“Babeș-Bolyai” University

Faculty of Law

Ph.D. THESIS

Extended confiscation

(content and summary)

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KEYWORDS

Confiscation; extended confiscation; the presumption of lawful acquisition of wealth; the seriousness of the predicted offence; the susceptibility to obtaining a material benefit; the state of danger; subjective dangerousness; objective dangerousness; the court's conviction; property derived from criminal activities; financial disproportion; confiscation of assets; legal presumptions; standard of proof; third-party confiscation; safety measure; execution of confiscation, *suis-generis* penalty.

SUMMARY

Extended confiscation was first regulated in 2012. Since then, more than 10 years have passed, with the institution still being somewhat misunderstood and randomly applied. In this thesis, we sought to address in a structured and concise manner the most important elements of extended confiscation, in which sense, the structure was intended to be clear and unambiguous.

In Title I, we tried to address the introductory aspects necessary for the coherent study of the safety measure. As such, we tried to set out the purpose of the research, making a somewhat cumbersome approach, namely the justification for the choice.

In summary, Chapter 1, entitled *Scope of enquiry*, started in Section 1 with a brief overview of the institution, trying to capture the elements that distinguish it from the rest of similar institutions and why it is interesting. In section 2, we presented information on the current state of research, the published articles, and books, as well as the national case law and what has been written in foreign doctrine. Subsequently, section 3 was fully dedicated to the methodology in research. As we have said many times, we believe that it is an important, unique aspect of this thesis, and it is imperative that it be widely applied. The effect is that it restricts as much as possible grandiose and unsubstantiated conclusions and provides internal validity to any research.

Chapter 2, entitled *Forms of confiscation in national law*, provides clarity in relation to the typologies of confiscation in national law and not just around criminal law, the work being divided into 3 distinct sections. Consequently, we presented the situation of criminal confiscation, namely the fact that there are 2 forms of confiscation, then administrative confiscation, namely the mechanism laid down in Government Order No 2/2001 on the general rules governing administrative offences, applicable to all acts other

than criminal offences and, finally, civil confiscation. We referred to it as civil, although it is not governed by ordinary law, but by Law No 115/1996, given the merits and the mechanism for ordering it.

Chapter 3, entitled *The premises of extended confiscation*, is the most technical chapter in this first part of the thesis. In Section 1, we presented in an exhaustive manner the context in which the institution appeared and the factual elements which gave rise to the idea that it was necessary. Next, in section 2, we discussed the sources. The intergovernmental source of the mechanism, the contribution of the United Nations, the effect of the Conventions drawn up under its umbrella, and so on. A separate part was devoted to the European Union, given that, in our view, it represents the main reason for which the institution is currently regulated in positive law. The most recent source is Directive 2014/42/EU, but the whole supranational mechanism has been presented since the first relevant Framework Decision, i.e., Framework Decision 2001/500/JAI of 26 June 2001. Subsequently, Section 3 was dedicated to the regulation, *largo sensu*, of extended confiscation. We set out in detail the legislative process and the discussions existing at the time of the transposition of Directive 2014/42/EU. An important part of the thesis was devoted to the constitutional review, the Romanian landscape being somewhat unique in Europe in terms of the constitutional presumption of lawful acquisition of wealth, transposed immediately after the end of the Communist period, for obvious reasons. In this part, we presented all the facets of the constitutional dispute, and the analysis was divided into two segments. The first was the analysis of the constitutional mechanism related to the presumption of lawful acquisition of wealth, while the second dealt with the presumption of innocence and potentially applicable guarantees. Finally, the last section of Chapter 3 was dedicated to explaining the differences between extended and special confiscation. *Inter alia*, differences in relation to the criminal activities concerned, the solutions reached by the court regarding the predicted act, the link between the predicted act and the property subject to the measure, the types of property concerned, and the temporary applicability have been addressed.

Chapter 4 is an essential part of the thesis, dealing with the case law of the European Court of Human Rights applicable in the context of judicial decisions ordering extended confiscation. The analysis looked at how the institution of extended confiscation was perceived by the Strasbourg judges and what safeguards were assessed as applicable in the proceedings conducted – irrespective of the internal qualification by which assets were seized. We therefore examined the applicability of Articles 6, 7 and 4 of Additional

Protocol No 7, on the one hand, and the applicability of Article 1 of Additional Protocol No 1, on the other. The conclusion was mainly uncertain, but rather applied to the level of interpretations concerning Romania, which is why the latter section of this chapter deals with ECtHR case law specifically in cases against Romania.

Chapter 5 is the last part of Title I, which provides several partial conclusions on what has been investigated. The special nature, the constitutionality, the ECtHR's view of confiscation, its sources, the forms of confiscation in national law and the European source of the institution were presented.

Title II is by far the most technical and detailed part of the analysis. As also suggested by the name – *Ordering extended confiscation,* it deals with the most problematic aspects of the institution, namely the nature of the institution, the conditions under which it can be ordered and its application vis-à-vis third parties. Each topic is analyzed in one chapter out of the total of four, the last one being reserved for partial conclusions.

Chapter 1 seeks to answer a question that has been raised many times in academic literature and which has not yet received a definitive answer. The question is: what is the nature of extended confiscation? In an attempt to provide an answer, we analyzed all relevant literature, as well as the case-law of the courts in applying the measure and agreed on what we believe to be the best solution.

Chapter 2 deals with the conditions required to activate the extended confiscation mechanism. We decided to split the analysis into two, on the one hand, conditions allowing the mechanism to be activated and, on the other hand. conditions allowing the measure to be ordered.

