

**SOME CONSIDERATION REGARDING LEGAL LIMITATIONS
ABOUT ASSET FREEZING DURING THE CRIMINAL TRIAL IN
ROMANIA**

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ABSTRACT: *In the field of the Romanian criminal trial, especially regarding the serious offences, judiciary bodies may order asset freezing, in order to avoid concealment, destruction, disposal or dissipation of the assets that may be subject to special or extended confiscation or which may serve to secure the penalty by fine enforcement or to pay court fees or to compensate damages caused by the committed offense. A general legal frame is provided by Articles 112 and 112¹ Criminal Code, Articles 249-253 Criminal Procedure Code.*

For a clear outline of the precautionary asset freezing, including the fact that such aspects may prejudice the rights of the defendant or could regard the entire criminal trial, we must take into consideration the provisions and guarantees provided by the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), and also the Romanian Constitutional Court's jurisprudence or the decisions of the High Court of Review and Justice regarding the motion of appeal in the interest of the law.

KEY WORDS: *asset freezing; special confiscation; extended confiscation; trial; rights of defendant.*

JEL Classification: *K 14, K 42*

The trial measures, together with the procedural measures, form the category of criminal procedural law measures thus being legal means made available to the judicial bodies in order to ensure the proper course of the criminal proceedings and of other judicial proceedings in connection with a criminal case.

Therefore, the trial measures appear as possibilities, and as they are not characteristic to every criminal case, they are taken only if necessary, *ie.* if the judiciary bodies consider it necessary according to the concrete circumstances of each criminal case [Neagu, I., Damaschin, M., 2014, p. 583] and if the conditions required by law are met. Usually the situations are taken into consideration where there are impediments, obstacles or difficulties in the normal course of the criminal procedural activities and these measures aim at their removal (Crișu, A., 2011, p. 284) or these measures are ordered for the

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purpose of protecting certain categories of persons whose interests would be harmed by the criminal proceedings [Neagu, I., Damaschin, M., 2014, p. 583].

The Articles 249-254 of the Criminal Procedure Code (CPC) regulate a series of procedural measures with a real, temporary¹ and precautionary feature (Neagu, I., 1988, p. 327), in order to “avoid hiding, destruction, alienation or the evasion of goods which may be the subject of special confiscation or extended confiscation or which may serve to ensure the execution of the punishment by fine or of judicial costs or the repair of the damage caused by the crime” (Article 249, para.1, CPP).

This is what criminal law and doctrine call “precautionary freezing measures.” These are defined by the legal literature as “procedural measures with a real feature which have the effect of making unavailable the movable and immovable assets belonging to the suspect, defendant or civil servant, with a view to special confiscation, extended confiscation, execution of the fine punishment or judicial costs or to repair civil damages” [Neagu, I., Damaschin, M., 2014, p. 654].

Thus, the precautionary freezing measures consist, in essence, in the *unavailability* of certain movable or immovable goods, by a freezing order [Boroi, A., Negruț, G., 2017, p. 375]² over these goods (Article 249 para. (2) CPP), by a *garnishment* or *motgage notation*.

Assets considered by the precautionary freezing measures may be movable or immovable assets belonging to the suspect, defendant or civil responsible person or even of other persons possessing these assets, as the case may be³. With regard to the sphere of these goods, after a period of uncertainty, the Romanian Supreme Court has determined that “when precautionary freezing measures are instituted in the criminal trial, it is not necessary to indicate or prove or individualize the goods on which the precautionary freezing measure is established”⁴ (as opposed to the situation of the actual establishment of the asset freeze, where the competent body has enforce the measure). We believe that such a view imposed by the supreme court’s decision (Chilea, D., 2016, pp. 83-84)⁵ is criticized considering that it extends way too much the dimension of such a procedural measure. Even the point of view of the General Prosecutor’s Office attached to the High Court of Cassation and Justice expressed within the procedure for resolving an appeal in the interest of the law in question, refers to the necessity of having in the patrimony of the

¹ Constitutional Court Decision no. 629 of 8 October 2015, published in the Official Journal of Romania no. 868 of 20 November 2015.

