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CERTAIN ARGUMENTS RELATED TO THE FORECLOSURE AND LEGAL SEIZURE OF THE DEBTOR'S AND HIS/HER FAMILY'S RESIDENCE CONCERNING THE PAYMENT OF CIVIL AND TAX DEBTS

Alin TRAILESCU[1]

Abstract

In this article, starting from the meaning of the terms "family" and "family residence", the author attempted to analyze whether the domestic law is harmonized with the ECHR and ECJ case law in terms of foreclosure of the family residence in relation to the due and outstanding payments of the civil and tax debts.

The author's conclusion is that the domestic law, although it provides a certain degree of protection for the family residence, may at any time be improved, the author putting forth a number of proposals in this regard.

Keywords

Family; family residence; foreclosure; civil debt; tax debt.

1. Meaning of „family" and „family residence" terms

a) In domestic law, the term "family" (Anitei, 2019, pp. 25-44) has a narrow meaning, being essentially limited to the relationship between the spouses and their children. Consequently, art. 258 of the Romanian Civil Code provides, in par. 1, that: "The family is based on the freely consented marriage between the spouses, on their equality, as well as on the parents' right and duty to provide the raising and education of their children." Further more, art. 258 of the Romanian Civil Code provides, in par. 4, that: "For the purpose of this Code, it is understood that the spouses mean the man and the woman legally joined by and in marriage" (Anitei, 2012, pp. 15-32).

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Keeping the same meaning, art. 17 of Law no. 114/1996[2] on housing and residences stipulates that: "By family, within the meaning of this domestic law, is understood the husband, the wife, the children and the spouses' parents who stay and live together".

On the other hand, in European law, the term "family" has a broader meaning, as is results from the case law of the European Court of Human Rights, which held that the existence of "family" derives from factual circumstances and that it is characterized by affectionate, stable and close bonds between its members who, as the case may be, may be: siblings[3], close relatives (uncles, aunts, nephews, nieces, grandparents), domestic partners or persons of the same sex[4].

b)These pretty different premises regarding the term of "family" have generated inconsistencies between the domestic law and the European law as well as in relation to the meaning of the following phrase: "family residence".

Thus, in the domestic law, art. 321 paragraph 1 of the Romanian Civil Code stipulates that the "family residence" is strictly defined as "the joint residence (dwelling) of the spouses or, in the absence thereof, the residence of the spouse who has been given the custody of the children"[5], furthermore, the term "residence" generally implies the construction consisting of one or several rooms, with the required outbuildings and appurtenances, facilities and utilities, which satisfies the living requirements of either a person or a family[6]. In the light of the domestic rules and regulations, the doctrine has been properly tailored so as to indicate that the "family residence" is the location where the spouses are effectively living together with their children; furthermore, the family residence may be represented, as the case may be, by a

[2] Published in the Official Gazette no. 393 as of December 31st, 1997.

[3] ECHR Decrees delivered in the cases Moustaquim vs. Belgium (§ 36); Mustafa & Armağan Akın vs Turkey

[4] ECHR Decrees delivered in the cases Vallianatos et al. vs Greece; X et al. Vs. Austria; P.B. & J.S. vs. Austria; Schalk & Kopf vs Austria

[5] It should be noted that, according to art. 309 para. 2 of the Romanian Civil Code, the family residence survives and when the spouses, although emotionally connected, live separately due to well-founded reasons. Specifically, this article of law states that "They (the spouses) have the duty to live together" and that "for sound reasons, they may decide to live separately", as the measure, the debtor's right to housing is effectively guaranteed.

[6] Art. 2 ltt. a) of the Romanian Law no. 114/1996 on houses and residences.

personal property or by a rented property duly leased by the spouses (Nicolescu, 2012, pp. 332-334).

