THE COMPENSATION FOR LOSS AND THE RECOVERY OF THE GOODS OBTAINED BY COMMITTING CRIMINAL OFFENCES - THE NEW CRIMINAL POLICY OF THE ROMANIAN STATE

Mihai Adrian HOTCA (*)

Abstract

The academic literature of the last decades and the ECHR acknowledge the proportionality of criminal protection as an essential rule of Criminal Law, which means that the measures chosen by the legislator for fighting criminality have to be appropriate, necessary and equivalent to the gravity of the penalised conduct [nulla poena (sanctio) sine crimine et necessitate]. As regards the criminal offences aimed at obtaining illegal gains, as a special application of the principle of proportionality of criminal protection, in the last years, the state's criminal policy has started to change, whereas its main goal is the compensation for the loss caused, the recovery of illicit goods or the confiscation thereof, in order to introduce them or their value equivalent in the public budget. The criminal policy of the last decades has undergone visible changes in respect of the criminal offences through which the offenders aim to obtain goods. Starting from the objective according to which the criminal offences do not create goods, the laws adopted in the last years are mainly aimed at compensation the damages and at recovering the goods obtained by committing criminal offences. In this article, we want to signal this change of paradigm and to present some institutions that breathe the new conception.

Keywords: *criminal offence, damage, illicit goods, criminal policy, recovery of goods, illicit products*

1. Introduction

Throughout its evolution the content of Criminal law has been often influenced or determined by the people exercising power during the different historical times. In other words, in specific ways, each civilisation or culture has left strong or superficial marks on Law, in general, and on Criminal Law, in particular.

The classical (theory) school of Criminal law has put an emphasis on the free will of the offender, and the positivist school on the thesis of the influence of different factors on the criminal conduct. The classical doctrine of Criminal Law has gravitated around the idea that man is naturally equipped with free will. Having the ability to make a distinction between what is forbidden and what is allowed, man has to be accountable for his acts that violate the legal rules. It was deemed that the finality of Criminal Law was not to prevent the commission of offences, but only the imposition of penalties proportional to the degree of harm of the acts of those with antisocial conducts (the repressive reaction). What can be reproached to the classical school is that it did -not focus on the active subject of the criminal offence, that is the person that violates the Criminal Law (the offender).

Indeed-, according to the classical doctrine, the punishment was conceived as a

(*) Professor, PhD, Faculty of Law, "Nicolae Titulescu" University, Bucharest (e-mail: mihaihotca@gmail.com).

retribution aimed at compensating the harm caused by the criminal offence. It was deemed that, once the enforcement of the sentence ended, the offender was rehabilitated. The effect of such conception was a negative one, the crime has increased, and Criminal Law proved to- be unable to contribute to the reduction of crime.

Another aspect that can be reproached to the classical school of Criminal Law is that, by focusing the attention on the criminal offence and the punishment, it has ignored the causes of criminal offences and the means required for preventing them.

On the contrary, the positivist doctrine (school) has placed the criminal offender in the centre of Criminal Law, by insisting on the factors that may determine or influence him in the criminal activity. The safeguards, the analysis of the causes of crime and the move of the *spotlights* on the criminal offender are, maybe, the most important merits of the positivist school.

By believing that the man, far from benefitting from an absolute free will, is determined in his acts, the basis for the imposition of criminal penalties is social defence, and not the moral responsibility of the offender. According to the positivist view, the punishment is the last solution (*ultima ratio*) and, in any case, it has to be adapted (individualised, customised) by taking into consideration the degree of social harm of the perpetrator.

The positivist school has undeniable merits, such as the orientation of scientific research to the causes of crimes, the putting of the person of the offender, who is not absolutely free, under the *radar* of the judge, and the promotion, for the first time, of the thesis of the need to take safeguards, together with the penalties or separately.

In time, the classical doctrine and the positivist one have brought their concepts closer. Being receptive to the critiques made and realising the importance of certain principles of the classical doctrine, the followers of the positivist doctrine have restated a part of the arguments of this doctrine, aligning significantly the positivist doctrine to the classical one, more precisely to the neoclassical doctrine[1]. Indeed, taking into consideration the relevant critiques given to the classical school, the classical doctrinaires have tried to correct the flaws identified and to update the classical conception by reference to the social realities, thus determining the emergence of the neoclassical doctrine. The supporters of the classical ideas have started to pay attention to the person of the perpetrator, have accepted the need to research the causes of crimes and to individualise the criminal penalties[2].

Regardless of the critiques given, the positivist doctrine, in its *updated* form, constitute, together with the *neoclassical* doctrine, the foundation (the pedestal) for the current criminal laws. The criminal laws of all democratic legal systems include principles of the classical and positivist doctrine.

In retrospective, we can say that the French Revolution has infused Criminal Law with humanism, the modernism has imposed then idea of proportionality of criminal protection, and the postmodernism proposes and provides alternatives to the

[1] Some of the contemporary criminologists are positivists, and others are supporters of different doctrines (classical, eclectical etc.).

