

I RESEARCH QUESTIONNAIRE - II WORKPACKAGE

“ESTABLISHING THE SUBJECT MATTER OF THE REGULATION”:

NATIONAL CONFISCATION MODELS COVERED BY THE REGULATION no. 1805/2018. TYPES, FEATURES AND SAFEGUARDS.

For each question it is important to answer considering the scholars' opinion and the evolution of the jurisprudence/case law (Constitutional Court, Supreme Court, etc.)

1) Which are the different models of forfeiture/confiscation in Your system of law (direct confiscation, confiscation of the value, extended confiscation, non-conviction based confiscation, confiscation against third parties, etc.)? Please, explain which are the different models in general, also the ones not falling under the scope of the Regulation.

I. Definitions

Relevant definitions provided by Romanian law in the application of the confiscation procedure:

Confiscation following the commission of a criminal act/offence (as a security measure): is a security measure ordered by the Court following the commission of a criminal act/offence. It may accompany a principal penalty, but may also occur in the absence of a criminal conviction, and consists of the definitive deprivation of a specific category of property related to the criminal act/offence (property obtained, used or resulting from the commission of an offence).

Confiscation following a contravention penalty (as an additional contravention penalty): is a measure ordered by competent authorities following the commission of a contravention. It accompanies the application of a principal penalty (warning, fine, community service). The measure of complementary confiscation applies to goods intended for, used in or resulting from the commission of a contravention.

A criminal offence is an act **provided** for by the criminal law, committed with **fault**, **without justification** and **imputable** to the person who committed it.

Criminal liability is a form of legal liability that results from disregarding the provisions of criminal law, consisting of the criminal legal relationship of coercion, arising from the commission of the offence, between the State and the offender. It should also be noted that criminal liability is personal (it applies only to the offender, not to his successors, as in the case of civil liability), which is why the security measure of confiscation in criminal matters applies mainly only to the property/assets of the person held criminally liable and only in exceptional cases to the property/assets of a third party (who has not been held criminally liable).

A contravention is an antisocial act with a lower degree of social danger than a criminal offence, committed with guilt and provided for by civil legislation on contraventions.

Contraventional liability is a form of legal liability resulting from the violation of the provisions of the legislation on contraventions, consisting in the creation of a legal relationship between the State and the offender arising from the commission of a contravention. It should also be noted that the contravention liability is personal, and for this reason the security measure of confiscation also applies to the property/assets of the person held liable for the contravention. The procedural rules applicable are those of a civil trial.

II. Types of confiscation regulated by criminal law

National criminal law provides **two types of confiscation following the commission of a criminal offence: special confiscation**, which also includes the situation of **confiscation in equivalent, and extended confiscation**, both of which are regulated in the Criminal Code - hereinafter referred to as the CP.

Both special and extended confiscation can be applied to third parties, thus including the type of **confiscation against third parties**.

Special confiscation can also be applied even in the absence of a conviction, while extended confiscation cannot be applied in the absence of a conviction. Thus, in Romania, **confiscation without a conviction is regulated and is also a form of special confiscation**.

To sum up, in Romania **special confiscation** corresponds to **direct confiscation, confiscation in equivalent, confiscation against third parties and confiscation without conviction**, while **extended confiscation** can be ordered both against the **convicted person and against third parties**, and also can be order as **confiscation in equivalent**.

In national legislation we also find forms of confiscation of an administrative nature in the following two situations:

a) OG 2/2001 - contravention confiscation;

b) in Law No 144/2007 on the establishment, organisation and functioning of the National Integrity Agency with subsequent amendments and additions.

Criminal confiscation differs from administrative confiscation. In both cases, confiscation is justified by the existence of a state of social danger arising from the nature of the property linked to a specific offence. What distinguishes them is that in the case of criminal confiscation the property is linked to a criminal offence, whereas in the case of administrative confiscation, the offence is either a contravention or is caused by a manifest disproportion of property.

In view of these aspects, we consider that **only criminal confiscation falls within the scope of the Regulation**.

The legal regime for **special confiscation and extended confiscation** is set out in General Part of the CP, under Title IV "Security measures". Confiscation is regulated as a **security measure**, i.e. a **preventive measure of constraint**, aimed at removing a state of danger and preventing the commission of criminal offences.

Special confiscation and extended confiscation are the only security measures of a patrimonial nature. Confiscation affects a person's property and can therefore be considered a property security measure for the benefit of society.

The CP provides that confiscation may be imposed on a person who has **committed an offence under criminal law that is unjustified** and that it may also be imposed if the offender is not punished.

In addition to the general provisions mentioned above, which define the different models of criminal confiscation in the Romanian legal system, confiscation is also provided for by specific provisions in the special part of the CP or in other special laws for the following offences:

- **Corruption offences** (taking bribes art. 289 CP, giving bribes art. 290 CP, influence peddling art. 291 CP, buying influence art. 292 CP);
- **Offences of money laundering and terrorist financing** (Law 129/ 2019 on preventing and combating money laundering and terrorist financing, as well as amending and supplementing some normative acts - art. 51);
- **Offences of illicit drug trafficking and consumption** (Law No 143/2000 on preventing and combating illicit drug trafficking and consumption - Article 16);
- **Offences against the hunting and game protection regime** (Law on hunting and game protection no. 407/2006 - art. 46).

The state of danger in the case of confiscation concerns the goods expressly mentioned in the provisions of the CP. This condition must always be linked to the dangerousness of the person of the offender who possesses the goods and is able to put them into circulation.

Although some goods are inherently dangerous (weapons, drugs, etc.), it is essential that the dangerousness be linked to the person of the offender.

It must also be taken into account that some goods, although not dangerous in themselves, are dangerous because of their illicit acquisition by the offender (e.g. money received by an official as a bribe, the offender being in danger of committing other offences in the future).

Confiscation is applied *in rem*, on the property linked to the offence. For this reason, it is not subject to any statute of limitations and is not affected by grounds that lead to the termination of criminal proceedings or that extinguish criminal liability.

As a rule, confiscation applies to property **belonging to the offender** and only in exceptional cases expressly provided for by law to property belonging to **other persons**.

Confiscation is a final security measure. **It cannot be revoked on the grounds that the threat has ceased to exist.** Confiscated property is returned to the State or destroyed.

In order to eliminate as quickly as possible the danger posed by the existence of the property to be confiscated, the legislator has provided for the possibility of **seizing and freezing** it for the purpose of confiscation, both at the prosecution stage, by the public prosecutor, and at the trial stage, by the judge.

a. Special confiscation

According to art. 112 CP:

(1) *Are 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) lett. 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 taking into account the result produced or that could have been produced and 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) lett. 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) lett. b) do not apply to offenses committed by using the press.

(5) If the assets subject to confiscation pursuant to par. (1) lett. 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) lett. b) and c), shall be also confiscated.

b. Extended confiscation

Law No. 63/2012 amended both the 1969 Criminal Code and Law No. 286/2009 on the new Criminal Code, introducing into both acts the security measure of **extended confiscation**. This legislative amendment aimed to transpose into Romanian law the Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-related Proceeds, Instrumentalities and Property.

On 5 November 2020, Law No. 228/2020 entered into force, amending the Criminal Code with regard to adapt extended confiscation provisions. The amendment made by Law No. 228/2020 was necessary following the entry into force of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and the proceeds from crime committed in the European Union. Under this

new regulation, extended confiscation will be ordered where a person has been convicted of an offence punishable by a custodial sentence of four years or more and has property acquired within the last five years which the Court is satisfied has been derived from criminal activity. The conviction is based on the disproportion between the legal income and the assets.

According to art. 112¹ CP:

(1) Assets other than those referred to in Article 112 are also subject to confiscation, when a person is convicted of an offence that is likely to bring him material benefit and for which the punishment prescribed by law is imprisonment for 4 years or more, the Court shall form the conviction that the assets in question derive from criminal activities. The Court's conviction may also be based on the disproportion between the lawful income and the person's wealth.

(2) Extended confiscation shall be ordered on property acquired by the convicted person within a period of 5 years before and, if applicable, after the commission of the offence, by the date of issue of the writ of summons. Extended confiscation may also be ordered on property transferred to third parties if they knew or should have known that the purpose of the transfer was to avoid confiscation.

(3) For the purposes of applying the provisions of paragraph 1, the following shall apply (2) account shall also be taken of the value of property transferred by the sentenced person or by a third party to a family member or to a legal person over which the sentenced person has control.

(4) Property within the meaning of this Article shall include money.

(5) In determining the difference between the lawful income and the value of the property acquired, the value of the property at the time of its acquisition and the expenses incurred by the sentenced person, members of his family shall be taken into account.

(6) If the property subject to confiscation is not found, money and goods shall be confiscated in its place up to the amount of their value.

(7) Property and money obtained from the exploitation or use of property subject to confiscation, as well as property produced by such property, shall also be confiscated.

(8) Confiscation may not exceed the value of the property acquired during the period referred to in paragraph 1. (2), which exceeds the level of the lawful income of the convicted person.

III. Procedural aspects about confiscation

For a better understanding of the situations in which criminal confiscation may be ordered, the following are **general aspects of the conduct of criminal proceedings in Romania**.

Article 16 of the Romanian Criminal Procedure Code - hereafter CPP - regulates the cases in which a criminal case is closed. If one of these cases is identified, the criminal proceedings are closed, regardless of the stage they are at - indictment or trial. The cases are the following:

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.*

If, in the course of the criminal proceedings, the public prosecutor finds that one of these cases applies, he shall order to close the file.

Also, during the prosecution, the prosecutor may order the discontinuance of the prosecution if he considers that, although an offence has been committed, there is no public interest in prosecuting the offence. The prosecutor will then review the appropriateness of the prosecution and this decision will be confirmed by a judge. It should be noted that the prosecution cannot be dropped if one of the cases provided for in Article 16 is established.

If any of these cases are established by the Court on trial, it will order acquittal for cases a-d and dismissal of the prosecution for the remaining cases.

If a person has been sent to criminal Court and the Court does not find any of the cases referred to in Article 16, it shall pronounce a conviction.

