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EXTENDED AND THIRD PARTY CONFISCATION IN THE EU

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Foreword

The present study partly corresponds to my presentation from the first meeting on the agenda of the project, held in Utrecht, on 23 and 24 November 2017[1]*. Therefore, in the follow-up, I will try to encompass both the content of the lecture and the discussions generated by it. Still, the reader must bear in mind that the structure of this study will partially depart from the initial presentation. At that time, the analysis focused, inter alia, on the case studies of Germany and Romania in transposing legislation, as, on the one side, the German model was at that moment the most far reaching regarding both extended and third party confiscation and, on the other side, the Romanian system was best known by myself and met significant problems in the implementation stage. As well, the presentation was well embedded in a more general panel – "Towards a common EU approach to confiscation: problems and challenges", chaired by Michele Simonato – alongside Ciro Grandi's presentation on "Non-conviction based confiscation", Michaël Fernandez-Bertier's "Fundamental rights in confiscation proceedings" and Vera Weyer's "Mutual recognition of confiscation orders and national differences". This is no longer the case in*

[1] See, *Confiscation of criminal assets in the European Union*, Utrecht University 23 - 24 November 2017, organized within the ConfiscEU project. More info is available on the project's website (*http://www.improvingconfiscation.eu/en/evento/convegno-alluniversita-di-utrecht/*).

the present paper and hence, one must understand the delineations from the study: first, an in-depth research of these two legal systems will be made in both the German and the Romanian country reports, so the study aims only on "anticipating" some relevant issues for our analysis; second, reference must be made to non-conviction based confiscation and to the need to respect fundamental rights, in order to fully understand the core problems of both extended and third party confiscation. Even if all these aspects will be approached in a more systematic and detailed manner by my fellow colleagues in their own dedicated studies, at least the most important connections must be touched upon now, even with the risk of repeating ourselves.

1. Introduction. Outline of the study

During the last 20 years, building on the Tampere[2] and Stockholm Programmes[3], at the EU level, focus has been oriented towards reinforcing the fight against serious organized and transnational crime[4] and, in particular, the identification, seizure and confiscation of the proceeds and instrumentalities of criminal actions[5]. As Johan Boucht points out, "confiscation has been high on the agenda of the EU for at least two decades, which has resulted in a fairly comprehensive confiscation regime, comprising both substantial and procedural provisions"[6].

There is no doubt that as a result of the interest at EU level, a vast and complex legal framework devoted, generally speaking, to confiscation arose. Still, there is no consensus about the clarity and coherence of the outcome – partially demonstrated by the new efforts made, the last and definitely not least being Directive 2014/42/EU. Trying to sum up all the European instruments comprising this new legal framework, some authors

[2] See, Presidency Conclusions - Tampere European Council, 15 and 16 October 1999 (available at *https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm*).

[3] See the Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, Brussels, 2 December 2009 (available at *https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the_stockholm_programme_-_an_open_and_secure_europe_en_1.pdf*).

[4] For a definition of transnational crimes, see S. Gless, J.A.E. Vervaele, "Editorial. Law Should Govern: Aspiring General Principles for Transnational Criminal Justice", *Utrecht Law Review*, (9) 4, 2013, 1-10. Gless and Vervaele define transnational crimes as offences that affect multiple jurisdictions, but are not core crimes in public international law, where as transnational criminal law would be the sum of existing laws applicable to transnational crimes.

[5] S. Montaldo, "Directive 2014/42/EU and social reuse of confiscated assets in the EU: advancing a culture of legality", *New Journal of European Criminal Law*, (6) 2, 2015, 197. For a similar approach, from the perspective of fighting corruption, which includes "asset recovery", see R.D. Ivory, "The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases", *Utrecht Law Review*, (9) 4, 2013, 149.

[6] See, J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, Oxford and Portland, Oregon: Hart Publishing, 2017, 30. As it seems, the author links the start of the period of interest at the EU level not to the 1999 Tampere Program, but to the Joint Action of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime.

make distinctions between substantial (material) provisions and procedural provisions[7] while others recognize, on the one side, common rules on the seizure and confiscation of proceeds and instrumentalities and on the other side, rules on the principle of mutual recognition of confiscation orders[8].

We opt for a more precise distinction, proposed by Simonato[9]: after establishing the fact that the EU so far has focused mainly on confiscation matters, rather than on other phases of the asset recovery process, he identifies three main areas of EU intervention: *harmonization of confiscation regimes*[10], *mutual recognition between judicial decisions on*

[7] See, M.J. Borgers, "Confiscation of the Proceeds of Crime: The European Union Framework" in C. King, C. Walker (eds.), *Dirty Assets, Emerging Issues in the Regulation of Criminal Law and Terrorist Assets*, Ashgate, 2014, quoted by J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 30.

[8] S. Montaldo, *Directive 2014/42/EU and social reuse of confiscated assets in the EU: advancing a culture of legality*, op. cit., 197. Montaldo quotes F. Gascon Inchausti, "Mutual recognition and transnational confiscation orders", in S. Ruggeri (ed.), *Transnational inquiries and the protection of fundamental rights in criminal proceedings*, Heidelberg: Springer, 2013, 253, who, as well, use the distinction minimum standards (on confiscation) and mechanism for recognition and execution of seizure and confiscation orders.

[9] See M. Simonato, "Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?", *New Journal of European Criminal Law*, (6) 2, 2015, 216-217.

[10] The European instruments dealing with these aspects are – in a chronological order – Joint Action 1998/699/JHA of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime (available online at *https://eur-lex.europa.eu/legal-content/FRF/TXT/?uri=celex:31998F0699*); Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds of crime (available online at *https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:32001F0500*); Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (available online at *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32005F0212*) and last, but not least, Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (*available online at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042*).

freezing and confiscation[11] and *horizontal cooperation between national authorities involved in the recovery of assets*[12].

Starting from this latter distinction, but having in mind the previous ones, we must underline that our analysis will be dedicated strictly to substantial (material) law aspects and, in particular, it will focus on confiscation issues, as regulated by EU normative instruments. Eventually, narrowing even more the object of the research, our analysis will follow a twofold approach – on the one side, extended confiscation and on the other side, third party confiscation, both in the version shaped by Directive 2014/42. Of course, reference to other types of confiscation and to procedural aspects is somehow inevitable, but these aspects will be touched upon only in order to fully understand the new EU approach regarding extended and third party confiscation.

2. Extended confiscation. Towards a new and integrative legal framework

2.1. Preliminary aspects. Terminology. From ordinary confiscation to extended confiscation

Confiscation per se, often called now the *regular criminal confiscation*[13] or *basic confiscation*[14] is a well-known institution of Criminal law, which is in general, conceived as

[11] The relevant instruments are as follows: Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (available online *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003F0577*); Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (available online at *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006F0783*); Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (available online at *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32014L0041*), which partially replace the provisions of Council Framework Decision 2003/577/JHA for the Member States bound by this Directive. As well, we must mention the Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders – the last draft version, from 18 June 2018 sends a strong message that the Council, following a provisional agreement with the European Parliament, agreed on the new rules. See, for more details, *Crime will no longer pay: Council agrees new rules on mutual recognition of freezing and confiscation orders*, Press Release, 20 June 2018, available online at *http://www.consilium.europa.eu/en/press/press-releases/2018/06/20/crime-will-no-longer-pay-eu-agree-new-rules-on-mutual-recognition-of-freezing-and-confiscation-orders/*.