² The asset freeze regulated by CPC is similar to the insuring asset freeze regulated by the Civil Procedure Code - Alexandru Boroi, Gina Negruț, *Drept procesual penal*, 2017, p. 375. According to the authors, this similarity also explains the inconsistency of the legislator regarding the use of the term sometimes “Asset freeze”, some other times “insuring asset freeze” (for example, in Article 252² paragraph 2 CPC, Article 253 paragraph 2 letter b) CPC;)

³ Starting from the provisions of Article 249, in particular 4 (referring to other persons as owners of the goods concerned) and 5 (which expressly refers to the civil responsible person) CPC or Article 250 -251 CPC (referring to “any other interested person”)

⁴ Appeal in the interest of the law - Decision of the High Court of Cassation and Justice no. 19 of 16 October, 2017, published in the Official Journal of Romania no. 953 of 4 December 2017.

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person concerned the movable and immovable property that may be considered by the asset freeze measure at the time the measure is ordered⁶.

Depending on the purpose for which they are set up, the precautionary freezing measures are divided into the following categories (Article 249 para. 3-5 CPC):

- precautionary freezing measures taken to ensure the execution of the fine - may concern only the suspect or the defendant's goods;

- precautionary freezing measures taken for special confiscation or extended confiscation - may concern the property of the suspect or defendant or other persons in the possession of whom the goods would be confiscated. The sphere of the goods which may be subject to special confiscation or extended confiscation is established by the provisions of the Civil Procedure Code (CPC) and the Romanian Criminal Code (CC) (Articles 112 and 112¹).

- the precautionary freezing measures taken to repair the damage caused by the offense - may concern *only* the suspect or defendant's property and that of the civil responsible person, to the extent of the concurrency of their probable value. Also, the property or goods that the suspect or the defendant has transferred onerous or free of charge to other persons, as well as the assets deriving from the offense found in the possession of the suspect or the defendant (by ordering the return of these goods to the injured person to whom they belong). In order to be able to set up a precautionary freezing measure for this purpose it is necessary the civil action to be carried out in the criminal proceedings [Udroiu, M., 2016, p. 755].

- the precautionary freezing measures taken to guarantee the execution of judicial costs - may concern *only* the property of the suspect or the defendant and of the civil responsible person in charge of the civilian business, up to the concurrency of their probable value which is due to the State or to the civil party.

The precautionary freezing measures consisting in the freezing order of movable or immovable assets are made by a freezing order [Volonciu, N., 2017, p. 643], a garnishment (in the case of some money) or by mortgage notation (in the case of immovable property frozen) for the purpose of special confiscation, extensive confiscation, execution of the fine or of judicial costs or for the purpose of covering the civil damages.

The unavailability, by freezing order, has the effect of loss by the owner or the person possessing the goods, as the case may be, of the right of disposal (the right to alienate or burden with charges), respectively the right to use, as the case may be (in case the goods subjected to freeze must be taken), goods covered by the insurance freezing measure (Neagu, I., Damaschin, M., 2014, p. 654) [Boroi, A., Negruț, G., 2017, p. 375]. The Constitutional Court of Romania⁷ (Chiriac, L., 2004, p. 113; Criste, M., 2016, pp. 43-53;

⁶ Address no. 1785/C/1983 /III-5/2017 issued by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice in the Appeal in the interest of the law - the Decision of the High Court of Cassation and Justice no. 19 of 16 October 2017, published in the Official Journal of Romania no. 953 of 4 December 2017.

⁷ Romanian Constitutional Court play the own role shaping the normative framework regarding precautionary freezing measures – about the role of Romanian Constitutional Court, see Lucian Chiriac, *Controlul constituționalității ordonanțelor Guvernului*, Accent Publishing House, Cluj Napoca, 2004, p. 113; Mircea Criste, *Le controle de conventionalite: l'ultime frontiere*, in „Curentul Juridic” Journal, no. 1/2016, pp. 43-55; Ionița Cochințu, *Dreptul și obligația Curții Constituționale de a interpreta un text constituțional*, in Ionița

Cochințu., I., 2017, p. 133) ruled on the effect of unavailability confirming that “the owner of these goods loses the right to alienate them or burden with charges, the measure affecting the attribute of the legal and material provision throughout the criminal proceedings until the final settlement of the cause”⁸.

