

# **Presumption of lawful acquirement of property and confiscation of unlawfully acquired property in the case-law of the Romanian Constitutional Court. The reference constitutional framework for regulating of the extended confiscation**

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## **Abstract**

*This study examines - from a dual perspective - historical and teleological, the constitutional provisions that enshrine the presumption of lawful acquirement of assets, including the development and interpretation thereof in the case-law of the Constitutional Court, in order to create a framework for analysis of Law no. 63/2012 amending and supplementing the Criminal Code and Law no. 286/2009 on the Criminal Code, a law that establishes the measure of extended confiscation, expression of international regulatory concerns in this area.*

**Keywords:** *right to property, presumption of lawful acquirement of property, legal certainty, extended confiscation, revision of the Constitution.*

**JEL Classification:** *K10, K11, K14*

## **Introduction**

One of the proposals contained in the bill for revision of the Constitution, initiated by the President of Romania in 2011, at the Government's proposal, includes the elimination of the presumption of lawful acquirement of property, currently governed by Article 44(8) second sentence of Constitution. By Decision no. 799/2011<sup>2</sup>, resuming the reasons which substantiated the finding of unconstitutionality of two proposals for revision of the Constitution which had the same subject matter, the Constitutional Court found that *«elimination of the second sentence of Article 44(8) of the Constitution, stating that „Lawfulness of acquirement shall be presumed” is unconstitutional because it results in suppression of a guarantee of the right to property, infringing thus the limits in matter of revision provided by Article 152(2) of the Constitution.»*

In the same context, the Court also emphasized its case-law in the meaning that *„the regulation of this presumption does not prevent the investigation of unlawful acquirement of wealth, but in this case the burden of proof lies with the person making such allegation. Insofar the interested party proves that some assets, part of the wealth or the entire wealth of a person was acquired unlawfully, those unlawful assets or wealth can be confiscated subject to the law”,* as well as the fact that *„the regulation of this presumption does not prevent the delegated or primary legislator to adopt, pursuant to Article 148 of the Constitution -*

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<sup>2</sup> published in the Official Gazette of Romania, Part I, no. 440 of 23 June 2011.

*Integration into the European Union, regulations to enable full compliance with EU legislation in the fight against crime*”, with direct reference to the Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property<sup>3</sup>.

Less than one year after publication of the Constitutional Court Decision no. 799/2011, Parliament passed a law transposing Article 3 of the above-mentioned Framework Decision 2005/212/JHA, which introduced in the Criminal Code the safety measure of extended confiscation. i.e. Law no. 63/2012 amending and supplementing the Criminal Code and Law no. 286/2009 on the Criminal Code<sup>4</sup>.

This study is mainly aimed at presenting the constitutional framework of reference of the new regulation, respectively the development and interpretation of relevant constitutional norms in the Constitutional Court's case-law in the context of international regulatory concerns in the same matter.

### **1. Enshrining in the Constitution the presumption of lawful acquirement of property - an historical interpretation**

Undoubtedly the application of a legal norm requires a necessary process of interpretation, for a better understanding thereof; interpretation of the law requires, as pointed out before<sup>5</sup> an approach using a series of conjunct methods, which establishes, for customization purposes, the exact meaning of the norm, its scope, effects and purpose.

One of methods used for interpreting the law is the historical method, which requires examination of the socio-legal circumstances that led to the development and adoption of the law, involving the study of documents, the preparatory work of the normative act, the explanatory memorandum, the proposed amendments, the interventions during the debate of the normative act, and comparison of the current regulation with the previous ones in order to draw the practical reason that led to a certain regulation, the purpose of the regulation and the legislative means employed to achieve the purpose<sup>6</sup>.

The historical interpretation of the constitutional norm which establishes the presumption of lawful acquirement of property - both by comparison with the previous regulations in this matter and looking at the social and historical circumstances that led to its enshrining in the current Constitution - can be very useful for its correct understanding and application. This is all the more because, as emphasized in the doctrine of specialty<sup>7</sup>, in interpreting the Constitution account must be given to the original intent of its „parents”. The Constitution is a fluid text,

<sup>3</sup> published in the Official Journal of the European Union no. L 68 of 15 March 2005.

<sup>4</sup> published in the Official Gazette of Romania, Part I, no. 258 of 19 April 2012.

<sup>5</sup> Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *General Theory of Law*, C. H. Beck Publishing House, Bucharest, 2006, p. 392.

<sup>6</sup> Nicolae Popa, Mihail-Constantin Eremia, Simona Cristea, *General theory of Law*, All Beck Publishing House, Bucharest, 2005, p. 257.

<sup>7</sup> Gheorghe Iancu, *Some aspects concerning the interpretation of the Constitution in the case-law of the Constitutional Court*, „Journal of Public Law” No. 2/2008, p. 119.

constantly evolving, but to understand its meaning, at least the origin point must be considered, i.e. the original meaning that the authors wanted to give to each norm.<sup>8</sup>

Analyzing the development of constitutional regulations governing the right to property, we can notice the following:

The 1866 Constitution of Romania<sup>9</sup> treated with special attention the regulation on property, which it declared to be „*sacred and inviolable*” [Article 19(1)], establishing, at the same time, in detail, within the same article, the requirements for deprivation of property by expropriation. As for the sanction of confiscation of assets, it was regulated in a separate article, which stated that „*no law can establish the penalty consisting in wealth confiscation*” (Article 17). A similar provision exists at present in Article 17 of the Constitution of Belgium<sup>10</sup>.

The 1923 Constitution maintained, in the provisions of Article 15, the same prohibition to regulate, as a penalty, the confiscation of assets, a regulation contained in Title II - *About the rights of Romanians*.

Unlike previous Constitutions, the 1938 Constitution admitted the possibility for establishing the sanction of confiscation of property in two situations: „*cases of high treason and embezzlement of public money*” [Article 16(2)]. Furthermore, the same article established the circumstances and requirements for deprivation of property - expropriation and confiscation.

After nearly a century in which private property was declared, even by the basic laws of the country as „*sacred and inviolable*”, the communist period brought an essential change in this regard, as well as legislative measures corresponding to the new vision on property, which basically have restricted almost to annihilation the right to private property.

Thus, after a period of time (1944-1948) in which constitutional acts had been adopted as to prepare the enactment of the new Basic Law<sup>11</sup>, the 1948 Constitution created the radical change of the concept of the right to property. It established that the means of production belong either to the State as property of the entire people, or to cooperative organizations or individuals, legal or natural persons. Enumerating, in Article 6(1), the assets that may be subject only to the State property as common property of the entire people, the Constitution provided

<sup>8</sup> Ioan Muraru, Mihai Constantinescu, Simina Tănăsescu, Marian Enache, Gheorghe Iancu, *Interpretation of the Constitution. Doctrine and practice*, Lumina Lex Publishing House, Bucharest, 2002, p. 11.