[12] See, Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime (available online at *https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:32007D0845*) and Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (available online at *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006F0960*). As Simonato points out, this latter instrument sets the rules for the cooperation – M. Simonato, *Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?*, op. cit., 217.

[13] See, J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 27. Previously (16 et seq.); the author dedicated an entire section to terminological aspects,

"the final deprivation of the property representing the result of a crime for which the offender has been convicted"[15]. Irrespective of its legal nature (safety measure, remedy etc.), criminal confiscation is, as a general rule, mandatory and consecutive to a final judgment, where usually the offender is convicted[16]. Without a doubt, this regular criminal confiscation is by far the one that offers the most safeguards for the person affected by the measure (e.g., the offence is proven, as well as a causal link between the assets sought to be confiscated and the criminal activity, all within the criminal trial). Still, there are numerous elements that can hinder confiscation in these cases: although the offence is proved, there is insufficient evidence that the property or goods originate from the commission of the offence, or the aforementioned goods are not in the possession of the defendant etc. All these difficulties are multiplied in cases of large-scale offences (tax fraud, corruption, drug or human trafficking etc.), especially when committed transnationally and within a criminal organization[17].

Therefore, the EU was aware that traditional confiscation has proven its limits and it was insufficient[18] - a new instrument was needed - *extended confiscation*. In a pragmatic manner, Johan Boucht "defines" it as a way of partially overcoming the difficulties met by the ordinary / basic confiscation and making it easier for the state to claim confiscation. The

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having in mind that the term "confiscation' is used occasionally as a denominator for all kinds of confiscation".

[14] See, Report from the Commission pursuant to Article 6 of the Council Framework Decision of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property, Brussels, 17.12.2007, COM (2007) 805 final, p. 4 (available online at *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52007DC0805*).

[15] See also, M. Simonato, *Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?*, op. cit., 217. The author underlines that among the legislation and doctrine from Member States there are still discrepancies, as "different nuances and terminology" can be found, giving the example of the UK and quoting D.J. Dickinson, "Towards more effective asset recovery in Member States – the UK Example", *ERA Forum*, 10, 2009, 436 on the a special meaning of the term "confiscation". For a similar approach, see D.J. Fried, "Rationalizing Criminal Forfeiture, *Journal of Criminal Law and Criminology*, 79, 1988, 328-436, quoted by J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 27, on the use of the notion of "forfeiture" with the sense of confiscation.

[16] Exceptions when regular confiscation will be ordered even in cases of acquittal can be provided – for example, in the Romanian Criminal law (Article 112 of the Criminal Code), regular confiscation will be enforced once all its conditions are fulfilled, irrespective of the judgment rendered (conviction, acquittal for certain grounds, closure of the criminal case etc.) – for details in the Romanian law, see V. Paşca, *Măsurile de siguranţă. Sancţiuni penale*, Bucharest: Lumina Lex Publishing House, 1998; C. Sima, *Măsurile de siguranţă în dreptul penal contemporan*, Bucharest: Beck Publishing House, 1999; D. Hoffman, *Confiscarea specială în dreptul penal. Teorie şi practică judiciară*, Bucharest: Hamangiu Publishing House, 2008. A similar case is in Sweden, where confiscation will be "effected even though the offender cannot be punished because of his lacking mental capacity (which, according to section 20 of the Penal Code, includes minimum age) or *mens rea*" – for more details, see *Criminal Confiscation in Norway and Sweden* in J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 40 et seq.

[17] See also, J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 27.

[18] See, M. Simonato, *Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?*, op. cit., 219, with the reservation that the author makes reference to ordinary confiscation as "conviction based confiscation" and he analyses its limits in comparison not so much with extended confiscation, but with non-conviction based confiscation.

same author considers extended confiscation to be an "instrument relaxing the otherwise strict standards for the rules on evidence in criminal proceedings relating to confiscation"[19].

2.2. Legal framework – from the Joint Action of 3 December 1998 to Directive 2014/42/EU

It was previously mentioned that over the last 20 years, confiscation was one of the priorities of the EU, being seen as an effective mean of combating transnational organized crime, a plague affecting all Member States.

The first EU instrument adopted in the field and generally recognized as being the prime attempt to regulate confiscation regimes was the Joint Action 1998/699/JHA of 3 December 1998, adopted by the Council on the basis of Article K.3 of the Treaty on the European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds from crime[20]. Focusing on substantial provisions, Article 1(2) was the most important, as it provided that "each Member State shall ensure that its legislation and procedures on the confiscation of the proceeds from crime shall also allow for the confiscation of property, the value of which corresponds to such proceeds, both in purely domestic proceedings and in proceedings instituted at the request of another Member State, including requests for the enforcement of foreign confiscation orders".

The Joint Action is relevant from at least two perspectives: first, it required Member States to regulate and enable value-based confiscation (and not merely confiscation of an asset in its present form, e.g., an identified asset of the offender). Secondly, it represented a punctual approach regarding the harmonization of confiscation regimes across Member States. The interest at the European level regarding the latter was observed in the following year, at the Tampere meeting and in the 2001 Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and proceeds of crime, which regulated again the need for value-based confiscation provisions at the national level of Member States.

Four years later, Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property was adopted - the most comprehensive approach towards harmonization at the European level. From the Preamble of the Framework Decision, the premises were set. First, it was stated that the existing instruments failed to achieve their goals, as there are Member States which were unable to confiscate the proceeds from all offences punishable by deprivation of liberty for

[19] J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 27-28. The author offers a very interesting reasoning for extended confiscation schemes, by drawing a comparison with the criminalization of money laundering, as in both cases "the moral imperative that no one should benefit from his crime" read in conjunction with the difficulties in probation lead eventually to public policy support for such mechanisms.

[20] Joint Actions were used under the Maastricht Treaty; the Treaty of Amsterdam (1997) abolished Joint Actions and introduced Framework Decisions and Decisions – see for details, A. Klip, *European Criminal Law. An Integrative Approach*, Cambridge-Antwerp-Portland: Intersentia, 2012, 54. A joint action was legally binding. Member States were allowed to take national action, but on the condition that the Member States refrained from taking any course of action that would impede with an adopted joint action. As well, the Member States were to notify the Council in advance on any action taken that might touch upon a joint action.

more than one year. Second, the aim of the instrument was to ensure that all Member States have efficient and effective rules governing confiscation of proceeds from crime, *inter alia*, in relation to the onus of proof concerning the source of assets held by a person convicted of an offence related to organized crime[21]. Summing up, Article 2 of the Framework Decision, entitled "confiscation", regulated the so-called criminal / ordinary / general / conviction-based confiscation, reiterating and enlarging the provisions of Article 1 (1) of the Joint Action of 3 December 1998 and Article 3 of Framework Decision 2001/500/JHA, requiring Member States to enable confiscation (in whole or in part, in specie or in value) of instrumentalities and proceeds. Article 3, of utmost importance for our analysis, regulated, for the first time, extended confiscation ("version 2005").

