of Law no. 318/2015 has two main options. It can either administer the assets and then hand them over to the competent authorities in order to be capitalized according to Government Ordinance no. 14/2007 on the regulation of the manner and conditions for the capitalization of goods entered, according to the law, in the private property of the state **OR** it can administer the assets and then pass them free of charge to other public entities or to associations and foundations.

Concerning the latter prospect, respectively **the re-use of confiscated property**, the practice entails a relatively new concept that consist of the passing free of charge or putting into use of the proceeds of crime to public institutions, administrative authorities or non-governmental organizations in order to be used for social or public interest purposes.

In accordance with the information presented on its website[69], it is very well known that at EU level, there is an increasing interest in this method of capitalizing on confiscated assets that resulted in the adoption on the 3rd of April 2014 od Directive 2014/42/EU on the freezing and confiscation of proceeds of crime. The European Union thus urged Member States to *consider adopting measures to enable seized goods to be used in the public interest or for social purposes. Such measures could include, inter alia, the allocation of those assets for law enforcement and crime prevention projects as well as for other projects of public interest and social utility. The obligation to consider adopting such measures implies a procedural obligation for Member States, such as carrying out a legal analysis or discussing the advantages and disadvantages of introducing such measures. When managing frozen goods and adopting measures on the use of confiscated goods, Member States should act appropriately to prevent criminal or illegal infiltration*.

In this spirit, article 34 of Law no. 318/2015 states that *The immovable property entered through confiscation in the private property of the state may be transmitted free of charge in the private domain of the administrative-territorial units **at the request** of the county council, respectively of the General Council of the Bucharest Municipality or of the local council, as the case may be, by government decision, initiated by the Ministry of Public Finance at the Agency's proposal, to be used for social objectives*.

[69] For details see https://anabi.just.ro.

Article 35 of the same Law further states that *the immovable property entered through confiscation in the private property of the state may be given free use to associations and foundations, as well as to the Romanian Academy and branch academies established under a special law by Government decision initiated by the Ministry Public Finance, **on a proposal from the Agency**, to be used for social, public-interest purposes, or in relation to their subject-matter, as the case may be.*

Complementary to the aforementioned legal provisions, if the assets were initially ordered to be capitalized, a remedy procedure is provided by the governing legal instrument, respectively Government Ordinance no. 14/2007. The provisions are essentially redacted so as to avoid the compulsory capitalization in cases where the assets could be used legitimately, and they could be more useful to other bodies when opposed to the obtaining of sums of money. According to the instrument[70]:

The Ministry of Public Finance may submit or, as the case may be, propose to the Government the free transfer of goods subject to capitalization to natural or legal persons as follows:

a) to the General Secretariat of the Government - motor vehicles, ambulances with related facilities, boats and motors attached to them, which will be distributed by the interministerial commission, free of charge, to the ministries, central and local public authorities, within the limits of the endowment norms, as well as cult institutions, the Romanian Red Cross Society and non-governmental organizations accredited by the Ministry of Labor, Family, Social Protection and the Elderly as social service providers / social canteens and who actually carry out such activities;

b) nurseries, kindergartens, foster care centers and childcare centers, old people's homes, poor canteens, asylums, hospitals, schools, libraries, religious institutions, disabled people, the Romanian Red Cross National Society, as well as non-governmental organizations accredited by the Ministry of Labor, Family, Social Protection and the Elderly as providers of social services / social canteens and actually carrying out such activities, as well as natural persons who suffered from natural disasters at the proposal of the recovery bodies , by order of the minister or decision of the head of the recovery body, according to the provisions of the methodological norms for the application of the present Ordinance;

c) Ministries, central and local public authorities - communication equipment, computer equipment and office equipment, supplies, durable goods, household inventory, maintenance and repair materials, observing the declaration and evaluation procedures, by order of the Minister of Public Finance or decision of the head of the recovery body, as the case may be;

[70] Ordinance no. 14 of January 31, 2007 regulating the manner and conditions for the capitalization of the assets entered, according to the law, in the private property of the state, published in the Official Gazette no. 694 of 23 September 2014.