The jurisdiction for taking precautionary freezing measures in the criminal proceeding fall on the judicial bodies (corroborated with the advancement of the stages of the criminal proceedings):

- the prosecutor, during the criminal prosecution, *ex officio*, by ordinance,
- the Preliminary Chamber judge, in the course of the preliminary-ruling procedure, *ex officio* or at the request of the prosecutor, by reasoned judgment
- the court, during the trial, *ex officio* or at the request of the prosecutor, through a reasoned judgment.

Starting from the provisions of Article 249 para. 1 CPC, by grammatical interpretation, we can conclude that taking these measures is not an obligation, being left to the competent judicial body to appreciate the opportunity to take the measure, which is basically optional⁹. In support of this view is also the fact that, when the legislator wanted to impose on the judicial bodies the obligation to take such a measure, he expressly stipulated it, as in paragraph 7 of Article 249 CPC. Thus, by exception and at the same time as a form of protection, the CPC provides that taking of precautionary freezing measures is *mandatory* for the judicial bodies if the injured person is a person with little or no exercise capacity. In addition, the establishment of precautionary freezing measures is mandatory in the case of serious crimes: corruption offenses (Article 20 of Law no. 78/2000 on the prevention, detection and sanctioning of corruption offenses), money laundering and terrorist financing (Articles 32 and 33 of Law no. 656/2002 on the prevention and sanctioning of money laundering, as well as for the introduction of measures to prevent and combat terrorism financing), offenses of tax evasion (Article 1 of Law 241/2005 on prevention and combating the tax evasion).

The precautionary freezing measures are temporary. Once ordered, they begin to produce legal effects from that moment and, as a rule, until the trial is finalized, by a final decision. The court is obliged to give a judgment on the precautionary freezing measure by either ordering the confiscation or by giving a release. The temporary feature derives from the preventive character of these measures, these measures being set up to prevent the concealment, destruction, alienation or evasion of goods that could be used to achieve the purpose of the measures. [Volonciu, N., 2017, p. 653].

When the competent court is notified through indictment by the prosecutor, the notification may also contain the proposal to take, maintain, revoke or replace a precautionary freezing measure, according to Article 330 CPC.

The precautionary freezing measures taken to repair the damage caused by the offense and to guarantee the payment of the judicial costs may be taken during the criminal proceedings of the preliminary procedure and of the trial and at the request of the civil

Cochințu., Marian Enache (coord.), *In memoriam Ioan Vida*, Hamangiu Publishing House, Bucharest, 2017, p. 133.

⁸ Constitutional Court Decision no. 24 of 20 January 2016, published in the Official Journal of Romania no. 276 of 14 April 2016.

⁹ Constitutional Court Decision no. 894 of 17 December 2015, published in the Official Journal of Romania no. 168 of 4 March 2016.

party. The insurance measures taken *ex officio* by the competent judicial bodies may also be useful to the civil party (Article 249 para. 8, CPC).

“The precautionary measures, irrespective of the judicial body that establishes them, must be reasoned, being necessary to show in the act of order (ordinance or judgment) the fulfillment of the legal conditions regarding the necessity of ordering the measures and also the extent of the damage or the amount required for the freeze and the amount to be secured in this way.”¹⁰

By way of *exception*, the CPC provides that goods belonging to a public authority or institution, or other public law person, or assets exempt from the law (Article 249 (8) CPP) can not be frozen.

With regard to the scope of the goods which may be the object of a precautionary freezing measure, a distinction must be made between the goods which may be the subject of special confiscation and the extended confiscation and the goods which may be covered by a precautionary freezing measure because they can serve to guarantee the execution of the penalty or of the fines or to guarantee the reparation of the damage caused by the offense.

According to Article 112 CC, the following categories of goods may be subject to special confiscation:

- a) the goods produced by committing the deed provided by the criminal law;
- b) goods that have been used, in any way, or intended to be used for the commission of an act punished by the criminal law, if they are the offender’s property, or if being another person’s goods this person knew the purpose of their use;
- c) the goods used, immediately after the act was committed, in order to ensure the escape of the offender or the retention of the benefit or the obtained product, if they are the offender’s property, or if being another person’s goods this person knew the purpose of their use;
- d) goods which have been given to cause the commission of a criminal act or to reward the perpetrator;
- e) the goods acquired by committing an offense punished by the criminal law, if they are not returned to the injured party and insofar as they do not serve to compensate the injured party;
- f) goods the possession of which is prohibited by the criminal law.