The 2005 version of extended confiscation proposed a complex mechanism, which represented a minimum standard (clause) and did not prevent Member States to adopt more severe provisions[22]. Confiscation was permitted if at least one of the conditions of the two alternative scenarios were met:

Scenario (1): Conviction for an offence committed within the framework of a criminal organisation

In this case, several sub-conditions needed to be fulfilled. First, the offence must have been committed within the framework of a criminal organisation, as defined in Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the EU. Second, the aforementioned offence must have been covered by one of the Council Framework Decisions provided by Article 3 (1) letter (a), the so-called "Euro offences". This offence was known as the "trigger offence", being the one that set the whole mechanism in motion.

Scenario (2): Conviction for an offence covered by Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism

In this case, no connection with a criminal organisation was needed.

For both scenarios, subsequent sub-conditions needed to be fulfilled: first, in all cases, the offence must have been of a nature that can generate financial gain. Second, if the offence was not money laundering, it must have been punishable with imprisonment of at least 5 to 10 years, or, be the case that the offence in question is money laundering, be punishable with imprisonment of at least 4 years.

Article 3 (2) of the Framework Decision provided three different methods for Member States to implement the new institution in their national legal framework. The methods were alternative and optional, but for each Member State it was compulsory to enable confiscation under at least one of the methods prescribed. In fact, as Johan Boucht noticed, all three methods envisaged by the European legislator "rested upon an assumption

[21] See, point (10) from the Preamble.

[22] See, *Extended Confiscation in the 2005 Framework Decision* in J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 33 et seq.

that individuals convicted of the relevant offences liable to give rise to economic benefit (…), could be suspected of having committed similar offences in the past"[23].

Method (1): The court is fully convinced that the property in question has been derived from criminal activities of the convicted person during a period prior to conviction for the offence, which is deemed reasonable by the court in the circumstances of the particular case;

Method (2): The court is fully convinced that the property in question has been derived from similar criminal activities of the convicted person during a period prior to conviction for the offence, which is deemed reasonable by the court in the circumstances of the particular case;

Method (3): It is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court is fully convinced that the property in question has been derived from the criminal activity of that convicted person.

A few comments must be made:

Firstly, the prior two methods are almost identical, the sole distinction being that the latter adds a cumulative element, namely, the similarity between the offences for which the defendant is convicted and the previous criminal activity from which the property in question derived. Both suffer from the same standard of proof requirement - for the court to even consider extended confiscation. Since the court must be "fully convinced" that the property was derived from (similar) prior criminal activities, one must but notice that this is fairly close to the regular standard of proof in criminal cases in order to convict the defendant. In this case, why not make use of the general / ordinary / conviction-based confiscation?

Secondly, with regard to the third method, it is not exactly clear who establishes that the value of the property is disproportionate to the lawful income of the convicted person. The first answer would be the national court, but we must observe that letter (c) makes explicit reference to the court only when reaching the conclusion that the property derives from criminal activities. *Per a contrario* – and having in mind the wording of letters (a) – (b) – it is possible for another actor to establish the disproportion. It is not clear who this person or institution might or could be – e.g., could it be the local tax administration, since it implies only a mathematical comparison between licit income and the value of properties? Did the European legislator want to leave this aspect at the latitude of each Member State? Apparently, the omission went unnoticed by the doctrine and, most probably, the reasons lie in the fact that in order for extended confiscation to be ordered, it is necessary for the court to be – once again – *fully convinced* that the property in question is derived from criminal activities. As such, annotating this provision, it was stated that although the standard of proof seems similar to the first two methods, the case is

[23] J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 34.

"somewhat" different: the standard is based on the relationship between the defendant's lawful income and the added value of his assets. Therefore, the model comes close to a "reversed burden of proof" in certain situations[24]. We are not sure this was the will of the European legislator, but we have to admit that it is the most convenient interpretation. On the one hand, it is definitely in favour of the defendant to have the court be the one which must establish the disproportion. On the other hand, only such an interpretation could elude the regular standard of proof which could normally permit the indictment of the offender for the previous criminal activity and, thus, allowing the court to juggle only with the conviction based ordinary confiscation.

All the above-mentioned comments and "inquires" were noticed in the years following the Framework Decision, in the process of its implementation. In a 2007 report regarding the status of the implementation[25], the Commission showed that most Member States are slow in putting in place mechanisms to allow widespread confiscation. The reasons were considered to be an apparent lack of clarity of the provisions, which "lead to piecemeal transposition". Moreover, the Framework Decisions' alternative criteria for extended confiscation might have *de facto* restricted the scope for mutual recognition, as national authorities will execute confiscation orders issued by other Member States only if these are based on the same ground(s) for confiscation applicable in the receiving Member States[26].

In 2008, the Commission had to acknowledge that although Framework Decision 2005/212/JHA aimed at ensuring that Member States will introduce effective rules on confiscation, including rules on the burden of proof with regard to the source of the assets concerned[27], the outcome was not a success. The Commission underlined in 2008 that the existing legal texts were only partially transposed, due to the fact that some provisions of the Framework Decision were not clear enough. The result was that transposition into national legislation was "patchy". As a conclusion, ten strategic priorities were proposed, all highlighting that confiscation is "one of most effective ways to fight organized crime". Among other action points aiming at ensuring that the EU continues to uphold the highest standards in this area, the Commission proposed: recasting the existing EU legal framework by improving its clarity and coherence, as well as further extending the existing legal

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[24] See, J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 34-35. In fact, this was exactly the solution embraced by the Romanian legislature, when transposing the provisions of the Framework Decision in national law, by Law no 63 of 2012 (published in the Official Gazette no 258 of 19 April 2012) – for more details, see F. Streteanu, "Consideraţii privind confiscarea extinsă", *Caiete de Drept Penal*, 2, 2012, 23 et seq.

[25] Report from the Commission pursuant to Article 6 of the Council Framework Decision of 24 February 2005 on Confiscation of Crime-related Proceeds, Instrumentalities and Property, Brussels, 17.12.2007, COM(2007) 805 final (available online at *https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52007DC0805*).

[26] See, J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 36; M. Simonato, "Extended confiscation of criminal assets: limits and pitfalls of minimum harmonisation in the EU", *European Law Review, 2016*, 729 et seq.

[27] See, Communication from the Commission to the European Parliament and the Council, *Proceeds of organised crime. Ensuring that "crime does not pay"*, Brussels, 20.11.2008, COM(2008) 766 final (available online at *https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0766:FIN:EN:PDF*).

concepts and introducing new provisions. The road was thus paved for the new Directive - 2014/42/EU.

2.3. Directive 2014/42/EU – the new standard for extended confiscation

Following its findings from 2008 and onwards, the Commission started working on a proposal aimed at remedying the inconsistencies sprung from Framework Decision 2005/212/JHA, but also from accompanying legislation[28]. According to the Explanatory Memorandum, the Commission started from the ten strategic priorities for future work and highlighted shortcomings in the EU legal framework (lack of implementation, lack of clarity of some provisions, lack of coherence between existing provisions) identified in its Communication on the proceeds of crime adopted in 2008. In that context, the Commission proposed a "(…) Directive laying down minimum rules for Member States with respect to freezing and confiscation of criminal assets through direct confiscation, value confiscation, extended confiscation, non-conviction based confiscation (in limited circumstances), and third party confiscation. It was stated that the adoption of minimum rules will further harmonize the Member States' freezing and confiscation regimes, and thus facilitate mutual trust and effective cross-border cooperation"[29].