<sup>9</sup> see I. Muraru, Gh. Iancu, Mona -Lisa Pucleanu, Corneliu - Liviu Popescu, *Romanian Constitutions – texts, notes, comparative presentation*, Regia Autonomă „Monitorul Oficial”, Bucharest, 1993.

<sup>10</sup> „assets may not be confiscated as a means of punishment”.

<sup>11</sup> Decree no.1626/1944 aimed at „Securing Romanians’ rights established in the 1866 Constitution and the amendment of the Constitution of 29 March 1923”, Decree no.1849/1944 „Adding a new paragraph within Article IV of the High Royal Decree no.1626 of 31 August 1944”, Law no.86 of February 1945, concerning the status of national minorities, Law no.187 of 23 March 1945 for carrying out agricultural reform, Decree no.2218 of 13 July 1946 on the exercise of the legislative power, Law no.363 of 30 December 1947 for the establishment of the Romanian State in the People’s Republic of Romania – for comments and explanations see Ioan Muraru, Elena Simina Tănăsescu, *Constitutional Law and Political Institutions*, Volume I, C.H. Beck Publishing House, Bucharest, 2008, pp. 90-95

in the second paragraph of that article that the law will determine the transfer of the assets in question into the State's property, which at the entry into force thereof „were in private hands”. As concerns property, it is no longer regulated in the chapter on rights, as in previous constitutions, the issue of property being dealt with under Title II of the Constitution, dedicated to the *Social – Economic Structure*. Private property is no longer „sacred and inviolable”, but, according to Article 8 of the Constitution, „it shall enjoy special protection”. Article 11 of the same Constitution creates the legal framework for future nationalizations, establishing that „when public interest so requires, the means of production, the banks and the insurance companies, which are private property of individuals or legal entities may become State property, that is property of the people, under the terms provided by law.”

The period between 1952 and 1965 is characterized by extension of State and cooperative property and radical restriction of private property. Thus, the 1952 Constitution provided in Article 12 under Chapter I - *Social Order* - that „the right to personal property of citizens of the People's Republic of Romania on income and savings from work, on the house and household around the house, on household items and personal use items, as well as the citizens' right to inheritance on the personal property shall be protected by law”.

In the same vein, the 1965 Constitution introduced the right to property in Section II - *Fundamental rights and duties of citizens*, establishing, in Article 36 that „The right to private property is protected by law. Revenues and savings from work, house, household, and the affherent land, as well as personal use and comfort items can be covered by the right to personal property.”

Under this Constitution, Law no.18/1968<sup>12</sup> concerning the control of unlawfully acquired assets belonging to individuals was enacted. Establishing, within Article 1(1), the principle that „acquisition of property by means other than the lawful ones constitutes a breach of the principles of ethics and equity, and shall be prohibited”, the law in question provided for in paragraph 2 of same article, that property acquired in violation of those provisions, or their cash value, „shall be transferred into State's property”.

According to Article 2 of the law, the control could be aimed at „the source of the assets of any natural person, if there are data or evidence that there is an obvious disproportion between the value of his/her assets and his/her legal revenue and the lawful acquirement of property cannot be justified.

*Justification of origin of assets shall mean that the concerned person is required to prove the legality of the means used to acquire or enhance assets.*

*The investigation concerns the assets acquired within the 15 years preceding the referral, both those present in the patrimony of the concerned person and those alienated with due consideration or free of charge. If there is clear evidence that certain assets achieved before this period came from an unlawful source, the control shall be extended also on them.*

*Upon justification of the source of assets, consideration shall be given to all revenues from productive activities useful to society, as well as to those*

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<sup>12</sup> republished in the Official Bulletin no. 33 of 10 May 1933.

*acquired by legal acts. In the case of revenues for which related taxes or legal fees have not been paid, the financial authorities shall be notified in view of establishing and paying such dues within the legal limitation periods."*

Wealth control was initiated, under Article 3 of the legislative act mentioned, upon referral by any individual or by the management of the socialist organization where the person concerned had performed or continued to perform any activity, regardless of its nature; at the request of the person against whom public imputations had been brought in relation to the source of its assets; upon referral made by the management of financial authorities, by prosecution offices or by courts of law if they held data, resulting from their work, on the obvious disproportion between the value of assets and the legal revenues of a person.

According to the law, an investigation committee composed of one judge, one prosecutor, a representative designated by the director of the county financial administration, a delegate of the county militia, a member of the popular municipal council, town or village or of the respective sector of Bucharest, as well as 4 workers operating directly in the production, was being established. This committee, whose acts and documents were not made public, had wide powers, i.e. to call and listen the searched person or any other persons who could give explanations, to conduct local research or to order technical and accounting expertise, to take steps to seize the searched person's assets. It could decide, as appropriate, to refer the case to the court for settlement, to dismiss the case, to suspend the search and refer the case to the competent unit of prosecution, if the assets whose source could not be justified resulted from the perpetration of an offence.

The 1991 Constitution answered the requirements to achieve a democratic legal framework and establish the foundation of the rule of law. In terms of property, the experience of application of regulations adopted in the communist period, in the context of a long period in which the right to private property was almost deprived of content, has determined that one of the main points of discussion in the Constituent Assembly on the Theses of the Draft Constitution be the regulation of safeguards of this fundamental right, in particular of the presumption of lawful acquirement of property.

Thus, the proposal to replace the regulation of this thesis with the words *„confiscation of unlawfully acquired property may not be ordered except under conditions prescribed by law"* was not adopted by the majority. Likewise, the proposal to eliminate this presumption from the text of Title II - *Rights, freedoms and duties of citizens*, substantiated in the sense that *„the text in the current draft would render ineffective the current Law no.18/1968 or other possible regulation where the burden of proof would be incumbent on the person who did not acquired the assets lawfully"* was rejected on the grounds that *„safeguard of the rights is not possible without the resumption of lawful acquirement of wealth. The procedure set forth in Law no.18/1968 is a contradiction in terminis"*<sup>13</sup>.

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<sup>13</sup> see *the Genesis of the Constitution of Romania, 1991 - Constituent Assembly Works*, Regia Autonomă Monitorul Oficial, 1998, p. 321.