[2] One of the most important neoclassics was R. Saleilles, who wrote the outstanding work The *individualisation of penalties*, Paris, 1898. Other neoclassics are: Ludwig von Fuerbach and Francesco Carrara (from the foreign ones) or Vasilake Petroni and Constantin Eraclide (from the Romanian ones) – see Constantin Duvac, Norel Neagu, Niculae Gamenţ, Vasile Băiculescu, *Criminal Law. General Part (Drept penal. Partea generală)*, Universul Juridic Publishing House, 2019, p. 42-43.

classical penalties, claiming the need for changing some paradigms of classical Criminal Law.

We live the most accelerated period in history, the moving speed of which increases progressively, as if we are in the antechamber of a disruptive imminent change, whereas humankind has reached the stage in which information doubles in 24 hours.

Together with the undeniable facilities provided, the explosion of widely accessible data generates, as a secondary effect, the multiplication of possibilities to harm the social values and the increased complexity of serious antisocial conducts. The criminal offences committed via the IT systems, the criminal offences concerning personal data protection, the criminal offences concerning organ trafficking, the transplant and the xenotransplant, money laundering and so on have appeared and have become more numerous, varied and sophisticated.

Volens nolens, the postmodern Criminal Law - in action - is obviously determined, not only influenced, by the paradigmatic changes in the society, and tries to keep up with them in order to fulfil its *ultima ratio* mission (the last redoubt) of the society in the defence against the persons who commit the most serious antisocial acts (the criminal offences).

If we examine the current state of Criminal Law, we see that criminal laws have a hard time keeping up with the realities that change continuously and in an increasingly accelerated manner, and they are inappropriate in many fields, such as the IT or the virtual coins, or are totally absent in fields like the artificial intelligence, the biomedicine or the bioethics.

Not long ago, we could talk about the arbitrary of the lawmaker in respect of the *opportunity of the scope of Criminal Law*, in the sense that its absolute constitutional freedom to assess whether to forbid or not certain antisocial conducts and, also the faculty of sanctioning, in the case where it chooses to criminalise them, were acknowledged, in the new circumstances - the increase of the ways of injury and of their degree of complexity - the observance of the principle of proportionality of criminal protection, from the standpoint of the *ultima ratio*[3] requirement, appears to be necessary.

According to this orientation, the definition of a criminal liability for minor antisocial acts is not necessary, but, at the same time, the criminal liability is imperative in all cases in which the existent extra criminal measures or means are not effective in fighting the serious antisocial acts. For example, usually, the imposition of criminal liability is not necessary in the case of conduct crimes, that is against certain ways of life, because such conducts are related to the inner feelings of the individual and do not harm the general interest, as long as they do not harm the general interests of the society. Therefore, any human conduct reflecting aspects of the individual morals must not be forbid by criminal laws[4].

The relatively recent academic literature, the Constitutional Court and the ECHR acknowledge the proportionality of criminal protection as an essential rule of Criminal Law, which means that the measures chosen by the legislator for fighting criminality have to be appropriate, necessary and equivalent to the gravity of the penalised conduct [*nulla poena (sanctio) sine crimine et necessitate*].

[3] Mihai Adrian Hotca, *Reflection of Criminal Law principles in the Criminal Code in force (Reflectarea principiilor dreptului penal în Codul penal în vigoare)*, in "Dreptul", No. 12/2021, p. 176.

[4] Idem, p. 179.

Moreover, as regards the criminal offences aimed at obtaining illegal gains, as a special application of the principle of proportionality of criminal protection, in the last years, the state's criminal policy has started to change, whereas its main goal is the compensation for the loss, the recovery of illicit goods or the confiscation thereof, in order to introduce them or their value equivalent in the public budget.

2. Criminal provisions that confirm the reorientation of criminal policy

2.1. Preliminary considerations

The criminal laws in force are more and more infused with rules that breathe the thesis of *reconfiguration* of the goals of criminal policy in the field of *crimes against property* (able to provide the offenders with goods).

The first clear signal has been given in the years 2000, via the laws on fighting tax evasion, frauds involving European funds and money laundering, the content of which included provisions reflecting the change of the general policy in the field of crimes against property or of those generating economic gains.

2.2. Romanian Criminal Code provisions

But, the strongest message, by which the change of criminal policy in the field of *criminal offences generating economic gains* has been confirmed, has been given by the Romanian Criminal Code in force, adopted by the Law No. 286/2009, with the subsequent amendments and supplements. Thus, *the extended confiscation safeguard* has been regulated by the Law No. 63/2012, being introduced in both criminal codes - the previous Romanian Criminal Code and the Romanian Criminal Code in force. By this regulation, the legislator has pursued a goal already visible in the criminal legislation in force *ilo tempore*, that is to connect the latter to the theories of the postmodern Criminal Law doctrine.