On the other hand, at the European level, the term of "residence (dwelling)" is seen in a broader sense which is not related to the institutionalized relationship between spouses, as every person has the right to own a "dwelling", regardless of his/her social status. Therefore, according to the caselaw of the European Court of Human Rights, the term of "residence (dwelling)" is hardly confused with the phrase of "permanent address (domicile)" or "personal property"[7], since the existence of a "residence (dwelling)" is determined according to factual circumstances and based on a personal, emotional, close and continuous relationship with a certain place[8]. Hence, the scope of the phrase "family residence (home)" may also include, for example: the buildings used for longer periods of time with no lease or legal forms[9]; caravans or temporary shelters (removable facilities)[10]; cabins or bungalows[11]; holiday homes (which are actually used for longer periods of time)[12]; or partially equipped premises[13].

2. Brief references related to the protection of family and family residence set out in the domestic and the European laws

a) In domestic law, the protection of "family" and "family residence" is guaranteed by art. 26 paragraph 1 of the Constitution which provides that: "public authorities observe and protect the intimate, family and private life", as well as by art. 258 par. 2 of the Romanian Civil Code, which stipulates that: "the family is entitled to benefit from the protection from both the community and the governmental agencies".

[7] ECHR Decree delivered in the case Surugiu vs Romania

[8] ECHR Decrees delivered in the cases Khamidov vs Russiua ; Winterstein et al. Vs. France

[9] ECHR Decrees delivered in the cases Menteş et al. Vs. Turkey; Prokopovich vs. Russia; Yevgeniy Zakharov vs. Russia ; McCann vs. UK

[10] ECHR Decree delivered in the case Chapman vs UK.

[11] ECHR Decrees delivered in the cases Winterstein et al. vs France; Yordanova et al. vs Bulgaria.

[12] ECHR Decrees delivered in the cases Demades vs. Turkey ; Sagan vs Ucraine.

[13] ECHR Decree delivered in the case Halabi vs France

Also, since the family enjoys a privileged status, art. 321[14] of the Romanian Civil Code allows the spouses, taking into account their capacity, to request the notation of the family residence in the relevant land register so that the family interests be duly protected both in terms of the relationships between spouses and in their relations with any third parties, under the terms and conditions set forth by art. 322[15] of the Romanian Civil Code, which requires the consent of both spouses when any documents regarding their residence are being signed. Thus, where the family residence is duly registered in the land book, the written consent of both spouses is required for the completion of any legal transaction such as donation, sale, exchange, mortgage, lease or constitution as a contribution to a trade company involving the real estate property which acts as the family residence even when such estate only owned by one of the spouses concerned. Also, where the family residence is represented by a leased building, the consent of both spouses is required for the termination of the rental contract or the

[14] Thus, art. 321 of the Romanian Civil Code stipulates that: "Any of the spouses may ask for the notation in the land book, according to the legal provisions in force, building as a family residence, even if that spouse is not the owner of the building". Also, art. 902 paragraph 2 item 5 of the Romanian Civil Code stipulates that: "Apart from other cases provided by law, the following are subject to notation in the land book: the destination of a building as a family residence." For details regarding the notation of a family residence in the land book, see also art. 182 of Annex 1 to ANCPI Order no. 700/2014 regarding the approval of the Regulation of approval, reception and registration in the cadastre and land book records.

[15] The content of art. 322 of the Romanian Civil Code stipulates that: "(1) Without the written consent of the other spouse, neither spouse, even if he/she is the single owner of the building, may enforce any of the rights upon or regarding the family home and consequently may not enter into any documents that would affect the use of the building. (2) Also, a spouse may not move from the home the goods that furnish or decorate the family residence and cannot dispose of them without the other spouse's written consent. (3) Where the consent is refused without a legitimate reason, the other spouse may notify the guardianship court, in order for it to authorize the signature of the relevant papers. (4) The spouse who did not give his/her consent at the conclusion of the document may request the cancellation thereof within one year from the date on which he/she became aware of it, but not later than one year from the date of termination of the matrimonial property regime. (5) In default of the notation of the family residence in the land book, the spouse who did not give his/her consent cannot request the cancellation of the document; however, the spouse may claim damages from the other spouse, unless the acquiring third party knew, by other means, the quality of the building, i.e. that of family residence. (6) The provisions of para. (5) are properly applied to the documents entered into with the violation of the provisions of par. (2)".