In conclusion, it appears that the historical interpretation of the provisions establishing the presumption of lawful acquirement of wealth reveals the following aspects:

➤ this provision was introduced following a specific socio-historical development of the Romanian state - hence the fact that other European Constitution do not enshrine nor have they enshrined this presumption is not, in our view, of any particular relevance, nor can it support an eventual claim to the effect that, in this respect, the Constitution of Romania would give a more or less adequate regulation to the safeguards of the right to private property;

➤ in this specific socio-historical context, the regulation of this presumption by the constituent legislator was considered to be absolutely necessary for defining the new legal regime of private property, corresponding to the democratic legal framework established by the 1991 Constitution;

➤ as the constituent legislator specifically mentioned on the occasion of discussing the amendment to eliminate this presumption, the very reason of its establishment by the Constitution was to ensure legal certainty of the right to property;

➤ the concept of legal certainty was approached by a constituent legislator in opposition to the provisions of Law no. 18/1968, hence this concept was used for the purposes aimed at protecting the citizens and their rights "against a threat that comes right from the law, against uncertainty created by the law or which it may create"<sup>14</sup>. The constitutional text was therefore introduced as a safeguard against the adoption of regulations similar to those who during the period preceding the 1991 Constitution allowed abuses and flagrant violations of the right to property.

## **2. The significance of introduction in the Constitution of the presumption of lawful acquirement of property**

In a constant case-law, pronounced in the exercise of its power of review of initiatives for revision of the Constitution [Article 146a) second sentence of the Basic Law], review of laws before the promulgation [146a) first sentence] and settlement of exceptions of unconstitutionality of laws and ordinances [Article 146d)] the Constitutional Court ruled that the presumption of lawful acquirement of wealth is one of constitutional guarantees of the right to property.

Thus, in exercising its power under Article 146a) first sentence of the Constitution, the Court issued three decisions whereby it rules as mentioned above.

By Decision no.85/1996<sup>15</sup>, the Court held that *the presumption of lawful acquirement of wealth is one of constitutional guarantees of the right to property, in accordance with the provisions of paragraph (1) of Article 41 of the Constitution [the current paragraph (1) of Article 44], which states that the right to property*

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<sup>14</sup> Lucien François, *Le problème de la sécurité juridique*, work paper *La sécurité juridique*, Ed. Jeune Barreau de Liège, Liège, 1993, p. 10, *apud* Ion Predescu, Marieta Safta, *The principle of legal certainty, foundation of the rule of law. Case-Law landmarks*, in „The Constitutional Court Bulletin” no. 1/2009.

<sup>15</sup> published in the Official Gazette of Romania, Part I, no. 211 of 6 September 1996.

*shall be guaranteed. This presumption is based also on the general principle that any legal act or deed is lawful until proven otherwise, requiring, as concerns the wealth of a person, that unlawful acquirement be proven. [...]*" Court, referring to the debates that accompanied the adoption of the 1991 Constitution theses, also held that *„The legal certainty of the right to property on the assets that make up one's wealth is [...] inextricably linked to the presumption of lawful acquirement of property. Therefore removal of this presumption is tantamount to a suppression of a constitutional guarantee of the right to property”*.

By Decision no. 148/2003<sup>16</sup>, adjudicating on the proposed text to be introduced in the Constitution, a text that established the cases of application of the presumption in question, stating that it does not apply in case of *„property obtained from criminal conduct”*, the Court held that this wording implies that it is meant to reverse the burden of proof on lawful acquirement, being provided the unlawfulness of wealth acquired from criminal conduct. As in the other decision, the Court found unconstitutional the proposal for revision that was aimed, in essence, at the same objective, i.e. removal of the presumption of lawful acquirement of wealth, because it is tantamount to a suppression of a constitutional guarantee of the right to property.

Decision no. 799/2009 resumed the grounds set forth in the aforementioned decisions, also declaring that *„in the absence of such presumption, the owner of property would be subject to continuing uncertainty because, whenever someone would invoke the unlawful acquirement of the property, the burden of proof lays not with the one who makes the allegation, but with the owner of the property.”*

Because, pursuant to Article 152(2) of the Constitution, *„No revision shall be possible if it leads to the suppression of any of the citizens' fundamental rights and freedoms, or their safeguards”*, and the presumption of lawful acquirement of wealth is, according to the interpretation given by the Constitutional Court<sup>17</sup>, a guarantee of the right to property, the conclusion of the three decisions was the same, i.e. the unconstitutionality of the initiatives for revision concerning the removal of the text regulating the mentioned presumption.

The decisions that found unconstitutional certain laws before promulgation, or certain laws in force, decisions which we shall refer to in what follows, in the context of examining the need to enshrine in the Constitution the presumption of lawful acquirement of wealth, have used the previous facts, reiterating the same opinion, i.e. that the mentioned presumption is a constitutional guarantee of the right to private property.

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<sup>16</sup> Official Gazette of Romania, Part I, no. 317 of 16 April 2003.

<sup>17</sup> Constitutional Court's interpretation of constitutional provisions is mandatory under Article 147(4) second sentence of the Constitution, which states that *“as from their publication, decisions shall be generally binding and take effect only for the future.”*

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A pertinent question is whether this presumption needs to be established as constitutional guarantee as, in fact, it is merely a means of evidence, or could it have found its place within an infraconstitutional regulation.

We consider that the necessity to enshrine it in the Constitution – almost unique at European level<sup>18</sup> – was demonstrated over the time by its real protection of legal certainty of the right to property. This protection has resulted in the removal, as unconstitutional, of those regulations which- often by faulty drafting and use of imprecisely determined formulas - have constituted a breach of legal certainty of the right to property.

Making a brief historical examination of the norms adopted by the Romanian legislator - this time under the rule of the 1991 Constitution, revised in 2003 – we note the concern for adoption of regulations requiring certain socio - professional (in consideration of their role and status) categories to declare their assets, and also enabling their control by establishing procedures and bodies with powers in this matter.

In this context, it is worth noting that Law no. 18/1968 was amended following the entry into force of the new Constitution<sup>19</sup>. Only some of its provisions, incompatible with the new constitutional order, have been implicitly repealed after that date, which was also ascertained by the Constitutional Court Decision no. 64/1996<sup>20</sup>. The Court held on that occasion that „*Law no. 18 of 24 June 1968 on control of the origin of assets of individuals who have not been lawfully acquired, republished in 1983 and amended by Article III of Law no. 45 of 4 July 1991 amending certain provisions relating to judicial activity, is not unconstitutional as a whole, because the Constitution, pursuant to Article 41(7) and Article 54 [AN: the numbering of the texts of the Constitution before its revision, in 2003] protects lawfully acquired property and Romanian citizens should exercise their rights and liberties in good faith, without infringing the rights and freedoms of others*”, noting also that the provisions of Article 2(2) of this law, stipulating that „*justification of origin of assets shall mean that the concerned person is required to prove the legality of the means used to acquire or enhance assets*” are contrary to Article 41(7) second sentence of the Constitution which establishes the presumption of lawful acquirement of property. Consequently, the Court held that Article 2(2) of Law no. 18/1968, as amended, shall be deemed repealed pursuant to Article 150(1) of the Constitution [current Article 154(1)].