The compensation for the loss and the recovery of the goods obtained by committing the criminal offences are reflected in several provisions of the 2014 Romanian Criminal Code. The most relevant ones are presented below.

The criminal fine, in conjunction with the imprisonment for the commission of a criminal offence

According to Article 62 para. (1) Romanian Criminal Code, if the committed offense was intended to provide a material gain, the penalty of imprisonment may be accompanied by a fine penalty. It can be noticed that, in this case, the fine is optional[5]. In order to apply the provisions of Article 62 para. (1) Romanian Criminal Code, it is not necessary that the offender had actually acquired the economic gain, but it is enough to find that the offender had pursued it for his benefit or for the benefit of a third party. Indeed, whereas the law does not make a distinction, we believe that the provisions of Article 62 para. (1) Romanian Criminal Code apply both in the case where the convicted person has pursued the economic gain for himself, and in the case where he intended that the gain is obtained by another person.

[5] For a case in which the Bucharest Court of Appeal has applied the fine in conjunction with the penalty of imprisonment, see Norel Neagu, *Criminal Law. General Part (Drept penal. Partea generală)*, Universul Juridic Publishing House, Bucharest, p. 347.

On another note, we support the opinion according to which it is possible to cumulate the fine with the imprisonment regardless of whether the imprisonment is provided for as a sole penalty or as an alternative penalty to the fine. But, in this last case, the cumulation of the two penalties is admissible only if the court does not choose to impose the fine. Moreover, the addition discussed here is also possible in the case where the imprisonment is regulated alternatively with the life imprisonment. Of course, the cumulation of the two main penalties shall be performed provided that the court considers that a prison sentence is required.

According to the provisions of Article 91 para. (2) Romanian Criminal Code, the fine may also accompany the prison sentence in the case where the suspension of the enforcement of the penalty under supervision has been ordered, but the fine penalty has to be enforced, whereas the suspensive nature only concerns the prison sentence. This interpretation has also been confirmed by the Decision (Appeal in the Interest of the Law) No. 4/2020. In this Decision, the High Court of Cassation and Justice has stated: 'Article 62 of the Romanian Criminal Code aims to stimulate the voluntary compensation for the loss, throughout the proceedings, and mainly represents an aggravating factor for the punitive treatment, to be exploited in the context of the judicial individualisation. This regulatory way and the different and cumulated purpose of the distinct main penalties, the imprisonment and the fine, justify the solution provided for in Article 91 para. (2) of the Romanian Criminal Code, namely the suspension of the prison sentence, provided that the fine penalty has been enforced'.

By developing the recitals, the Supreme Court shows: 'The substantiation note of the draft of the New Romanian Criminal Code specifies that the enforcement of the fine penalty, imposed either as a sole main penalty, or as a main penalty together with the imprisonment, in the case where the criminal offence committed was intended for obtaining an economic gain and the court opts for a cumulative penalty, may not be suspended[8]. The exclusion of the suspension of the enforcement of the fine penalty is clearly reflected in the criminal rule in respect of the sole main penalty, the resultant penalty and in the case of the fine penalty accompanying the prison sentence and a solution resulting from the interpretation of Article 91 of the Romanian Criminal Code, in the case of the resultant penalty in which the fine is added to the prison sentence.

The resultant penalty legally cumulates the individual penalties so that, in the case where the fine is enforced in the case of the sole penalty, all the more the enforcement regime shall remain the same in the case of the resultant involving a criminal plurality, therefore an aggravating state, which excludes the case of indulgence, the suspension of the enforcement of the penalty.

The same is true of the resultant penalty that includes/adds the fine and the imprisonment, according to Article 39 of the Romanian Criminal Code. In the case of concurrence or of merger of the main penalties, the fine and the imprisonment, the fine shall be added to the prison sentence, and the criminal fine may not be suspended in the framework of the resultant penalty.

The reason that has determined the legislator to adopt this solution in the case of the sole fine penalty, of the fine penalty accompanying the prison sentence, in the case where the criminal offence committed was intended for obtaining an economic gain, or of the resultant fine is even clearer in the case of the resultant that includes/adds the main fine penalty to the prison sentence.

The loss of autonomy in the case of merger may not change the enforcement method, in the sense of excluding the express interdiction of the suspension, whereas this way of interpretation would be equivalent to an addition to the law, to an actual law-making.

This solution of fully suspending the resultant penalty, including the fine, brings harm to the res judicata (in the case of merger of final sentences, if, initially, the criminal fine was enforced either as a sole main penalty or as a penalty accompanying the prison sentence, following the merger, the enforcement of the criminal fine would be suspended).

