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PREJUDICE IN CRIMINAL CASES. CONCEPTS AND NOTIONS

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ABSTRACT:
THE RECOVERY OF CRIMINAL PROCEEDS AND ASSETS RESULTING FROM CRIMES / OFFENCES IS TARGETED AS AN INVESTIGATIVE PRIORITY AT INTERNATIONAL, EUROPEAN AND NATIONAL LEVEL. IN ORDER TO BE ABLE TO PREVENT AND COMBAT CRIME EFFECTIVELY, LAW ENFORCEMENT AGENCIES MUST POSSESS EFFECTIVE MEANS OF IDENTIFYING, SEIZING AND MANAGING THE CRIMINAL PROCEEDINGS. IN THIS RESPECT, THE PRESENT MATERIAL AIMS TO CONTRIBUTE TO THE SUBSTANTIATION OF A GUIDING TOOL, FLEXIBLE AND EFFECTIVE FOR THE ACTIVITY OF PRACTITIONERS AND SPECIALISTS INVOLVED IN THE EXTENSIVE PROCESS OF RECOVERY AND RECOVERY OF ASSETS FROM CRIME AND ALSO FOR THE BENEFIT OF OTHER SOCIO-PROFESSIONAL CATEGORIES INTERESTED IN THE ISSUE.

KEYWORDS: *PREJUDICE, DAMAGE, CRIMINAL PROCEEDINGS, ASSETS RECOVERY, LAW ENFORCEMENT AGENCIES.*

Over time, practice has shown that law enforcement agencies, respectively criminal investigation bodies[3] face a number of difficulties and problems with the application of precautionary seizures, including:

- ambiguous and lacunary legal provisions regarding the goods related to the crimes;
- lack of a concrete and comprehensive methodology for calculating prejudices within / during investigated cases;
- the application of precautionary seizures over the entire patrimony of investigated persons[4], although the quantified prejudice is much lower;
- insufficient knowledge of open-source information sources regarding the evaluation of seized goods (or goods that are susceptible of being seized);

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[3] Judicial police officers and agents within The General Inspectorate of Romanian Police (mainly economic crime investigation and judiciary units).
[4] Weather we are talking about companies, or individuals.

- insufficient knowledge (know-how) of the electronic data bases and official records that can be accessed / consulted by the law enforcement agencies with attributions in seizing goods/criminal proceedings.

Regarding the situations mentioned above, investigative bodies should take into account the issues discussed further on.

CONCEPTUAL CLARIFICATIONS. INTERNATIONAL REGULATIONS (HARD LAW)

If we look at the terms of "*criminal proceedings*" or "*products*" resulting from crime", international regulations correlate them with a multitude of definitions and notions, the following international documents being relevant in this respect:

The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted in Vienna on December 20, 1988[5], refers to art. 5, par. 1, lit. a, on the confiscation of "products obtained from offences established in accordance with paragraph 1 of art. 3 or goods the value of which corresponds to that of the products in question", defining the notion of "*product*" in the text of art. 1 (o), as follows: "the product term refers to any good which comes directly or indirectly from the commission of an offence / crime, established in accordance with paragraph 1 of art. 3 or obtained directly or indirectly by commission".

The European Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime adopted in Strasbourg on 8 November 1990[6], defines in art. 1 (a) and (b) the following notions:

- *product*: designates any economic advantage obtained from the offences. This advantage can consist of any good, as defined in letter b) of this article;
- *goods*: refers to any kind of property, whether tangible or intangible, movable or immovable and legal acts or documents attesting a title or right regarding goods / property.

The UN Convention against Transnational Organized Crime, adopted in New York on November 15, 2000[7] and **The UN Convention against corruption**, adopted in New York on October 2003[8], 2000 defines in art. 2 (e) the term "*proceeds*" of crime, which refers to any good that comes directly or indirectly from the commission of a crime or is obtained directly or indirectly by committing it.

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, adopted in

[5] Law no. 118 of December 15, 1992 for Romania's accession to the 1971 Convention on Psychotropic Substances and to the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1985, published in the Official Gazette, Part I, No. 341 of December 30, 1992

[6] Law no. 263 of 15 May 2002 on the ratification of the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, concluded in Strasbourg on 8 November 1990, published in the Official Gazette, Part I, no. 353 of May 18, 2002

[7] Law no. 565 of 16 October 2002 on the ratification of the United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, in addition to the United Nations Convention against Transnational Crime as well as the Protocol against Illegal Trafficking in Migrants by Land, Air and Sea, in addition to the United Nations Convention against Transnational Organized Crime, adopted in New York on 15 November 2000, published in the Official Gazette, Part I. no. 813 of November 8, 2002

[8] Law no. 365 of September 15, 2004 for the ratification of the United Nations Convention against Corruption, adopted in New York on October 31, 2003, published in the Official Gazette, Part I, no. 903 of October 5, 2004

Warsaw on 16 May 2005[9], defines the notion of product in art. 2 (a), referring to any economic advantage, derived or obtained, directly or indirectly, from crimes.

Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of orders seizure / confiscation defines in art. 2 points 3 and 4 the following notions:

- "*property* / *goods*" means property of any kind, whether tangible or intangible, movable or immovable, and legal acts or instruments proving the existence of a title or right to such property, of which the issuing Authority considers that:
  (a) it represents the product of an offence or its equivalent, whether it be the total amount or only part of the value of such a product;
  (b) it represents the instrument of a crime or the value of that instrument;
  (c) is subject to confiscation by applying in the issuing State any of the powers of confiscation provided for in Directive 2014/42 / EU;
  (d) is subject to confiscation under any other provisions concerning the powers of confiscation, including confiscation in the absence of a final conviction under the law of the issuing State, within the proceedings instituted as a result of an offence;
- "*products*" means any economic benefit derived directly or indirectly from the commission of an offence, consisting of any kind of good and including any subsequent reinvestment or transformation of the direct products, as well as any valuable gain.

Directive 2014/42 / EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instruments and proceeds of crimes committed in the European Union defines in art. 2 pt. 1 the notion of "*products*" as meaning any economic advantage obtained, directly or indirectly, from the commission of an offence[10]. It can consist of any type of goods and includes any investment or subsequent transformation of the direct products, as well as any valuable benefits.

As can be seen, none of the instruments of international judicial cooperation or the Community Directive is concerned with the establishment of a terminologically and conceptually agreed definition of the notion of "*prejudice*" or "*damage*"[11].

This international and European legal framework is justified by the fact that the economic benefit or material advantage obtained by committing offences / crimes provided by the criminal law are included in the phrase "proceeds of crime" or "*productum sceleris*".

The meaning of this phrase is indirectly given by the Court of constitutional legal department in its jurisprudence[12], keeping in mind that the extended confiscation security

[9] Law No. 420 of 22 November 2006 on the ratification of the Council of Europe Convention on the Laundering, Detection, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism, adopted in Warsaw on 16 May 2005, published in the Official Gazette, Part I, no. 968 of December 4, 2006

[10] Flavius Cristian Mărcău. "Dynamics of Deconsolidating Democracies of Poland, Hungary and Romania" în Astra Salvensis, VII (2019), no. 14, p. 293-305

[11] The United Nations Convention against Corruption (Decision 2008/801/CE) invokes explicitly mentions regarding the recovery / repairing of the prejudice. Article 35 of the Convention requires States Parties to give "entities or persons who have suffered prejudices as a result of an act of corruption the right to bring an action against those responsible for such damage, in order to obtain the repair of the damage suffered through the crimes." The Convention requires, in art. 53, States Parties to allow courts to order offenders to pay reparation or damages to another State Party that has suffered harm as a result of such offences. In art. 57, the Convention requires States Parties to seek "as a matter of priority to return confiscated property to the requesting State, to return it to its former rightful owners or to compensate victims of crime".

measure falls[13] into the category of the type "*fructum sceleris*" or "*productum sceleris*" and refers to the gains obtained through criminal activities.

At the same time, examining the jurisprudence of the constitutional court[14], we note that it operates a distinction between offences for which the damage is a condition of typicality[15] and offences likely to lead to damage, without this being an element of their objective typicality.

In the Romanian legislation there is only one express legislative consecration of the notion of "*criminal product*", respectively in the text of art. 307, par. 3 of Law no. 302/2004 which states that: "the product of a crime means any economic advantage deriving from the commission of the criminal act. It can take any form of good that has been created by committing the crime".

Another consecration of this notion is made through the text of art. 112¹ par. 1 of the Criminal Code, in which case "other goods than those provided for in art. 112 are taken into account when a person is convicted for an act likely to have provided him with a material benefit". In fact, this last phrase synthetically explains the notion of the product of the crime as it was developed in a conventional way at the international level and through the Community legislative acts.