Following delivery by the Constitutional Court of Decision no. 64/1996, Law no. 115/1996 for the declaration and control of the wealth of dignitaries, magistrates, of persons holding management and control positions and public officials was adopted,<sup>21</sup> a normative act that repealed, *inter alia*, Law no. 18/1968

<sup>18</sup> exception: the Constitution of Moldova –Article 43(3) second sentence.

<sup>19</sup> Law no. 45 of 4 July 1991 amending certain provisions relating to judicial activity, Official Gazette of Romania, Part I, no. 142 of 11 July 1991.

<sup>20</sup> published in the Official Gazette of Romania, Part I, no. 181 of 7 August 1996.

<sup>21</sup> published in the Official Gazette of Romania, Part I, no. 263 of 28 October 1996.

concerning the control of unlawfully acquired assets belonging to individuals, as well as Government Decision no. 473/1993 on declaration of wealth by public officials within the executive power authorities<sup>22</sup>. The new normative act established an obligation of declaration of wealth by high officials, magistrates, public servants and certain persons holding managing positions in self-managed companies, the State Property Fund, the National Bank of Romania and State-owned banks, wholly or in majority percentage, and it regulated a procedure of control of their wealth should there be clear evidence that certain assets or values have been unlawfully acquired.

Following a referral by the Advocate of the People on the unconstitutionality of some of the provisions of this law, the Constitutional Court dismissed the exception raised, on the grounds that „*although the impugned legal provisions are drafted with sufficient precision and clarity as to render effective the protection established by the mentioned constitutional text [Article 44(8)] and in order to allow the interested persons to regulate their conduct, those provisions do contain inadequate wording which could indeed generate problems and difficulties in terms of application thereof*” Citing in this respect the case-law of the European Court of Human Rights that admitted that, because of the generality of the laws and for the purpose to avoid an excessive rigidity, their drafting cannot be absolutely precise (Case *Cantoni v. France*, 1996), the Court held that „*the judges, within the administration of justice, shall be free to decide on the interpretation and application of certain legal rules.*”<sup>23</sup>

Two years later, however, being referred within the *a priori* review on the Law amending Law no. 115/1996, and adjudicating on the new drafting of paragraph (1) of Article 18 of the law, according to which „(1) *If between the wealth achieved while in office and revenues over the same period there are unjustifiable differences in terms of income obtained, the appeal court will determine, by means of an order, the property or the share of property that has not been acquired from income or other legal sources of the person whose property is subject to control. [...]*.” text challenged in relation to Article 44(8) of the Constitution, stating that “*Lawfully acquired wealth may not be confiscated. Lawfulness of acquirement shall be presumed*”, the Court declared unconstitutional the impugned text. As grounds for its decision, the Court held that «*the proposed changes are vague and inadequate, as it is used the term „unjustifiable differences” whose scope cannot be determined*». That is why the Court held that, „*insofar the impugned law regulates excessive, poorly developed measures, sometimes impossible to achieve, but with obvious unconstitutional effect, it is necessary to remove them.*” Furthermore, the Court also held that „*the impugned legal provisions are aimed at [...] overthrow the burden of proof on the lawfulness of wealth, providing that the wealth which lawful acquirement cannot be proven*

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<sup>22</sup> legislative act that compelled people exercising managing positions in public central and local administration authorities to declare their assets, but such were not meant for public release.

<sup>23</sup> Decision no. 599/2006 of 25 January 2011, published in the Official Gazette of Romania, Part I, no. 839 of 11 October 2006.

*shall be confiscated. Consequently, it results that one's wealth is presumed to be unlawfully acquired until proven otherwise by its holder*", which is contrary to Article 44(8) of the Constitution. Further extending the constitutional review on other provisions of the impugned act, the Court found them unconstitutional, for the same reasons.

In 2007 was adopted the Law on the establishment, organization and functioning of the National Agency for Integrity (Law no. 144/2007<sup>24</sup>), a normative act which, regulating the declaration and control of wealth and the conflict of interests, extended the scope of persons who must submit declarations of wealth, regulated the organization and functioning of an independent and unique authority, with permanent activity, to control wealth, the procedure to be followed for this purpose, the sanctions and the legal solutions that may be ordered.

By Decision no. 415/2010<sup>25</sup> the Constitutional Court declared unconstitutional the provisions under Chapter I „*General provisions*” (Articles 1 to 9), as well as those of Article 11e), f) and g), Article 12(2), Article 13, Article 14c), d), e) and f), Article 17, Article 38(2)f), g) and h), Article 42(2), (3) and (4), under Chapter VI - „*Verification of assets, conflicts of interest and incompatibilities*” (Articles 45-50) and Article 57 of Law no. 144/2007 on the establishment, organization and functioning of the National Agency for Integrity, also in terms of infringement of the presumption of lawful acquirement of property. Court held in this regard that *«the power of the integrity inspector to require confiscation of property violates Article 44(8) and (9) of the Constitution, which states that "lawfully acquired wealth may not be confiscated. Lawfulness of acquirement shall be presumed", and that „any goods intended for, used, or resulting from criminal offences or misdemeanors may be confiscated only under the terms laid down by the law.”* Recognizing the possibility of integrity inspector to request the competent court – should part of the wealth or some determined assets could not be justified in terms of acquirement – to confiscate that part or the determined asset, the provisions of Article 46 of Law no. 144/2007 extend the measure of confiscation of unlawfully acquired assets also on the unjustified assets, infringing thus the provisions of Article 44(8) and (9) of the Constitution».

As grounds for the same decision, the Court also held that *„in the process of adoption of the current form of Law no. 144/2007 there were situations of inconsistency and instability, contrary to the rules of legislative technique, provided by Law no. 24/2000 on the rules of legislative technique for drafting normative acts, republished in the Official Gazette, Part I, no. 777 of 25 August 2004. Thus, after Law no. 144/2007 on the establishment, organization and functioning of the National Agency for Integrity was published in the Official Gazette, Part I, no. 359 of 25 May 25 2007, after less than a week, it was amended and completed by Government Emergency Ordinance no. 49/2007, published in the Official Gazette, Part I, no. 375 of 1 June 2007, which amended and supplemented*

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<sup>24</sup> published in the Official Gazette of Romania, Part I, no. 359 of 25 May 2007, republished in the Official Gazette of Romania, Part I, no.535 of 3 August 2009.