sublease of the residence, even if only one of the spouses had actually signed the rental agreement (Nicolescu, 2012, pp. 334-336).

b) At the European level, "family" and "family residence" are safeguarded by art. 8 item 1 of the European Convention on Human Rights which, similarly to art. 7[16] of the EU Charter of Fundamental Rights, states that "every person is entitled to have his/her private and family life, his/her domicile and his/her correspondence respected". Also, art. 33 paragraph 1 of the Charter states that "the family enjoys legal, economic and social protection".

And the European Court of Human Rights has repeatedly held in favour of protecting the family residence, pointing out that its loss represents a serious breach of the right to have the permanent home (residence) respected, putting the family in particularly fragile circumstances[17].

Also, in accordance with the caselaw of the Strasbourg Court, the European Union Court of Justice has also ruled[18] that the person at risk of losing his/her residence is entitled to request the examination of the proportionality of such measure, and the national court must have at its disposal provisional measures to suspend or prevent an unlawful enforcement or foreclosure procedure.

c) Since the protection of the family residence is consistent with the principle of the debtor's protection during the legal seizure phase, we will refer below to certain aspects related to the foreclosure of the dwelling acting as the family residence belonging to the debtor and his/her family.

[16]Thus, art. 7 of the European Union Charter of Fundamental Rights states that: "Everyone has the right to have his/her private and family life, domicile respected and the secrecy and privacy of communications observed".

[17] ECHR Decrees delivered in the case McCann vs UK and Rousk vs Sweden

[18] ECHR Decree delivered in the case C-34/13, Monika Kušionová vs SMART Capital a.s.

3. Several aspects related to the foreclosure of the debtor's residence and his/her family in the common law foreclosure procedure

a)The Romanian Rules of Civil Procedure do not prohibit the pursuit and forced sale of the debtor's and his/her family's residence, but these Rules do contain certain restrictions on the real estate foreclosure matter and these rules are applicable when the object of the proceeding is in fact the family's residence (Anitei, 2017, pp. 13-18).

b) In relation to these restrictions, art. 813 par. 5 of the Romanian Rules of Civil Procedure argues that: "In the case of enforceable titles whose value does not exceed 10,000 lei, the sale of the debtor's immovable assets may be completed only if the debtor has no other assets subject to foreclosure or where such assets do exist, they cannot be used. The debtor's unjustified refusal to provide the court officer with the necessary information, explanations and evidences, as well as providing in bad faith incomplete information regarding the existence and value of any movable properties or revenues that may be used in order to fully cover the debt, may allow the commencement of the foreclosure procedure even if the value of the debt does not exceed 10,000 lei".

b1) Hence, in accordance with art. 813 par. 5 of the Romanian Rules of Civil Procedure, as mentioned above, the rule is that the unsecured creditors cannot claim the foreclosure of the family residence in relation to any joint or personal debts of the spouses who, individually or cumulatively, do not exceed the sum of 10,000 lei (Bozeşan, 2017, pp. 544 - 546).