We shall now consider each of these situations from the point of view of the possibility of confiscation.

a. Confiscation during the criminal investigation

As we have already explained, if the prosecutor finds one of the cases under Article 16 during the prosecution, he will close the file. According to Art. 315 (2) c) of the CCP, the prosecutor shall refer the matter to the Preliminary Chamber Judge if he considers that the conditions for **special confiscation** are met. At the same time, the prosecutor must follow the same procedure if he decides to discontinue the criminal proceedings.

In this case, the **Preliminary Chamber Judge cannot be asked to order extended confiscation**, since one of the conditions for this type of confiscation is the existence of a conviction. If the public prosecutor orders the case to be closed, this condition is not met.

The prosecutor may also refer the case to the Preliminary Chamber Judge for special confiscation **regardless of the basis for the closure**. Although not expressly excluded, certain grounds for closure are clearly incompatible with the institution of special

confiscation. However, to order the special confiscation, a judge must find that an unjustified criminal act has been committed.

When the prosecutor formulates the proposal for special confiscation, the provisions of Article 549¹ of the CPP become applicable:

(1) Where the public prosecutor has ordered the dismissal or abandonment of the prosecution [...] and the matter has been referred to the Preliminary Chamber Judge for a precautionary measure of special confiscation or the destruction of a document, the dismissal order or, where appropriate, the order ordering the abandonment of the prosecution confirmed by the Preliminary Chamber Judge, accompanied by the case file, shall be submitted to the Court which would be competent by law to hear the case at first instance [...].

(2) The Preliminary Chamber Judge shall determine the time limit for the decision, depending on the complexity and specific features of the case, which may not be shorter than 30 days.

(3) The prosecutor shall be notified of the time limit and the persons whose rights or legitimate interests may be affected shall be summoned and shall be served with a copy of the order, and shall be informed that they may submit written notes within 20 days of receipt.

(4) The Preliminary Chamber Judge shall give his decision in a public hearing, after hearing the prosecutor and the persons whose rights or legitimate interests may be affected, if they are present.

(5) The Preliminary Chamber Judge, in deciding the request, may order one of the following solutions:

(a) reject the proposal and order, as appropriate, the return of the property or the lifting of the protective measure taken for confiscation;

(b) allow the proposal and order the confiscation of the property or, where appropriate, the destruction of the document.

(6) Within 3 days of the communication of the decision, the public prosecutor and the persons referred to in paragraph 1 shall (3) may lodge a reasoned appeal.

b. Confiscation during the criminal trial

If, after the case has been committed for trial, the criminal Court finds that one of the cases referred to in Article 16 has occurred, it shall not pronounce a conviction, but shall acquit the accused - points a) to d) - or shall dismiss the criminal proceedings - points e) - j).

In the case of **extended confiscation**, the criminal Court must order a conviction for at least one offence. Consequently, if the criminal Court orders an acquittal or termination of the criminal proceedings, it cannot order extended confiscation.

In the case of **special confiscation**, it can be ordered **even if the criminal Court does not order a conviction**. In this case, **no further special procedure is carried out**, but after the acquittal or termination of the criminal proceedings, if it is established that the conditions for special confiscation are met, the Court will order this type of confiscation.

If, after committing the offender to trial, the criminal Court finds that the offence is a criminal offence and that the offender is guilty of the offence, it shall order a conviction. In this case, together with the conviction, it will also order special confiscation and/or extended confiscation if it finds that all the specific conditions are met.

In Romania there is no procedure for reviewing the application of extended confiscation in another criminal case after a person has been convicted. Therefore, **extended confiscation can only be ordered in the criminal proceedings in which the person was convicted.**

IV. Procedural aspects about freezing measures

The Code of Criminal Procedure regulates the precautionary measures in the General Part, Title V, Chapter III, Articles 249-254.

Freezing measures are **procedural measures of real coercion** which consist in the freezing of movable or immovable property belonging to persons designated by law, by imposing an attachment on such property.

As the very name of the law indicates, these procedural measures have only a precautionary and not a remedial function. At the same time, they are procedural measures of a real nature, designed to ensure the enforcement of the fine or the costs or the special/extended confiscation.

The freezing measures prevents the person against whom the measure has been applied from disposing of or encumbering the assets in question and thus also prevents the risk of insolvency.

General conditions for taking precautionary measures

Article 249. - (1) The public prosecutor, in the course of criminal proceedings, the preliminary chamber judge or the Court, ex officio or at the request of the public prosecutor, in the preliminary chamber procedure or in the course of the trial, may take precautionary measures, by order or, as the case may be, by reasoned decision, in order to prevent the concealment, destruction, disposal or evasion of assets which may be subject to special or extended confiscation or which may serve to guarantee the enforcement of the fine or legal costs or to make good the damage caused by the offence.

(2) Precautionary measures shall consist in the seizure of movable or immovable property by placing a lien on it.

(3) Precautionary measures to guarantee the execution of the fine may be taken only against the property of the suspect or accused person.

(4) Precautionary measures for special or extended confiscation may be taken against the property of the suspected or accused person or of other persons in whose property or possession the property to be confiscated is located.

(4¹) In the case of property which may be subject to special or extended confiscation, the prosecutor shall take precautionary measures to prevent the concealment, destruction, alienation or evasion of prosecution of such property.

(5) Precautionary measures to compensate for the damage caused by the offence and to guarantee the execution of legal expenses may be taken against the property of the suspect or accused and the person liable in tort up to the probable value thereof.

(6) The precautionary measures referred to in paragraph 1 shall be taken in accordance with the provisions of this Article. (5) may be taken during the criminal proceedings, the pre-trial proceedings and the trial, and at the request of the civil party. The precautionary measures taken ex officio by the judicial bodies referred to in paragraph 5 shall be taken in accordance with the procedure referred to in Article 6. (1) may also be used by the civil party.

(7) Precautionary measures taken under paragraph 1 shall be used by the judicial authorities. (1) shall be mandatory if the injured party is a person who lacks or has limited capacity to act.

(8) Property belonging to a public authority or institution or to another person governed by public law or property exempted by law may not be seized.

Precautionary measures may also be ordered with a view to special or extended confiscation, in which case they may relate to the property of the suspect, the accused or other persons in whose ownership or possession the property to be confiscated is located.

Although the wording of Art. 249 para. 4 CPP expressly states that such a measure may also be ordered in respect of the property of third parties, it is assumed in the literature that the measure of extended confiscation will ultimately be ordered not in respect of the property of third parties, but in respect of the property derived from the criminal activity of the convicted person.

V. European Union legislation on confiscation ratified by Romania

- Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.
- Framework Decision 2005/212/JHA on Confiscation of Crime-related Proceeds, Instrumentalities and Property.
- Framework Decision of 6 October 2006, OJ L 328/2006, on the application of the principle of mutual recognition to confiscation orders.
- Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.
- Framework Decision 2007/845/JHA on cooperation between national Asset Recovery Offices of the Member States in the tracing and identification of proceeds from crime.
- Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and the proceeds of crime committed in the European Union.
- Regulation (EU) 2018/1805 on mutual recognition of freezing and confiscation orders.

2) For each model of confiscation:

- a) Which is the object of the confiscation and its meaning/interpretation? (proceeds, products of the crime, instruments of the crime, etc.). Clarify if and in which case it is possible to confiscate the 'value equivalent'.

Models of confiscation	Meaning/Interpretation
<p><u>Special confiscation</u></p> <p>Direct confiscation</p> <p>NCBC</p> <p>Art. 112 para. (1), (6) CP</p>	<p>(1) Are subject to special confiscation:</p> <p>a) assets produced by perpetrating any offense stipulated by criminal law;</p> <p>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;</p> <p>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;</p> <p>d) assets given to bring about the commission of an offense set forth by criminal law or to reward the perpetrator;</p> <p>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;</p> <p>f) assets the possession of which is prohibited by criminal law.</p> <p>(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) lett. b) and c), shall be also confiscated.</p>
<p><u>Special confiscation</u></p> <p>Confiscation by equivalent</p> <p>Confiscation against third parties</p> <p>NCBC</p> <p>Art. 112 para. 2, 3, 5 CP</p>	<p>(2) In the case referred to in par. (1) lett. 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 taking into account the result produced or that could have been produced and 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.</p> <p>(3) In cases referred to in par. (1) lett. 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</p>

	<p>not aware of the purpose of their use, the cash equivalent thereof will be confiscated in compliance with the stipulations of par. (2).</p> <p>(5) If the assets subject to confiscation pursuant to par. (1) lett. B) - e) are not to be found, money and other assets shall be confiscated instead, up to the value thereof.</p>
<p><u>Extended confiscation</u></p> <p>Confiscation against third parties</p> <p>Confiscation by equivalent</p> <p>Art. 112¹ CP</p>	<p>(1) Assets other than those referred to in Article 112 are also subject to confiscation, when a person is convicted of an offence that is likely to bring him material benefit and for which the punishment prescribed by law is imprisonment for 4 years or more, the Court shall form the conviction that the assets in question derive from criminal activities. The Court's conviction may also be based on the disproportion between the lawful income and the person's wealth.</p> <p>(2) Extended confiscation shall be ordered on property acquired by the convicted person within a period of 5 years before and, if applicable, after the commission of the offence, by the date of issue of the writ of summons. Extended confiscation may also be ordered on property transferred to third parties if they knew or should have known that the purpose of the transfer was to avoid confiscation.</p> <p>(3) For the purposes of applying the provisions of paragraph 1, the following shall apply (2) account shall also be taken of the value of property transferred by the sentenced person or by a third party to a family member or to a legal person over which the sentenced person has control.</p> <p>(4) Property within the meaning of this Article shall include money.</p> <p>(5) In determining the difference between the lawful income and the value of the property acquired, the value of the property at the time of its acquisition and the expenses incurred by the sentenced person, members of his family shall be taken into account.</p> <p>(6) If the property subject to confiscation is not found, money and goods shall be confiscated in its place up to the amount of their value.</p> <p>(7) Property and money obtained from the exploitation or use of property subject to confiscation, as well as</p>

	<p>property produced by such property, shall also be confiscated.</p> <p>(8) Confiscation may not exceed the value of the property acquired during the period referred to in paragraph 1. (2), which exceeds the level of the lawful income of the convicted person.</p>
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b) Which is the scope of its introduction? (the fight against organised crime/money laundering/corruption/terrorism, etc., the application of the principle that crime doesn't pay, etc.)