<sup>25</sup> published in the Official Gazette of Romania, Part I, no. 294 of 5 May 2010.

19 articles of the Law no. 144/2007, and three paragraphs of Article 39, Article 43 and Article 53 were repealed.

By its content, the Government Emergency Ordinance no. 49/2007 amending and supplementing Law no. 144/2007 on the establishment, organization and functioning of the National Agency for Integrity infringed upon the citizens' rights and freedoms provided by the Constitution. By Law no. 94/2008 approving Government Emergency Ordinance no. 49/2007, the legislator adopted amendments to 16 articles of the Law no. 144/2007, and under 8 articles new paragraphs were introduced, and by Government Emergency Ordinance no. 138/2007, published in the Official Gazette, Part I, no.843 of 8 December 2007, approved by Law no. 105/2008, published in the Official Gazette, Part I, no. 375 of 16 May 16 2008, four articles of the same law were modified."

Furthermore, the Court held that, «pursuant to Article 1(5) of the Constitution, „In Romania, observance [...] of the laws shall be obligatory” and, pursuant Law no. 24/2000 concerning the norms of legislative technique for drafting normative acts, republished in the Official Gazette of Romania, Part I, no. 777 of 25 August 2004, legislative technique ensures systematization, unification and coordination of legislation, as well as the appropriate content and legal form for each normative act. Similarly, Article 13 of this Law establishes the principle of unity in regulation, stating that the same level regulations with the same object shall be included in a single normative act, and, according to Article 15, denominated „Avoiding duplication”, in the law-making process it is prohibited the establishment of the same rules in two or more normative acts, and where there is duplication, it will be removed either by repealing or by concentrating the matter in a unique regulation». However „in the field of activity of control of wealth acquired while in public office or functions and of verification of the conflicts of interest, there are parallel regulations, namely, on the one hand, Law no. 115/1996 for the declaration and control of the wealth of dignitaries, magistrates, of persons holding management and control positions and public officials, published in the Official Gazette of Romania, Part I, no. 263 of 28 October 1996, amended and supplemented by Law no. 161/2003 on certain measures to ensure transparency in the exercise of public dignity, of public office and in the business environment, and to prevent and punish corruption, published in the Official Gazette of Romania, Part I, no. 279 of 21 April 2003, and, on the other hand, Law no. 144/2007 on the establishment, organization and functioning of the National Agency for Integrity, which states that the activity of verification concerning the wealth acquired while in public office or functions, as the case may be, of conflicts of interest and incompatibilities shall be carried out by the National Agency for Integrity.”

In conclusion, taking into account the case-law subject to analysis, we note the following:

- presumption of the lawful acquirement of wealth is a guarantee for the right to private property. Therefore, no initiative for revision of the Constitution can remove it, because it is part of what is called the „core content” of the Basic

Law. It is important also the clarification made in the specialized literature<sup>26</sup> in that the text of Article 152 of the Basic Law establishes at constitutional level a general principle in matter of protection of fundamental rights, namely that of permanent evolution of their legal protection regime and the impossibility to go back (*cliquet arrière-retour*) to a legal regime less favorable than the one established at a certain time.

From this perspective, we consider that one may not invoke the provisions of Article 148 of the Constitution (i.e. an alleged contradiction between the rules of the Basic Law and the provisions of EU law) as the basis for removal of this guarantee, especially where the level of protection of the right to property, as fundamental right, in the Constitution of Romania, is superior to that established by European standards. In our opinion, the text of Article 152(2) of the Constitution, which establishes unequivocally that „**no revision shall be possible**” (if it leads to the suppression of any of the citizens' fundamental rights and freedoms, or their safeguards) is not subject to any exception or derogation. *Mutatis mutandis*, we could assume that the constitutional norms that make up the „core content” to which we referred are the equivalent of what, for example, the Constitutional Court of Germany called „*eternal guarantee*” whose violation would mean violation of people's constituent power.<sup>27</sup>

▪ regulation of the presumption of lawful acquirement of property has fulfill the role for which it was established, allowing the sanctioning of legal provisions challenging the legal certainty of the right to property; in this respect, it is noted that the Constitutional Court has always sanctioned not only the legislator's attempt to overthrow the burden of proof in terms of lawful acquirement of wealth, but also elements of the constitutional or infraconstitutional laws affecting the quality of these regulations - lack of clarity and precision, inadequate formulas used by legislator, legislative duplication, i.e. problems related as pointed out above to the scope of the principle of legal certainty.<sup>28</sup>

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<sup>26</sup> S. Tănăsescu in I. Muraru, E. S. Tănăsescu (coord.) *Constitution o Romania, articles comment*, C. H. Beck Publishing House, Bucharest, 2008, p. 1463.

<sup>27</sup> „constitutive power of the Germans, established by the Basic Law was intended to set a border impassable for any future political change. Amendments of the Basic Law affecting the principles laid down in Article 1 and Article 20 of the Basic Law shall be inadmissible (Article 79.3 of the Basic Law). The so-called eternity guarantee takes the disposal of the identity of the free constitutional order even out of the hands of the constitution-amending legislature [...] The constituent power has not granted the representatives and bodies of the people a mandate to dispose on the identity of the Constitution. The constituent power has not granted the representatives and bodies of the people a mandate to change the constitutional principles which are fundamental pursuant to Article 79.3 GG.. The Federal Constitutional Court shall see to the compliance thereof”- Decision no. 72 of 30 June 2009 on the Lisbon Treaty, par. 217, 218, see <http://www.bundesverfassungsgericht.de/en/press/bvg09-072en.html>.

<sup>28</sup> Ion Predescu, Marieta Safta, *Principle of legal certainty, foundation of the rule of law*, „Constitutional Court Bulletin” no. 1/2009.

**3. Does the constitutional regulation of the presumed lawfulness of acquired property lead to the impossibility to adopt regulations providing for the confiscation of unlawfully acquired property? Does the constitutional regulation in matter of confiscation prevent compliance with the commitments undertaken by Romania as Member State of the European Union?**

The Constitutional Court of Romania has consistently ruled that the mentioned constitutional norms do not prevent the search and confiscation of unlawfully acquired property.