d) Ministry of Foreign Affairs - movable and immovable goods abroad, by Government decision;

e) legal persons administering memorial houses, by a Government decision;

As it can be seen, steps have been taken in order to align to the European trend and make re-use of confiscation assets so as to help public institutions and associations and foundations to use set assets in their day to day activity. However, an important and unjust difference is made within the legal instrument. As such, according to art. 34, with regard to public institutions, the potential transfer is initiated at the request of set authority, while according to art. 35, private bodies may obtain the assets only insofar as the Agency makes a proposal in this sense. From our point a view, the difference of treatment is rather unjustified, the state having an unmotivated advantage.

In this sense, in order to complete the aforementioned provisions within the procedural limb, the Romanian Parliament adopted Law no. 216/2016 on the determination of the purpose of confiscated immovable property, that entered into force on the 18th of November 2016.

According to article 1 *The immovable property entered through confiscation in the criminal proceeding in the private property of the state may be transmitted free of charge in the public domain of the state and in the administration of the central public administration authorities, other public institutions of national interest, after or the Autonomous Registrars of National Interest, hereinafter referred to as Beneficiary Entities, by a Government Decision initiated by the Ministry of Public Finance at the proposal of the National Agency for the Management of Non-Disposable Goods, hereinafter referred to as the Agency, under the terms of the law.*

Further details are provided in the legislative instrument. *Inter alia*, it is provided that the assets described in article 1 will be made available for the institutions known as beneficiaries by means of a management contract, only for the purpose of setting the immovable assets as primary or secondary headquarters.

Procedurally, within 45 days of the communication on the value of the immovable property, the Agency must analyze whether it would be appropriate to initiate the procedure according to article 34 (transmission free of charge to a public institution) or according to art. 35 (transmission to private entities or the Romanian Academy) by means of a bailment agreement.

The criteria for the selection process are provided in the same legal instrument and they are: (1) lack of office space, (2) the need to expand the current location, (3) the location of the building, (4) the surface, (5) the technical condition of the building, (6)the current destination, (7) the date of receipt of the request, (8) the financial situation of the applicant, (9) the possible impact on the state budget.

An important addition must be made with regard to the lack of initiative in the procedure. As such, if the Agency does not initiate or is not required to initiate one of the procedures described above, in accordance with its functional law, the assets will be capitalized according to Government Ordinance no. 14/2007 for the regulation of the manner and conditions for the

capitalization of the assets entered, according to the law, in the private property of the state. As a final note, according to the same legal instrument, if the capitalization is not successful after at least three public auctions, the competent authority in charge of capitalization can request the agency to repeat the initial procedures provided by article 34 and 35 of Law no. 318/2015.

Turning back to the issue of capitalization, the functional law of the National Agency for the Management of Seized Assets only provides that the agency can choose to directly opt for capitalization, in accordance with Government Ordinance 14/2007. Concerning the sums resulting from capitalization, the legal instrument only states that they shall be allocate on the basis of the annual balance presented by the Agency as follows:

a) 20% for the Ministry of National Education and Scientific Research;
b) 20% for the Ministry of Health;
c) 15% for the Ministry of Internal Affairs;
d) 15% for the Public Ministry;
e) 15% for the Ministry of Justice;

Going back to the complementary legal instrument (Government Ordinance 14/2007), it states that as a rule, if chosen to, *assets of any kind entered under the law in the private property of the state shall be capitalized under the terms of the present ordinance by the National Agency for Fiscal Administration through the competent authorities, unless the law stipulates otherwise*. However, when the assets are situated abroad, the competent authority in charge of capitalization is the Ministry of Foreign Affairs.