The grammatical, systematic and teleological interpretation of the provisions of Article 91 para. (1) letter (a) of the Romanian Criminal Code, which concerns the suspension of the prison sentence (of not more than 3 years) in the case of concurrence of criminal offences, therefore of the resultant prison sentence, and of Article 62 para. (2) and (3) of the same regulatory act, which excludes the suspension of the fine penalty, either as a sole main penalty, or as a penalty accompanying the prison sentence, proves the will of the legislator in relation to the enforcement of the criminal fine and the exclusion of the suspension institution in all cases in which it is imposed, as a sole main penalty, as a penalty accompanying the prison sentence in the case of criminal offences intended for obtaining an economic gain and in the case of loss of autonomy in favour of the resultant penalty'.

In the application of the provisions of Article 62 of the Romanian Criminal Code, if it is found that the acquisition of an economic gain represents an aggravating circumstantial factor in the qualified or aggravated content of a criminal offence, we consider that the cumulation of the fine and the imprisonment is not possible. For example, in the case of the qualified murder committed because of an economic interest [Article 189 para. (1) letter b) Romanian Criminal Code]. If the cumulation was also allowed in these cases, the same circumstances would be used for a double tightening of the punitive treatment. Furthermore, according to the substantiation note accompanying the new Romanian Criminal Code, the possibility of cumulation has been justified by the idea of finding effective means of criminal constraint, which do not involve the increase of the length of the prison sentence[6]. Or, in the case where the legislator has wished to aggravate the liability by creating aggravated or qualified criminal variants, in the case where the perpetrator has intended to obtain an economic gain, the cumulation of the imprisonment with the fine is not justified.

In the case of addition of the penalty fine to the prison sentence, the special thresholds of the days-fine are those provided for in Article 61 para. (4) letter b) and c) and shall be determined by reference to the length of the prison sentence set by the court and may not be reduced or increased as an effect of the grounds for mitigating or aggravating the sentence [Article 62 para. (2)].

The value of the economic gain obtained or pursued shall be taken into account in order to establish the amount corresponding to a day-fine [Article 62 para. (3)].

In the context of this analysis, the following question seems legitimate: The court shall take into consideration only the value of the economic gain or shall also take into account the criteria provided for in Article 61 para. (3) second sentence of the Romanian Criminal Code, namely the economic situation of the convicted person

[6] Available on *www.just.ro*.

and the legal obligations to his/her dependants? We believe that the provisions of Article 61 para. (3) second sentence have a general nature, which means that they apply in all cases in which the court imposes the fine penalty, including the hypothesis provided for in Article 62 of the Romanian Criminal Code, but in addition to the special criteria.

The reconciliation, a ground for removing criminal liability in the case of property offences, other than those in the case of which the criminal proceedings are instituted on the basis of the prior complaint of the injured party

In the case of property offences, the previous Romanian Criminal Code provided for the reconciliation in all cases in which the prior complaint of the injured party was regulated as a requirement for instituting the criminal proceedings, and, in respect of the other criminal offences, the reconciliation was provided for in only one case, the seduction offence. On the contrary, the Romanian Criminal Code in force regulates the reconciliation in the case of the mere theft, the theft with the intention of usage, the appropriation of the good found or arrived by mistake to the perpetrator, the deception or the insurance fraud.

By introducing the possibility of reconciliation in the case of property offences, such as the theft or the deception, the legislator has wanted to provide support to the injured parties in respect of the compensation for the loss suffered by them. The jurisprudence has endorsed the view of the legislator, as there are cases in which the parties to the proceedings have reconciled.

The extended confiscation

The extended confiscation[7] was introduced by Article 112^1 of the Romanian Criminal Code, by the Law No. 63/2012 on the amendment and the supplementation of the Romanian Criminal Code and of the Law no. 286/2009 on the current Romanian Criminal Code.

The final part of the Law No. 63/2012 specifies that this 'transposes into the domestic legislation Article 3 of the Framework-Decision 2005/212/JHA of the Council of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, published in the Official Journal of the European Union series L, No. 68/15 March 2005'.

Article 2 of the Framework-Decision 2005/212/JHA specifies: '(1) Each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.

(2) In relation to tax offences, Member States may use procedures other than criminal procedures to deprive the perpetrator of the proceeds of the offence'.

According to Article 3 para. (1) of the Framework-Decision 2005/212/JHA, each Member State shall as a minimum adopt the necessary measures to enable it, under the circumstances referred to in paragraph 2, to confiscate, either wholly or in part, property

[7] In order to review the provisions on extended confiscation, introduced in the Romanian legislation by the Law No. 63/2012, see: Mirela Gorunescu, Costin Toader, *The extended confiscation – from constitutional disputes to tax and administrative disputes towards tax disputes (Confiscarea extinsă – din contencios constituţional, în contencios administrativ şi fiscal spre contencios penal)*, in "Dreptul", No. 9/2012; Florin Streteanu, *Considerations concerning the extended confiscation*, in "Caiete de drept penal", No. 2/2012, p. 11.

belonging to a person convicted of an offence indicated in this Article.