Models of confiscation	Meaning/Interpretation
<p><u>Special confiscation</u></p> <p>Direct confiscation</p> <p>Confiscation by equivalent</p> <p>NCBC</p>	<p>Direct confiscation was regulated with the scope to obtain definitive deprivation of a specific category of property related to the criminal offence (property obtained, used or resulting from the commission of an offence).</p> <p>By Law No 278 of 4 July 2006 amending and supplementing the Criminal Code and amending and supplementing other laws and by Law No 286/2009 on the Criminal Code, Romania responded to international requests and amended its domestic regulations on special confiscation. It has thus provided in its domestic legislation for the possibility of confiscation by equivalent.</p> <p>Council Framework Decision 2001/500/JHA introduced the obligation for Member States to regulate the measure of confiscation, to allow confiscation of equivalent value in cases where the proceeds of crime cannot be confiscated and to ensure that requests from other Member States are treated with the same priority as domestic proceedings. Also, Framework Decision 2005/212/JHA established the harmonising confiscation laws. Ordinary confiscation, including confiscation of equivalent value, must be available for all offences punishable by a custodial sentence of 1 year.</p> <p>The Financial Action Task Force (FATF) was created in July 1989 as an intergovernmental group during the Group of Seven (G7) Summit in Paris. It has since been recognised worldwide as an authoritative body for setting universal standards and developing anti-money laundering policies, among other things. In 2003, it issued a specific recommendation, which was ratified by Romania, calling</p>

	<p>for confiscation even in the absence of a previous criminal conviction (Recommendation 3): <i>"Precautionary measures and confiscation 3. Countries may consider adopting measures, allowing for the confiscation of such gains or instrumentalities without requiring a criminal conviction (confiscation without a conviction) or requiring an offender to prove the lawful origin of property alleged to be liable to confiscation, to the extent that such a requirement is in accordance with the principles of domestic law."</i></p>
<p><u>Extended confiscation</u></p> <p>Confiscation against third parties</p>	<p>Legal basis:</p> <p>Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, under which each Member State is required to take the necessary measures to enable the confiscation of all or part of the property of a person convicted of an organised crime or a terrorist offence which is provided for in national law at a certain level of seriousness and which is liable to generate financial gain.</p> <p>The Romanian legislator has chosen to extend the list of offences to include other types of crime: tax evasion, fraudulent banking or offences against property.</p> <p>Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and the proceeds of crime committed in the European Union. It should be noted that most of the texts of Directive 2014/42/EU had a corresponding text in Romania's Criminal Code and Code of Criminal Procedure, with only a few aspects needed to be transposed into national law.</p> <p>At the moment, all offences for which the prison sentence is 4 years or more can trigger the applicability of the extended confiscation institution.</p> <p>Scope:</p> <ul style="list-style-type: none"> - Application of the principle "Crime is not profitable!" - Fight against cross-border organised crime and money laundering.

c) Which are the elements to be realised and/or to be assessed for its application?
e.g., conviction for a crime,
property or availability of the confiscation object,

link -between the crime and the proceeds/instruments/products, etc.,
 disproportionality (“the value of the property is disproportionate to the lawful income of the convicted person”),
 illegal origin (suspects/presumption of illegal origin),
 temporal connection with the crime,
 the lack of a justification of the legal origin by the owner, etc.

Models of confiscation	Elements to be realised/assessed
<p><u>Special confiscation</u></p> <p>Direct confiscation</p> <p>Confiscation by equivalent</p> <p>Confiscation against third parties</p> <p>NCBC</p> <p>Art. 112 CP</p>	<p>(a) assets produced by perpetrating any offense stipulated by criminal law;</p> <p>In this case exists a link between the crime and the proceeds of crime.</p> <p>Property which did not exist prior to the commission of the offence or existed in another form.</p> <p>For example, counterfeit currency, illegally produced alcoholic beverages, etc.</p> <p>Conditions must be met:</p> <ul style="list-style-type: none"> - an offence under criminal law has been committed. It is not necessary for the act to constitute a criminal offence, but it is sufficient that the act is unjustified. <p>A criminal act is justified in the following situations: 1. self-defence; 2. necessity; 3. exercise of a right or performance of an obligation; 4. consent of the injured party.</p> <ul style="list-style-type: none"> - the property is produced perpetrating any offense stipulated by criminal law. This concerns goods that did not exist before the offence was committed, but only exist after it was committed, for example, the fraudulent issue of currency (Article 315 of the Criminal Code). <p>Another category of goods which are considered to have been produced by the act stipulated by the criminal law are those which have acquired through the act a certain quality, a factual position which they could only have acquired by illegal means (goods brought into the country by smuggling, certain narcotic drugs contained in higher doses in medicines produced on the basis of abusive prescriptions).</p>

This category also includes the confiscation of stolen goods which have become part of other goods as a result of the offence stipulated for by the criminal law, because the original goods have lost their individuality and their release into the civil circuit presents a state of danger.

If the goods produced have been destroyed by the offender before the crime was discovered or have been consumed by him, they cannot be confiscated or ordered to pay the monetary equivalent, since they no longer exist and no longer present a state of danger to society and there is no likelihood of further offences being committed.

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. These provisions do not apply to offences committed through the press. In this case exists a link between the crime and the instruments.

(c) property used, immediately after the commission of the offence, to ensure the escape of the offender or the preservation of the benefit or product obtained, if it belongs to the offender or if, belonging to another person, he knew the purpose for which it was used. In this case exists a link between the crime and the instruments.

(d) property which has been given in order to induce the commission of a criminal offence or to reward the offender. This category includes, for example, a sum of money given to a person to commit murder.

(e) property acquired through the commission of an act provided for by criminal law, if it is not returned to the injured party and in so far as it does not serve to compensate the injured party. In this case exists a link between the crime and the products of the crime.

f) property the possession of which is prohibited by criminal law. This includes goods whose possession is not authorised by law or goods held under conditions other than those authorised (e.g. weapons, narcotic substances,

	explosive substances). By goods whose possession is prohibited by criminal law, we mean those goods for which, in order to possess them, it is necessary to have certain authorisations or approvals, as the case may be.
Extended confiscation Confiscation against third parties	<p>1. Have committed one or more offences for which the law prescribes a prison sentence of 4 years or more.</p> <p>2. The Court has convicted the defendant of an offence for which the law prescribes imprisonment for 4 years or more.</p> <p>3. The offence for which the conviction was ordered is likely to bring the offender material benefit. Material benefit means any pecuniary advantage that could have been obtained by the defendant through the commission of the offence. It is not necessary for the offender to have actually obtained the benefit in question, but for the act committed by the offender to be likely to confer such an advantage.</p> <p>4. The Court is satisfied that the property acquired is derived from criminal activity. The Court's conviction may also be based on the disproportion between the lawful income and the person's wealth. The Court is satisfied that third parties knew or ought to have known that the purpose of the transfer of the property to them was to avoid confiscation.</p>

d) Can this form of confiscation be applied when the owner or the convicted is dead?

Regarding the death of the person under investigation, we will repeat the aspects presented in point 1, with certain particularities.

Models of seizure	Remarks
Special confiscation	<p>In the case of special confiscation, including its form of confiscation by equivalent, confiscation is possible in the event of death occurring prior to the time of final conviction. In this case two hypotheses can be identified depending on the time of death.</p> <p>If the perpetrator dies during the course of criminal investigation, according to Article 315(2) CPP, the confiscation may be ordered in this case. The prosecutor shall refer the matter to the Preliminary Chamber Judge for special confiscation of the identified assets. The procedure has been outlined above.</p>

	<p>If the perpetrator dies after the indictment has been issued, the Court will note this incident and order the criminal proceedings to be terminated and may still order confiscation. Thus, confiscation can be ordered in the context where what the criminal Court has to find is only the commission of an unjustified criminal act.</p> <p>Unfortunately, there is no uniform judicial practice on this point. Some Romanian Courts consider that confiscation cannot be ordered in the event of death, on the grounds that this measure leads to a form of criminal liability. As long as the perpetrator is dead, it is not possible to order confiscation because it is impossible to hold him criminally liable.</p> <p>At the same time, there are also problems with regard to the possibility for the judge, after the death of perpetrator, to establish whether there is an unjustified criminal act, especially in the context where the perpetrator, following his death, will not be able to mount an effective defence.</p> <p>If a special confiscation measure has been ordered and the owner dies afterwards, its enforcement is not affected. If confiscation is ordered on individualised property, the death of the owner does not affect enforcement, since from the moment the confiscation measure becomes final, the property subject to confiscation becomes the private property of the State. If confiscation in equivalent terms is ordered and the person subject to confiscation subsequently dies, the State will act as a creditor with a claim against the succession. Thus, heirs will only be able to accept the inheritance if all the debts of the succession, including those resulting from the special confiscation by equivalent, are paid.</p>
<p>Extended confiscation</p>	<p>Extended confiscation cannot be ordered because this type of confiscation can only be ordered by the criminal Court if a conviction is also ordered. In the context where the offender died before the conviction was ordered, extended confiscation cannot be ordered.</p> <p>In Romania there is no procedure for verifying the incidence of extended confiscation in another criminal</p>

	<p>trial after a person has been convicted. Thus, if a person who has been definitively convicted has died, without extended confiscation being ordered in the trial in which he or she was convicted, such an institution can no longer be accessed.</p> <p>If an extended confiscation measure has been ordered and the owner dies afterwards, its enforcement is not affected. If confiscation is ordered on individualised property, the death of the owner does not affect enforcement, since from the moment the confiscation measure becomes final, the property subject to confiscation becomes the private property of the State. If confiscation in equivalent terms is ordered and the person subject to confiscation subsequently dies, the State will act as a creditor with a claim against the succession. Thus, heirs will only be able to accept the inheritance if all the debts of the succession, including those resulting from the special confiscation by equivalent, are paid.</p>
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e) For the model of confiscation which demands the conviction for a crime:

Can this model of confiscation be applied when the crime is statute barred (i.e. after the prescription) or somehow (in particular circumstances) without the conviction?