Thus, by Decision no. 64/1996, noting that only certain provisions of the Law no.18/1968 are implicitly repealed upon the entry into force of the Constitution, the Court held in principle that the Basic Law, "*according to Article 41(7) [current Article 44(7)] and Article 54 protects the lawfully acquired property and that Romanian citizens should exercise their rights and liberties in good faith, without infringing the rights and freedoms of others.*"

By Decision no. 85/1996, the Constitutional Court held that *„paragraph (8) of Article 41 of the Constitution [currently paragraph (8) of Article 44] provides that any goods intended for, used, or resulting from criminal offences or misdemeanors may be confiscated only under the terms laid down by the law. The presumption established by Article 41(7) of the Constitution [currently Article 44(7)] does not prevent the investigation of the unlawful acquirement of property.”*

By Decision no. 148/2003, the Court referring to the text proposed to be introduced and which set conditions for the presumption of lawful acquirement of wealth, held, *inter alia*, the following: *„This wording is objectionable and may lead to confusion. Thus, if the text is meant to enable confiscation of property lawfully acquired, but which was based on a sum of money derived from crime, its wording is inappropriate.”*

By Decision no. 453/2008, the Court stated that *„the presumption established by the constitutional text of reference does not prevent the investigation of unlawful acquirement of wealth. But the impugned legal provisions are aimed at overthrowing the burden of proof on the lawfulness of wealth, providing that the wealth which lawful acquirement cannot be proven shall be confiscated. Consequently, it results that a person’s wealth is presumed unlawfully acquired until the contrary is proven by the holder himself”.*

The same idea was underlined also in the recent Decision no. 799/2011, where it was held that *„regulation of this presumption does not prevent the investigation of the unlawfulness of acquirement”.* This time, the Court, referring to the motivation that determined the proposal for revision of the constitutional norm of reference, specifically mentioned that it does not prevent the legislator to adopt regulations consistent with the European Union Law in matter of fight against crime, with direct reference to the Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, published in the Official Journal of the European Union no. L 68 of 15 March 2005.

We believe that both the solutions delivered by the Court, and the reasons substantiating them, support the idea that the discussions on constitutional texts of reference in matter of confiscation, in the sense that they would be against EU rules, i.e. preventing the adoption of regulations allowing confiscation of unlawfully acquired property are based on an erroneous approach to legal problem, which are largely based on the burden of proof.

Thus, the presumption of lawful acquirement of wealth, as any presumption, represents a means of evidence<sup>29</sup>. Pursuant to Article 1191 of the Civil Code, presumptions are „consequences that the law or the magistrate draws from a known fact in relation to an unknown one”.<sup>30</sup> Being determined „specifically by law” (Article 1200 of the Civil Code), the presumption in question is a legal presumption. Legal presumptions are divided into absolute presumptions - those against which, as a rule, is not admissible evidence to the contrary - and relative presumptions - which can be countered by contrary evidence, in principle being admissible any evidence. Presumption of lawful acquirement of wealth is a relative legal presumption, as not falling within any presumptions indicated as such by Article 1202 of the Civil Code (in the sense that the law, based on such a presumption, „cancels any act or does not entitle to claim in court”) and not being described as such by any other regulation.

Being a relative legal presumption it may be rebutted by evidence to the contrary. Analyzing the reasons substantiating the examined case-law of the Constitutional Court and noting that, in most cases, the Court condemned the legislator's attempt to reverse the burden of proof in terms of lawful acquirement of wealth, we are inclined to qualify the presumption established by Article 44(8) of the Constitution as what the doctrine called „ante-judicial presumption” which has the role to assign, positively or negatively, the burden of proof to one party<sup>31</sup>. The law considers a fact as established in the absence of contrary evidence. Such presumptions designate the parties who must bring evidence, producing only one inversion of the role of parties in terms of burden of proof - in other words<sup>32</sup> „the party to whom it will be opposed a relation established by law as constant, will be able to prove, according to the rules of evidence, that certainty inferred by the legislator does not prove to be true, does not correspond to reality”.

Thus, establishing in the constitutional text of reference this presumption does not prevent, *de plano*, confiscation of unlawfully acquired property. The legislator cannot adopt a regulation that would overturn the burden of proof in this matter, because such regulation would be unconstitutional, but can regulate the probation system so that to allow the interested parties to bring evidence to contradict the presumption established by constitutional text.

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<sup>29</sup> according to the prevailing view in the doctrine of specialty, for a discussion on this issue see Maria Fodor, *Evidence in civil proceedings*, Universul Juridic Publishing House, p. 357 et seq.

<sup>30</sup> similarly, Article 1349 of the French Civil Code, „Presumptions are consequences that the law or the magistrate draws from a known fact in relation to an unknown one”.

<sup>31</sup> J. Ghestin, G. Goubeaux, *Traite de droit civil, Introduction générale*, 3<sup>e</sup> ed., Librairie Générale de Droit de Jurisprudence, 190, nr. 582, 649.

<sup>32</sup> Matei B. Cantacuzino, *Elements of civil law*, All Educational, 1998.

In conclusion:

✓ the presumption of lawful acquirement of property established by Article 44(8) of the Constitution is a relative legal presumption, which can be countered by evidence to the contrary;

✓ in this context, the legislator's task is not an interference with the right to private property according to Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, if the probation system is properly regulated, as to allow the defendant to counter the presumption of lawful acquirement of property and if the law establishes sufficient procedural guarantees for the property holder.

#### **4. Extended confiscation regulated by Law no. 63/2012 amending and supplementing the Criminal Code and Law no. 286/2009 on the Criminal Code**

In most jurisdictions of the continental Europe, confiscation is generally part of criminal proceedings involving criminal prosecution and criminal convictions<sup>33</sup>. Given the efforts to combat organized crime, at present, more countries belonging to this legal system adopted pieces of legislation aimed at not only the confiscation of instrumentalities or products of a specific crime (simple confiscation), as they are increasingly more open to more radical measures, in the form of extended confiscation. It's about confiscation, in some cases, of various assets owned by a person convicted of an offence committed within organized crime.<sup>34</sup>

These legislative measures are, in fact, the effect of concerns at European level in this area, resulting in the adoption of measures such as Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property<sup>35</sup>.

This framework-decision was determined by the need for an instrument which, taking into account the best practices in Member States and with due regard

<sup>33</sup> In the *common-law* European countries – comprising mainly Great Britain and Ireland, it is allowed to recover products resulting from illegal acts through civil proceedings in the absence of a conviction. Currently, several European countries have adopted systems of recovery of goods using proceedings that do involve indictment. These are the so called "civil proceedings" in those jurisdictions where the relevant state agencies sue the defendant and bring him before a court which seeks to prove based on the financial condition or the probability that its assets resulted from criminal activity. In such cases, courts may order confiscation of assets on the basis of the fact that the defendant has acquired them illegally. There is a tendency to approximate the two systems. For example, in Bulgaria a bill was initiated that provides for the forfeiture of assets in the absence of any convictions. The Venice Commission, which was requested on 16 November 2009, the opinion on the bill in question - on confiscation by the State of unlawfully acquired property - has developed a number of opinions, between 12 March 2010 and 17 June 2011 noting also the fact that the bill is modelled on Irish law, transposing therefore, according to the same opinion, provisions from a *common law* legal system in civil law legal system.