The Commission underlined the consistency of the new proposal with other policies integrated in the general aim of providing better safeguards for taxpayers' money at EU level against fraud and corruption.

The Commission's proposal tried to encompass all types of confiscation regimes[30], but after serious arguments within the Council and the Parliament – especially concerning

[28] Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, Brussels, 12.3.2012, COM(2012) 85 final (available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0085&from=EN*). See a

[29] See, Explanatory Memorandum, General Context, p. 4.

[30] See, for a justification, the Commission Staff Working Paper, *Accompanying document to the Proposal for a Directive of the European Parliament and the Council on the freezing and confiscation of proceeds of crime in the European Union Impact Assessment*, Brussels, 12.3.2012, SWD (2012) 31 final (available online at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-is-new/news/pdf/1_en_impact_assesment_part1_v4_en.pdf). The Commission imagined four types of asset confiscation; type 1 assets are those amenable to ordinary confiscation proceedings (ordinary confiscation) ; type 2 assets are those not so amenable due to barriers to prosecution (barriers to prosecution); type 3 assets are those not so amenable due to insufficient evidence (insufficient evidence); type 4 assets are those not so amenable for both of these reasons (third party confiscation was seen distinct). As an operational objective, the Proposal wanted to harmonize all these types at the Member States' level in order to allow for easier mutual recognition. As well, the Commission wanted to extend the criminalization, which involved defining non-traditional crimes, which in turn meant that more assets were available for confiscation.

the safeguard of the presumption of innocence[31], the Directive was considerably revised compared to the initial wording[32].

Having all these in mind, we will focus only on the final version of the Directive, as it was adopted on April 3, 2014 by the EU Council and the Parliament. From the outset, we mention that we embrace Simonato's conclusion regarding the limits of the Directive – "due both to inner limits of the legal basis provided by Treaties and to policy consideration"[33]. As he pointed out, (at least) three aspects must be taken into account: *first*, the Directive aims only at the harmonization of national laws; second, the existing instruments which share the same harmonization objectives will remain in force if not covered by the Directive[34]; and *third*, the instruments mainly deal with material law – "substantive concept(s) of confiscation and the related procedural safeguards"[35]

Trying to synthesize the novelties of the Directive, as compared with Framework Decision 2005/212/JHA, we must mention the following:

2.3.1. A unique set of minimum rules for extended confiscation

[31] See, for more details, G. Arcifa, "The new EU Directive on Confiscation: a good (even if still prudent) starting point for the post-Lisbon EU Strategy on trafficking and confiscating illicit money", *Università di Catania, Online Working Paper*, 64, 2014, (available online at: *http://www.cde.unict.it/sites/default/files/Quaderno%20europeo_64_2014.pdf*).

[32] See also, J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 38, in the context of analysing Article 5 from the Directive.

[33] M. Simonato, "Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?", op. cit., 220. The author considers that the reason why the Directive does not address mutual recognition lies, probably, in the fact that failure of mutual recognition is ascribed to insufficient harmonization. As a supplementary argument, we send to the Commission's notes that the alternative models (the 3 methods we presented in the previous section) for extended confiscation were the main reason for piecemeal transposition in the domestic laws of Member States, causing a rupture in mutual recognition, as each state recognized confiscation orders similar to the ones from its own legislation – see, Communication from the Commission to the European Parliament and the Council, *Proceeds of organised crime. Ensuring that "crime does not pay"*, op. cit., p. 4.

[34] See also, details, G. Arcifa, "The new EU Directive on Confiscation: a good (even if still prudent) starting point for the post-Lisbon EU Strategy on trafficking and confiscating illicit money", op. cit. The directive covers all the offences mentioned in Article 83 TFEU (the so called "Euro offences" according to Simonato -) and Article 14 explicitly provides that Joint Action 98/699/JHA, point (a) of Article 1 and Articles 3 and 4 of Framework Decision 2001/500/JHA, and the first four indents of Article 1 and Article 3 of Framework Decision 2005/212/JHA, are replaced by the Directive for the Member States bound by this Directive. Therefore, Article 2, 4 and 4 of the Framework Decision 2005/212/JHA will remain in force for criminal activities which fall outside the scope of the Directive [the first scenario will be of offence punishable by deprivation of liberty for more than one year, as provided by Article 2(3) from the Framework Decision]. See also on this M. Simonato, "Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?", op. cit., p. 220. Arcifa questions such a technique, which permits a former third pillar act to "survive", as she considers it a threat to the "principle of legal clarity in a domain (judicial cooperation in criminal matters) which may affect fundamental rights". The future will show if such a "technique" will lead to practical problems, but from the perspective of our analysis this will probably not be the case – the main problem will be with Article 2 from Framework Decision 2005/212/JHA (although, indeed Article 4 and 5 will "survive" as well), which regulate ordinary confiscation, not extended confiscation.

[35] Aspects considered "the core" of EU attention – M. Simonato, "Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?", op. cit., p. 220.

The major hindering behind Framework Decision 2005/212/JHA was the alternative options for extended confiscation provided by Article 3, which led to a restriction in the functioning of mutual recognition of confiscation orders. Although the Framework Decision established alternative minimum rules for extended confiscation in order to make the implementation process smoother and also provide the possibility for Member States to freely apply the desired "methods", the outcome was unsuccessful. As already noted by the Commission in its official reports, Member States usually relied on one model and consequently executed confiscation orders issued by another Member only if the basis was the same.

In contrast, the Directive provides for a unique mechanism, being relatively close to the one proposed by Article 3 (2) letter c) from Framework Decision 2005/212/JHA (the disproportion between the value of property and the lawful income). According to Article 5 of the Directive, *Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct*.

In order for extended confiscation to be ordered, a set of sub-conditions need to be fulfilled.

a) *First*, the offender must be convicted for one of the specific crimes provided by Article 5(2) of the Directive, which defines the notion of 'criminal offence' as including at least the following:

- active and passive corruption, both in the private and public sector;
- offences relating to participation in a criminal organization, at least in cases where the offence has led to economic benefit;
- offences relating to child pornography;
- offences relating to illegal system interference and illegal data interference;
- any other criminal offence that is punishable, in accordance with the relevant instrument mentioned in Article 3 of the Directive or, in the event that the instrument in question does not contain a penalty threshold, in accordance with the relevant national law, by a custodial sentence of at least four years.

When analyzing this condition, Johan Boucht refers to a conviction for a "relevant triggering offence"[36], a good denomination, as it represents the first element, which – if fulfilled, puts in motion the mechanism for extended confiscation.

In this context, a few comments must be made regarding the triggering offence condition.

[36] J. Boucht, The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds, op. cit., 38. The triggering offences are, as Simonato points out, the "Euro offences", mentioned in Article 83 (1) TFEU – see, M. Simonato, "Directive 2014/42/EU and Non-Conviction Based Confiscation. A Step Forward on Asset Recovery?", op. cit., p. 220.