Models of seizure	Remarks
Special confiscation	<p>In the event of prescription, special confiscation is possible under the same conditions as in the case of death. Thus, if it is established that the limitation period has expired during the criminal investigation, the public prosecutor will close the criminal investigation and refer the matter to the Preliminary Chamber Judge for special confiscation. The procedure is that provided for in Article 549¹ CPP and has been described above.</p> <p>Also, if the perpetrator has been indicted and it is established in the course of the trial that the criminal liability is statute-barred, the Court shall order confiscation if it finds that an unjustified criminal act has been committed.</p>

Extended confiscation	Extended confiscation cannot be ordered in the case of prescription, as the condition of a conviction is not met.
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f) **Which is the legal nature?** (a criminal sanction - accessory or principal criminal penalty -, a preventive measure - *ante delictum* criminal prevention measure -, security measure in a broad sense, administrative measure, civil measure *in rem*, a civil consequence of committing an offense - provided for by criminal law -, another type of autonomous - *sui generis* - instrument, etc.)

Models of confiscation	Elements to be realised/assessed
<u>Special confiscation</u> Direct confiscation Confiscation by equivalent Confiscation against third parties NCBC	<p>Special confiscation is a security measure of a patrimonial nature, consisting in the confiscation of certain goods related to the offence committed.</p> <p>In other words, the security measure consists in the forcible transfer free of charge to the State's assets of property belonging to a person who has committed an offence provided for by the criminal law without justification and which is related to such an offence or which is held contrary to the legal provisions.</p> <p>The justification for taking the security measure of special confiscation is the state of danger posed by leaving certain goods in circulation, a state which creates the belief that they could be used in the future to commit similar offences.</p> <p>The security measure of special confiscation is a preventive sanction and not a civil remedy.</p>
Extended confiscation Confiscation by equivalent Confiscation against third parties	<p>Extended confiscation was introduced in both the 1969 Penal Code and the new Penal Code in the chapter on security measures.</p> <p>Extended confiscation may be ordered only if a criminal offence has been committed and only if the offender has been convicted. Extended confiscation may also be ordered by the Court only in the judgment disposing of the case. Until that time, assets suspected of being the proceeds of unlawful activity may be subject to seizure (under Article 249 of the Code of Criminal Procedure). Therefore, de lege lata, extended confiscation is a safety measure in Romanian law.</p> <p>This measure is designed to remove the state of danger resulting from the possession by criminals or criminal organisations of significant material resources resulting from criminal activities which have not been processed by</p>

	<p>the judicial authorities. Thus, the purpose of this measure is precisely to prevent the state of danger that could result from the possession by criminal organisations of significant material resources that could be reinvested and used in criminal activities.</p> <p>The security measure of extended confiscation is also highly repressive. Since it is a criminal law sanction, it is subject to more favourable criminal law provisions. In the case law of the Constitutional Court, it has been established that the provisions relating to extended confiscation are constitutional insofar as they apply only to offences committed after the entry into force of Law No 63/2012¹, i.e. 22 April 2012.</p> <p>It has also been established that the legal rules on extended confiscation are constitutional insofar as extended confiscation does not apply to property acquired before the entry into force of Law No 63/2012².</p>
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3) In particular, in Your national legal order is confiscation without conviction possible in cases of death, illness, absconding, prescription, amnesty, etc. and which are the relevant legal bases?

In Romanian law it is possible to confiscate in case of **death**, as indicated above. The grounds have been indicated at length in the previous section.

In the case of **illness**, confiscation cannot be ordered under criminal law. If illness intervenes, the criminal proceedings, whether in the prosecution or trial phase, will be **suspended**. Thus, according to Article 312 para. 1 of the CPP, if it is established by an expert that the suspect or defendant suffers from a serious illness, which prevents him from taking part in the criminal proceedings, the criminal investigation body shall submit its proposals to the prosecutor together with the case file, in order to dispose the suspension of the criminal proceedings. Also, according to Article 367 para. 1 of CPP, when it is established on the basis of an expert's report that the accused suffers from a serious illness, which prevents him from participating in the trial, the Court shall, by order, suspend the trial until the state of health of the accused allows him to participate in the trial.

If the person recovers, the criminal trial resumes. If the person dies, the judicial authorities may initiate specific procedures for confiscation in the event of death. Illness from which the person suffers must be one that makes it impossible for him or her to participate in the criminal proceedings and must be established following a forensic examination. Although the case of confiscation in the event of illness was expressly regulated in Directive 2014/42, the Commission considered that the regulation of the suspension of the case for a limited period and after obtaining a forensic expert opinion ensured the necessary transposition.

¹ Decision No 78/11.02.2014 and Decision No 11/15.01.2015.

² Decision No 356/25.06.2014.

In the case of **absconding**, confiscation may be ordered in accordance with the rules of ordinary law. There is no express regulation to this effect. However, there is an extraordinary remedy known as the reopening of criminal proceedings in the event of a default judgment whereby. In this procedure the person who has been convicted in absentia may request a retrial of his case if he was not aware of the existence of the criminal proceedings - Article 466 CPP.

Special confiscation is also possible in the case of **prescription** and **amnesty**, according to the model indicated at death - grounds art. 16 and 549¹ CPP.

4) For each model of confiscation:

a) which is the procedure for its application? (the qualification/nature, the competent authority, the different steps, etc.)

Models of confiscation	Rules of procedure
Special confiscation	<p>Special confiscation can only be ordered in Romania only by judges.</p> <p>Special confiscation can be ordered if the offence is found to be criminal and unjustified. Accordingly, for this type of confiscation it is not mandatory to order a conviction, as long as the Court finds that the offence is criminal and unjustified, and may thus order confiscation in cases such as: prescription, death, amnesty.</p> <p>If during the criminal proceedings the prosecutor orders the criminal case to be closed, if he considers that the conditions for special confiscation are met, he may refer the matter to the Preliminary Chamber Judge with a view to ordering confiscation Art. 549¹ of the CPP.</p>
Extended confiscation	<p>Extended confiscation can be ordered in Romania only by judges.</p> <p>Extended confiscation can be ordered only if the person is convicted of at least one offence and all the conditions mentioned above for extended confiscation are met.</p>

b) which is the standard of the proof/is the reversal of the burden of the proof admitted?

Regarding the standard of evidence for **special confiscation**, the Code does not expressly state what that standard is, only that it is necessary to prove the specific conditions of each type of seizure.

However, in the case of **extended confiscation**, the judge must be convinced that the assets in question come from criminal activities (criminal conduct).

No reversal of the burden of evidence is allowed, as the person still enjoys the presumption of innocence. However, judicial bodies may use relative presumptions as evidence.

c) Which are the safeguards (limitations e.g. proportionality clauses, relevant legal remedies)?

With regard to safeguards, both in the case of special and extended confiscation, the Courts are obliged to **identify and summon all affected persons** so that they can make defences.

Also, as regards proportionality, under Article 112 of the Criminal Code, the partial confiscation can be ordered on equivalent confiscation in certain circumstances. Thus, according to Art. 112 para. 2 CP, in the case provided for in para. (1) lit. b) - goods that have been used in any way or intended to be used in the commission of an offence provided for by the criminal law, if they belong to the offender or if, belonging to another person, he knew the purpose of their use and lit. (c) - goods used, immediately after the commission of the offence, to ensure the escape of the offender or the preservation of the benefit or product obtained, if they belong to the offender or if, belonging to another person, he knew the purpose for which they were to be used, **if the value of the goods subject to confiscation is clearly disproportionate** to the nature and gravity of the offence, partial confiscation shall be ordered, by monetary equivalent, taking into account the damage caused or likely to be caused and the contribution of the goods to that damage. **If the property was produced, modified or adapted for the purpose of committing the offence provided for by the criminal law, it shall be confiscated in its entirety.**

d) Is the trial *in absentia* possible in your legal system in order to apply the confiscation?

In the case of absconding from criminal proceedings, confiscation can be ordered according to common law rules. There is no express regulation to this effect. However, there is an extraordinary remedy known as the reopening of criminal proceedings in the event of a default judgment whereby. In this procedure the person who has been convicted in absentia may request a retrial of his case if he was not aware of the existence of the criminal proceedings - Article 466 CPP.

e) For the confiscation without conviction: can this form of confiscation be applied also in case of acquittal?

In Romania, acquittal may be ordered in the following situations mentioned at art. 16 CPP : 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. There is no prohibition on ordering confiscation if the Court orders acquittal.

5) For each model of confiscation:

Does it comply with the principles of:

legality?

legal specificity of a statute?

non-retroactivity of the /more severe/statute?

the right to private property?

the proportionality?

the right to a fair trial?

the right to defence?

the presumption of innocence?

the *ne bis in idem* principle?

and other relevant rights - what sort of?

Principle/rights	Remarks
PRINCIPLE OF LEGALITY	The principle of legality underpins the entire criminal process and is expressly mentioned in the Code of Criminal Procedure in Article 2.
PRINCIPLE OF NON-RETROACTIVITY	<p>In transitional situations, the provisions on special confiscation and extended confiscation may be retroactive only to the extent that they do not prevent the application of the more favourable criminal law.</p> <p>Constitutional Court Decision 356/2014 established that the provisions on extended confiscation are constitutional insofar as extended confiscation does not apply to property acquired before the entry into force of Law 63/2012 which introduced extended confiscation into the Romanian system, i.e. 22 April 2012.</p> <p>At the same time, according to Constitutional Court Decision No 78/2014, it was established that the provisions on extended confiscation are constitutional insofar as they apply only to offences committed under the new legislative solution that came into force after the entry into force of Law No 63/2012, that is to say 22 April 2012.</p> <p>In particular, in order for extended confiscation to be ordered, both the acquisition of the assets and the</p>

	commission of the offence must occur after 22 April 2012.
THE RIGHT TO PRIVATE PROPERTY	Regarding the right to property, the Courts are under the obligation to inform any interested party before any confiscation measure is ordered. Thus, in the course of criminal proceedings, the judicial authorities are obliged to summon third parties whose property will be affected by the confiscation order, to inform them of the proceedings and the possible consequences for their civil rights, giving them a real opportunity to defend themselves, including by giving the possibility to present evidences.
THE RIGHT TO A FAIR TRIAL	Regarding the right to a fair trial, this principle is expressly provided for in Article 8 of the CPP, according to which: the judicial bodies are obliged to conduct the criminal prosecution and trial in compliance with the procedural guarantees and the rights of the parties and of the subjects of the proceedings, so that the facts constituting offences are established in time and in full, no innocent person is held criminally liable, and any person who has committed an offence is punished in accordance with the law within a reasonable time.
THE RIGHT OF DEFENCE	The right of defence is expressly regulated in Article 10 of the CPP and gives every person who justifies a legitimate right the possibility to organise his defence in the forms provided for by the criminal procedure. Thus, the persons concerned may benefit from a qualified defence through a lawyer, including this defence which may be provided free of charge. The person concerned may also make use of all the means of evidence relating to the interest which he justifies. At the same time, confiscation may be ordered only after the conclusion of an adversarial procedure in which the parties and third parties concerned are guaranteed an effective defence.
THE PRESUMPTION OF INNOCENCE	The presumption of innocence is expressly established in Article 4 of the CPP. Thus, any person is considered to be innocent until proven guilty by a final criminal judgment. The ordering of a confiscation measure in the absence of a conviction must be carried out with the highest degree of caution in terms of reasoning, so as not to affect the presumption of innocence.
NE BIS IN IDEM	It is clear from the entire content of Article 112 CP that a special double confiscation is not possible. The Latin