<sup>34</sup> at large, L. Coraș, The measure of confiscation from the perspective of the Council framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, „Dreptul” Magazine no. 11/2010, pp. 225-231.

<sup>35</sup> published in the Official Journal of the European Union no. L 68 of 15 March 2005, pp. 49-51.

to principles of law, would provide the possibility of introducing in criminal, civil or tax law, as the case may be, a reduction of the burden of proof regarding the source of goods held by a person convicted of a crime related to organized crime. The aim of the framework-decision is to ensure that all Member States have effective rules on confiscation of crime related proceeds, *inter alia*, in terms of burden of proof regarding the source of assets held by a person convicted of an offence relating organized crime.

The Framework-decision provides that „*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.*”

According to Article 3 of the mentioned act, denominated *Extended powers of confiscation*: “(1) *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 belonging to a person convicted of an offence:*

(a) *committed within the framework of a criminal organization, [...] provided that the offence according to the Framework Decisions referred to above;*

- *regarding offences other than money laundering are punishable with criminal penalties of a maximum of at least between 5 and 10 years of imprisonment;*

- *regarding money laundering, are punishable with criminal penalties of a maximum of at least 4 years of imprisonment; and the offence is of such a nature that it can generate financial gain.*

(2) *Each Member State shall take the necessary measures to enable confiscation under this Article 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.*

(3) *Each Member State may also consider adopting the necessary measures to enable it to confiscate, in accordance with the conditions set out in paragraphs 1 and 2, 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. The same shall apply if the person concerned receives a significant part of the legal person's income.*

*(4) Member States may use procedures other than criminal procedures to deprive the perpetrator of the property in question.”*

Applying Article 3 of the mentioned Framework-Decision, the legislator adopted Law no. 63/2012 amending and supplementing the Criminal Code and Law no. 286/2009 on the Criminal Code, which introduced in Romanian legislation the safety measure of extended confiscation<sup>36</sup>.

According to Article 118<sup>2</sup> of the Criminal Code, newly introduced<sup>37</sup>, the measure of extended confiscation is ordered by court:

- if a person is convicted for committing an offence expressly and exhaustively laid down by law (procurement, drug trafficking and precursors trafficking, human trafficking offences, offences related to the state border of Romania, the offence of money laundering, offences provided by the law on preventing and fighting pornography, offences provided by the law on preventing and combating terrorism, association to commit a crime, the offence of initiating or establishing a criminal organization or membership to or support under any form of such a group, offences against property, offences regarding the trespassing of weapons and ammunition, nuclear or other radioactive materials and explosives, currency or other assets counterfeit, disclosure of economic secrets, unfair competition, breach of the provisions on import or export operations, embezzlement, breach of the provisions of import of waste and residues, offences related to the organization and operation of gambling, trafficking of migrants, corruption offences, offences related to corruption, offences against EU financial interests, tax evasion offences, offences concerning customs procedures, offence of fraudulent bankruptcy, offences committed through computer systems and electronic payment facilities, trafficking in organs, tissues or cells of human origin);

- the offence is of such a nature that it can generate financial gain to the convicted;
- if the penalty provided by law is imprisonment of 5 years or more.

As concerns, in itself, the extended confiscation legislation as penalty of criminal law, and the offences for which it applies, these are issues related to the State's criminal policy, and, in principle, up to the legislator which, by reason of special circumstances, may adopt appropriate legislative measures. However, we note the quite broad and heterogeneous field of offences set down by the legislator.

The extended confiscation may cover „*other property than the one referred to in Article 118*” [A.N. of the Criminal Code], thus other property than the one subject to special confiscation, property that has been acquired „*from criminal activities of the kind referred to in paragraph (1)*”. Therefore, it refers only to unlawfully acquired assets, conclusion strengthened by Article 118<sup>2</sup> final paragraph

<sup>36</sup> Article 111(2) of the Criminal Code: "Safety measures are taken against persons who have committed offences under criminal law".

<sup>37</sup> respectively Article 112<sup>1</sup> of Law no. 286/2009 on Criminal Code.

of the Criminal Code, which states that „*Confiscation shall not exceed the value of property [...] going beyond the legitimate income of the convicted person*”.

The conditions of extended confiscation are regulated by paragraph (2) of Article 118<sup>2</sup> of the Criminal Code, as follows:

*"a) the value of property acquired by the convicted person 5 years before and, if applicable, after the perpetration of the offence, until the date of issuance of the document instituting the proceedings, clearly exceeds the revenues he might have obtained lawfully;*

*b) the court is convinced that the goods come from criminal activities such as those provided in paragraph (1) ”.*

It should be mentioned that the intention of the study is not to analyze the constitutionality of new rules, but only to emphasize a number of issues that could provide guidelines for such an analysis.

First, comparing the regulation cited with the terms of the Framework-Decision mentioned by the initiator of the regulation in the explanatory memorandum, we note that such terms were adopted, but only in part. Thus, Article 3(2)c) of the Framework-decision uses the wording „*the value of the property is disproportionate to the lawful income of the convicted person*”, respectively the court is „*fully convinced*”, instead of which the Romanian legislator preferred the wording „*obviously exceeds the income lawfully acquired*”, respectively the court is „*convinced*”. Of course, in itself, this is not a regulatory defect, but may be a flaw in terms of how it is ensured the safeguard of the right to private property, therefore an unconstitutionality flaw.

As for the comparison between the terms „*fully convinced*” in the Framework Decision and „*convinced*” in the Criminal Code, it is obvious that the first is more suggestive in terms of collaterals for a person accused in criminal proceedings. Furthermore, there aren't clear how this convinced is formed. In this context, we mention that Article 124(3) of the Constitution provides that „*Judges are [...] subject only to the law*”. Examining a similar wording, the Constitutional Court found it unconstitutional<sup>38</sup>, holding that: «The Constituent Assembly, during the debate on articles of the draft Constitution and of the Drafting Committee Report (published in Official Gazette, Part II, no. 35 of 13 November 1991 and, respectively, no.36 of 14 November 1991) discussed also the proposed amendment on completion of the final sentence of paragraph (2) of Article 123 of the Constitution by „*[...] and their personal belief*.” After debates, the Constituent Assembly rejected by a majority vote this amendment, expressing in this way, specifically, the will that the judges be subject „*only to the law*” and not also to "*their personal belief*." Therefore, the Court finds that the provisions of Article 63(2) of the Code of Criminal Procedure, under which „*Assessment of all evidence shall be made by the prosecution body and by the court according to their belief [...]*”, are contrary to Article 123(2) of the Constitution [A.N. the numbering of constitutional text prior to revision of the Basic Law], stating that „*Judges are independent and they subject only to the law*”».