According to Article 3 para. (2) of the Framework-Decision 2005/212/JHA, each Member State shall take the necessary measures to enable confiscation at least: a) where a national court, based on specific facts, 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 referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively; b) where a national court, based on specific facts, 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 referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively; c) where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court, based on specific facts, is fully convinced that the property in question has been derived from the criminal activity of that convicted person.

And according to Article 3 para. (3) of the Framework-Decision 2005/212/JHA, each Member State may also consider adopting the necessary measures to enable it to confiscate, either wholly or in part, property acquired by the closest relations 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 relations — has a controlling influence. These provisions are also valid in the case where the person concerned receives a significant part of the legal person's income.

The substantiation note that has accompanied the draft of the Law No. 63/2012 shows that, although Romania currently has a coherent and comprehensive legislative framework, developed in accordance with the international standards in the field of confiscation of proceeds of crimes, this framework has certain flaws, by reference to the relevant European requirements.

More precisely, the above-mentioned Framework-Decision is not fully transposed into the domestic legislation, as the transposition of Article 3 of the Community act, on the extended confiscation, is missing. The extended confiscation measure must be at least one of the three variants provided for in Article 3 para. (2) letter a), b) and c), respectively. In all cases, this allows the confiscation of the goods originating from criminal activities that are not directly related to the criminal offence for which the person is convicted; more precisely, the direct link between the criminal offences leading to the conviction and the confiscated goods is not proven. This is a principle of the extended confiscation of the goods of the convicted person. Letter a) concerns those goods in the case where they originate from activities carried out in a period preceding the conviction, while the letter b) concerns the goods originating from 'similar' activities. As regards the letter c), this concerns the disproportion between the value of the goods and the level of the lawful income of the convicted person.

Moreover, it is specified that, in the case where the extended confiscation operates exclusively in criminal proceedings, concerns a list of very serious criminal offences and applies exclusively to a person already convicted - the introduction of the extended confiscation is not incompatible with the presumption of the lawful nature of the wealth, included in Article 44 para. (8) of the Constitution of Romania, republished. This presumption is a relative one, so this will be rebutted, from case to case, by submitting evidence that will

convince the court that the goods possessed by the convicted person are obtained from criminal offences.

In this context, the conditions provided for in the draft and which have to be proved in advance are enough for rebutting the presumption without violating though the constitutional principle mentioned.

Otherwise, the prosecutor would only have to prove that a certain person, in a period of time, was involved in the commission of certain criminal offences; for example, organised crime. From that moment on, the judge may presume that the goods acquired are the result of the criminal activities carried out by the convicted person throughout a period preceding the conviction, which is deemed reasonable by the court. In this case, the burden of proof concerning with the lawful nature of the wealth acquired would lie with the convicted person. If the judge reaches the conclusion that the value of the goods held is disproportionate by reference to the legal income, he may order that they are confiscated from the convicted person.

Furthermore, it is specified that the finding of the Constitutional Court may also be brought in support of the arguments made in the substantiation note. In the Decision No. 799/17 June 2011, on the unconstitutionality of the removal of the presumption of the lawful acquisition of the wealth, the Constitutional Court has shown that the regulation of this presumption does not impede the primary or the delegated legislator, in application of the provisions of Article 148 of the Constitution – 'Integration in the European Union'- to adopt regulations allowing the full compliance with the Union laws in the field of crime fighting.

At the end of the substantiation note, it is shown that the proposed regulatory act aims to transpose Article 3 of the Framework-Decision 2005/212/JHA of the Council of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, with full observance of the constitutional principles concerning the ownership.

The Constitutional Court has assessed several initiatives concerning the revision of Article 48 para. (8) of the Fundamental Law.

Thus, by the Decision No. 85/1996[8], the Court has delivered its opinion on an initiative concerning the revision of the Constitution, proposing the replacement of the text regulating this presumption with another, with the following content: 'The wealth the lawful acquisition of which cannot be proven shall be confiscated". On this occasion, the Court has held that the presumption of the lawful acquisition of the wealth is one of the constitutional guarantees of the right to property, in accordance with the provisions of para. (1) of Article 41 of the Constitution [currently Article 44 para. (1)], according to which the right to property is guaranteed. This presumption is also based on the general principle according to which any legal act or fact is lawful unless there is evidence to the contrary, and requires to prove, in respect of the wealth of a person, the unlawful acquisition thereof. By finding that the revision proposal aims at rebutting the burden of proof concerning the lawful nature of the wealth, in the sense that the wealth of a person is presumed to be unlawfully acquired unless its holder submits evidence to the contrary, and that the legal security of the right to property over the goods composing the wealth of a person is indissolubly related to the presumption of lawful acquisition of the wealth, and the removal of this presumption means that a constitutional guarantee of the right to property is abolished, the Court has found that this proposal is not constitutional.

[8] Published in the Official Gazette of Romania No. 211/6 September 1996.

