



OPINION

on the introduction of the institute of civil confiscation

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This opinion reviews the current confiscation mechanism applied to goods resulting from criminal activity and unjustified assets. The existing instruments of confiscation are mainly related to the criminal proceedings and can be applied outside the criminal investigation, only in case when NIA finds unjustified assets and only in respect to persons holding public office or positions of public dignity, with regard to the differences identified during the period of holding the respective mandates.

We recommend extending the categories of offenses against which extended confiscation can be applied, as well as introducing the civil confiscation mechanism for unjustified assets. The burden of proof further will remain on the public authorities, while the sources for proving substantial differences shall be related to the income and assets declarations of civil servants and public officials. The civil confiscation mechanism could involve the authorities already mandated with supervisory, investigation and control functions such as ARA, NIA and OPFML in the process of identifying and confiscating unjustified assets, with the assistance of the Ministry of Finance and the State Fiscal Service.

¹ Note: this opinion was drafted in the period September 23-29, 2021.

CONTEXT

Confiscation of property is now being widely discussed in the Republic of Moldova. The main argument that brings up the subject of confiscation is that not only the conviction and deprivation of liberty are essential. The process of asset recovery is just as important. This exercise had a rather limited practical application in the Republic of Moldova. The amount of recovered assets within criminal proceeds has been very limited. The public interest with regard to the procedure of confiscation of assets is considerably high in the Republic of Moldova given a series of episodes related to bank fraud, Russian "laundromat", concession of Chisinau International Airport, the activity of Metalferos SA, but also the most recent episodes in insurance fraud cases, with loans offered by insurance companies to companies in tax havens, under the jurisdictions that do not implement international transparency standards, or the so-called "offshore" companies.

Since the interest in recovering damages caused by the bank fraud and other high-level corruption cases is high, we consider to be important to review the current framework for the application of confiscation proceedings resulted from criminal activity. This opinion provides a series of recommendations to increase the efficiency of the confiscation mechanism by promoting the civil confiscation mechanism.

1. The current legal framework on the application of confiscation

Articles 106 and 106¹ of the [Criminal Code](#) use the term of special confiscation and extended confiscation. Thus, special confiscation means the free transfer to the state property of goods (or their value if they no longer exist) that: a) have been used or that are intended to be used for committing a crime, b) are the result of a crime or c) represent the income resulting from a crime, or d) were offered to commit a crime.

Article 106¹ of the Criminal Code provides that extended confiscation procedures also apply to property that was obtained five years before and five years after the offense has been committed. The Criminal Code includes a list of offenses, provided that the value of the legally obtained goods is substantially higher and that the court has established, based on the evidence in the case file, that these goods derive from criminal activities.

In case of both Article 106 and Article 106¹ of the Criminal Code, confiscation (special or extended) applies when it can be proved by evidence that the goods obtained were connected to the offenses that have been committed. The difference between special and extended confiscation is the legally obtained income for a period of 5 years before and 5 years after the crime had been committed. In this case, the burden of proof is set only for the criminal investigation body.

The Constitutional Court [expressed its opinion](#) on the constitutionality of Article 106¹ of the Criminal Code. Thus, the Constitutional Court found that the provisions of Article 106¹ are constitutional, based on the following reasons:

- a) extended confiscation is applied based on a burden of proof on the public authority, according to the provisions of Article [46 of the Constitution](#);
- b) extended confiscation is applied for serious crimes, which substantially affect social relations;
- c) extended confiscation is used as an instrument for prevention and deterrence in committing crimes.

The Constitutional Court issued a [note](#) addressed to the Parliament where it has streamlined the need to clarify the term „value which substantially exceeds the acquired means” used in Article 330² of the Criminal Code, regarding illicit enrichment.

Aside from the forms of special and extended confiscation provided by the Criminal Code and the [Law no. 132/2016 on the National Integrity Authority](#) confiscation of unjustified assets is the case of finding substantial difference between the income obtained while holding public office or positions of public dignity and the assets owned during the same period.

The unjustified confiscation of property in this case refers only to the property obtained while holding public office or positions of public dignity and only after the ascertaining act remains final. The confiscation action itself takes place on the basis of a separate action of NIA in court, while the confiscation is enforced by the Ministry of Finance.

2. Authorities involved in the process of application of confiscation

The Criminal Asset Recovery Agency (CARA) ensures the collection of the necessary information to identify the goods obtained by persons under criminal investigation. CARA's actions involve, *inter alia*, conducting parallel financial investigations and assessing, managing and capitalizing unavailable assets derived from criminal activity. CARA also applies orders of freezing of the identified goods and requests the courts to apply seizure in pending criminal cases.

Thus, already at the stage of conducting parallel financial investigations, CARA undertakes actions to identify assets that may result from crimes to ensure that with the final conviction, it is possible to enforce the part of the sentence related to special confiscation or the extended one.

CARA's actions are initiated at the request of the criminal investigation body according to the provisions of Article 258 of the [Criminal Procedure Code](#).

NIA and the Ministry of Finance are involved in the process of confiscation of unjustified assets, which is, however, limited only to civil servants and persons holding public office and only to the difference detected between the assets in possession and the income obtained during the term of office.

3. The limits of the current mechanism of confiscating assets derived from criminal activity

The current framework established by the Criminal Code implies a number of limitations on the mass of assets that may be subject to special or extended confiscation. Consequently, confiscation is limited only to goods that have been identified by evidence and by judgment of the court as resulting from or related to a criminal activity.