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<sup>38</sup> Decision no. 171 of 23 May 2001, published in the Official Gazette of Romania, Part I, no. 387 of 16 July 2001.

The term „*obviously*” contained in the cited Criminal Code can be a source of legal uncertainty, as long as it is left to the sole discretion of those who interpret and apply the law. The Framework Decision, by the wording used, induces the need for a test of proportionality, which criteria should be established in each State’s law, so that enforcement of relevant norms be done uniformly.

The teleological interpretation of the text of the law, given the statements made by the initiator of the bill in the explanatory memorandum, i.e. the prosecutor must prove that „*a particular person, at a certain time, was involved in committing certain offences*” and that “*since that time, the judge may presume that the goods acquired are the result of criminal activity undertaken by persons convicted in a period before conviction deemed reasonable for the court*”, which would mean that „*the burden of proof on the lawfulness of acquired property would rest with the convicted person*” could lead to the conclusion that it was intended to create a relative legal presumption in the meaning that property acquired by a person who has committed for a certain period of time, a certain category of offences, and whose value obviously exceeds the revenues proven as unlawfully acquired at the time, comes those criminal activities. This presumption, being relative, could be combated with any evidence to the contrary, in this case the burden of proof lying with the person convicted for the respective offence. But, on the one hand, in our opinion, the reasoning outlined in the explanatory memorandum does not find support in the texts of the newly adopted law, which do not refer to probation, but to a safety measure, and on the other hand, they raise problems in terms of the constitutional framework analyzed. We mention in this respect also the case-law of the European Court of Human Rights, which, for example in the case of *Arcuri and others v. Italy*, 2001, mentioning that the relevant applicable Italian provisions establish that, where there is sufficient circumstantial evidence<sup>39</sup>, a presumption that the property of a person suspected of belonging to a criminal organization represents the proceeds from unlawful activities or has been acquired with those proceeds, held that every legal system recognizes presumptions of fact or of law, and the Convention for the Protection of Human Rights and Fundamental Freedoms does not prohibit such presumptions in principle. However, the applicants’ right to peaceful enjoyment of their possessions implies the existence of an effective judicial guarantee.

Referring to this case, the Venice Commission, in one of its opinion<sup>40</sup>, stressed the importance of accurate legislation relating to evidence, which must be followed by authorities in case of forfeiture, to ensure that forfeiture of assets do not amount to unjustified interference with the right to peaceful enjoyment of his/her possessions. This accuracy is a source of uniformity, provide legal certainty and foreseeability while ensuring that the provisions governing the forfeiture proceedings are emanating from the legislative, and not from the judiciary, an indispensable aspect especially in countries affected by corruption.

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<sup>39</sup> „sufficient circumstantial evidence”.

<sup>40</sup> Venice Commission – „*Avis interimare sur le projet de loi relative a la confiscation en faveur de l etat des biens acquis illegalement de la Bulgarie*” – adopted by the Commission in its 82<sup>nd</sup> Plenary Session, Venice, 12-13 March 2010; the report can be accessed at [www.venice.coe.int](http://www.venice.coe.int).

### Short conclusions

The phenomena of organized crime impose appropriate criminal policy measures in line with international regulations in this matter, respectively with the requirements imposed on Romania as Member State of the European Union. The adoption of these measures should be undertaken in compliance with Constitution which, certainly, does not protect unlawful acts, but devotes the necessary guarantees to ensure the protection of fundamental rights and freedoms, including everyone's right to peaceful enjoyment of all his/her lawfully acquired possessions.

It is up to the legislator to identify legislative measures which, respecting these safeguards, would answer the need of adopting appropriate criminal policy measures given the social development and the crime phenomena. Regarding Law no. 63/2012, it remains to be seen, on the one hand, the problems caused by its practical application (considering, among others, lack of clarity and precision) and whether will be a legislative intervention in matter of criminal evidence which is necessary for the regulation to achieve the purpose intended by the legislator, and on the other hand, upon a future constitutional review of the newly introduced norms, how will they be assessed in relation to the constitutional framework which, in this study, we tried to outline, as a base analysis of the provisions on extended confiscation.

### Bibliography

1. Coraş, L., The measure of confiscation from the perspective of the Council framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, „Dreptul” Magazine no. 11/2010.
2. Dănişor, Dan Claudiu; Dogaru, Ion; Dănişor, Gheorghe, *General Theory of Law*, C. H. Beck Publishing House, Bucharest, 2006.
3. Iancu, Gheorghe, *Some aspects concerning the interpretation of the Constitution in the case-law of the Constitutional Court*, „Journal of Public Law” No. 2/2008.
4. Muraru, Ioan; Constantinescu, Mihai; Tănăsescu, Simina; Enache Marian; Iancu, Gheorghe, *Interpretation of the Constitution. Doctrine and practice*, Lumina Lex Publishing House, Bucharest, 2002.
5. Muraru, I.; Iancu, Gheorghe; Pucleanu, Mona-Lisa; Popescu, Corneliu-Liviu, *Romanian Constitutions – texts, notes, comparative presentation*, Regia Autonomă „Monitorul Oficial”, Bucharest, 1993.
6. Muraru, Ioan; Tănăsescu, Elena Simina, *Constitutional Law and Political Institutions*, Volume I, C.H. Beck Publishing House, Bucharest, 2008.
7. Muraru, I.; Tănăsescu, Elena Simina (coord.) *Constitution o Romania, articles comment*, C. H. Beck Publishing House, Bucharest, 2008.
8. Popa, Nicolae; Eremia, Mihail-Constantin; Cristea, Simona, *General Theory of Law*, All Beck Publishing House, Bucharest, 2005.
9. Predescu, Ion; Safta, Marieta, *The principle of legal certainty, foundation of the rule of law. Case-Law landmarks*, in „The Constitutional Court Bulletin” no. 1/2009.
10. *Genesis of the Constitution of Romania, 1991 - Constituent Assembly Works*, Regia Autonomă Monitorul Oficial, 1998.