Moreover, by the Decision No. 148/2003[9], the Constitutional Court has given its opinion on the constitutionality of the legislative proposal for the amendment of the same text, amendment concerning the circumstantiation of the presumption of lawful acquisition of the wealth. The proposed text established that the presumption does not apply" in the case of goods acquired following the exploitation of the income obtained from criminal offences'.

By the Decision No. 799/2011, the Constitutional Court has found that 'it has already given its opinion on certain initiatives for the revision of the same constitutional text, initiatives that have concerned, essentially, the same finality: the removal of the presumption of lawful acquisition of the wealth from the Constitution'[10].

Then, in respect of the matter concerned, the Constitutional Court has stated: 'In application of the provisions of Article 152 para. (2) of the Constitution, according to which no revision may be made if it has as effect the abolition of the fundamental rights of the citizens or of their guarantees, the Court finds that the deletion of the second sentence of Article 44 para. (8) of the Constitution, according to which the" lawful nature of the acquisition is presumed", is unconstitutional, whereas it has as effect the abolition of a guarantee of the right to property, thus violating the limits of the revision, provided for in Article 152 para. (2) of the Constitution.

In this context, the Court emphasizes its views found in its jurisprudence, for example, in the Decision No. 85/3 September 1996, mentioned, or in the Decision No. 453/16 April 2008[11], in the sense that the regulation of this presumption does not impede the examination of the unlawful nature of the acquisition of the wealth, but the burden of proof lies with the person claiming this nature. To the extent to which the party concerned proves the unlawful acquisition of some goods, of a part or of the whole wealth of a person, the confiscation may be ordered in respect of those goods or the wealth unlawfully acquired, according to the law'.

After examining the arguments of the Constitutional Court, we notice that the Court rightly considers that the presumption of lawful acquisition of the wealth of a person is essential (fundamental).

Getting back to the regulation of extended confiscation, we specify that the *sedes materiae* is Article 112^1 of the Romanian Criminal Code. This has the following content: '(1) Goods other than those referred to in Article 112 are also subject to confiscation in the case where a person is convicted for an act likely to procure him/her a material benefit and the penalty provided by law is a term of

[9] Published in the Official Gazette of Romania No. 317/13 May 2003.

[10] It concerns the Decision No. 86/1996 and the Decision No. 148/2003. Thus, for example, by the Decision No. 148 of 2003, the Constitutional Court alleges that 'this way of drafting is criticable and can lead to confusions', showing that it follows from the way of drafting para. (7^1), the introduction of which is proposed, that the rebuttal of the burden of proof of the lawful nature of the wealth is intended, by the provision of the unlawful nature of the wealth acquired by the exploitation of the income resulting from the criminal offences. Therefore, by making reference to its Decision No. 85/1996. The Court has held that this case also concerns the abolition of a constitutional guarantee of the right to property, which is contrary to the provisions of Article 148 para. (2) of the Constitution [the current Article 152 para. (2) – *author's note*]. On the same occasion, the Court, by referring to the way the rule examined is drafted, has held that if the text aims at allowing the confiscation of the wealth acquired in a lawful manner, but which was built on an amount of money originating from criminal offences, the drafting thereof is inappropriate.

[11] Published in the Official Gazette of Romania No. 374/16 May 2008.

imprisonment of 4 years or more, the court is convinced that such goods originate from criminal activities. The conviction of the court may also be based on the disproportion between the lawful revenues and the person's wealth. (2) The goods acquired by the convicted person within a period of 5 years before and, if appropriate, after the time of perpetrating the offence, until the issuance of the document initiating the proceedings, may be subject to the extended confiscation. The extended confiscation may also be ordered in respect of the goods transferred to third parties, if they knew or should have known that the purpose of the transfer was to avoid the confiscation. (3) In order to apply the provisions of para. (2), the value of the goods transferred by the convicted person or by a third party to a family member or to a legal entity controlled by the convicted person shall be taken into account. (4) According to this Article, the goods shall also include the amounts of money. (5) In determining the difference between the lawful income and the value of the assets acquired, the value of the goods upon their acquisition and the expenses incurred by the convicted person and his/her family members shall be considered. (6) If the goods subjected to confiscation are not found, money and assets shall be confiscated up to the value thereof. (7) The goods and the money obtained from exploiting or using the goods subject to confiscation as well as the assets produced by such shall be also confiscated. (8) The confiscation may not exceed the value of the goods acquired during the period provided for in para. (2), which exceeds the level of the lawful revenues of the convicted person'.

After analysing the provisions of Article 112^1 of the Romanian Criminal Code and those of Article 107 of the Romanian Criminal Code, we consider that the reviewed safeguard may be ordered only if the following conditions are cumulatively met:

- the offender status of the perpetrator;
- the conviction of the offender;
- the conviction for an act able to provide the offender with an economic gain and for which the legal penalty is imprisonment to 4 years or more. The extended confiscation may also be ordered in respect of the goods transferred to third parties, if they knew or should have known that the purpose of the transfer was to avoid the confiscation;
- the belief of the court that those goods originate from criminal activities. The conviction of the court may also be based on the disproportion between the lawful revenues and the person's wealth;
- the safeguard ordered eliminates a state of danger and prevents the commission of new acts provided for by criminal law.