Article 5 (1) requests another element to be fulfilled, namely that the offence in question is liable to give rise, directly or indirectly, to economic gain. This represents a rephrasing of the sub-condition from Article 3 (1) final from the Framework Decision 2005/212/JHA, where it was provided that the triggering offence "(...) is of such nature that it can generate financial gain". Since no problems of interpretation were noticed when the Framework Decision was in force, most probably the condition will not give rise to any difficulties in practice. In fact, just looking over the offences provided by Article 5 (2) and Article 3 of the Directive, one can notice that a person will usually commit such a crime in order to try to obtain one form or another of economic benefit.

Furthermore, we underline the fact that the person must be *convicted*. Hence, a question arises. Must there a conviction judgment be pronounced, or it suffice to have a judgment where it is established that the offence was committed by the defendant? Strictly referring to the particular case of the Romanian Code of Criminal Procedure, starting with the year 2014, there are several solutions that reflect the commission of an offence by a certain person, but the finality is not a conviction - the waiver of penalty and the postponement of penalty judgments. In these cases, the court deems that the person indicted did commit the crime. Looking over the French version of Article 5 (1), we see that the *conviction* is now *reconnue coupable*, which would translate in found guilty. As such, attention must be given by Member States when transposing this condition into national legislation. In our opinion, the French version is more accurate and corresponds to the EU's will. Still, the current normative version of extended confiscation in the Romanian law refers only to the conviction judgment (*condamnare* in Romanian), so the measure cannot be imposed, even if all the other conditions are met, in cases of waiver or postponement of penalty[37].

b) *Second*, provided the defendant was convicted for a "Euro crime" (triggering offence), the analysis moves forward in checking if the property in question is derived from criminal conduct.

The sub-condition must be read in comparisons with Article 3 (2) letters a) to c) from Framework Decision 2005/212/JHA, in order to identify the novelty elements with ease. The standard of proof is lowered: from the initial "fully convinced" to the "satisfaction" of the court that the property in question derives from criminal conduct.

The court can reach such a conclusion by comparing the value of property and the lawful income of the convicted person; if a disproportion is found, there is a presumption that the property derives from criminal conduct. We underline that it is the court (and only the court) who establishes that the property derives from criminal activity [as opposed with the wording of Article 3 (2) c) from the Framework Decision where it was not clear who "establishes"].

[37] Most probably, the reason behind this lie in the fact that Framework Decision 2005/212/JHA was transposed into Romanian law in 2012, when the former Criminal Code and Criminal Procedure Codes were in force. At that time, in cases where the offender was found guilty, the court had no other solution than to convict him. See Law no 63 of 2012 for the amendment of the Criminal Code and of Law no 286 of 2009 regarding the Criminal Code, published into Official Gazette no 258 from 19 April 2012.

Boucht briefly notes in a footnote "that the provision does not require that the onus of proof be shifted"[38], statement which must be analyzed in conjunction with his findings regarding the Norwegian scheme "which is based on a reversed burden of proof, so that confiscation may be ordered unless the defendant can prove, on a balance of probabilities, that the assets in question have been legitimately acquired"[39]. It is our opinion that, although not as detailed as the domestic (Norwegian) one, the EU mechanism proposed by the Directive will work similarly. At this stage, the court has concluded that: (1) the predicate or triggering offence has been committed by the defendant; (2) the offence in question is able to give rise, directly or indirectly, to economic gain; (3) the value of assets in question is objectively disproportionate to the cumulative lawful income of the defendant[40]. Hence, all these already proven facts justify the court to draw a simple assumption: namely that the value property which does not have an equivalent in the incomes of the defendant derives from previous criminal conduct[41].

In fact, looking at the Preamble of the Directive, we think that this interpretation correspondents with the general aim of confiscation as proposed in this instrument, as the need for confiscation was affirmed "(...) where there is insufficient evidence for a criminal prosecution, if a court considers on the balance of probabilities that the property is of illicit origin"[42]. The balance of probabilities, mentioned both in the Preamble and by Boucht when focusing on the Norwegian model, are another denomination for simple assumptions; which, indeed, do not imply a reverse burden of proof, but allows the court to reach the conclusion (either inductive or deductive) that the property derives from criminal conduct on the basis of previous particular elements of the case (including the disproportion aspect).

2.3.2. The triggering offence – a broader approach

Although partially touched upon in the previous sections, the triggering (or predicate) offence which enables extended confiscation must be analyzed distinctively. Comparing the "target area" of Article 3 of the Framework Decision 2005/212/JHA and that of Article 5 of the Directive, it is clear that the scope of extended confiscation was

[38] See J. Boucht, "The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds", op. cit., p. 39, footnote 38.
[39] Idem, p. 44.
[40] This will probably consist in a mathematic comparison between the general income of the offender and the value of property in question. We do not consider it to be a reverse burden of proof when the defendant bring proofs that there is no disproportion (e.g., he or she offers information about rentals initially ignored by the authorities which can add the total lawful income), as the case starts from the premise that there is a disproportion between these two. And, to be even more explicit, this conclusion (premise) has been *proved* by the authorities, by collecting info and data on the income of the offender and the value of his/hers properties.
[41] This is the case both in the Romanian system and in the Spanish one. For more details, see, F. Streteanu, "Considerații privind confiscarea extinsă", op. cit., 16-17. Having in mind the fact the Romania implemented the provisions of Framework Decision 2005/212/JHA only in 2012, the (alternative) model selected was the one closest to the one regulated by the Draft Proposal of the Directive, which was already part of the public debate.
[42] Preamble, point (12).

considerably enlarged[43]. If the previous instrument was mainly based on the criminal organisation framework and on terrorism, the Directive refers to these offences as one of the categories mentioned by Article 5 (2) letter (b) – organised crime – or letter (e), read in conjunction with Article (3) (e), Council Framework Decision 2002/475/JHA on 13 June 2002 on combating terrorism.

In the context of the triggering offence (namely the one for which the person is convicted), another comment must be made. We already presented the unique mechanism envisaged by the Directive and showed that this partially represents an inspired rephrasing of Article 3 (2) letter (a) to (c) of Framework Decision 2005/212/JHA. Another aspect that helps enlarge the area in which extended confiscation can be ordered is that there is no need to identify a similarity between the triggering offence and the prior criminal activity from which the property in question derived. As such, the "similarity" principle enshrined in Article 3 (2) letter (b) from Framework Decision 2005/212/JHA was abandoned.

To conclude on this point, the scope of the Directive was significantly enlarged, both from the perspective of the predicate offence and from the one of the prior criminal activity of the defendant.

2.3.3. More accurate definitions

Another aspect which enhances the functioning of extended confiscation is the more precise definitions which will apply, according to Article 2 of the Directive.

The term "proceeds" from Article 2 (1) makes reference to "economic advantage derived directly or *indirectly* from a criminal offence". We underlined "indirectly" as this is a new element, comparing the text to the 2005 version[44]. Although apparently we are in the presence of a minor amendment, the new wording will permit an easier functioning of extended confiscation (e.g., in cases where the defendant did not commit – not even as an accomplice or instigator – the previous criminal activity from which the property in question derived *indirectly*[45]). Even more, the final thesis of Article 2 (1) provides that proceeds "may consist of any form of property *and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits*". Once again, the latter (italic) part is new when compared to the similar text from the 2005 Framework decision and highlights the aim at EU level to allow confiscation at the subsequent levels, even after the initial assets (benefit) were transformed or reinvested, either by the defendant or by third parties. This is a step forward to allow both extended confiscation and – as we will see in the following section – third party confiscation, seen as a distinct and new institution.