However, in the context in which the law does not prohibit such aspects, it is possible to agree the foreclosure of the family residence of the debtor spouses and to register thereof with the relevant land book (Răducan, 2013, p. 388); Moreover, these measures are justified, since the creditors of the spouses do not know, at the beginning of the foreclosure procedure, whether the spouses gain incomes or hold movable assets the creditor may seize in order to recover the debt, so it is in the best interest of the creditors to make the foreclosure public and opposable.

b2)Although they are entitled to obtain the approval regarding the foreclosure of the debtor spouses' residence for the debts that do not exceed the sum of 10,000 lei, the creditors may only ask for the forced sale of the residence only in two exceptional cases, namely:

- where the spouses do not earn seizable proceeds or do not own seizable movable assets which might be used for debt settlement by the court officers; as well as

- where the spouses do not earn seizable proceeds or although there are certain seizable movable assets, such assets cannot be used for debt settlement by the court officers[19].

b3) Since the court officer must play an active role in carrying out the foreclosure procedure, he/she may prepare[20] the forced sale of the residence of the debtor spouses even if their debt does not exceed the sum of 10,000 lei, where the debtor spouses are of bad faith and prevent the normal course of the foreclosure procedure; Their bad faith lies in refusing[21] to provide the court officer with information about their assets and incomes, as well as in providing incomplete information.

However, even in these cases, the court officer may not proceed to the forced sale of the debtor spouses' residence if, following the steps

[19] The impossibility of capitalizing the debtor's assets entails the suspension and, later on, the termination of the foreclosure procedure. Thus, art. 708 para. 1 pc. 3 of the Romanian Rules of Civil Procedure stipulates that the limitation of the right to be granted the foreclosure procedure is suspended "as long as the debtor does not have any seizable assets or any assets which could not be used or as long as the debtor does not declare his/her assets and revenues to be seized". This article of law is corroborated with art. 780 paragraph 1 of the Romanian Rules of Civil Procedure, which states that: "The seized assets that could not be used under the conditions of this section remain unavailable for no less than one year from the date of the seizure enforcement. During this term, the executor may proceed to re-use these assets; In this case, the starting price of the auction will be fixed, under a court resolution, by the court officer and will be equal to the starting price from the last organized auction for that particular movable asset. If even after the exiry of this term the assets cannot be used and the creditor refuses to take them in the account of the debt, the assets may be returned ex officio to the debtor or to his/her representative ". This last article of law correlates, in turn, with art. 703 para. 1 item 2 of the Romanian Rules of Civil Procedure, according to which: "The foreclosure is terminated if it can no longer be carried out or continued due to the lack of the seizable assets or due to the impossibility of using such assets"

[20] In relation to the legal measures that are applied prior to the forced sale of the assets, please see art. 829 – 834 of the Romanian Rules of Civil Procedure.

[21] We should specify that, according to art. 627 paragraph 3 of the Romanian Rules of Civil Procedure, the unjustified refusal of the debtor to present or give the necessary explanations, as well as giving in bad faith incomplete information entails his/her liability for all the damages caused, as well as the enforcement of the sanctions provided by art. 188 paragraph (2). The latter article stipulates that: "The non-observance by any person of the provisions regarding the ordinary course of the foreclosure procedure is sanctioned by the president of the executing court, upon the request of the court officer, with a judicial fine from 100 lei to 1,000 lei".

he/she is bound to take, he/she identifies their income or other seizable movable property, since, as we have shown above, they must be used with priority for the recovery of the souses' debts that do not exceed the sum of10.000 lei.

c) Continuing pursue the aspect regarding the restrictions applicable in the field of foreclosures in real estate matters, applicable also in the cases where the object of the legal seizure is represented by the debtor and his/her family's residence, art. 818 paragraph 1 of the Romanian Rules of Civil Procedure provides that: "the personal creditors of a debtor co-owner or beneficial joint owner will not be able to seize his/her share of the building(s) owned as joint property; in this case, the creditors will have to firstly ask for the legal division of property".

In contrast, art. 678 para. 1 of the Romanian Civil Code provides, similarly to art. 818 paragraph 3[22] of the Romanian Rules of Civil Procedure, that: "the creditors of a co-owner may seize his/her share of the right on the joint property or may ask the court to divide the assets, in which case the foreclosure shall affect only that part of the asset or, as the case may be, the amount of money due to the debtor (following the legal division of property- nn, AT) ". Furthermore, art. 678 of the Romanian Civil Code provides, at para. 2, also that: "in case of a forced sale of a share of the right of ownership over a real estate property (...) against an equal price, the co-owners will be preferred to the award of the share".