From a doctrinaire point of view, it should be noted that, since 1970, the notion of criminal proceed[16]s has been used under the phrase "*fruit of the crime*" and the mechanism in which special confiscation works by repairing damages has been analysed. At the same time, it was revealed that "proof of the obvious acquisition of the goods from the commission of the offences can be made with any evidence and means of proof regarding the material

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[12] Decision of the Constitutional Court no. 356 of June 25, 2014, published in the Official Gazette, Part I, no. 691 of September 22, 2014, para. 22

[13] Flavius Cristian Mărcău (2019), „Hindering the process of democratization in Romania as a consequence of the social protests in the early 90s", in Research and Science Today No. 1(17)/2019, pp. 69-76

[14] Decision of the Constitutional Court no. 3 of January 15, 2014, published in the Official Gazette Part I, no. 71 of January 29, 2014, point IV para. 4.3.2.: "The case law distinguishes between infringements of damage - in which the occurrence of damage is a necessary condition for the existence of the offence and other offences - for which the damage is not a constituent element, but which, in concrete terms, may result in the occurrence of an injury. By way of example, the first category includes offences against property (theft, robbery, fraudulent management, destruction, etc.) or part of work related crimes (abuse of office, negligence, etc.), as regulated in the Criminal Code, and the second category may include some of the person related crimes (injury, deprivation of liberty, blackmail, etc.), crimes against authority (assault), crimes against the family (abandonment of the family), against the safety of rail traffic (destruction and false signaling) etc.. The same distinction, from the point of view of the damage caused, can be found in the case of offences regulated in various special laws. For example, some of the tax evasion crimes, regulated by Law no. 241/2005, are prejudicial offences, while Law no. 78/2000 for the prevention, discovery and sanctioning of corruption contains offences for which the damage is not a necessary condition for the realization of the constitutive elements of the crime, but which, in concrete terms, are / can be generating prejudice/damage."

[15] Decisions no. 101/2021, 272/2010, 1084/2009 of The Constitution Court of Romania: "The amount of damage caused is that which results from the documents in the file, namely from the indictment or from the financial-accounting documents existing in the file. It cannot be argued that the damage caused would have a variable amount depending on the claims made by the Civil Party at different timeframes and the method of calculating them adopted by the Civil Party. It is also noted that the specific establishment of the damage caused belongs to the prosecution phase of the case prosecutor".

[16] Ina Raluca Tomescu, Flavius Cristian Mărcău „European Policies and strategies for combating cross-border criminality. implications for the internal legal system", in *International Conference "New Criminal Legislation - important phase in the development of Romanian law"*, Bologna (Italy), Medimond, pp. 291-296

situation of the offender before and after the commission of the crime" [17]. This type of criminal investigation is now known as "*financial investigation*".

THE NOTION OF PREJUDICE

The French judicial literature states that we must distinguish between "damage" (*damnum / le dommage*) and "prejudice". The justification for this distinction is determined by the fact that, from a temporal point of view, the damage is the first to occur, which is the factual objective consequence of the wrongful act committed, while the prejudice is the legal conceptualization of the damage from the perspective of interest legitimately protected by law, which may substantiate the exercise of civil action in court[18].

The subsidiarity of the prejudice, as a notion, compared to the notion of "criminal product" was also underlined in the doctrine[19], where it was shown that, from the perspective of the material incidence of the security measure of special confiscation, in the category of criminal proceedings are included the following: stolen goods, money or embezzled property, goods obtained by threat, blackmail, fraud etc." – being therefore included in the object of special confiscation also the goods acquired from crimes for which the damage is a typical element (theft, embezzlement, fraud) – as well as things replaced goods originally acquired by crime (having the same regime as those they replaced).

PREJUDICE AND PRECAUTIONARY MEASURES IN THE ROMANIAN CRIMINAL LAW

As highlighted also by the Constitutional Court, for some offences, the amount of prejudice /damage is the essential element that attracts criminal liability. For example, if we talk about forestry offences, the amount of the damage generated by the illegal acts determines the classification of the deed as a felony (with judicial implications) or misdemeanor (witch only transposes in pecuniary implications). Furthermore, regarding tax evasion crimes, the illicit act is no longer punishable under the conditions of covering the damage, increased by 20%, to which are added interest and penalties. Thus, an exact determination of the prejudice / damage generates practical consequences regarding the following:

- the legal classification of the criminal acts;
- the incidence of eventual causes of impunity;
- exercising the cause of reduction of the punishment;
- the extent of precautionary measures

Therefore, the determination of the damage serves the criminal action and must be carried out, in the situation of prejudice generating offences, independent of the constitution of the civil parties. In many cases, the criminal proceedings may even be represented by the actual damage. For example, the amount of tax liabilities from which the defendant evades payment by committing one of the acts of tax evasion is detrimental to the state budget but, at

