



MINISTERUL JUSTIȚIEI



MINISTERUL JUSTIȚIEI
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**NATIONAL CONFISCATION MODELS
(COVERED BY THE EU REGULATION
NO. 1805/2018) AND
PROPOSALS OF HARMONIZATION:
A NEW DIRECTIVE**

ROMANIA

APRIL 13-14, 2023





Romanian Legal System



Romania belongs to the **continental European tradition of law**.

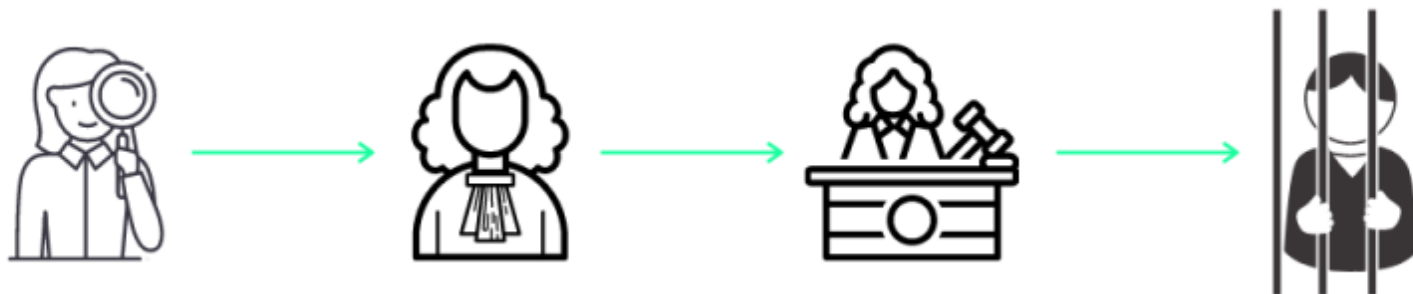
- The primary source of law is **written legislation**. Romania has an **inquisitorial background** as criminal justice model with some legal transplants from common law systems.
- The main sources of law are the **Constitution, the Criminal Code, the Criminal Procedure Code and special laws containing criminal provisions**.
- Even though, Romania follows the continental European tradition of law:
 1. the **decisions issued by the Constitutional Court** are **mandatory** for all courts.
 2. the **decisions from the Supreme Court** bringing uniformity to the **interpretation of the law**, while not a source of law in the Romanian legal system, **tends to provide a unitary practice, when requested by other Romanian courts**.

Romanian Legal System

According to the provisions of the Romanian Criminal Procedure Code, the typical structure of a criminal case includes four stages, in this chronological order:

1. **investigation phase (or pre-trial stage)**
2. **preliminary chamber**
3. **prosecution phase (or trial stage)**
4. **enforcement of criminal decisions**

Each of these phases is defined by certain procedural acts and within each of these phases certain categories of judicial bodies exercise their functions.



Romanian Legal System

Criminal investigations are conducted by **prosecutors** and **judicial police** (art. 55 Criminal Procedure Code).

- The investigation is **led and supervised by the prosecutor**, who can perform any criminal investigation act in the cases he or she coordinates and supervises.
- The **law enforcement bodies** carry out their criminal investigation **directly** under the **guidance and supervision** of the prosecutor.



Romanian Legal System

During criminal proceedings, **there are three types of judges:**

- 1. Judge for Rights and Freedoms** - is a judge who, in the course of a criminal investigation, decides on: a) **preventive measures**; b) **freezing of assets**; (is like the judge of instruction)
- 2. Preliminary Chamber Judge** - is a judge who verifies: a) the **legality of the prosecution** issued by the Prosecutor; b) the **legality of the production of evidence** and the performance of **procedural acts** by the criminal investigation bodies;
- 3. Court Judge** - is a judge who **decides the merits of the criminal case**.



Confiscation Models in the Romanian Legal System

Romanian criminal law provides for **two types of confiscation**:

- 1. Special confiscation**
- 2. Extended confiscation**

Both special confiscation and extended confiscation **can be applied to third parties**.

Special confiscation can also be applied in the absence of a conviction, while **extended confiscation can only be applied as part of a conviction** and after conviction.