The principle of the personality of the extended confiscation safeguard follows from the content of the provisions of Article 112^1 and of Article 107 of the Romanian Criminal Code, which means that the penalty may not be imposed on persons who have committed mere unlawful acts, not provided for by the criminal law. Moreover, by derogation from the general rule, existing in the field of safeguards, according to which they may also be imposed on persons who commit acts provided for by the criminal law (regardless of whether they are criminal offences or not), in respect of the extended confiscation, in order to be ordered, the act has to be a criminal offence and the person on which the safeguard is imposed has to be convicted.

Moreover, the extended confiscation may not be imposed on other persons than the convicted one, who have not committed criminal offences, regardless of the relationship between them and the offender, whereas the criminal law penalties apply

only to the persons who have infringed the criminalisation rules and are also served by these persons.

Besides the legal considerations, the principle of personality of criminal law penalties is very important for any legal system, whereas it is not usual and educational that a criminal law penalty is imposed on a person who was not involved at all in the commission of a criminal offence.

We specify that, by the amendment made to Article 112^1 by the Law No. 228/2020, the legislator provides that the extended confiscation may also be ordered in respect of the goods transferred to third parties, if they knew or should have known that the purpose of the transfer was to avoid the confiscation.

The compensation for the loss created by criminal offences by the convicted persons

Currently, the conditional release is granted if, in addition to the other conditions, the convicted person fully pays the civil obligations set by the sentence.

Thus, according to Article 100 para. (1) of the Romanian Criminal Code 'Conditional release in case of imprisonment may be ordered if: a) a convict served at least two thirds of the penalty, in case of a term of imprisonment no longer than 10 years, or at least three quarters of the penalty, but no more than 20 years in prison, in case of a term of imprisonment exceeding 10 years; b) a convict is serving a sentence in an open or semi-open regime; c) a convict fulfilled completely all civil obligations established by the judgment of conviction, unless he/she proves to have been unable to do so (our emphasis added); d) the court is convinced that the convicted person has reformed and is able to reintegrate into society'.

3. The reflection of the new orientation of the criminal policy in special laws

According to Article 20 of the Law No. 78/2000, in the case of criminal offences against the financial interests of the European Union, the adoption of safeguards is compulsory. Moreover, the adoption of safeguards is mandatory according to the provisions of Article 50 of the Law No. 129/2019 and of Article 11 of the Law No. 241/2005.

The Law No. 126/2024, recently entered into force[12], has partially *reconfigured* the legal framework applicable to the field of preventing and fighting tax evasion," the primary aim" of the law, according to the substantiation note, being the" compensation for the loss to the budget" and" rendering liable the guilty persons".

The new regulation arrived in the legal landscape, aimed at fighting the tax evasion phenomenon (introduced by the Law No. 126/2024), confirms *the mutations* occurred at the level of criminal policy in terms of approaching the criminality impacting the public budget. According to this approach, which *redefines* the main goal of the regulation, the main goal of the state's criminal policy is the compensation for the loss and the recovery of the goods resulting the criminal offences.

Indeed, the penalty has to be only a mean of achieving a higher social goal and not an aim in itself. The purpose of the penalty is the prevention of new criminal offences and the reinstatement of the rule of

[12] On 16 May 2024 (it was published in the Official Gazette of Romania No. 437/13 May 2024).

law[13]. The aim of the penalty is subordinated to the goal of Criminal Law, that is the protection of the State, the individual and of his/her rights or freedoms against the criminal offences.