[17] Theoretical explanations of the Romanian Criminal Code, General part, Vintilă Dongoroz and collective, Ed. Academiei Românei, 1970, vol. II, page 322-324.
[18] Art. 29 Code of Civil Procedure states: civil action is the set of procedural means provided by law for the protection of the subjective right claimed by one of the parties or another legal situation, as well as for ensuring the defense of the parties in the process"
[19] Theoretical explanations of the Romanian Criminal Code, General part, Vintilă Dongoroz and collective, Ed. Academiei Românei, 1970, vol. II, page 322

the same time, it represents property acquired by crime. Relevance in this case holds the penal sentence no. 59 of 17.01.2018 of the Bucharest High Court, final by the criminal Decision no. 939 / A of 28.06.2018 of the Bucharest Court of Appeal - Criminal Section II, by which it was held that there should be no theoretical confusion between:

- the object (source) of taxation and the inventory value,
- the object (source) of the tax and the value of the construction works.

Thus, the High Court of Cassation and Justice also ruled that "the taxable source should not be confused with the method of calculating taxes, the latter being a way of interpreting the applicable taxes in relation to the income generated and the source of such income" (Decision of the H.C.C.J. No. 3907 / 28.11.2012).

In parallel with the determination of the prejudice / damage, the judicial law enforcement agencies must also determine the extent of the proceeds of crime. In the same sense, in parallel with the determination of the damage and the proceeds of the crime, the judicial bodies must determine the applicability of the measures of extended confiscation and confiscation from third parties.

In our doctrine, the prejudice / damage has been defined as "an essential element of tortious criminal liability" which "consists in the result, respectively the negative effect suffered by a certain person, as a result of the illicit act committed by another person, or as a result of the action of an animal or thing under the legal protection of another person[20]".

According to the provisions of art. 1.531 par. (2) of the Civil Code, "the damage includes the loss actually suffered by the creditor and the benefit which he is deprived of. In determining the extent of the damage, account shall also be taken of the expenses incurred by the creditor, within a reasonable limit, in order to avoid or limit the prejudice". Par. (3) of the same article mentions the creditor's right to compensation for non-pecuniary damage.

At the same time, "in determining damages, future prejudice shall be taken into account when it is certain"[21]. Also, "the damage which would have been caused by the loss of a chance of obtaining an advantage can be repaired in proportion to the probability of obtaining the advantage, taking into account the circumstances and the actual situation of the creditor"[22], known as "*unachieved benefit*".

According to the criminal law, during the criminal proceedings (which involve both the criminal investigation phase and the preliminary chamber procedure and the trial phase), the competent judicial law enforcement agencies may order precautionary measures to avoid hiding, destroying, alienating or evading pursuit of goods which are the subject of special confiscation or extended confiscation or which may be used to guarantee the execution of the fine (parole) or legal costs or to repair the damage caused by the offence.

The importance of taking precautionary measures as soon as possible has also been emphasized by the Constitutional Court: "the Court stated that the stage of the criminal investigation from which the seizure measure can be ordered is that of the criminal investigation *in person* and that, in fact, in the case of serious crimes, it is desirable that

[20] C. Bîrsan in C. Stănescu, C. Birsan, Civil Law, General Theory of Obligations, 11th Edition, revised and added, Hamangiu Publishing House, Bucharest, 2008, p. 145; M.N. Costin, C.M. Costin, Dictionary of civil law from A to Z, 2nd Edition, Hamangiu Publishing House, 2008, p.771; V. Stoica, N. Pușcaș, P. Trușcă, Civil law. Civil law institutions. Selective course for license, 2nd Edition, Universul Juridic Publishing House, Bucharest, 2004, p. 307; Ioan Ciochină-Barbu, Civil law. Obligations (In the regulation of the new Civil Code). PIM Iași Publishing House, p. 127; apud, Ioan Ciochină-Barbu, A new vision on damage as an element of tortious civil liability, available on www.ugb.ro, Juridica, Issue 1/2013

[21] Art. 1532 par. (1) of the Civil Code

[22] Art. 1532 par. (2) of the Civil Code

seizure measures are instituted as soon as possible during the criminal investigation, in order to prevent the suspect from alienating the goods or benefits of the crimes, long before assessing the extent of the criminal activity and the damage, thus the judicial bodies having the possibility to institute the precautionary seizure on all the assets of the suspect or defendant, as well as on the property of other persons, about which it is known to have originated from crimes. [...] The Court noted that the precautionary measure, regardless of the judicial body that may institute it, must be motivated and it is compulsory for the act by which it is ordered (ordinance or conclusion) to show the fulfillment of the legal conditions regarding the necessity of ordering the measure and also the extent of the damage or amount required for the seizure and the amount that is to be secured in this way[23]".