	<p>principle <i>non bis in idem</i> with regard to the punishment of a person is also applied to special confiscation and consists in the fact that both the property and its monetary equivalent cannot be confiscated. The property is first confiscated in kind and, only if this is not possible, an amount representing the monetary equivalent of the property is confiscated.</p>
OTHERS	<p>The provisions of Article 44(8) of the Romanian Constitution establish the assumption of the licit character of the property obtained ("<i>Property acquired licitly cannot be confiscated. The lawful nature of the acquisition is presumed</i>"). These are frequently invoked as a basis for the lifting of seizures for confiscation by persons who are not parties to criminal proceedings.</p> <p>However, as the presumption is relative (<i>juris tantum</i>) - since it can be rebutted by evidence to the contrary - to the extent that there is some indication that the third party has acquired the property as a result of acts provided for by criminal law, the Court may require him to make his own defences as to how he came into possession of the property. In this case, the constitutional provision is not violated, but this request helps to clarify the situation.</p>
The relevant case law rules on the constitutionality (or otherwise) of the confiscation measure.	<p>Constitutional Court Decision No 78/2014</p> <p>Constitutional Court Decision 356/2014</p> <p>Both decisions were presented above in the section on the principle of non-retroactivity</p>
European Court of Human Rights cases on the Romanian confiscation model	<p>Telbiş and Viziteu v. Romania, Judgment of 26.06.2018, HUDOC</p>
CJEU decision on the "your" model of confiscation	<p>No identified</p>

7) For each model of confiscation:

- a) Are there constitutionality issues which have been detected in the legal doctrine and is there any relevant jurisprudence ruling on the constitutionality (or not) of the confiscation measure?

Models of confiscation	Remarks
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Special confiscation	No identified
Extended confiscation	<p>The main complaint against the regulation of extended confiscation was that it undermines the presumption established by Article 44 (2) (8) of the Romanian Constitution, according to which the lawful nature of property is presumed.</p> <p>The Constitutional Court has often held that the presumption of the lawful acquisition of property is one of the main guarantees of the right to property. According to the case law of the Constitutional Court, this presumption is relative. However, the recitals of Decision No 799/17.06.2011 state that the regulation of this presumption does not prevent the primary or delegated legislator, in application of the provisions of Article 148 of the Constitution - Integration into the European Union, to adopt regulations allowing full compliance with EU legislation in the field of the fight against crime. This objective was also taken into account by the initiator of the proposal for revision, in particular with reference to Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, published in the Official Journal of the European Union No L 68 of 15 March 2005, which requires the necessary measures to be taken to comply with its provisions, in particular a reduction of the burden of proof as regards the source of assets held by a person convicted of an offence connected with organised crime.</p> <p>The regulation of extended confiscation was not intended to reverse the burden of proof, but only to mitigate it, as the burden of proof falls on the judicial authorities, which will be able to order the measure on the basis of specific facts which show that criminal activity has taken place and from which the property subject to confiscation was derived. A relative presumption (such as that of the lawful nature of property) can also be rebutted by simple presumptions.</p> <p>Therefore, the Constitutional Court found that the provisions on extended confiscation, introduced into Romanian law by Law No 63/2012, cover the safeguards revealed in the case law of the European Court. Thus, the measure of extended confiscation is ordered by a Court on the basis of its own conviction that the property subject to confiscation originates from criminal activities,</p>

	<p>formed following the completion of a public judicial procedure, in which the persons concerned have access to the file and to the arguments of the prosecution and have the opportunity to propose evidence and present the evidence they consider necessary.</p> <p>By Decision No 365/25.06.2014, the Constitutional Court found that the introduction of extended confiscation does not contravene the presumption of innocence, governed by Article 23 para. (11) of the Romanian Constitution, and does not violate the right to a fair trial.</p>
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b) Are there European Court of Human Rights cases in relation to “Your” model of confiscation?

Please, explain the position of the ECHR about “Your” model of confiscation.

Models of confiscation	Remarks
Special confiscation	-
Extended confiscation	<p>Telbiş and Viziteu v. Romania, Judgment of 26.06.2018, HUDOC</p> <p>The Court finds that there has been no violation of Article 6 para. 1 of the Convention.</p> <p>The Court concludes that the interference with the property rights of the first and second applicants was not disproportionate to the legitimate aim pursued. There was therefore no violation of Article 1 of Additional Protocol No. 1.</p>

Telbiş and Viziteu v. Romania, Judgment of 26.06.2018

On 1 March 2014, a prosecutor from the Public Prosecutor's Office of the High Court of Cassation and Justice began criminal proceedings regarding the commission of corruption offences by S.T., a doctor and employee of the Caras Severin County Pension House.

On the same day, a house search was carried out at his residence in the presence of his lawyer. The property belonging to S.T. and his family was seized.

On 26 May 2014 S.T. was charged with the commission of 291 material acts of bribery committed between 3 February 2014 and 13 March 2014. He entered into a guilty plea in relation to these acts and was sentenced to 3 years imprisonment

The applicants are L.T. (first applicant and wife of S.T.), L.A.T. (second applicant and daughter of S.T.) and M.A.V. (third applicant and granddaughter of S.T.). The Court ordered the confiscation of various sums of money and property received by S. Telbiş. T. during the period in which he committed the bribery acts, as well as the confiscation of other sums of

money and property owned jointly by the spouses: 124,000 euros, a dental surgery, an apartment and a car. The second complainant's property (an apartment and two cars) and the sum of EUR 40 400 were also seized. In his plea agreement, S.T. stated that some of the property belonged to his wife and daughter, who had not committed any offence under criminal law.

He also claims that the goods were purchased with money obtained from the sale of several properties between 2007 and 2013 and that the prosecutor failed to prove that these goods were purchased from an illegitimate, illegal source. S.T. mentions that out of the total amount subject to confiscation, 40,400 euros were obtained from the sale of an apartment, owned jointly with his wife and granddaughter, submitting a copy of the sale-purchase contract. Accordingly, S.T. asked the Court not to confiscate these assets.

With regard to the defendant's requests, the Court found that the total value of the seized property could not be justified by the defendant's and his wife's declared income in the five years prior to the commission of the offence, taking into account that their daughter was a student and had no income. An analysis of the documents and expert reports submitted in the case file revealed that the annual income of the defendant and his wife amounted to 35,000 euros, while the value of the assets owned by the family over the last five years amounted to 300,000 euros. The Court also took into account the Constitutional Court's Decision No 356 of 2014 and ordered only the confiscation of assets obtained after April 2012, lifting the seizure on assets that do not fall within the scope of application. However, the applicants appealed against this judgment and became parties to the proceedings.

The plaintiffs argued that the listed assets had been obtained through efficient management of the family income.

Since they considered that the confiscation measure was excessive and unlawful, they appealed against the judgment given by the Court of Arad. In the appeal decided by the Timisoara Court of Appeal, the defendant's niece explained that the 40,400 euros obtained from the sale of the apartment belonged to her and that she had asked S.T. to keep them. A copy of this notarised contract of sale and purchase was filed in the case file. The Court found that this contract was irrelevant and that the amount mentioned by Mr T (EUR 40 400) did not coincide with the amount that his niece claimed to have entrusted to him (EUR 30 000). The Timisoara Court of Appeal dismissed the appeal in which the plaintiffs requested the hearing of several witnesses claiming that they had lent money to the family and requested a new accounting report, as an accounting report had already been submitted and the Court considered that there was sufficient evidence on file to calculate the family's income and the value of their assets, and the plaintiffs had sufficient time to prepare their defence and to submit written evidence during the numerous hearings. The Court considered that it could be inferred from the large number of criminal acts committed by S.T. that he had established a habit of taking bribes, a habit which would have started long before the period in which the criminal proceedings began. At the same time, S.T. and his family (wife and daughter) have accumulated considerable wealth over the last 5 years. Thus, the Court found that it was clear from the evidence in the case file that some of the seized assets were direct proceeds of crimes committed by S.T., while other assets belonged to his wife and daughter. As regards the second applicant, she was a student, had no income and her allegations that her assets had been donated by other family members were not substantiated. In conclusion, the Court of Appeal held that the judgment of the first instance was correct and proportionate in relation to the confiscated property.

The first and second applicants claim that the confiscation measure taken in respect of their property is contrary to the provisions of Directive 42/2014 and that the unlawful origin of the confiscated property has not been proven by the authorities. They also complain that they were deprived of their property in violation of Article 1 of Protocol 1 to the Convention.

The Court found that the parties had had an effective opportunity to participate in the confiscation proceedings and that domestic law allowed interested persons to intervene in the proceedings. The applicants were represented by chosen counsel, were informed of their rights and were ultimately accepted as parties to the criminal proceedings, given a full hearing and given the opportunity to present their claims and arguments before the Court. The Court notes that all the arguments and requests made by the applicants have been considered and dealt with.

Thus, the Court finds that the Romanian authorities gave the applicants the opportunity to protect their interests and that there was no violation of Article 6(1).

c) Is there any CJEU decision concerning “Your” confiscation model?

No identified

9) For each model of confiscation:

a) How was the Directive 2014/42/EU transposed in Your national legal order and how did this affect national law?