Following the entry into force of the Law No. 126/2024, Article 10 of the Law No. 241/2005 has the following content: '(1) In the case where a criminal offence provided for in Article 6^1, 8 or 9 is committed, if, until the expiry of a period of not more than 30 days from the completion of the inspection carried out by the relevant bodies, following on which a damage to the general consolidated budget of not more than Euro 1,000,000 is identified, the damage, increased by 15% of its value, to which the interest and the penalties are added, is fully covered, by actual payment, the act shall not be punishable. In this case, the relevant bodies shall not make a referral to the criminal prosecution bodies. (2) In the case where a criminal offence provided for in Article 6^1, 8 or 9 is committed, if, until the first court hearing, the damage caused is fully covered, by an actual payment, the thresholds for the penalty provided for by the law for the act committed shall be reduced by half. If the damage caused and recovered in these conditions does not exceed Euro 1,000,000, in the domestic currency equivalent, a fine may be imposed. In the case where a criminal offence provided for in Article 6^1, 8 or 9 is committed, if, until the first court hearing and until the final settlement of the case, the damage caused is fully covered, by an actual payment, the thresholds for the penalty provided for by the law for the act committed shall be reduced by a third. The damage shall be determined on the basis of an expert report. The suspect or the defendant shall be entitled to take part in the conduct of the expert examination. The provisions of Article 172-180 of the Criminal Procedure Code shall apply accordingly. The suspect or the defendant, natural person or legal entity, by representative, as appropriate, shall be notified that an expert witness has been appointed, and shall be given the time required to fully exercise his/her procedural rights. (3) In the case where a criminal offence provided for in Article 6^1, 8 or 9 is committed, by which a damage not exceeding Euro 1,000,000, in the domestic currency equivalent, is caused, if, throughout the criminal investigation, the damage cause, increased by 25% of its value, to which the interest and the penalties are added, is fully covered, by an actual payment, the act shall not be punishable, and the provisions of Article 16 para. (1) letter h) of the Criminal Procedure Code shall apply. If, throughout the preliminary chamber procedure or the court proceedings, until a first instance judgment is delivered, the same damage, increased by 50% of its value, to which the interest and the penalties are added, is fully covered, by an actual payment, the act shall not be punishable, and the provisions of Article 16 para. (1) letter h) of the Criminal Procedure Code shall apply. If, throughout the appeal proceedings, until a final court judgment is delivered, the same damage, increased by 100% of its value, to which the interest and the penalties are added, is fully covered, by an actual payment, the act shall not be punishable, and the provisions of Article 16 para. (1) letter h)

[13] Prof. Vintilă Dongoroz considered that the punishment acts in three directions: towards the individuals with latent criminality; towards the victim of the criminal offence; towards the whole society (Vintilă Dongoroz (coord.) at alii, *Theoretical explanations of the Romanian Criminal Code. General Part*, Vol. II, Romanian Academy Publishing House, Bucharest, 1970, p. 583]. It-was also said that, whereas the punishment is an evil, its effect is also an evil (Cathrein). This idea may not be accepted, whereas we would-be unable to impose the penalty, because, as Giuseppe Bettiol said, the end does not justify the means (*Diritto penale*, Cedem Publishing House, Padova, p. 666).

of the Criminal Procedure Code shall apply. (4) The provisions of this Article shall apply to all defendants even though they have not contributed to the compensation for the damage provided for in para. (1) and (2). (5) In the case where the person who has committed one of the criminal offences provided for in Article 6^1, 8 or 9 reports the criminal offence committed to the criminal investigation bodies or to the tax bodies, while the criminal offence is still ongoing or within not more than one year from the end of the criminal activity and before the criminal offence is referred to the criminal investigation bodies and, later, facilitates the discovery of truth and the imputation of the criminal liability to one or more participants to the criminal offence, the special thresholds shall be decreased by half. (6) The provisions of para. (1) and (2) shall not apply if the perpetrator has committed a criminal offence provided for in this law within 5 years from the commission of the act in relation to which it has benefitted from the provisions of para. (1) or (2)'.

Moreover, the Constitutional Court has reiterated this state objective in the Decision No. 146/2024, specifying that the Law No. 126/2024 'constitutes an important step in the transition that the states have to make from the traditionalist retributive theories of Criminal Law, according to which the imposition of custodial sentences in the case of criminal offences represent a sine qua non condition for the reinstatement of the rule of law, to the modern theories specific to the branch of law, according to which, in the case of criminal offences aimed at obtaining illegal gains, the main goal of the state criminal policy must concern the identification and the confiscation of those goods (in a broad sense), in order to introduce them or their countervalue in the public budget (our emphasis). Therefore, the legal provisions (...) represent a form of transposition of the above-mentioned objective into the State's criminal policy in the field of tax evasion'[14].

Conclusions

The Romanian criminal policy of the last decades has undergone visible changes in respect of the criminal offences through which the offenders aim to obtain goods. Starting from the objective according to which the criminal offences do not create goods, the laws adopted in the last years are mainly aimed at compensation the damages and at recovering the goods obtained by committing criminal offences.

Article 10 of the Law No. 241/2005 constitutes most important step in the transition that the states have to make from the traditionalist retributive theories of Criminal Law, according to which the imposition of custodial sentences in the case of criminal offences represent a sine qua non condition for the reinstatement of the rule of law, to the modern theories specific to the branch of law, according to which, in the case of criminal offences aimed at obtaining illegal gains, the main goal of the state criminal policy must concern the identification and the confiscation of those goods.

Another step was Article 62 para. (1) Romanian Criminal Code, if the committed offense was intended to provide a material gain, the penalty of imprisonment may be accompanied by a fine penalty and introduced by Article 112^1 of the Romanian Criminal Code, by the Law No. 63/2012 regarding extended confiscation.

[14] See the Decision of the Constitutional Court of Romania No. 146/2024, published in the Official Gazette of Romania No. 496/29 May 2024.

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