These legal provisions are related to art. 353 of the Romanian Civil Code which, in par. 1, stipulates that "the joint assets cannot be seized by the personal creditors of one of the spouses" and, in par. 2, that "after the seizure of the debtor spouse's own assets, his/her personal creditor may request the division of the joint assets, but only to the extent necessary to cover such debt".

The following conclusions are drawn from the corroboration of these legal provisions:

[22] Therefore, art. 818 par. 3 of the Romanian Rules of Civil Procedure stipulates that: „personal creditors may seize the determined share of their debtor from the ownership of the property, without having to ask for the division of property, provided that such share has been undoubtedly established and clarified and it has been registered, by showing a fraction, with the relevant land book. In this case, the co-owners shall be able to ask for the sale of the entire building under co-ownership under the conditions provided in art.823".

c1) As regards the payment of the joint debts of the spouses[23] their creditors may mainly seize the joint assets and, in addition, their own assets, and the debtor spouses cannot defend themselves by simply invoking the benefits of discussion or division of property, as art. 352 par. 1 of the Romanian Civil Code stipulates that: "to the extent that the joint obligations have not been covered by the seizure of the joint goods, the spouses shall be jointly liable with their own assets"[24].

c2) On the other hand, for the payment of the spouses' own debts, their personal creditors must seize their own assets and incomes, as the spouses are liable for their own debts with their own assets, as it results from art. 353 of the Romanian Civil Code, as quoted above. If, however, the debt cannot be recovered by using the debtor spouses' own assets, their personal creditors may ask for the legal division of the joint assets in order to seize the assets that, following the division of property, are due to them.

- In this regard, since at the time of the foreclosure commencement the aspect that the debtor spouses may have seizable own assets is unknown, their personal creditors are entitled, in order to protect their interests, to obtain the approval to institute the legal seizure of the real estate properties jointly owned by the spouses, including the buildings acting as family residence(s) and to ask that these procedures be duly registered in the relevant land book.

- However, as we have shown before, the personal creditors of the debtor spouses are not entitled to obtain the division of the joint assets belonging to the spouses, as the main action but only as a second

[23] In compliance with art. 351 Romanian Civil Code, „Spouses are liable with their joint assets for: a) obligations arising in connection with the preservation, administration or acquisition of the joint assets; b) the obligations they have contracted together; c) the obligations undertaken by either spouse to cover the usual expenses of the marriage; d) reparation of the damage caused by the acquisition, by one of the spouses, of the belongings of a third party, insofar as, by this, they have increased the family joint assets".

[24] The complete content of art. 352 Romanian Civil Code, titled "Subsidiary liability for joint debts" is as follows: "(1) To the extent that common obligations have not been covered by the foreclosure of joint assets, the spouses are jointly and severally liable with their own assets. In this case, the person who paid the common debt is subrogated in the creditor's rights for what he/she has borne over the share that would be returned to him/her from the community if the liquidation were made upon the date of the payment of the debt. (2) The spouse who paid the joint debt under the conditions of par. (1) has a right of retention on the assets of the other spouse until the full coverage of the debts that he/she owes".

measure, and only if they are able to prove that the debt cannot be recovered because the debtor spouses do not own seizable own assets, or they own such assets but the assets cannot be used. Also, after an in-depth analysis and interpretation of the special provisions set forth by art. 353 of the Romanian Civil Code, as mentioned above, we consider that, where the debtor spouses own relevant seizable assets, the debtor spouses' personal creditors cannot choose to ask for the forced sale of the shares from the family residence which belong to them as, otherwise, such action would breach the principle according to which the spouses are liable for their own debts with their own assets.