Extended confiscation also applies for a limited time within which the goods were acquired - 5 years before and 5 years after the crime was committed. CARA, criminal investigation bodies, and prosecutors take several actions related to the analysis of available assets, including those registered through intermediaries, to demonstrate that these individuals knew or were to know that the assets were derived from or related to a crime.

Another important limitation is that the task of the authorities also requires efforts to determine at what point of time some goods were obtained (both legally and illegally),

being necessary to determine exactly which part of the goods were obtained illegally and as a result to confiscate their value.

Finally, extended confiscation is applied only in respect to a group of crimes provided by articles 158, 165, 206, 208¹, 208², 217–217⁴, 218–220, 236–240, 243, 248–253, 256, 260³, 260⁴, 279, 280, 283, 284, 290, 292, 302, 324–329, 330², 332–335¹ of the Criminal Code.

Thus, the confiscation does not extend to other crimes provided by the Criminal Code, such as kidnapping a person (Article 164 of the Criminal Code), slavery and forced labour (Article 167 and 168 of the Criminal Code), corrupting voters (Article 181¹), illegal financing of political parties (Article 181²), infringement of copyright and industrial property rights (Article 185¹ and 185²), fraud (Article 190), embezzlement (Article 191), the acquisition or sale of goods which are known to have been obtained illegally (Article 199), water, soil pollution and illegal cutting of forest (Articles 228-231), illegal practice of entrepreneurial activity (Article 241), illegal gambling (Article 242³), capital market manipulation (Article 245¹), restricting free competition (Article 246), low quality construction work (Article 257), IT fraud (Article 260⁶), falsification of vehicle identification elements (Article 275) etc.

In conclusion, extended confiscation:

- a) does not apply to goods in respect of which the public authorities have not presented evidence that they were obtained as a result of a crime or are otherwise related to the commission of the crimes;
- b) is limited to 5 years before and 5 years after the commission of a crime;
- c) does not apply to a wide range of crimes, which are committed out of material interest;
- d) does not apply to goods that derive from legal and illegal revenues. The public authority must first demonstrate which parts of the goods originate from illegal activities, and then confiscate their value.

On the other hand, the confiscation of unjustified wealth requested by NIA is limited only to the difference between the assets possessed and the income obtained during the period of holding public office or public dignity position.

4. Civil confiscation – a solution for improving the confiscation mechanism

Article 106 of the Criminal Code provides that special confiscation is also applicable if no criminal penalties are applied to the perpetrator. Thus, following the content of the criminal norm, special confiscation would be possible even when the sentence does not provide for any form of criminal punishment. However, the court would establish the guilt based on the evidence presented by the criminal investigation body.

It should be emphasized that apart from establishing the guilt by a final court judgment, the confiscation mechanism would allow for an arbitrariness in its application, if the criminal investigation body is not bound to determine the illegal nature of the assets.

Therefore, the current framework is too focused on the application of the criminal penalty and less on the alternative options to determine the illegal nature of the assets, which are possessed by persons who have not been convicted of committing specific offenses. In this respect, a special provision relates to Article 330² illicit enrichment, which, however, may not be applicable if all the conditions are not met - for example the status of special subject (persons holding public office or public dignity positions).

On the other hand, norms in the Fiscal Code allow the State Fiscal Service to apply taxation for goods by indirect estimation of the individuals' income. These rules are, however, insufficient to ensure the effective application of coercion, which is otherwise possible in the case of confiscation, because these assets are not analysed in terms of the legality of their possession, but in terms of the application of tax law.

In conclusion, the spectrum of cases that is not covered by either the criminal law or the national tax law is related to the illegally owned goods, but in regard to which the criminal investigation body, for various reasons, failed to prove that they are related in some way to the commission of the crime. These cases are multiple, given both the weak capacities of the authorities, but also the large number of crimes that are being committed and that remain undiscovered. However, the general purpose of the criminal law, namely prevention, is not ensured, because the confiscation of illegal assets does not apply to cases where there was a failure to prove in court that the crime has been committed.

Recommendations

Against this background, we consider that it necessary to include in the national legal framework the form of civil confiscation, in those cases when the criminal case does not conclude with a conviction, but the confiscation could be still applied in case the illegal nature of the assets has been established. Thus, we recommend to consider the following legal components to describe the civil confiscation:

1. The application of confiscation shall not be limited in time nor related to any specific offenses, as is the case for extended confiscation.
2. It shall be still the task of the authorities to prove the illegal nature of the assets, but the verification is to be made based on the individual's obligations to declare - the income or assets within the framework of the tax and integrity legislation. Any difference between the declarations filed and the existing real assets will be considered illegal property and confiscated via the civil confiscation, unless the individual proves the legality of the assets.
3. The instrument of civil confiscation shall not be placed framework of the criminal law, in order to avoid any limitations imposed by criminal law related to non-retroactivity. Instead, civil confiscation would be an integral part of administrative proceedings.
4. Civil confiscation may be executed by the State Fiscal Service, NIA and the Ministry of Finance. The civil confiscation mechanism is to implemented following a court decision.
5. The norms regarding the civil confiscation shall be inserted in the Fiscal Code, with separate references to the related normative acts, such as the the Criminal Code, the legislation regarding NIA, CARA etc.
6. NIA, CARA, Office for the Prevention and Fight Against Money Laundering could be assigned to ensure an effective instrument of civil confiscation of assets.



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