In the situations provided by Article 112 para. 1 letter b) (goods used or intended for the commission of the offense) and letter c) (in order to ensure the escape of the perpetrator or the retention of the benefit obtained) CC, if it is found that the value of the assets subject to confiscation is manifestly disproportionate to the nature and gravity of the deed, the confiscation is only partially settled by money equivalent, taking into consideration the effect caused or which could have been caused by the contribution of the asset to the outcome. If the goods were produced, altered or adapted for the purpose of committing the offense provided by the criminal law, their confiscation shall be ordered in their entirety. Likewise, if the goods can not be confiscated because they do not belong to the offender, and the person to whom they belong did not know the purpose of their use,

¹⁰ Constitutional Court Decision no. 629 of 8 October 2015, published in the Official Journal of Romania no. 868 of 20 November 2015.

their equivalent in money will be confiscated by respecting proportionality. By way of exception, goods which have been used in any way or are intended for use in committing an offense under the criminal law committed through the press may not be confiscated.

The Romanian legislature has extensively expanded the area of assets that can be confiscated by establishing that, if the goods subject to confiscation according to para. 1 letter b) - e) and Article 112 CC are not found, money and goods are confiscated according to their value.

The goods and money obtained from the exploitation of goods subject to confiscation, as well as the goods produced by them, shall be confiscated, except for the goods referred to in Article 112 para. 1 letter b) and letter c) CC.

According to Article 112¹ CC, other goods, other than those referred to in Article 112 CP (including amounts of money) are subject to extended confiscation, if the person is convicted for committing one of the offenses stipulated¹¹, if the deed is likely to bring him/her material benefit, and the penalty provided by law is a four-year imprisonment or more. Extended confiscation may be ordered if two conditions are met cumulatively:

a) the value of the goods acquired by the convicted person within a period of 5 years before (not exceeding the moment when the Law no. 63/2012 came into force, and the offenses for which the criminal investigation is carried out have been committed after the entry into force of Law no. 63/2012)¹² and, if there's the case, after the moment of the offense committed, until the date of the court's notification, clearly exceeds the revenue lawfully obtained by it;

b) the court is convinced that the respective goods come from criminal activities of the nature provided by para. 1.

In the matter of precautionary freezing measures, the requirements of constitutionality and conventionality must also be respected.

Although the internal regulations do not impose conditions on the existence of reasonable suspicion of an offense, also in the sphere of precautionary freezing measures as procedural measures, the judicial bodies are obliged to respect the requirement of necessity and proportionality of the measure [Coman, R.M., 2017, p. 55] aiming to avoid turning this measure with the passage of time into an excessive burden. Proportionality is based on a fair balance between the general interests of the company and the interests of the person whose goods were unavailable and it is appreciated according to several

¹¹ Article 112¹ para. 1 CC: "a) offences on the traffic of drugs and precursors; b) offenses related to the trafficking and exploitation of vulnerable persons; c) offenses on the state border of Romania; d) money laundering offense; e) offenses against the legislation on the prevention and combating pornography; f) offenses in legislation on combating terrorism; g) setting up an organized criminal group; h) offenses against patrimony; i) infringement on the regime of arms, munitions, nuclear materials and explosive materials; j) counterfeiting currency, stamps or other values; (k) disclosure of economic secrecy, disloyal competition, infringement of the provisions on import or export operations, embezzlement, offenses on the import and export regime and the introduction and removal from the country of waste and residues; l) gambling offenses; m) offenses of corruption, offenses assimilated to them, as well as offenses against the financial interests of the European Union; n) offenses of tax evasion; o) offenses on the customs regime; p) frauds committed through computer systems and electronic payment devices; q) trafficking in human organs, tissues or cells."

¹² Constitutional Court Decision no. 356 of 25 June 2014, published in the Official Journal of Romania no. 691 of 22 September 2014; Constitutional Court Decision no. 11 of 15 January 2015, published in the Official Journal of Romania no. 102 of 9 February 2015.

criteria: the complexity of the criminal activity and the structural organization of the offenders, the period of unavailability, etc. [Udroiu, M., 2016, pp. 765-766].

The remedy against the provisions on preventive measures or their way of enforcement is the appeal (Articles 250, 250¹ CPC).