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[43] See also, E. Calvanese, "Enforcement of Confiscation Orders", in R.E. Kostoris (ed.), *Handbook of European Criminal Procedure*, Springer International Publishing, 2018, 439.

[44] See, Article 1 of the Framework Decision 2005/212/JHA, according to which "proceeds mean any economic advantage from criminal offences. It may consist of any form of property as defined in the following indent''.

[45] For a similar conclusion, but drawn from the wording of Article 5 from the Directive, see J. Boucht, *The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds*, op. cit., 40; M. Simonato, "Extended confiscation of criminal assets: limits and pitfalls of minimum harmonisation in the EU", op. cit., p. 734.

With regard to the same paradigm of enabling the function of enlarged extended confiscation and of a brand new third party confiscation, Article 2 (4) defines confiscation as "(...) a final deprivation of property ordered by the court in relation to a criminal offence". When comparing the definition with the previous one, found in Framework Decision 2005/212/JHA[46], we note instantly that there is no more reference to the nature of confiscation, either as a penalty or another type of measure. As a direct effect, it will be easier for Member States to transpose in their national legislation the new form of extended confiscation and, especially third party confiscation. In this respect, it will be possible to regulate and define it according to the particularities of each national system, meaning that it will not necessarily be of a criminal nature (either seen as a penalty or another type of measure, e.g. safety measure in some systems). These particular aspects, although of significant importance in the case of extended confiscation, are of utmost importance when dealing with third party confiscation, this being the reason why we will focus more on it in the following section, when analyzing Article 6 of Directive 2014/42/EU - "confiscation from a third party".

3. Third party confiscation

3.1. Preliminary aspects

The connection between third parties and confiscation measures was simply mentioned in the Preamble of Council Framework Decision 2005/212/JHA. Accordingly, "pursuant to paragraph 50(b) of the Vienna Action Plan, within five years of the entry into force of the Treaty of Amsterdam, national provisions governing seizures and confiscation of the proceeds from crime must be improved and approximated where necessary, taking account of the rights of third parties *in bona fide*"[47].

A closer look at Article 3 (3) from the 2005 Framework Decision reveals that in the context of extended powers of confiscation, the idea to confiscate from other parties than the defendant was inserted. Without calling it third party confiscation, the possibility for Member States to adopt "(…) the necessary measures to enable confiscation, in accordance with the conditions set out in paragraphs 1 and 2, either wholly or in part, for property acquired by the closest relatives of the person concerned and property transferred to a legal person in respect of which the person concerned — acting either alone or in conjunction with his closest relatives — has a controlling influence. The same shall apply if the person concerned receives a significant part of the legal persons' income". Article 3 (4) made a step back, by stipulating that "Member States may use procedures other than criminal procedures to deprive the perpetrator of the property in question". First, this kind of confiscation seemed to still be linked to the defendant (so, it wasn't *in rem*, following the property, but still *in personam*, following the person of the perpetrator); second, it provided

[46] According to which "confiscation means a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property".
[47] See Preamble, point (3).

a very large legislative framework for Member States, which could include civil law, making it less a criminal law measure or penalty. *Nota bene!*, Article (1) defined confiscation as a penalty or measure ordered in relation to a criminal offence.

When presenting the reasons behind the lack of success of the 2005 Framework Decision, emphasis was put on the alternative model for extended confiscation. Still, the Commission already put forward yet another aspect that hinders confiscation in practice: third parties. It was revealed that the JHA Council Conclusions on confiscation and asset recovery adopted in June 2010[48] called "for a more coordinated approach between Member States to achieve a more effective and widespread confiscation of criminal assets". In particular, the Commission was called "(…) to consider strengthening the legal framework in order to achieve more effective regimes for third party confiscation and extended confiscation."

As a result, the Commissions' Communication "An Internal Security Strategy in Action" stated that the Commission will propose legislation to strengthen the EU legal framework on confiscation, in particular to allow for more third party confiscation and extended confiscation.

At that time, *third party confiscation* was considered to involve "(…) the confiscation of assets that have been transferred by an investigated or convicted person to a third party"[49]. The Commission argued the need for third party confiscation in detail, showing that "(...) criminals often transfer their assets to knowing third parties as soon as they come under investigation, in order to avoid confiscation[50].

The Commission noted that Member States' national provisions on third party confiscation are diverging, aspect which hampered the mutual recognition of freezing and confiscation orders on assets transferred to third parties. Still, "in order to meet the requirements of proportionality and protect the position of a third party acquiring property in good faith", the Proposal did not bring minimum harmonization provisions on third party confiscation in all cases. Instead, it merely required third party confiscation "(...) to be available for the proceeds of crime or other property of the defendant received for a price lower than market value and that a reasonable person in the position of the third party would suspect to be derived from criminal activities or to be transferred in order to circumvent the application of confiscation measures". The Proposal clarified that the "reasonable-person-test" must be based on concrete facts and circumstances to prevent arbitrary decisions. Moreover, third party confiscation should be possible only following an assessment, based on specific facts, that the confiscation of property of the convicted, suspected or accused person is unlikely to succeed, or in situations where unique objects must be restored to their rightful owner[51].

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[48] See, Council document 7769/3/10, quoted in Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, Brussels, 3.

[49] See, footnote 9 from the Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, Brussels, 3.

[50] See Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, Brussels, 12.

[51] See, *Third party confiscation* in the Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, Brussels, 11-12.

3.2. Confiscation from a third party - Article 6 of Directive 2014/42/EU

The original version of Article 6 from the Proposal was significantly amended in the course of negotiations; for reasons already mentioned when analyzing extended confiscation, we will focus only on the final version, as provided by Article 6 of the Directive. According to the provision in question, "Member States shall take the necessary measures to enable the confiscation of proceeds, or other property, the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value".

The Preamble of the Directive gives few indications regarding the new institution. As a consequence of the generalized practice where defendants transfer properties to knowing third parties with a view so as to avoid confiscation, rules were necessary "(...) to allow for the confiscation of property transferred to or acquired by third parties"[52]. Examples were given: acquisition by a third party refers to situations where property has been acquired, directly or indirectly, for example through an intermediary, by the third party from a suspected or accused person, including when the criminal offence has been committed on their behalf or for their benefit, and when an accused person does not have property that can be confiscated. As well, a minim standard was set - confiscation should be possible *at least* in cases where third parties *knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation*, on the basis of concrete facts and circumstances, including that the transfer was carried out free of charge or in exchange for an amount significantly lower than the market value.

The Preamble also provides that third party confiscation should extend to both natural and legal persons, a logical approach, and that the rights of *bona fide* third parties should not be affected. Regarding the *bona fide* third parties, we mention that Article 6 (1) stipulates that third party confiscation should not prejudice their rights[53], while Article 8 provides an exhaustive list of safeguards[54].

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[52] See, Preamble, point (24).