- Conversely, where the debt is not fully covered by the foreclosure of the debtor spouses own assets, their personal creditors are entitled to choose either to proceed to the forced sale of the share of the building that constitutes their family residence (in which case the co-owner spouse, acting as a third party in the foreclosure proceeding, has the right of preference to the allotment of the share), or to ask for the division of the property and subsequently to ask for the foreclosure of that part of the building, or, as the case may be, the balancing payment.

In conclusion, according to the legal provisions outlined above, the legal restrictions regarding the foreclosure in real estate matters are applicable including, or especially, in the case in which the object of the foreclosure is in fact the family residence. However, we consider it necessary that, in the future, the Romanian Civil Code and the Romanian Rules of Civil Procedure should contain clearer rules and regulations which should be more directly focused on the protection of the family residence subject to foreclosure procedures.

4. Several particularities regarding the foreclosure of the debtor's and his/her family's residence in the procedure of legal seizure of tax debts

a) Ab initio, it is necessary to indicate that the foreclosure of tax debts is regulated by the Romanian Code of Fiscal Procedure whose provisions are complemented[25] by the provisions of the Romanian Rules of Civil Procedure; In other words, foreclosure of tax debts is a special

[25] Thus, art. 3 paragraph 2 Of the Romanian Code of Fiscal Procedure provides that: "Where this Code does not have specific provisions, the provisions of the Civil Code and of the Civil Procedure Code, republished, shall apply, insofar as they may be applicable to the relations between public authorities and taxpayers".

procedure presenting several peculiarities that derive from the specific governmental relationships existing between the tax agencies and the taxpayers.

b) One of such particularities is that that the tax authorities have no legal power to seize the debtor's real estate properties if the value of such assets is less than 1% of the value of the debtor's debts, provided that these debts exceed the amount of 500,000 lei.

Thus, art. 242 para. 1, first thesis of the Romanian Code of Fiscal Procedure stipulates that: "The immovable property owned by the debtor are subject to the foreclosure procedure and consequently, the provisions of art. 238 para. (7) lit. b) shall apply accordingly", and the latter article of law provides that:" The assets are not seized (for the purpose of forced sale - nn) if: their value is less than 1% if the value of the payment obligations is over 500.000 lei".

Interpreting these legal provisions, the Constitutional Court of Romania held that "the provisions of art. 242 para. 1 first thesis (mentioned above - nn) set the rule according to which the immovable assets may be subject to the foreclosure proceeding provided they fulfill cumulatively, as the case may be, the following conditions: (i) they are legally owned by the debtor[26], (ii) the payment obligation is over 500,000 lei and (iii) the value of the immovable property is greater than 1% of the value of the payment obligation ", outlining that "the law conditions the foreclosure of the immovable assets of the debtor by the amount of the debt and the value of the immovable assets related to the actual amount of that debt[27].

c) Another particularity is that the seizure [28] of the debtor's assets by the tax enforcement agency has the value of a legal mortgage[29], the revenue

26 Where the debtor holds the property in common with other persons, the foreclosure shall extend to the assets only if such assets are assigned to the debtor following the judicial division of property.

27 The decision of the Constitutional Court no. 423/2019 regarding the rejection of the exception of unconstitutionality of the provisions of art. 242 para. (4) and (6) of the Fiscal Procedure Code, published in M. Of. no. 747 of September 13, 2019.

In fiscal matters, the seizure may be, as the case may be, a distraint upon property (if it is stipulated under the conditions of art. 213 of the Romanian Code of Fiscal Procedure, before the start of the foreclosure, as a measure of preservation of the taxpayer's assets) or executory (if it is disposed over the debtor's assets during the foreclosure procedure, for the purpose of selling the assets upon auction). It should be noted, however, that if the foreclosure process begins, the distraint will be transformed into an executory seizure. In this sense, art. 213 para. 3 of the Romanian Code of Fiscal Procedure, the second thesis, states that: "The measures ordered by the competent tax

agent having the right to ask for, based on the seizure minutes[30], the legal registration[31] of the legal mortgage in the land book afferent to the buildings subject to the seizure procedure.