Since the rule provides for assets of any kind, it is important to note that a yet clear exemption is introduced. As such, assets will not be capitalized if they do not fulfill the necessary conditions in order to be commercialized. For assets of this type, the required action is destruction. Procedurally, according to art. 1 para. 3, they *will be destroyed at the expense of the natural or legal persons from whom they were confiscated or the holder, if they cannot be identified. The destruction shall be carried out in the presence and with the signing of a takeover and destruction commission made up of representatives of the holder, the National Authority for Consumers Protection, the Recovery Authority, the Ministry of Internal Affairs and the Ministry of Environment and Climate Change.*

Concerning the evaluation procedure, it is stated that when recovery involves assets seized in criminal proceedings, a representative of the agency may also be a member of the Evaluation Commission. In this case, the Evaluation Committee consists of 5 members: 2 representatives of the Recovery Authority, one representative of the agency, one representative of the National Authority for Consumer Protection and one representative from the Ministry of Internal Affairs.

Regarding the income and expenses resulting from the capitalization of property entered into the private property of the state, several remarks are required.

First, the rule is that provided in article 37 of Law no. 318/2015, concerning the allocation of income to central institutions. Second, several exceptions are provided in Government Ordinance no. 14/2007, but these exceptions concern only assets confiscation by means of administrative confiscation by local authorities. In this case, art. 11 of the legal instrument

provides that *the goods confiscated by the bodies of the local public administration authority are handed over to the recovery bodies and the proceeds collected from their capitalization are paid to the local budget, after deduction of the expenditures with the capitalization under the legislation in force and a commission of 20% of the incomes remaining after the deduction of expenses with capitalization. The commission of 20% shall be paid to the state budget, within 5 working days from the receipt.*

Regarding the income and expenses resulting from confiscation ordered as requested by another Member State of the EU, the situation is regulated by article 265 of Law no. 302/2004. Per the article, in what concerns the sums of money resulted by capitalization:

a) if the amounts of money obtained following execution of a confiscation order have a value less than EUR 10,000 or the equivalent in lei of this amount, they shall be made available to the state budget;
(b) in all other cases, 50% of the amount obtained following the execution of a confiscation order shall be transferred to the issuing State[71].

If capitalization is not desired or its execution is impossible[72] the legal provisions state that the confiscated property may be transferred to the issuing State (optionally). However, when the confiscation order covers part of the value of the order, the property shall be transferred to the issuing State if the competent authority in the issuing Member State agrees. If consent is given, the transfer is compulsory.

As a final note, concerning cooperation with other institutions within the EU in the area of seized and confiscated assets, the National Agency for the Management of Seized asset is a part / works alongside the CARIN Network and the ARO Platform. As well, according to article 38 of Law no. 318/2015, the agency has competence in the execution of orders of seizure of goods issued by another state, in executing confiscation orders issued by another state and the ability to dispose of confiscated goods within the meaning of art. 265 of the Law no. 302/2004 (judicial cooperation in criminal matters).

II. Third party rights and claims for damages for wrongful management

Concerning the possibility to claim damages for wrongful management of frozen assets, it is deemed worthy to note that the possibility is not regulated through the law governing the functioning of the agency – Law no. 318/2015. However, one could try to endeavor and claim damages based on general provisions provided in Civil Code and the Code of Civil Procedure.

Contrary to the aforementioned, in the exceptional situation when a freezing order was issued and the assets in question fall within the ones that can be capitalized before the issuing of a

[71] Very important in this context is the fact that the capitalization by sale or the use of the assets will be realized in accordance with the Romanian legislation presented above.
[72] Article 265, para. 2 let. c. of Law no. 302/2004 provides that cultural goods belonging to the national patrimony subject to confiscation may not be sold or transferred.

confiscation or restitution order, article 252^4 of the Code of Criminal Procedure states that against the accomplishing of the measure, the prosecutor, the suspect, the defendant, the custodian, the party with civil liability and any interested party can lodge a complaint with the court competent to settle the case at first instance. It is also provided that the court shall rule in an emergency procedure, in a public session, with the summoning of the parties. As a final note, in order to protect the interests of third parties, the law states that if after the final settlement of the criminal trial, no challenges were filed against the manner of enforcing the court's decision regarding the capitalization of the seized movable assets, another challenge is admissible under civil law.