Models of confiscation	Remarks
<p>Extended confiscation</p>	<p>Extended confiscation was introduced in both the 1969 Penal Code and the new Penal Code in the chapter on security measures.</p> <p>The legislative amendment introduced by Law No 63/2012 aimed to transpose into Romanian law Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-related Proceeds, Instrumentalities and Property.</p> <p>According to the regulation:</p> <p>(1) Property other than that referred to in Article 112 shall also be subject to confiscation if the person is convicted of committing one of the following offences, if the offence is likely to bring him material benefit and the penalty provided for by law is imprisonment for 4 years or more:</p> <p>(a) offences relating to trafficking in drugs and precursors;</p>

	<p>b) offences concerning trafficking in and exploitation of vulnerable persons;</p> <p>c) offences relating to the state border of Romania;</p> <p>d) money laundering offences;</p> <p>e) offences under the legislation on preventing and combating pornography;</p> <p>f) offences under the legislation on combating terrorism;</p> <p>g) setting up an organised criminal group;</p> <p>h) offences against property;</p> <p>(i) failure to comply with the rules on arms, munitions, nuclear materials and explosive materials;</p> <p>j) counterfeiting of coins, stamps or other valuables;</p> <p>k) divulging economic secrecy, unfair competition, non-compliance with provisions on import or export operations, embezzlement, offences relating to the import and export regime and the introduction and removal of waste and residues;</p> <p>l) gambling offences;</p> <p>(m) corruption offences, offences connected therewith and offences against the financial interests of the European Union;</p> <p>n) tax evasion offences;</p> <p>o) offences relating to customs procedures;</p> <p>p) offences of fraud committed by means of computer systems and electronic means of payment;</p> <p>q) trafficking in human organs, tissues or cells.</p> <p>(2) Extended confiscation shall be ordered if the following conditions are met cumulatively:</p> <p>(a) the value of the property acquired by the convicted person, within a period of 5 years before and, if applicable, after the commission of the offence, up to the date of the issuance of the Court's indictment, clearly exceeds the income lawfully obtained by him/her³);</p>
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³ By Constitutional Court Decision No 11 of 15 January 2015, published in the Official Gazette No 102 of 9 February 2015, the Constitutional Court admitted the exception of unconstitutionality of the provisions of Article 112¹ para. (2) (a) of the Criminal Code, finding that they are constitutional insofar as extended confiscation does not apply to property acquired before the entry into force of Law No. 63/2012 amending and supplementing the Criminal Code of Romania and Law No. 286/2009 on the Criminal Code. According to Art. 147 para. (1) of the Romanian Constitution republished in the Official Gazette no. 767 of 31 October 2003, the provisions of the laws and ordinances in force, as well as those of the regulations, found to be unconstitutional,

	<p>(b) the Court is satisfied that the property in question is derived from criminal activities of the kind referred to in paragraph 1. (1).</p> <p>(3) For the purposes of applying the provisions of paragraph 1, the Court shall (2) account shall also be taken of the value of the property transferred by the sentenced person or by a third party to a family member or to a legal person over which the sentenced person has control.</p> <p>(4) Property within the meaning of this Article shall include money.</p> <p>(5) In determining the difference between the lawful income and the value of the property acquired, the value of the property at the time of its acquisition and the expenses incurred by the sentenced person, members of his family shall be taken into account.</p> <p>(6) If the property subject to confiscation is not found, money and goods shall be confiscated in its place up to the amount of their value.</p> <p>(7) Property and money obtained from the exploitation or use of property subject to confiscation, as well as property produced by such property, shall also be confiscated.</p> <p>(8) Confiscation may not exceed the value of the property acquired during the period referred to in paragraph 1. (2), which exceeds the level of the lawful income of the convicted person.</p> <p>The legislative amendment introduced by Law No. 228/2020 was required following the advent of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and the proceeds of crime committed in the European Union. According to the new regulation, if a person is convicted of committing any offence punishable by law by imprisonment of 4 years or more and has assets acquired in the last five years which the Court is</p>
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shall cease to have legal effect 45 days after the publication of the decision of the Constitutional Court if, within this period, the Parliament or the Government, as the case may be, do not bring the unconstitutional provisions into line with the provisions of the Constitution. During this period, the provisions found to be unconstitutional shall be suspended by operation of law. Therefore, during the period from 9 February 2015 to 25 March 2015, the provisions of Art. 112¹ para. (2) letter a) of the Criminal Code, insofar as extended confiscation applies to assets acquired before the entry into force of Law no. 63/2012 for the amendment and completion of the Criminal Code of Romania and of Law no. 286/2009 on the Criminal Code, were suspended by right, ceasing their legal effects as of 26 March 2015, since the legislator did not intervene to amend the provisions declared unconstitutional.

convinced originate from any criminal activities, it shall order extended confiscation. The conviction is formed on the disproportion existing between the lawful income and the wealth held.

Extended confiscation can only be ordered if a crime has been committed and only if the offender has been convicted. Unlike the 1969 Criminal Code, which stipulated the need to have committed a crime and to have been convicted as conditions for the imposition of other security measures, under the new Criminal Code extended confiscation is the only security measure for which these conditions must be met.

Differences regarding the establishment of the safety measure of extended confiscation as amended by Law No 63/2012 vs. Law No 228/2020:

Law No 63/2012	Law No 228/2020
Transposes Framework Decision 2005/212/JHA	Transposes Directive 2014/42/EU
Offences punishable by law by imprisonment for 4 years or more (5 years in the 1969 Penal Code)	Any offence for which the law provides for a penalty of imprisonment of 4 years or more
Mandatory requirement: the value of the property acquired by the convicted person, within a period of 5 years before and, if applicable, after the offence was committed, up to the date of the Court's decision, clearly exceeds the income lawfully obtained by the convicted person	Conviction of the Court that the property in question is derived from criminal activity may be based including on the disproportion between the lawful income and the person's wealth
Extended confiscation cannot operate from third parties	Extended confiscation from third parties, if they knew or ought to have known that the purpose of the transfer was to avoid confiscation
Equivalent confiscation	Equivalent confiscation

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- b) Does the relevant confiscation procedure fall within the concept of “proceedings in criminal matters” which is provided for by the Regulation (EU) no. 1805/2018?

Both confiscation measures in criminal matters in Romania are ordered only by the criminal Courts, thus fulfilling the conditions set out in Article 1 para. 4 and recital 13 of the Regulation.

- c) In Your opinion are the safeguards required by the Regulation enough for the protection of the defendants’rights? Is there any additional national legislation aimed at adjusting the national legal order to the provisions of Regulation or any relevant need thereof in order to make Your national confiscation models more compliant with the safeguards required by the Regulation? Are there any lessons that we should learn from Your national experience?

We consider that there are sufficient safeguards in the Regulation to protect the rights of defendants. Moreover, the provisions of the Regulation, which are directly applicable in national law, are complemented by domestic provisions, thus ensuring a coherent criminal procedural framework.

Following the written request of the national prosecutorial structures, we received the following feedback:

Directorate for the Investigation of Organised Crime and Terrorism

Scope of the Regulation

According to Article 1 of Regulation (EU) 2018/1805 on mutual recognition of freezing and confiscation orders, the instrument applies only to criminal proceedings, expressly excluding civil or administrative proceedings.

From this perspective, some practical difficulties arise in situations where the execution of freezing orders issued in the framework of proceedings in other States is requested, which cannot be specifically classified as "criminal matters", an autonomous concept according to the explanatory memorandum of the Regulation (e.g. Misure di prevenzione in the Italian judicial system).

The existence of difficulties in identifying the competent authority to execute the freezing order when it has been issued in proceedings where there is no actual criminal prosecution.

A distinction should be made between assets that are subject to freezing/confiscation and assets that are surrendered upon recognition and execution of European Investigation Orders.

Communication of the measure to the person concerned, in particular when the freezing order is accompanied by a European arrest warrant; the same problem arises when the consent of the person concerned is required for the recovery of the property.

Storage and preservation of confiscated property.

Enforcement of Article 255 of the Code of Criminal Procedure, i.e. verification, at least 6 months after the criminal proceedings, that the grounds for taking or maintaining the measure as envisaged by the issuing authority still exist.

National Anticorruption Directorate

In the application of Regulation (EU) 2018/1805, difficulties arise from differences between the laws of the Member States on the recovery of damages, which are the subject of a civil action, in criminal proceedings, in particular when the State is the one harmed by the commission of the offence.

Thus, in a criminal case in which the Directorate requested the imposition of a seizure under Regulation (EU) 2018/1805 for the purpose of recovering damages, a court in the requested State rejected the request, stating that the seizure was requested "for the purpose of securing civil obligations" and that the provisions of Regulation (EU) 2018/1805 did not apply in this situation.

Other difficulties could arise from the use of information provided by administrative authorities, such as ANABI or ONPCSB, on the assets or accounts whose seizure is requested in the content of the attachment certificate, without the possibility of specifying the source of the information.

Moreover, in practice, there have been cases where the requested authorities have made the execution of seizure certificates issued under Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence conditional on the transmission of clarifications concerning the source of the information mentioned in the content of the seizure certificate. Although the

example given refers to a different legal instrument, the difficulty could also arise in the application of Regulation (EU) 2018/1805.

Bucharest Public Prosecutor's Office

Regarding the enforcement of freezing orders issued by foreign judicial authorities after the entry into force of Regulation (EU) 2018/1805:

- Arrest warrants have been registered for execution together with the certificate issued under Article 9 of Framework Decision 2003/577/JHA; for these reasons, given that Article 8(8) of Framework Decision 2003/577/JHA provides that the certificate must be issued in accordance with Article 9(2) of Framework Decision 2003/577/JHA. (1), Art. c) of Regulation (EU) 2018/1805 provides that the transmission of a certificate of indisposition in a manifestly incorrect manner is one of the grounds for non-recognition and non-execution of orders of indisposition, we have requested the issuing foreign judicial authorities to send us the certificate of indisposition provided for in Annex 1 of Regulation (EU) 2018/1805, translated, signed and certified.