However (although the tax authorities have the right to register the foreclosure measure in the relevant land book[32] and to seize the shares of the buildings jointly owned by the spouses[33] even if only one of

authorities, as well as by the courts or other competent bodies, if they have not been abolished under the conditions of the law, shall remain valid throughout period of the foreclosure process, without completing other formalities. With the individualization of the debt and its maturity, in the case of non-payment, the measures are transformed into enforcement measures ". Referring to the executory seizure, it was considered in the doctrine that the revenue agent is not obliged to seize the debtor's buildings before selling them at auction (Iancu, (2016),: 515). In our opinion, the revenue agent has this obligation that derives from art. 247 para. 1 Of the Romanian Code of Fiscal Procedure having the following content: "If the fiscal debt is not extinguished within 15 days from the closing date of the seizure report, proceed, without carrying out any other formality, to seize the seized assets, except in cases where, according to the law, it was ordered to terminate the seizure or suspend the forced execution ". Finally, we make it clear that, in the common law enforcement procedure, the application of the sequestration on the debtor's buildings remains at the discretion of the executor. Thus, art. 831 paragraph 2 Of the Romanian Rules of Civil Procedure states that: "The court executor, when he deems it necessary, will appoint, by conclusion, a seizure administrator to ensure the administration of the building, collecting the revenue, making the necessary expenses and defending in disputes regarding the this good".

29 Thus, art. 242 para. 6 of the Romanian Code of Fiscal Procedure states that: "The seizure applied to immovable assets pursuant to par. (5) constitutes a legal mortgage".

30 Thus, art. 242 para. 5 of the Romanian Code of Fiscal Procedure stipulates that: "The revenue agent enforcing the seizure procedure shall prepare a seizure report, the provisions of art. 238 para. (9) - (11), art. 239 para. (1) and (2) and art. 241 being applicable. In this case, the seizure report will also include the cadastral number, and the land book number, if they are from the documents presented by the debtor".

31 Thus, art. 242 para. 8 Romanian Code of Fiscal Procedure provides that: "For the seized immovable assets, the revenue agent that instituted the seizure procedure shall promptly request the bureau of real estate and publicity to file the legal mortgage in the land book, within the terms and conditions provided by the law, attaching a copy of the minutes of distraint".

32 Thus, art. 230 paragraph 7 of the Romanian Code of Fiscal Procedure stipulates that: "Seizure of the building, based on the order provided in par. (1), shall be registered in the land book upon the request of the fiscal body regarding the immovable assets of the debtor, irrespective of the ownership upon the building, respectively exclusive property, beneficial joint ownership or co-ownership".

33 From the literal interpretation of art. 213 para. 12 of the Romanian Code of Fiscal Procedure, it turns out that the immovable property of the spouses in their devolved property cannot be seized, when only one of the spouses has the capacity of debtor. Thus, art. 213 para. 12 of the Romanian Code of Fiscal Procedure stipulates that:

the spouses acts as the debtor), under no circumstances shall the seizure be ordered upon the "minimum living space" of the debtor and his/her family, since it cannot be the object of foreclosure procedure, unless the fiscal debts result from the perpetration of a crime.

d) Thus, another particularity of the foreclosure procedure of tax debts is given by art. 242 para. 3 of the Romanian Tax Code Procedure which states that: "In the case of a debtor who is a natural entity, the "minimum living space" of the debtor and his / her family, as determined according to the legal provisions in force, cannot be subject to the foreclosure procedure". (Anitei 2011, pp. 545-547)

In relation to these legal provisions, the following comments are needed:

d1) By the phrase "minimum space inhabited by the debtor and his/her family" we basically understand that particular dwelling which, after meeting the minimum requirements provided by the Romanian Law no. 114/1996 on housing and residences, is satisfactory (convenient, acceptable) for the debtor and his/her family[34].