Thus, the suspect or defendant or any other interested person may appeal against the precautionary freezing measure taken by the prosecutor or the way of its execution, within 3 days from the date of communication of the ordinance on the respective measure or from the date of its fulfillment, to the judge of rights and freedoms from the court which has the jurisdiction to hear the case. The prosecutor submits to the judge of rights and freedoms the case file, within 24 hours of the request of the file by the judge. The appeal is not suspensive of execution.

The appeal shall be settled in the council chamber, with the summons of the contestant and the persons concerned, by reasoned judgment, which is final. The prosecutor's participation is mandatory.

The prosecutor, the suspect or the defendant or any other interested person may appeal to the judge or to the court against the manner of performing the precautionary freezing measure taken by the preliminary judge or by the court, within 3 days from the date of the measure issued.

The appeal shall be settled in a public hearing by reasoned judgment, with the parties summoned, within 5 days of its registration. The prosecutor's participation is mandatory. The appeal is not suspensive of execution.

After the final judgment has been resolved, one can challenge only the manner in which the precautionary freezing measure is carried out.

The preparation of the minute is mandatory.

According to Article 250¹ CPC¹³, *the defendant, the prosecutor or any other interested person has the right to appeal against the conclusion by which the judge of the preliminary chamber ordered the precautionary freezing measure, within 48 hours of pronouncement or, as the case may be, from communication.*

The appeal shall be resolved in a public hearing by reasoned judgment, with the parties summoning, within 5 days of its registration. The prosecutor's participation is mandatory. The appeal is not suspensive of execution.

Asset freezing

In order to enforce freezing, the competent judicial body responsible for the enforcement of the measure must identify and assess the frozen property, and may, where appropriate, use the assessors or experts, such an obligation being expressly provided by the law. The frozen goods are kept until the freezing is released.

Asset freezing shall be recorded *in a freezing minute* containing all the elements provided by Article 253 para. 1 and 2 CPC:

- all acts performed for applying the asset freeze;
- detailed description of the frozen assets, indicating their value;
- goods exempt from the law and found at the person to whom the asset freeze was applied;

¹³ Article 250¹ CPC was introduced by G.E.O. no. 18/2016 following the Constitutional Court Decision no. 24 of January 20, 2016, published in the Official Journal of Romania no. 276 of 12 April 2016.

- the possible objections of the suspect or defendant or of the civil responsible party, as well as those of other interested persons;

- informing the parties about the possibility of requesting the capitalization of the frozen assets, respectively regarding the possibility of the judicial body to capitalize the frozen assets even without the consent of the owner, under the conditions of Article 2521 para. 2 CPC.

Moreover, the judicial body that has ordered the asset freeze measure will request the competent body the mortgage notice for the seized immovable assets, respectively the mortgage notice on movable assets.

Copies of the minutes of asset freeze shall be given:

- to the person on the property of which the asset freeze has been applied (and in the absence thereof, the persons with whom this person resides, the administrator, the goalkeeper or the person who usually replaces it or a neighbor)

- possibly, to the custodian if the frozen property was handed over to him;

- the judicial body that ordered the taking of the precautionary freezing measure;

- possibly, to the competent body with mortgage notice of the immovable frozen assets.

Garnishment

Garnishment shall be ordered *by a third person or injured party* to the suspect or defendant, or to the civil responsible party on the *amounts of money* owed. Garnishment is ordered by the *ordinance* or the *judgment* by which the freeze is established. The amounts of money so frozen are recorded by the debtors, as the case may be, at the disposal of the judicial body or to the executing body that ordered the garnishment, within 5 days from maturity, the receipts being handed over to the prosecutor, to the judge of the preliminary chamber or to the court within 24 hours from registration (Article 254 CC).

CONCLUSION

In conclusion, precautionary freezing measures, like any other legal means of action available to the judicial bodies to ensure the proper evolution of the criminal proceedings and other judicial proceedings in connection with a criminal case, must comply with the conditions required by law. Particularly as they appear rather as possibilities, not characteristic to any criminal case. These measures are taken only if necessary, if the judicial bodies consider that they are necessary, depending on the concrete circumstances of each criminal case.

Beyond the purpose (legal and noble at the same time) - applying a special confiscation, extensive confiscation, execution of the fine or judicial costs or the remedy of civil damages - the precautionary freezing measures also must comply with the requirements of constitutionality and conventionality in this matter.

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