Although it is generally considered that the provision of precautionary measures is left to the discretion of the courts, there are a number of exceptions which provide for the obligation to institute precautionary seizure measures such as:

- if the injured person lacks or has limited capacity to exercise, whether or not one has appointed a legal representative and whether one intends to make a request for seizure;
- in case of committing any crime of money laundering or financing of acts of terrorism (Law no. 129/2019);
- in case of committing an offence of tax evasion (Law no. 241/2005);
- in the case of corruption offence, crimes directly related to corruption offences and offences against the financial interests of the European Union (Law No 78/2000);
- in the case of goods that may be subject to special confiscation or extended confiscation (art. 249, para. 41 of the Code of Criminal Procedure)

In order for judicial bodies to be able to enforce precautionary measures in the view of repairing the damage caused by the criminal acts, the following conditions must be cumulatively met: the existence of a material damage; the damage being caused by the offence/criminal activities; the existence of a civil party / damaged person[24].

In the criminal investigation phase, the enforcement of precautionary measures is ordered by the prosecutor, through a judicial act – ordinance, in the Preliminary Chamber procedure – through the sentence pronounced by a preliminary chamber judge and in trial – through the sentence pronounced by a legally invested court[25].

Recent doctrine has argued that precautionary measures "are real procedural measures which may be ordered through the course of the criminal investigation by the prosecutor, the judge of the preliminary chamber or the court and which consist in confiscating, by seizing movable property or real estate belonging to the suspect or defendant, the civilly liable party or other persons, as the case may be, for special confiscation or extended confiscation, for recovery of the damage caused by the offence and for guaranteeing the execution of the fine or legal costs[26].

[23] Decision no. 102 of February 17, 2021 regarding the exception of unconstitutionality of the provisions of art. 52 para. (3) and of art. 249 para. (1) of the Code of Criminal Procedure, as well as of art. 32 of Law no. 656/2002 for the prevention and sanctioning of money laundering, as well as for the establishment of measures to prevent and combat terrorism

[24] Criminal Procedure Treaty, Nicolae Volonciu, General Part, Paideia Publishing House, Bucharest, p. 442

[25] Criminal Procedure Code, art. 249 par. (1)

[26] Criminal Procedure, General Part, Gheorghită Mateuț, Universul Juridic Publishing House, Bucharest, 2019, p. 898

CONCLUSIONS

The relationship between the damage and the product of the crime was debated in several specialized literature. Thus, "the recovery of the proceeds of crime takes place both by repairing the damage caused to the victims of the crime and by confiscation. The two institutions are not characterized as incompatible, but on the contrary, they are in a relationship of complementarity. Recovery of damage, *lato sensu*, can take place, *inter alia*, by returning to the private domain of the state the goods acquired by committing certain acts of criminal law, in other words, by special confiscation. There were no few cases in which the repatriation of assets acquired by committing acts provided by criminal law took place by carrying out requests for rogatory commissions for the confiscation of the proceeds of crime, compensation of the victims of crime being considered a priority from the perspective of the founds recovered through the means mentioned above. In the laws of other countries, the granting of civil reparations to the victims of the crime from the confiscated sums takes place after the finality of the conviction decision by introducing some requests by the victims to the management unit of the criminal claims"[27].

Following a different legal tradition from other Member States of the European Union, in order to ensure a balance between the recovery of damages / prejudices suffered by civil parties and the confiscation of instruments and proceeds of crime, Romania has maintained the institution of *civil action* in criminal investigations / cases. An international report[28] has identified the usage of civil actions in criminal investigations in countries in the former Soviet zone of influence, such as: Azerbaijan, Armenia, Kyrgyzstan, Serbia, Montenegro and Ukraine.

In conclusion, in the light of the international and European legal framework, the concept of *proceeds of crime* ought to be looked at as part of the *prejudice / damage* caused by committing a crime, the proceeds of crime having a wider scope than the notion of damage / prejudice.

[27] Guide for Combating Money Laundering for Judges and Prosecutors, Camelia Bogdan, Elena Hach, Bucharest: Four Needles, 2015

[28] Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia, OECD (Organization for Economic Co-operation and Development), 2018, p. 66-65

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