- Incomplete certificates of seizure were registered for execution; in this respect, on the one hand, we found that there were missing files, on the other hand, the certificates of seizure were not completed by the issuing authorities with the data which were the subject of the seizure order; given that Article 8(2) of the Regulation provides that the certificate of seizure must be signed, signed and stamped by the issuing authorities. (1) lit. (c) of Regulation (EU) 2018/1805 provides that the transmission of an incomplete certificate of non-disposal is one of the grounds for non-recognition and non-execution of the orders of non-disposal, the issuing judicial authorities were requested to send a certificate of non-disposal with the fields fully completed with all the data for execution.

- European investigation orders/international letters rogatory were registered for execution, requesting also the freezing of the money in the bank accounts under investigation, without sending us the freezing certificate/Court order/decision/decision/freezing order (in original or certified copy) issued by the judicial authority competent in criminal matters; for this reason, the issuing judicial authorities were requested to send these documents.

Public Prosecutor's Office at the Constanta District Court

In the records of the Public Prosecutor's Office of the Constanta District Court, document no. 1618/11/5/2020 was identified, requesting the UK authorities to temporarily freeze the sum of €20,000 in criminal case no. 9497/P/2020, with an average execution period of approximately 1 year.

For the year 2022, the following data on the applicability of Regulation 2018/1805 have been collected at the level of the Ministry of Justice:

- The number of freezing orders received by Romania from other Member States that were recognized 55 (51 orders transmitted have been issued during criminal prosecution stage);

- The number of freezing orders received by Romania from other Member States that were executed 46(45 orders transmitted have been issued during criminal prosecution stage);
- 1 order has been refused, for the others our judicial authorities did not have updated information on the stage of the execution;
- The number of confiscation orders received by Romania from other Member States that were recognized -4;
- The number of confiscation orders received by Romania from other Member States that were executed-1;
- In some cases, Courts were unable to provide information on the actual execution of the confiscation orders.
- The average duration for the freezing orders reported by the prosecutors' offices is of 3, 5 months.

As judicial practice in the field of preventive measures ordered against a third party in order to guarantee the execution of the measure of special confiscation, we present below a case decision of the High Court of Cassation and Justice, where the principles and rules of national law indicated above have been analysed at length:

Appeal. Measures for special or extended confiscation taken against the assets of the suspect or defendant or other persons in whose property or possession the property to be confiscated is located.

Criminal Procedure Code Art. 249 para. (1)

Penal Code Art. 112 para. (1) and (5)

Law No 78/2000, Art. 20

For the purpose of special seizure by equivalent of the sums obtained by the suspect through corruption offences, it is lawful to seize the apartment owned by the witness, if the evidence shows the alleged involvement of the suspect in the purchase of the seized property and the position of the witness as a mere intermediary as the owner of the property, there being a clear risk of alienation or evasion of prosecution of the property in question.

Court of First Instance, Criminal Division, Criminal Decision No 526 of 18 October 2021.

I. By order dated 09.09.2021, the Public Prosecutor's Office of the High Court of Cassation and Justice of the National Anticorruption Directorate ordered the imposition of the measure of attachment up to the amount of 3,904,511.61 lei on the real estate located in Spain, property of witness A., which was identified by the Spanish judicial authorities during the execution of the European Investigation Order issued on 02.12.2020.

It was ordered that the certificate of seizure governed by Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders be issued.

Given that the immovable property is located outside the territory of Romania, being situated on the territory of a Member State of the European Union, a certificate of freezing was issued under the conditions regulated by Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing and confiscation orders.

On 20.09.2021, communication was received from the juzgado de instruccion n. 1 de marbella (antiguo mixto ni) informing of the application of the precautionary measure ordered by the order of 09.09.2021, which constitutes an order of immobilisation under the Regulation.

By means of the minutes of 23.09.2021, the witness A., assisted by his chosen lawyer, was given: a copy of the order of 09.09.2021, a copy of the certificate of unavailability issued on the same date and a copy in Spanish + an authorised translation into Romanian of communication no. 338/2021 of 20.09.2021 of the Juzgado De Instruccion N.L De Marbella (Antiguo Mixto Ni).

The following were essentially held:

In view of the need to avoid the alienation from prosecution of the assets held, it was ordered that precautionary measures be taken against the apartment in M., with a view to the special confiscation by equivalent of the sums obtained by suspect B. through corruption offences.

Thus, it was reasoned that the security measure of special confiscation is mandatory in the case under the provisions of Article 289 para. 3 of the Criminal Code and Art. 291 para. (2) of the Criminal Code with reference to Article 112 (d) of the Criminal Code. Article 289 of the Criminal Code criminalises the offence of bribery and Article 291 of the Criminal Code criminalises the offence of trading in influence.

According to Art. 289 para. 3 of the Criminal Code: "Money, valuables or any other property received shall be subject to confiscation, and when they are no longer found, confiscation by equivalent shall be ordered."

According to Art. 291 para. 2 of the Criminal Code: "Money, valuables or any other property received shall be subject to confiscation, and when they are no longer found, confiscation by equivalent shall be ordered."

Art. 112 para. 1 letter d and Art. 112 para. 5 of the Penal Code read as follows:

"Art. 112 - Special confiscation

(1) The following are subject to special confiscation:

(2) (...)

(3) d) goods which have been given in order to induce the commission of an offence provided for by criminal law or to reward the offender;

(4) (...)

(5) (5) If the property subject to confiscation under paragraph (2) is not confiscated, the confiscation of the property shall be ordered. (5) (5) If the property subject to confiscation under paragraph (1) (b) - (e) is not found, money and goods shall be confiscated instead up to their value."

It was held that the legislator allows for confiscation by equivalent in the event that the amount of money which was the object of the corruption offences is not found, a hypothesis also encountered in this case given that the total amount of 3,904,511.61 lei in its materiality was not found in any of the two suspects.

According to Art. 249 para. 4 of the Code of Criminal Procedure, the measures for special or extended confiscation may be taken against the assets of the suspect or defendant or of other persons in whose property or possession the property to be confiscated is located.

Thus, it has been found that protective measures for special confiscation may also be taken against property owned by other persons and not only by the suspect/defendant, as is the case of the apartment in M..

The legislator does not exclude from this alternative special confiscation by equivalent, and it is thus allowed to establish the precautionary measure both on the property received through the commission of the corruption offence in the property of another person and on other property (apart from the property received through the commission of the corruption offence) in the property of another person.

It was reasoned that such a measure should not be arbitrary when it comes to the imposition of security measures "on the property of ... other persons in whose ownership or possession the property to be seized is located", as it is necessary to establish a link between the suspect/defendant and that property which is not in his ownership, a link fully established in the case according to the evidence analysed above.

In practice, suspect B. is the de facto owner of that apartment in M., bought in the name of his uncle A..

In view of the subject matter of this case and the nature of the offences under investigation, it was found that the provisions of Article 20 of Law No. 78/2000 are also applicable, according to which, in the event of the commission of an offence under this chapter, precautionary measures are mandatory.

In accordance with the provisions of Art. 249 para. (1) of the Code of Criminal Procedure, considering that:

- Suspect B. disposed of his property by voluntary partition on 26.10.2020 when the file was at the Chamber of Deputies for the formulation of the request for further prosecution, thus at a time when the suspect was aware of the existence of the file
- suspect B. had emptied his deposit accounts, it was considered that the securing measure was necessary in order to avoid alienation of the property that may be subject to special confiscation.

Given that the real estate is located outside the territory of Romania, being located on the territory of a Member State of the European Union, a certificate of seizure was issued under the conditions regulated by Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing and confiscation orders.

II. Against the order of the Public Prosecutor's Office of the High Court of Cassation and Justice, National Anticorruption Directorate, to impose the attachment, the witness A., through his chosen defence counsel, appealed, requesting the lifting of the attachment measure applied to the property - apartment located in Spain, on the following grounds:

- failure to satisfy the conditions laid down in Article 249(2) of the EC Treaty (1) of the Code of Criminal Procedure, as subsequently amended and supplemented, since the prosecutor in the case had imposed the attachment measure without having proved any action by the witness in the sense of "concealing, destroying or disposing of property which may be subject to special confiscation or extended confiscation";

- the application of the measure of attachment by the prosecutor in the case is also contrary to the legal provisions referred to above in view of the fact that the undersigned is a witness in the criminal proceedings, since the witness cannot be ordered to pay legal costs and/or compensation for the damage caused by the alleged offence committed by the defendant B. The appellant has argued that, in view of his status as a witness, the measure of attachment cannot be ordered on the property

- apartment which is the subject of the criminal order of 09.09.2021 with a view to applying the legal institution of special confiscation or extended confiscation for the following reasons:

- the immovable property does not belong to the category of goods mentioned exhaustively by the legislator in Article 112(1) of the EC Treaty (1) of the Criminal Code, as amended;

- the ownership of the property was acquired by the appellant and not by suspect B. and there was no evidence of any involvement of the witness, and the provisions of Article 1121 para. (2) (a) and (b) of the same Act.

- there is no evidence to prove that he had carried out any action that could have led to the concealment, destruction, alienation or evasion from criminal prosecution of the property.

Examination of the documents and the case file shows that the prosecutor was right to consider that the precautionary measure should be imposed at this stage of the proceedings. Incident legal provisions:

- Article 249 para. (1) of the Code of Criminal Procedure: "The public prosecutor, in the course of criminal proceedings, may take precautionary measures by order to prevent the concealment, destruction, alienation or evasion from prosecution of property which may be subject to special confiscation or which may serve to guarantee reparation for the damage caused by the offence.

- Art.294 para. (4) of the Code of Criminal Procedure: "Precautionary measures for special confiscation may be taken against the property of the suspect or defendant or of other persons in whose property or possession the property to be confiscated is located."

- Art. 289 para. (3) Criminal Code and Art. 291 para. (2) of the Criminal Code (offences of bribery and influence peddling): "The money, valuables or any other property received shall be subject to confiscation, and when they are no longer found, confiscation by equivalent shall be ordered."

- Art. 112 para. (5) Criminal Code: "If the property subject to confiscation under para. (1) (b)-(e) are not found, money and goods shall be confiscated instead up to their value."

- Article 20 of Law No. 78/2000 on the prevention, detection and punishment of corruption: "if an offence among those provided for in Chapter III has been committed, the taking of precautionary measures is mandatory".

