

The Adjustment of Special Seizure to the European Criminal Law

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Abstract: Responding to international requests, Romania has recently modified the internal regulation as regards special seizure, generalizing the possibility of confiscation by equivalent. Special seizure in comparative law has a special legal status, appeared controversies concerning the true legal nature of special seizure. Thus, the majority view is that seizure is a special criminal sanction, not that of a criminal sanction, more as part of additional penalties than as part of safety measures.

Keywords: safety measures, additional penalties, legal nature, confiscation by equivalent

Special seizure is regulated by the Romanian criminal legislation as the only patrimonial and preventive safety measure, which ordering *in rem not in personam*, like of the other safety measures.

In **French criminal legislation**, *confiscation of a thing is a complementary penalty* and it meets both in enumerations of penalties privative and restrictive of rights, and also in complementary penalties. Also, in French legislation there is the possibility that seizure measure to be ordered separately, without any main penalty, similar with Romanian legislation. Special seizure is characterized by ones authors, like a safety measure more than a penalty (Desportes Fr., 1998, p. 647). In the same time, another part of doctrine, like as criminal law itself, characterized as a complementary penalty (Robert, 1999, p. 75).

French criminal law assigned to safety measures a very modest role, has the nature of safety measures, some complementary measures like as confiscation of dangerous assets, nature recognized by law case also to the other complementary measures, like interdiction of being in some localities, retraction of driving license, interdiction of exercising some professions (Phillipe, 1994, pp. 109-110).

Especially, special seizure regulate the *„seizure penalty is mandatory for some assets qualified by law or by regulation, as dangerous or harmful”*. As well, confiscation is

ordering on asset which served or was intended to serve for commit crime or by asset which is its product, except objects which could gave back to injured person. Actually, seizure can take place to any mobile object indicated by law or by regulation which punish a certain category of crimes.

In **Belgian criminal doctrine** is making differences between seizure as a penalty and seizure as a safety measure, measure which refers to dangerous objects which must be retracted from circulation even these not belong to perpetrator. In terms of *custom seizure*, this has a mixed nature, both as penalty and as restoring measure over the injury to authorities' tax. Law on customs and duties provides the possibility of vehicles confiscation removed from customs taxes, or payment equivalent amount of that vehicle. (Hennau, 1995, pp. 355-358).

Italian legislation classify the safety measures in *personal* safety measures and *economic* safety measures (bail for good behaviour and seizure) (Fiandaca, 1995, p. 765).

The objective of special seizure is removing of dangerous assets which are dangerous by themselves or in connection with committing criminal acts stipulated by law.

Special seizure is *optional* when is left to judge assessment and is *mandatory* when referring to assets which constitutes the crime price, assets whose production, use, ownership or alienation is a crime, even was not pronounced a sentence. Mandatory seizure is not regarding to assets which are the crime price, if these belong to a person who has nothing to do with the act (Padovani, p. 445).

Dutch criminal law proceeds an extension of the seizure proceedings about assets resulting for committed crimes for them commission has been an conviction decision, on assets confiscation resulting from similar acts on which are solid evidence that would have been committed by the same person, without need that for those acts have been even started a criminal procedure. In this case, connection between the suspect and the crime from which resulting unlawful benefits is enough to order special seizure. Dutch law does not specify whether the suspect of committing such illicit behaviour has the opportunity to bring evidences to dismantle these solidly indices invoked by the judicials, but in practice was noted that such evidence was admitted such proofs, at least to decrease the amount were to be confiscated (Golobinek, 2007, p. 56).

German criminal legislation provides that seizure measure, can ordered by the court on authors assets, on instigators or accomplices, when there is assumption that the assets were a result of committing unlawful acts, or were received for committing crime. When assets, for some reasons cannot be seized, special seizure will be ordered by equivalent amount.

Unlike the situation enshrined by Dutch Criminal Code, in Germany, if after issuing a confiscation order in considering a specific unlawful act committed as author, instigator or accomplice, confiscation of assets resulting from an act, other than covered by the order, it not be made, only if will be issued another which aimed especially that behaviour.

Like Romanian legislation, seizure measure from German Criminal Code requires the existence of some facts provided by criminal law, establishing the perpetrator guilt is not necessary, and from this act to be obtained any benefit as reward for committed crime or any other benefit, both for author and for others crime participants (Rudolph, 1993).

In **British legislation**, a confiscation order may be issued only in one of the following situations: as result of a conviction before the Superior Court (*Crown Court*); as result of introduced action by the customs or police before the subordinated Court (*Magistrates Court*); a last statement does not required a previous conviction, and the crime product returning to civil proceedings, introduced by the *Assets Recovery Agency*.