In relation to the former, we analyzed the 2 conditions which, in our view, are necessary for the activation of extended confiscation, namely the commission of a certain offence, a predicted crime, and the conviction of the offender for set crime. Naturally, in the context of the part dedicated to the commission of the predicted offence, the sub-conditions were also examined. That is to say, the condition of the seriousness of the offence, for the purposes of the assessment *in abstracto*, on the one hand, and the susceptibility of the act committed to obtaining material benefit, on the other. Without going into great detail, we merely state that the analysis was exhaustive, trying to scrutinize all aspects that might have posed problems.

Next, with regard to the second category – the conditions for ordering extended confiscation, we structured the analysis into 3 parts, each of which is tantamount to presenting one condition out of the three.

In our view, the first condition is to remove a state of danger. Unlike many others, we have taken the view that, in the event of extended confiscation, the condition of removing a state of dangerousness is not presumed but must be proved. We have therefore proposed 2 sub-conditions which we consider necessary for the Public Prosecutor's Office to prove to be met in order to be able to confiscate. In the first part, we set out the concept of subjective dangerousness, so that in the second part we focused on the concept of objective dangerousness. We explained why we considered that the state of danger must be proved *in concreto*, what is meant by the concept of subjective or objective dangerousness and what should be argued in order to be able to further follow the rationale of the legal texts provided in Article 112^1 of the Criminal Code.

The second condition under consideration is the one which raised most problems in judicial practice, namely the court's conviction that the property concerned by the confiscation measure originates from previous criminal activities. Here again, we decided to segregate the analysis and split it into three parts that: subject matter of belief, the standard and burden of proof and the property disproportion criteria.

In the part dedicated to the subject matter of the conviction, we analyzed the mechanism by which this can be achieved, what we try to prove, what we can obtain and what information we need to obtain the evidence. We have agreed on a mechanism characterized by presumptions, aimed at proving the relevant facts and for which we need certain evidence for the nexus, presumptions based on other presumptions not being an acceptable rationale.

The standard and burden of proof have also been a matter of great interest in the area of extended confiscation, the situation being bizarre. We discuss about a measure with extremely similar effects to a penalty for unproven criminal activities, which, moreover, affects property against a constitutional presumption. Here again, we put forward comparative points of view, possible solutions, different legal transplant models, case-law on the matter, and so on. Two aspects are, however, certain. The applicable standard is not that of proof beyond any reasonable doubt and the burden of proof lies in fact with the Public Prosecutor's Office. Besides this, a legislative change is needed to bring clarity and consistency in the legislation, the current *status quo* being lacking.

The asset mismatch, respectively the property disproportion, which is a former condition and an incomprehensible criterion, has posed numerous problems as to what needs to be proven and how this can be achieved. In this part, we analyzed the legislative changes that have taken place in this area, how to calculate the disproportion, the types of property included in the calculation, what is the meaning of income, how do we assess the value of property and finally, how much we can confiscate.

Finally, the last part in the structure of this section of Chapter 2 concerns the proportionality test. Like any sanction, be it a penalty, a security measure, or the equivalent of an educational measure, it must be seen whether extended confiscation involves an examination of proportionality and of what type. In this part, we answered the relevant questions and identified the way in which proportionality is achieved, agreeing that it operates both *in abstracto* and *in concreto,* at a substantial and temporal level.

Chapter 3 deals with the extent to which extended confiscation can be applied to property owned by third parties who do not have any capacity in criminal proceedings. In this chapter, we addressed things slightly differently, starting with the national approach and concluding with a proposal for a solution, between the two introducing cross-border elements and an analysis of potential transposition models in the legislation of some Member States of the European Union.

As regards the national approach, we reviewed the literature, analyzed the relevant case-law, and finally referred to some of the jurisprudence of the ECHR in this area.

As regards the European reference models, we set out the systems that we considered the most relevant. The mechanism for the operation of extended confiscation in the French, Belgian, German, Dutch and Italian systems was therefore presented.

Finally, we set out the solution which we considered most appropriate, either in the sense of minor, but substantive changes or, altering the mechanism altogether. Obviously, it was the latter chapter which contained the partial conclusions.

Title III, the last one, apart from the one dedicated to the conclusions, dealt with the institution of extended confiscation in a different way, trying to analyze its functioning in the light of the empirical data available. According to the title – *The application of the normative concept*, this latter part of the thesis represents the innovation element, in which we presented empirical data obtained from our research, on the one hand, and, on the other hand, we presented the reports of the relevant institutions in this area.

Chapter I dealt with the interpretation of the empirical data available during the reference period of the analysis, with both quantitative and qualitative analysis and the structure split into 2 parts, depending on how the data was collected.

The first section covered the period from 2012 to 2014, with quantitative data first identified and then interpreted. Next, we showed loopholes in the regulations, and finally, we presented how the institution was understood in the first two years of its introduction into the domestic legislative landscape, highlighting the mentality and interpretation of the courts of the time.

The second section covered the period 2014-2023 and was structured in a similar way to the one described above. Thus, the data available at quantitative level was identified and interpreted, then certain limitations of the mechanism for obtaining the data were explained and the correlation, and finally, we showed the interpretations of the courts in these 9 years' timeframe. We noticed that not much has changed, and the same confusions are also present.

Chapter 2 was devoted to the reporting mechanisms, i.e., the way in which the relevant institutions interpreted the evolution of extended confiscation, possible additional data, and so on. Thus, the work of ANABI was presented, describing the reports of the institution and the new system for monitoring confiscated assets. It can be said that we have discovered interesting things, from an absolute timid start in big-date matters and from a data collection disaster to a functional present in which, although not perfect, important steps have been taken in the right direction.