- Article 1 of Protocol No 1 to the European Convention on Human Rights: "Protection of property - Every natural or legal person has the right to respect for his property. No one shall be deprived of his property except in the public interest and subject to the conditions prescribed by law and by the general principles of international law."

Analysing the legality and merits of the precautionary measure ordered, the Judge of Rights and Freedoms finds that the legal requirements mentioned for the seizure for special confiscation of the apartment in Spain, owned by the witness A., are met in the case, the measure being necessary in view of the purpose governed by the provisions of Article 249 para. (1) of the Code of Criminal Procedure.

With reference to the above-mentioned legal provisions, it is found that the security measure of special confiscation is mandatory in the case, in accordance with the provisions of Article 289 para. 3 of the Criminal Code, Art. 291 para. (2) of the Criminal Code and Article 112 (d) of the Criminal Code.

Thus, in this case, by order of the D.N.A., Section for combating offences similar to corruption offences issued on 29.10.2020, it was ordered to extend the criminal prosecution and to continue the criminal prosecution against B., for the offence of trading in influence, an offence provided for by Art. 291 para. 1 of the Criminal Code, in relation to Art. 6 of Law 78/2000, with application of Art. 7 lit. a of Law 78/2000 and bribery, an offence provided for by Art. 289 para. 1 of the Criminal Code, in relation to Art. 6 of Law 78/2000, with application of Art. 7 lit. a of Law no. 78/2000 with application of Art. 35 para. 1 of the Criminal Code (2 material acts).

By the order issued on 29.10.2020, it was ordered, among other things, the establishment of a seizure up to the amount of 3,904,511.61 lei, on the real estate owned by the suspect B., on his shares and on the present and future sums of money in bank accounts. (5) Criminal Code ref. to art.294 para. (4) of the Code of Criminal Procedure, given that the sum of money in the total amount of 3,904,511.61 lei, which was the object of the corruption offences, was not found in its materiality in any of the two suspects investigated in the case, but also in the context of the insignificant value of the sums of money, real estate and shares held by the suspects and seized, compared to the value of the object of the offences investigated, investigations were conducted in order to identify assets held by the suspects through possible intermediaries.

By address dated 29.10.2020, the prosecution body requested A.N.C.P.I. to communicate a situation of the real estate owned by family members/relatives of the suspects. From the content of the reply address of A.N.C.P.I. no. 50258/17.11.2020- vol. 228, files 2-5 and its annexes, among other things, it emerged that: - on 13.12.2012 the father of suspect B. and witness A. bought a property located in mun. Bucharest, which was subsequently sold for the sum of 630,000 euros, of which 315,000 euros went to Mr. and Mrs. B. and 315,000 euros to Mr. A., as shown in the sale-purchase contract. In view of what A.N.C.P.I. communicated, on 25.11.2020, witness A. was heard and he indicated that he had inherited in 1990 from his father the sum of 100,000 dollars and 66,000 lei in the equivalent of old lions, but he did not deposit them in the bank until the purchase of the property in 2012 in undivided ownership with the father of suspect B., while he still had a sum of about 3000 euros in the bank and worked between 2006 and 2017 in Bucharest, where appropriate at a MOL gas station filling fuel, at green spaces and at a security firm on salaries that did not exceed 1000 lei. Subsequent to the receipt of the sale price, out of the 330,000 euros received, he

loaned the mother-in-law of suspect B. the sum of 230,000 euros without concluding a loan contract. In order to corroborate the data, checks were carried out, but they did not confirm the allegations of witness A., regarding the acquisition of money from his parents by inheritance. (...)

With regard to the allegations of the complainant A., who referred to the sums of money deposited with CEC BANK, which were not taken into account by the prosecutor and would prove that he had in 2012, about 2 years before the alleged criminal activity of the suspect B., the money needed to purchase the property located in Bucharest, the following is noted: From the addresses submitted by this banking establishment, it appeared that 3 deposits were made consecutively for 3 months, each amounting to 49,000 Euros, but in reality it is a single amount, initially deposited on 13.07.2010 and liquidated at the 3-month maturity of the deposit, when it was used to make a new deposit (finally liquidated on 12.01.2011).

Moreover, also with regard to this money, the order to liquidate the deposit at CEC BANK in the amount of 49,000 Euro was made to the account of witness A. by the father of suspect B.. The data obtained cannot, however, justify the source of the money for the purchase in 2012 of the building in mun. Bucharest (together with the suspect's father, with the amount of 330.000 Euro), 7 years before the money was received from the sale of the property in Iasi. The verifications carried out in this regard are also instructive, confirming the aspects of witness A.'s statement, according to which he had, over time, only unskilled jobs with modest remuneration and that he retired in 2017, with a pension of 1260 lei per month at the time of the hearing.

As for the profit obtained by the complainant and his brother-in-law from the sale of the property in Bucharest, in the amount of 315,000 euros: The order analyses in detail the amount paid in 2012 for the purchase of the apartment in Bucharest and the amount received in January 2020 from its sale, excluding that the apartment in Spain, purchased in 2018, will be paid with the money received in 2 years (in January 2020) by the complainant and the father of the suspect B. from the sale of the property in Bucharest. Bucharest. From the examination of the evidence, there is a reasonable suspicion that suspect B. was involved in the purchase of the seized property and that he is the de facto owner of the property, with the witness A. simply acting as the owner of the property in Spain. In these circumstances, there is a clear risk of alienation or evasion of prosecution of the property.

It should also be taken into account the circumstantial context of the taking of the securing measures during the criminal proceedings, on the one hand, the fact that at the time suspect B. became aware of the existence of the case, he disposed of the property he owned by voluntary partition on 26.10.2020 and emptied the bank accounts, and, on the other hand, the context in which the apartment in Spain was acquired. Under the latter aspect, the following emerged: after the transfer of the down payment by the suspect's parents to the witness's bank account, the rest of the amount for the payment of the apartment was paid from a loan granted to witness A. by an associate of the suspect (in two companies) B; at the time of the purchase of the property in Spain the witness was accompanied by the suspect and his wife; the data of the suspect and his wife appear in the witness's relationship with the Spanish banking establishment; witness A. did not go to Spain after the purchase of the property, unlike suspect B. and his wife, who had several trips to Marbella; the contradictory aspects of witness A.'s statement regarding the source of the money from which he had previously purchased, in 2012, together with the suspect's father, another property sold in January 2020 in the mun. Bucharest.

From the factual elements resulted the disproportion between the value of the seized property and the legal income of witness A., which, however, in conjunction with the other data, leads to the conclusion of a link between the suspect and the property in question - which is not his property - in the sense that suspect B. is the de facto owner of that apartment in Spain, bought in the name of his uncle A.. An additional argument in support of this conclusion is the steps taken by suspect B. to prevent a special confiscation by equivalent of the sums which were the object of the alleged corruption offences.

With reference to the nature of the formal charge brought against suspect B. and the provisions of Article 249(2) of the Criminal Code, the Court finds that (4) of the Code of Criminal Procedure, which allow the taking of protective measures for special confiscation of the property of other persons in whose property or possession the property to be confiscated is located, as well as the provisions of Art. 112 para. (5) of the Criminal Code, relating to special confiscation by equivalent, in the specific circumstances of the case, it is found that the imposition of the precautionary measure on the property formally in the ownership of another person is lawful and proportionate in relation to the nature and amount of the sum which was the subject of the corruption offences prosecuted.

Given the major interference with the property of a person who is not the subject of judicial proceedings, it is held that the requirements of Article 1 of Protocol No 1 to the Convention, which requires the existence of a reasonable relationship of proportionality between the means used and the objective pursued, are also satisfied (*Phillips v United Kingdom, Balsamo v San Marino*).

Thus, the suspect is under investigation for the commission of offences under Law No 78/2000, and the provisions of Article 20 of the Prevention, Investigation and Punishment of Corruption Act justify, *ope legis*, the taking of precautionary measures in the event of the commission of such offences. The appellant's arguments, relating to the fact that the apartment in Spain does not form part of the category of goods listed by the legislature in the provisions of Article 112(1) of the EC Treaty, are not sufficient to justify the imposition of a fine. (1) of the Criminal Code, are unfounded.

It is true that the apartment in question was not the property which was the object of the offence of corruption, but the sums of money alleged to have been given by way of bribes in connection with the charge against the suspect B., if they are not found - which is the situation in the present case - may be subject to confiscation by equivalent, in accordance with the legal conditions laid down in Article 112(1) of the Criminal Code. (5) Criminal Code.

As regards the appellant's claim that he cannot be ordered to pay legal costs and/or to make reparation for the damage caused by the alleged offence committed by suspect B., it is held that it is unfounded, on the one hand, on the ground that, not being a party to the criminal proceedings in which the suspect is being investigated, he cannot be ordered to pay such costs and, on the other hand, there is no damage in the case, since the offences which are the subject of the criminal proceedings are offences of danger, not of result. As mentioned above, the measure of attachment is ordered with a view to confiscation by equivalent of the sums of money which were the subject of the corruption offences and which were not found on either of the two suspects.

In conclusion, in the factual context of the case, it is found that the necessary nature of the safeguard measure has been justified in order to prevent the concealment, destruction, alienation or evasion from prosecution of assets which may be subject to special

confiscation. In accordance with the case-law of the ECtHR, the requirements of proportionality of the precautionary measure in relation to the aim pursued are also satisfied, in accordance with the procedural safeguards laid down in Article 1 of Protocol No 1 to the Convention.

From that perspective, the European Court has repeatedly held that an interference with the right to property must be provided for by law and pursue one or more legitimate aims. In addition, there must be a reasonable relationship of proportionality between the means used and the aims pursued.

In other words, it must be established whether a balance has been struck between the requirements of the general interest and the interests of the persons concerned (*Silickienė v Lithuania*). In this context, the European Court of Human Rights has recalled that confiscation measures are part of a policy to prevent crime. As regards confiscation in the absence of a criminal conviction, the Court has noted in its case law that common legal rules at European and even universal level can be said to encourage the confiscation of assets related to serious crimes such as corruption, money laundering and drug trafficking offences without the need for a prior criminal conviction (*Gogitidze and others v. Georgia*).

Therefore, also with reference to the European Court's rulings in this matter, it is found that the protective measure is justified. For these reasons, the appeal was dismissed as unfounded.