To sum up, in Romania, **special confiscation** corresponds to **direct confiscation, confiscation by equivalent, confiscation against third parties** and **non conviction based confiscation**, while **extended confiscation** can be ordered both against the **convicted person and third parties**.



Legal nature of the confiscation

The legal regime of **special confiscation** and **extended confiscation** is regulated in the **General Part of the Romanian Criminal Code**, in Title IV, entitled "*Security Measures*".

Both special and extended confiscation are regulated as a **security measure**.

According to the Criminal Code the scope of security measures is to **remove a state of danger and to prevent crimes from being committed**.

Although these measures are intrusive to the rights of a person, **they are not considered criminal sanctions**.

For example, these measures are **not registered in a person's criminal record**.



Legal nature of the confiscation

Both types of confiscation (special and extended) are regulated together with other types of security measures such as ordering medical treatment, hospitalization or prohibition from holding an occupation or exercising a profession.

Special and extended confiscation are the only patrimonial security measures.

Confiscation affects a person's property.

It can be seen as a measure to secure property in favour of the State.



Special confiscation

Art. 112 Criminal Code Romania provides for special confiscation.

This type of confiscation targets property:

- Obtained through the commission of a criminal offence;
- Used, or intended to be used for the commission of a criminal offence;
- Used immediately after the commission of a criminal offence in order to ensure the perpetrator from escaping justice, or for the suspect to keep the proceeds of crime;
- Offered in order to determine the commission of a criminal offence or to reward a perpetrator for the commission of a criminal offence;
- Obtained by committing a criminal offence, unless they have been returned to the injured party or they serve to compensate the injured party.;
- The possession of which is prohibited by law.

Both object-based and value-based confiscation is allowed under Romanian law.



Special confiscation

If property is used or intended to be used in the commission of an offence, or is used by the offender to ensure his or her escape from justice, and the value to be confiscated is manifestly excessive to the nature and gravity of the offence committed, **the court may order the partial confiscation of the property through its monetary equivalent.**

However, if the property was manufactured, modified or adapted for the purpose of committing the offence, it shall **be fully confiscated.**

Property obtained from the use of property subject to confiscation is also subject to confiscation.

Property belonging to a third party who had no knowledge of its use for criminal purposes is not confiscated, but its monetary value is subject to confiscation, to be satisfied from the offender's property.

Moreover, if property cannot be found, except for property obtained through the commission of a crime, its monetary value shall be subject to confiscation.



Extended confiscation

Extended confiscation was regulated for the first time in Romania in 2012 by Law No. 63/2012, which transposed the Council Framework Decision 2005/212/JHA of 24 February 2005 regarding the confiscation of products, instruments and assets related to crime.

On 5 November 2020, Law No. 228/2020 entered into force, amending the Criminal Code with regard to the introduction of extended confiscation.

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 the new regulation, extended confiscation will be ordered if a person has been convicted of an offence punishable by a sentence of four years' or more of imprisonment and has property obtained 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.



Extended confiscation

Law 228/2020 simplifies and clarifies the possibility of confiscating the property of **third parties**.

Currently, this type of property can be confiscated if it was transferred from the convicted person and the former owner knew or should have known that the purpose of the transfer was to avoid confiscation.

Another important amendment concerns the prosecutor's possibility to order special or extended confiscation in certain cases.

Law 228 transforms **this possibility into an obligation** for prosecutors to order asset freezing in order to avoid concealment, destruction, disposal or dissipation of the assets that may be subject to special or extended confiscation or that may serve to secure the penalty by fine enforcement or to pay court fees or to compensate damages caused by the committed offense.



Extended confiscation

Currently, art. 112 index 1 Criminal Code provides the following:

- Assets, including money, can be subject to confiscation when a person is convicted of an act that is likely to result in material benefit and carries a penalty of imprisonment for 4 years or more.
- The court **must be convinced** that the assets in question **were obtained through criminal activities**. The court's conviction can also be based on the discrepancy between the person's legal income and their accumulated wealth.
- Extended confiscation can be ordered on assets acquired by the convicted person within a period of 5 years before and, if necessary, after the commission of the crime, until the date of notification to the court. It can also be ordered on assets transferred to third parties if they knew or should have known that the purpose of the transfer was to avoid confiscation.
- The value of goods transferred by the convicted person or a third party to a family member or a legal entity under the convicted person's control will also be considered for the application of the provisions in paragraph 2.
- "Goods" in this article also include sums of money.
- When determining the difference between the legal income and the value of acquired assets, the value of the assets at the time of acquisition and the expenses incurred by the convicted person and their family members will be considered.
- If the assets subject to confiscation are not found, money and goods can be confiscated in their place up to their value.
- Assets and money obtained from the exploitation or use of the confiscated assets, as well as assets produced by them, are also subject to confiscation.
- The value of confiscation cannot exceed the value of goods acquired during the period specified in paragraph 2, which exceeds the level of the convicted person's lawful income.