[53] As Arcifa points out, it is worth mentioning that the Parliament has attempted to take legislative measures in order to prosecute persons who fictitiously attribute ownership and availability of property to third parties, but the amendment was rejected. See, G. Arcifa, "The new EU Directive on Confiscation: a good (even if still prudent) starting point for the post-Lisbon EU Strategy on trafficking and confiscating illicit money", op. cit.

[54] Our analysis will not focus on *bona fide* third parties, as in this case, the premise is that Article 6 (1) of the Directive will not apply. As well, the safeguards provided by Article 8 will not make the object of our analysis. For a comprehensive view of the application of fundamental principles in the case law of ECHR – see R.D. Ivory, "The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases", op. cit., pp. 151-164; M. Simonato, "Confiscation and fundamental rights across criminal and non-criminal domains", *ERA Forum, 2017,* 365-379; A. Balsamo, "The content of fundamental rights" in R.E. Kostoris (ed.), *Handbook of European Criminal Procedure*, op. cit., 166.

A very important aspect is stipulated briefly only in the Preamble, where point (25) affirms that: "Member States are free to define third party confiscation as subsidiary or alternative to direct confiscation, as appropriate in accordance with national law". The heterogeneous approaches at the national level regarding third party confiscation made it impossible for the EU legislator to propose a more precise tool. As such, as already recognized in the Explanatory Memorandum from the initial Proposal, the current state of play of third party confiscation is comprised of a minimum standard which aims at confiscating directly from third parties. The nature or characteristics of the measure is irrelevant when transposing the provision into national legislation, an aspect which allows Member States to adapt the institution in accordance with the domestic system. What is important is to have a tool which permits confiscation *in rem*, namely to follow the property in question.

3.3. The minimum standard required by Article 6

Although the Directive did not introduce minimum harmonization provisions on third party confiscation in all cases, explicitly to meet the requirements of proportionality and to protect the position of third parties acquiring property in good faith, a minimum standard can be drawn from the "crippled" version of Article 6[55].

When trying to imagine exactly how this institution is supposed to function, we will make use of the notion used in the Explanatory Memorandum of the Proposal, namely the *reasonable-person-test*. When the conditions of this test are applicable, the third party confiscation will be ordered. As such, the cumulative conditions of third party confiscation can be identified through a *per a contrario* interpretation of the aforementioned test.

Referring only to the provisions of Article 6, we consider that the court will verify the following "steps", in a chorological order:

(1) ordinary or extended confiscation conditions are met, as regards the defendant;
(2) the property in question was transferred by the defendant to a third party or was acquired by a third party;
(3) the third party knew or ought to have known that the purpose of the transfer of property was to avoid confiscation.

In cases in which all these requirements are met, third party confiscation will operate, directly from the third party. If the first two "steps" are relatively easy to verify, the third one is – without a doubt – the most difficult and in it lays the "core" of third party confiscation. This last step is actually the reversed *reasonable-person-test* and it will enable confiscation provided that the concrete facts and circumstances of the case demonstrate to the court that the (third) party acted in ill-faith. Such ill-faith consists of knowledge or even gross ignorance (as Article 6 regulates even the case where the person "ought to have known") that the transfer of property was intended to avoid confiscation (either ordinary or

[55] Crippled as in comparison with the corresponding Article 6 from the Proposal.

extended) from the defendant. Article 6 (1) mentions some elements that can help the court in establishing ill-faith, namely acquisition free of charge or for an amount significantly lower than the market value. In these cases, a reasonable person would suspect the property in question to be derived from criminal conduct or to be transferred in order to circumvent the application of confiscation measures and therefore would abstain from the acquisition or receiving of the property in question[56].

As it becomes apparent, the "reasonable-person-test" must be based on concrete facts and circumstances to prevent arbitrary decisions. After its completion, if the court considers that the third party did not act "reasonable", all the conditions for the application of Article 6 are fulfilled[57].

4. Conclusions. The German and the Romanian case studies

The complexity of both extended confiscation and third party confiscation has created a number of problems at national level, in the transposition phase. The problems encountered by Member States led to delays in the transposition schedule, from October 2015 to 2016. The postponement did not help and on 24 November 2016, the Commission started the infringement procedure according to Article 258 TFEU against the majority of the Member States. The procedure is still ongoing regarding several states, which failed to transpose the Directive, even at this time[58].

The case studies refer to Germany and Romania since these two reflect "opposing" realities regarding the fulfilment of transposition obligations. Although both states were part of the states that on 24 November 2016 were questioned by the Commission, requesting further information, now Germany transposed the Directive, while Romania is in the middle of an ongoing infringement procedure as it did not succeed in transposing the entirety of instrument[59].

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[56] The initial version of Article 6 from the Proposal contained several built-in limitations of third party confiscation. The measure was designed to be available only following an assessment, based on specific facts, that the confiscation of property of the convicted, suspected or accused person is unlikely to succeed, or in situations where unique objects must be restored to their rightful owner. The Directive does not provide for any restrictions other than the prejudice of *bona fide* third parties, according to Article 6 (2).

[57] Arcifa considers that the person who receives a property under such conditions "has a reasonable suspicion concerning the illicit origin of the same property" – see G. Arcifa, "The new EU Directive on Confiscation: a good (even if still prudent) starting point for the post-Lisbon EU Strategy on trafficking and confiscating illicit money", op. cit.

[58] For up to date information see, *Browse infringements of EU Home Affairs law* (available online at: *https://ec.europa.eu/home-affairs/what-is-new/eu-law-and-monitoring/infringements_en?country=All&field_infringement_policy_tid=All&field_infringement_number_title=*).

[59] See Infringement number 20160813, last checked on April 4, 2019 (available online at: *http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&decision_date_from=&decision_date_to=&title=&submit=Search&r_dossier=20160813*).

4.1. The German model and the July 2018 Romanian proposal

At this time, Germany seems to be the only Member State which fulfilled all its obligations regarding the transposition of Directive 2014/42/EU, or at least it is the only one which communicated all the relevant information. According to the European Judicial Networks' website[60], Germany has fully implemented the Directive in its domestic law in July 2017, by amending the Criminal Codes and regulating the (new) extended confiscation and the possibility of third party confiscation[61].

On the other side, we have the Romanian "model". Although communication was made to the Commission, arguing that the Directive was transposed, in fact, there was a merely partial transposition of Articles 10 and 11 from the Directive.

Until recently, various forms of draft proposals circulated, but all referred only to extended confiscation, leaving third party confiscation completely behind. The main reason for such an approach was the erroneous belief of Romanian law makers, partially backed up by a wrong case law application, that third party confiscation is somewhere included in either ordinary or extended confiscation. As an argument, it was invoked that both ordinary and extended confiscation mention that the court can consider the value of property transferred to third parties. What apparently is being ignored is that both types of confiscation are regulated by the Romanian Criminal Code as safety measures, which can be ordered only against the defendant (the person who committed an act regulated by Criminal Law and who, subsequently is blameworthy)[62]. Even more, in cases of extended confiscation, the defendant must be convicted by the court (so, the court must additional establish his or her guilt)[63].

Albeit such erroneous interpretations, one must admit that at the given moment, the Romanian legislation does not permit third party confiscation. In order to enable it, the legislator must understand that a coherent approach is needed, depending on the nature of the desired third party confiscation in the new legislation.