Superior Court (Crown Court) is only able to order special seizure in criminal matters, ordering being mandatory when is requested by the prosecutor or by the *Assets Recovery Agency*. Special seizure may be applied regardless of the type of convicted behaviour: *generic* (not having relevant the date of appearing criminal status or his remittance to judgement); *specific* (involves committing a crime, for which defendant was convicted and the seizure was ordered). Initially, the procedure takes into account for general behaviour, and if its determination is impossible, then it will be considered the specific (Lawrence, 2006, pp. 1-3).

In case the perpetrator has been held with a generic criminal behaviour, then the court will have to establish the concrete benefits of perpetrator, based on four assumptions: any expense of perpetrator, after beginning the criminal activity is made on the basis of a good result from generic behaviour; any asset acquired by the perpetrator after beginning the criminal activity is product of generic behaviour; the

asset was acquired in property since the perpetrator came into possession; the assets acquired by the perpetrator are untouched by any duty.

Danish Criminal Code provides that is order a total or partial seizure of property of a person found guilty of committing a punishable act, when the committed act has a nature that allows achieving a significant gain and when the committed act is punishable with prison sentence at least for 6 years or is a violation of drug laws. It also may be ordered a special seizure as regards the husband assets, or other individuals living with perpetrators, with two *exceptions*: 1) the assets were made by more than 5 years before the act on which the seizure was ordered; 2) marriage or concubinage not exist at the time of purchase that asset.

In *Ireland*, *The Proceeds of Crime Act* and *Criminal Assets Bureau Act* were founded in 1996, in order to combat effectively the organized crime by affecting the offenders' assets. *Criminal Assets Bureau* was created as a multidisciplinary agency, including policeman, customs, specialists in taxes and duties, but also the social welfare workers who can use their usually functional capabilities and access to various databases in exercise of duties inside of Bureau. The purpose of this organization is to identify and confiscate, in whole or in part, derived incomes or supposed to be derived, directly or indirectly, from criminal activities or products of such assets, resulting from the committing crimes. In this country, in accordance with Revenue and Social Welfare Act, *assets resulting from criminal activity are subject to tax*.

Law regarding to assets resulting from crimes (as amended in 2005) received some civil law disposals or regarding *in rem* seizure. In this case is not necessary a conviction in a criminal trial and Supreme Court decides temporary seizure or permanently seizure.

One aspect of novelty in the recently legislative landscape is the possibility of judicials to start a criminal or civil action in special seizure matters, with different legal consequences. It is interesting to see, if such a system would bring benefits for the current internal regime of special seizure.

International Conventions establishing the obligation for States, that signed to seize not only the tools or crimes products, but even them equivalent amount when these are not founded. Special seizure by equivalent was provided in Romania only in the special part of Criminal Code as regards the corruption crimes and was issued as result ratification of some international legal implements. As a result, this form of seizure was implemented in internal legislation in general part of Criminal Code (art.

118). This disposal creates, however, controversy regarding juridical nature of special seizure.

If through international Conventions is left to State part discretion to choose between one of the two procedures there provided (recognition and enforcement of the seizure order belonging to the national Court of the requested state), framework decisions of Community institutions are setting specific tasks, with deadlines for implementation previously established. Infringements of those deadlines may cause starting of procedures regarding to duties infringements, stipulated in the treaties by respective member state.

From national legislation analysis of different states, also result three interesting conclusions.

First, special seizure is regulated heterogeneity, each state watching its own criminal policy in seizure matters. Thus, can be seized, the crime product, its equivalent, seizure can occur only if committing a crime or even if committing only an act stipulated by criminal law, can occur partial seizure by equivalent, when the value asset, subject of seizure is to high in relation with crime result.

The most important conclusion resulting from the analysis of different states refers to legal nature of special seizure. Thus, it is regulated differently, being considered as well as safety measure or a criminal penalty (main penalty or complementary penalty). In some states, special seizure has a mixed legal nature, being considered, depending on the perused purpose by its adoption, a safety measure or a penalty. These differentiations are important and preclusive on juridical regime of these institutions, with different consequences and having, as appropriate, a preventive, repressive nature, or coercion one.

It is remarkable also the seizure approach in Anglo-Saxon law. Traditional approach of serious crimes consists in perpetrators arresting, followed by criminal trial against him, conviction and imprisonment. Recently, perpetrators enriching of economic crimes or drugs traffic was determined to adding a new element such as, seizure of crime product.

Although, first used in United States of America, seizure based on civil procedure seems to get a globalized trend recently, hoping that it would be more effective than special seizure in criminal trial, which is dependent on the perpetrators conviction for committing crime. Recently examples of jurisdictions which have been

introduced civil procedure of seizure are Italy, South Africa, United Kingdom, Ireland, Colombia, Australia.