Standard of proof

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

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.

Safeguards /limitations

- Regarding the safeguards, for both models of confiscation, the courts are obliged to identify and quote all persons concerned so that they can make defences.
- Also, as regards proportionality, under Article 112 of the Criminal Code, only partial and equivalent confiscation may be ordered 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.



Procedure to be followed in case of confiscation

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

The cases in which a criminal trial is closed are regulated in Article 16 of the Romanian Criminal Procedure Code.

If one of these cases is identified, the criminal proceedings are **closed** regardless of the stage they are at - **prosecution or trial**.



Procedure to be followed in case of confiscation

Art. 16 Criminal Procedure Code

The cases are as follows:

- 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.

Pre-trial stage

- If the prosecutor finds any of the cases under Article 16 during the prosecution, he will close the **criminal case**.
- After that, prosecutor shall refer the matter **to the preliminary chamber judge** if he considers that the conditions for **special confiscation** are met. Confiscation can be requested regardless of the reason for closing the criminal case.
- It should be noted that the judge cannot be asked to order extended confiscation **because one of the conditions for this type of confiscation is the existence of a conviction**.



Trial- stage - conviction

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



Procedure to be followed in case of confiscation

Trial-stage - non conviction

- If, after a person has been sent for trial, the court, at the sentencing stage, finds any of the cases referred to in Article 16, it shall order an **acquittal for cases a-d** or **the closure of the criminal proceedings** for the remaining cases.



Procedure to be followed in case of confiscation

Trial-stage - non conviction - special confiscation

- Special confiscation may also be ordered if the criminal court does not order a conviction.
- In this case, there will be no further special proceedings, but once the acquittal or the closure of the criminal proceedings has been decided, the court will order special confiscation if the conditions for special confiscation are met.

Procedure to be followed in case of confiscation

Trial-stage - non conviction - extended confiscation

- 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 the closure of the criminal proceedings, it cannot order extended confiscation.
- It should be noted that in Romania there is no procedure for examining 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 is convicted.

Specific cases

Trial *in absentia*

In the case of evasion of 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 called the reopening of the criminal proceedings in case of a default judgment whereby a person who has been convicted in absentia will be able to request a retrial of his case if he was not aware of the existence of the criminal proceedings - Article 466 of the CPP.

In case of acquittal

- In Romania, acquittal may be ordered in the following situations: a) the offence does not exist; b) the offence is not provided for by the criminal law or was not committed with the guilt provided for by the law; c) there is no evidence that a person committed the offence; d) there is a justifiable or non-culpable cause.

There is no prohibition on ordering confiscation if the court orders acquittal - only special confiscation.

Procedure to be followed in case of confiscation

Freezing measures

- The Code of Criminal Procedure regulates the issue of freezing measures in the General Part, Title V, Chapter III, Articles 249-254.
- Freezing measures are procedural measures of real coercion consisting in the seizure of movable or immovable assets belonging to persons specified by law, by imposing an order of seizure on such assets.
- These procedural measures have only a precautionary and not a remedial function in relation to the civil action exercised in criminal proceedings.
- At the same time, they are procedural measures of a real nature. Their purpose is to guarantee the enforcement of the fine or the costs or the special/extended confiscation.



Confiscated models covered by Regulation no. 1805

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 against third parties.**

In our national legislation we also find forms of confiscation of an administrative nature.

Criminal confiscation is different from administrative confiscation.

In both cases, confiscation is justified by the existence of a state of social danger arising from the nature of the goods linked to a specific offence.

The difference is that in the case of criminal confiscation, the property is linked to a criminal offence, while in the case of administrative confiscation there is no connection between the measure and any criminal act.