If the option is to regulate it as a safety measure, besides introducing a new type of confiscation, the first amendment should target the nature of the safety measures, providing

[60] See *https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=126*.

[61] See *Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung*, Bundesgesetzblatt Teil 1 (BGB 1), Nummer 22, 21.04.2017 (available online at: *ttps://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*%5b@attr_id=%27bgbl117s0872.pdf%27%5d#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl117s0872.pdf%27%5D__1509524157099*). For the reasons presented in the Foreword, we will not focus on these provisions, as the German National Report will contain a section dedicated to an in-depth analysis of these substantial law aspects.

[62] See also, M. Armaşu, "The Extended Seizure, Comparative Analysis between the Current Regulation and Changed Imposed by Directive 2014/42/EU, of the European Convention on Human Rights Perspective", *Revista Forumul Judecătorilor*, 2014, 184 et seq. The author underlines not only the nature of confiscation as a safety measures, but its character as a penalty, accordingly to the jurisprudence of the ECHR.

[63] Such an approach was met in the case law of the Bucharest Court of Appeal in two major criminal cases involving important politicians. In both cases, the court ordered ordinary confiscation from third parties (although these weren't even parties in the trial), probably applying the maxim "the end justifies the means". For a critique, see D. Nițu, "Confiscarea extinsă. Confiscarea specială. Confiscarea de la terți", *Caiete de Drept Penal*, 4, 2017, 56-61.

a new broader definition, in order to include third parties, not just offenders (as it is now, according to Article 107 of the Criminal Code).

If, following the suggestions from the Preamble of the Directive, third party confiscation will be regulated as subsidiary or alternative to confiscation, a new category of measures will probably need to be provided in the Criminal legislation[64]; among which, third party confiscation is the first.

At the current time, the Romanian Parliament just adopted a new draft proposal, amending *inter alia*, the Criminal Code[65]. It is the most complex attempt until now in order to transpose Articles 5 and 6 of the Directive, but yet again, the proposal is plain wrong from the outset, concerning both types of confiscation:

- first, there is no amendment to the nature or definition of safety measures and no new category of measures are introduced – as such, apparently, third party confiscation seems to be lost during the drafting process;
- second, extended confiscation – although partially amended in order to correspond to the wording of Article 5, is actually hampered from the beginning, as the standard of proof required for the court regarding the commission of previous criminal activities by the offender (other than that for which he or she stands trial) is the "fully convinced one"[66]; as well, the proposal adds to the Directive and requests that the offence for which the conviction is pronounced and the prior criminal activities to be of the same nature[67];
- finally, third party confiscation – without a denomination – seems to be now regulated by the last two paragraphs of Article 112^1. In fact, once again, the Romanian legislator proves to have an erroneous understanding on the fundamentals behind third party confiscation. By inserting provisions from Article 6 of the Directive within the national extended confiscation framework, again, extended confiscation will be able to target only the convicted person[68].

In September 2018, the Constitutional Court issued its decision and considered that some of the aforementioned amendments do not comply with the wording of the Romanian

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[64] For an example of how third party confiscation is regulated in candidate states for EU accession, see B. Misoski, "The impact of the EU Directive 2014/42/EU on freezing and confiscation of instrumentalities and procedees of crime to the Macedonian criminal justice system", *EU and Comparative Law Issues and Challenges Series*, 2, 2018, 364.

[65] See Draft Proposal PL-x nr. 406/2018 amending the Criminal Code and the law on corruption (available online at: *http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=17241*). The proposal was challenged to the Constitutional Court for several issues by the Romanian High Court of Cassation and Justice, the President and a number of 110 members of the Parliament from parties pertaining to the opposition.

[66] In fact, this was one of the arguments of the High Court of Cassation and Justice when challenging to the Constitutional Court the draft proposal. It was correctly underlined that under these auspices, the offender can be convicted for the previous criminal activity and, as a consequence, ordinary confiscation can be imposed (available online at: *http://www.cdep.ro/proiecte/2018/400/00/6/sesiziccj406.pdf*).

[67] This was one of the arguments invoked by the opposition when challenging the draft proposal at the Constitutional Court (available online at: *http://www.cdep.ro/proiecte/2018/400/00/6/sesizpnlusrpmp406.pdf*).

[68] Actually, this was one of the arguments invoked by the Romanian president when challenging the draft proposal at the Constitutional Court (available online at: *http://www.cdep.ro/proiecte/2018/400/00/6/neconPR406.pdf*).

Constitution[69]. Regarding extended confiscation, the Court criticized the new standard of proof required and it underlined that the Romanian legislator makes confusion between criminal confiscation and extended one; further, it added that such an approach hampers the application of Directive 2014/42/EU[70]. From the perspective of third party confiscation, the Constitutional Court considered that the new introduced paragraphs of Article 112^1 regulate "distinct normative hypothesises", other than extended confiscation[71]. So, the Court was not troubled that the general normative framework on safety measures was not amended, by providing a new definition or by introducing a new category of measures.

Following the publication of Decision no. 650, the draft proposal needs to be amended once again, in order to fully comply with the conclusions and the reasoning of the Court.

4.2. The impact of the new provisions. The future role of the Court of Justice of the European Union.

As a final conclusion, we opt for turning the focus of the discussion in another direction. If, until now, the analysis checked the EU legislations' evolution and issues of transposition, the premise is now on the interpretation of the aforementioned legislation on extended and third party confiscation, as transposed in the national legislation of Member States. For this, the Court of Justice of the European Union will have to embark on a pivotal mission and there are already signs that Directive 2014/42/EU will be on the spotlight, just as one time, the EAW and then the *ne bis in idem* principle were.

As a final aspect, regarding the future (and vital) role of the Court, we send to the request for a preliminary ruling recently referred by a Bulgarian court[72]. The questions raised refer to numerous provisions from the Directive, but for our analysis, it presents particular interest questions no. 4 and no. 5 on extended and third party confiscation. The Bulgarian court asked whether:

- Article 5(1) of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union is to be interpreted as meaning that a right to property may be withdrawn, as having been directly or indirectly obtained by way of a criminal offence, on the sole ground of the discrepancy between the value of a person's assets and his lawful earnings, in the case where there is no final criminal

[69] See Decision no. 650 from 25 October 2018, published in the Official Gazette no. 97 from 7 February 2019.
[70] See paragraphs 401 – 406 from the decision.
[71] See paragraph 413 from the decision. The Court found no irregularity in the fact that the case of third parties are dealt by both paragraph 3 of Article 112^1 and paragraph 9. In its opinion, paragraph 3 covers extended confiscation, and the reference to third party is made only in order to settle the exact amount needed to be confiscated from the convicted person. In that regard, the amendment brought to paragraph 3, namely that the third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, was also considered unconstitutional as at stake is not the confiscation from third parties (see paragraphs 410 – 412).
[72] See Request for a preliminary ruling from the Sofiyski gradski sad (Bulgaria), 3 April 2018, case C-234/18 (available online at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CN0234&from=EN*).

judgment finding that the person concerned committed the criminal offence in question?

- The provision contained in Article 6(1) of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union are to be interpreted as meaning that it provides for confiscation from third parties as an additional or alternative means of direct confiscation or as an additional means of extended confiscation?

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