Recently movement to civil procedure of special seizure can be explained by evolution of organized crime. Network leaders are using their resources for keeping away from committed crimes within organisation and for hide the criminal origin of acquired assets. For this reason, became increasingly difficult to be completed criminal trials likely to get a conviction of these perpetrators and seized instruments and especially, of seized crime products. As a result, often, assets provided from crimes, remain to perpetrators disposals, leading to undermining of public trust in law and its application. Therefore, it was recognized that there are situations in which criminal proceedings regarding seizure, is not appropriate and effective, appearing the need of additional procedure. The solution may be approaching seizure on civil side of the case, or an independent civil trial by criminal trial.

The legal nature of special seizure was discussed since the introduction of these disposals of criminal law within safety measures. Question arises regarding to danger that it may have for society about crime product being in perpetrator possession was the current at the time of endorsement of actual Criminal Code. Confiscation of this category of assets is rather a retributive nature, specific penalties, not preventive one, and specific safety measures. More, it can be argued the current regulation of special seizure, including seizure by equivalent, does not respect the legal nature and essential features of a safety measure. What kind of danger may present for society, leaving in perpetrators possession of a asset or an amount, illegally obtained, likely to seize if the assets fated, resulted, or derived from crimes are not founded? As regards international cooperation in special seizure matters, Romania had carried out, in principle, the obligations assumed by Conventions ratifying since 1990 and 2005. Indeed, in Romanian legislation are legal instruments that would allow both recognition of foreign judgement resolutions of seizure and that allows the confiscation of assets by Romanian authorities, as a results of requests made by judicials belonging to foreign states.

Obligations imposed in the European Union have not been implemented yet, in Romanian criminal legislation. As regards to cooperation with signatory states of Schengen Agreements there really are a cooperation procedure which depart from general disposals regarding rogatory commission, but does not comply, the requirements imposed by recent Community normative acts.

Very extensive discussions were held about seized vehicles. It was decided that can be seized the vehicle used by perpetrator for commit crimes such as murder, robbery, theft, concealment, or favouring. If in case of two crimes, not raise problems, for others, vehicle involved in the process of committing crimes and of producing results is questionable.

Although there were solutions based on decoupling „time consuming” at the „transport of stolen asset”, usually, the notion of „using for commit a crime” has a large interpretation. It was considered, if perpetrator, in the time of taking criminal decision, conceived also the way of achieving through using vehicles, special seizure is mandatory.

The current legal disposals not cover such a situation just by extending them beyond legislature’s intent. Although is indisputable that vehicle existence make possible crime commit and without it, the perpetrator would not be committed this act or, he would be substantially changed his action plan, it is also true, that the vehicle is not serving for commit the crime, but only to transport of stolen asset, in terms of already consumed crime. In accordance with actual legal disposals, such a vehicle cannot be seized, because there were no legal provisions for this.

We propose that in special legislation which contains rules with some seizure measure of assets, ***to state expressly which is the legal nature of special seizure.*** This, because otherwise, as well as we underline that happens now, there is the highest risk of confusion between special seizure as a criminal law sanction and seizure as a contravention sanction, implications of such confusion may be very serious.

Also, a better regulation in special seizure matters can be a situation where, in addition to disposals regarding to special seizure of the Criminal Code ***will be implemented some provisions regarding to a special seizure which can be applied after rules more pliable than Criminal Code rules.*** Sources of inspiration are the state legislation quoted, and within this type of procedure, the states were included some elements that can weigh heavily in balance with human rights. We have *for example*, a reversal of probation as regards illicit nature of acquiring certain assets, situation that would be against actually disposals of art. 44 paragraph 8 of the Romanian Constitution, in accordance with ***„Assets legally acquired cannot be seized. Legality of acquiring is supposed”.***

However, as could be observed, in legislations submissive to review, these measures were implemented, are functional and were facilitated the recovery of the Exchequer,

substantial amounts and values. Moreover, in an incipient phase such a civil procedure of seizure is found in Law no. 144/2007 on the establishment, organization and functioning of the National Agency for Integrity. (Gazette, no. 535, 2009).

Under disposal of the article 45 of this legislation, the Agency begins verifying assets, conflicts of interests, and incompatibilities, if after the verification, results tests or strong evidence regarding to violation of legal disposals. As a results as these verifications, it draws up a document *stating illicit nature of assets*, when, *for example*, between acquired asset while practice a job and incomes gained during the same time, are obviously differences, and gaining a part of asset or certain specific assets is not justified. In this situation, the case is sent to competent court, which may order the seizure of one part of asset acquired, or the seizure of a certain asset. Such a solution, could be extended and studied thoroughly, and, as we saw in other states legislations, on some very serious forms of manifestation of the crime phenomenon – with particular references to organized crime.

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