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

Statistics from the relevant authorities according to Article 35

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**.

New proposal of Directive on asset recovery and confiscation



From the perspective of confiscation, the new directive will regulate in article 16 a new confiscation case.

This new case of confiscation may also be applicable in case of acquittal.

The system is similar to extended confiscation and the assets will be checked if they result from criminal conduct.

When determining whether the property is derived from criminal conduct, account shall be taken of all the circumstances of the case, including the available evidence and specific facts and available evidence, such as:

- that the value of the property is substantially disproportionate to the lawful income of the person to whom the property belongs,
- that there is no plausible licit source of the property, or
- that the person is connected to people linked to a criminal organisation.

This new type of confiscation will have to be regulated in the Romanian national legislation.

New proposal of Directive on asset recovery and confiscation



NCBC in particular situations – art. 15 from proposal of Directive on asset recovery and confiscation

- At this moment, the negotiations led to the approximately following text:

Member States shall take the necessary measures to enable, under the conditions set out in paragraph 2, the confiscation of instrumentalities and proceeds, or property as referred to in Article 12, or which was transferred to third parties as referred to in Article 13, in cases where criminal proceedings have been initiated but the proceedings could not be continued because of the following circumstances:

- (a) illness of the suspected or accused person;
- (b) absconding of the suspected or accused person;
- (c) death of the suspected or accused person;
- ~~(d) immunity from prosecution of the suspected or accused person, as provided for under national law;~~
- ~~(e) amnesty granted to the suspected or accused person, as provided for under national law;~~
- (f) the time limits prescribed by national law have expired.



NCBC in particular situations

Death of the suspected or accused person

- 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 scenarios can be identified depending on the time of death.

NCBC in particular situations

- If the suspected or accused person dies **during the course of criminal proceedings**, according to the criminal procedure provisions, the prosecutor shall refer the matter to the preliminary chamber judge for special confiscation of the identified assets.
- If the perpetrator **dies after the indictment has been issued**, the court will note this incident and **order the criminal proceedings to be close and may still order confiscation**. For example, confiscation can be ordered in a context where the criminal court only needs to establish that an unjustified criminal act has been committed.

NCBC in particular situations

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. However, as long as the perpetrator is dead, it is not possible to order confiscation because it is impossible to hold him criminally liable.
- At the same time, there are also problems regarding the possibility for the judge to take evidence to establish whether there is an unjustified criminal act after the death, especially in the context where the perpetrator, following his death, will not be able to mount an effective defence.



NCBC in particular situations

- Extended confiscation cannot be ordered because this type of confiscation can only be ordered by the criminal court if a conviction is also ordered.
- However, in the context where the offender died before the conviction was ordered, extended confiscation cannot be ordered either.
- In Romania there is no procedure for verifying the incidence of extended confiscation in another criminal 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.



NCBC in particular situations

- If a **special or 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 property.
- Thus, heirs will only be able to accept the inheritance if all the debts of the estate, including those resulting from the special confiscation by equivalent, are paid.

NCBC in particular situations

NCBC in particular situations – **illness of the suspected or accused person**

- In the case of illness, confiscation **cannot be ordered under criminal law**. Thus, if illness intervenes, the criminal proceedings, whether in the prosecution or trial phase, **will be suspended**.
- 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 authorities **shall submit its proposals to the prosecutor together with the case file**, in order to order the suspension of the criminal proceedings. (pre-trial)
- Also, according to Article 367 para. 1 of CPP, when it is established on the basis of a forensic 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. (trial stage)
- Regardless of the procedural phase, **it will be checked periodically, not later than 3 months, if the cause that led to the suspension still exists**.

NCBC in particular situations

- 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.
- It should be noted that the 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 on the basis of a legal medical 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 legal expert opinion ensured the necessary transposition.

NCBC in particular situations

Absconding of the suspected or accused person

- In the case of absconding of the suspected or accused person, 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 case of a judgment *in absentia*, which allows a convicted defendant to request a retrial of his case if he was not aware of the existence of the criminal proceedings - Article 466 of the CPC.



NCBC in particular situations

Prescription and amnesty

- 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.
- The confiscation in case of prescription is a **common practice in Romania** at this time.



GOOD PRACTICES

Public reuse of a confiscated office building worth 14 million RON in a money laundering case

An example of a successfully case is the one handled by the Directorate for the Investigation of Organized Crime and Terrorism - Central Structure (DIICOT) which was efficiently conducted from the prosecution phase to the final court decision, ended with a **confiscated and reused building worth over 14 million RON, that is now under the administration of the Ministry of Justice.**

Several defendants, including a legal person, have been indicted by DIICOT for serious offences such as setting up an organised criminal group, embezzlement with particularly serious consequences and money laundering, which took place between July 2008 and June 2009. The defendants' modus operandi boils down to the idea that they set up the organised criminal group with the aim of obtaining material funds from the assets of a company by embezzling them, which were then transferred via several non-resident (offshore) companies, also controlled by the members of the group directly or through intermediaries, with a view to recycling them, precisely in order to conceal the true nature of their origin.

Between July-August 2008, 24 commercial sale-purchase contracts were concluded for the delivery of equipment, and 4 offshore companies created artificial/fictitious claims by activating penalty clauses, which resulted in the obtaining of receivables totalling RON 56,970,212.29. Of these, claims amounting to RON 39,665,729 were settled directly with creditors or indirectly through other means.

The laundering circuit of the criminal proceeds was planned including the establishment of two new companies. The next criminal stage was characterised by the rapid extinguishment of the artificially created debts, as well as the removal of the building located at 39 Calea Floreasca from the company's assets and its takeover by means of newly established resident companies controlled by the defendants, through relatives or relatives of the defendants, used for this sole purpose.

DIICOT ordered insurance measures on several assets belonging to the defendants, including the assets of the defendant legal person. Thus, the sum of RON 2,385,114.63 was seized and subsequently transferred **in the unique bank account of ANABI** (with a view to the special seizure of the building in Bucharest, Calea Floreasca, no. 39, sector 1, the sum of EUR 1,295,220 as well as the other 46 incomes or other material benefits obtained from the aforementioned building), to guarantee the execution of the fine and legal expenses.



GOOD PRACTICES

Must be mentioned that the defendant legal person owned an office building (Gf + 5) in Calea Floreasca no. 39, seized during the criminal proceedings, without interrupting its activity. Numerous companies carried out their activities in the building, which is why throughout the criminal proceedings, the rents owed by the companies were transferred directly to the account of the accused legal person (more than 25,000 euro/month). By this means of seizure, the fruits of money laundering were collected and the activity of the defendant legal person was efficiently managed to avoid bankruptcy.

DIICOT seized the sums obtained from the lease contracts as well as the building in question. DIICOT also ordered the transfer of the seized sums of money from the accounts of other banks to the unique bank account administered by ANABI, bearing in mind that the sums deposited in this account generate interest.

By the DIICOT indictment of 06.04.2015 issued in case no. 188/D/P/2013 several defendants were indicted for the offences of setting up an organized criminal group, embezzlement with particularly serious consequences and money laundering.

The criminal trial was concluded by criminal Judgment no. 53/2018 delivered in case no. 2185/2/2015* and made final by criminal Decision no. 306/A of **10.10.2019** of the Bucharest Court of Appeal which sentenced the defendant legal person to a fine of RON 18,000 and confiscated the building located in Bucharest, Calea Floreasca, no. 39 as well as the amount of EUR 1,295,220 and other income/material benefits obtained from this office building.

The good cooperation between DIICOT and ANABI since the beginning of the criminal prosecution became evident at the end of the trial when the Agency immediately enforced the confiscation measure as follows:

1. ANABI transferred the sum of 18,000 lei by way of criminal fine;
2. ANABI transferred the sum of 16,500 lei by way of legal costs;
3. ANABI transferred the sum of 2,927,108.5 Lei (representing the sum of 2,925,669.94 Lei + related interest) by way of confiscated sum.

GOOD PRACTICES

Concerning the building in Calea Floreasca, no. 39 obtained by committing crimes and confiscated by the court, the Agency formulated a proposal to reuse the building and by Government Decision no. **797/2020**, the building was transferred free of charge to the administration of the Ministry of Justice.



Source: <https://anabi.just.ro/storage/uploads/pagini/38/Raport%20anual%20ANABI%202020.pdf> (page 45-47 - press release link available in Romanian language)



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Thank you for your attention!