Thus, art. 2 lit. b) of the Romanian Law no. 114/1996 stipulates that "convenient dwelling" means "the dwelling which, by the degree of satisfaction of the relationship between the user's requirements and the

"Where the value of the debtor's own assets does not fully cover the fiscal debt of the consolidated general budget, the insurance measures may also be established on the assets held by the debtor in joint ownership with third parties, for the share held by him" (Trăilescu, 2015). However, in order not to lack the content of the seizure measure, we consider useful that the law should provide that the immovable asset owned by the spouses may be seized, when only one of them has the capacity of debtor. In our support is Decision no. 894/2015 (published in the Official Gazette no. 168 of March 4, 2016) by which the Constitutional Court (referring to the seizure of civil and criminal insurers) held that: "the application of the civil and civil procedural provisions mentioned in the procedure of the insured measures ordered In the criminal case, however, it is not to be understood that the jointly held assets could not be seized or that the seizure necessarily implies sharing, because this problem could arise when the seized property was subject to the foreclosure procedure (...) A contrary interpretation could deprive de seizure of the intended content, if the moment of its enforcement was postponed ". Moreover, the Code of Civil Procedure does not prohibit the seizure of buildings owned in common or devolved property.

[34] The Constitutional Court, interpreting the provisions of art. 2 let. a) and art. 17 of Law no. 114/1996 on housing, outlined that "we can define the minimum space for housing intended for the debtor and his/her family as that building that satisfies the housing requirements of a person, alone or together with the spouse, children and spouses' parents who live and stay together "(Decision no. 423/2019, published in the Official Gazette no. 747 of September 13, 2019).

characteristics of that building, at one point, covers the essential living needs such as the rest, food preparation, education and hygiene, providing the minimal requirements outlined in annex no. 1[35] to this law".

So, the meaning of art. 242 para. 3 of the Romanian Code of Fiscal Procedure is that the fiscal body cannot seize the residence of the debtor and his/her family when such residence corresponds to the minimum living space in accordance with Law no. 114/1996 on housing (Anitei, 2013, pp. 33-58).

d2) However, where the building that acts as the family residence exceeds, by its characteristics, the "minimum living space" needed by the debtor and his/her family, the fiscal body may ask for the compartmentalization of the apartment into two or more housing units under the conditions provided by Annex 1 to ANCPI Order no. 700/2014 so that, afterwards, the part of the building that exceeds the needs of the debtor and his/her family may be seized.

However, where the compartmentalization procedure is not technically feasible, the fiscal body cannot seize the building even if it exceeds the "minimum living space" needed by the debtor and his/her family.

e) By way of exception, art. 242 para. 4 of the Romanian Code of Fiscal Procedure entitles the fiscal body to seize the "minimum living space" of the debtor and his/her family for the payment of the tax debts resulting from the perpetration of certain crimes for which the debtor is convicted under the a final court order.

Specifically, art. 242 para. 4 of the Romanian Rules of Fiscal Procedure provides that: "The provisions of para. 3 (mentioned above - n.n.) are not applicable in the cases where the foreclosure is enforced to extinguish the tax debts resulting from the perpetration of certain crimes".

And in relation to these legal provisions the following comments are needed:

e1) From the literal interpretation of art. 242 para. 4 of the Romanian Rules of Fiscal Procedure, as mentioned above, it turns out that the fiscal body may enforce the foreclosure procedure regarding the "minimum living space" of the debtor and his/her family only for the

[35]Annex no. 1 of Law no. 114/1996, titled "Minimum requirements for housing" provides, among others, the minimum requirements and areas (depending on the number of persons / family) regarding the houses and dwellings.

recovery of the tax debts resulting from crimes, and not for the recovery of the budgetary (non-fiscal) debts[36].

However, we appreciate that, in the acceptance of art. 242 para. 4 of the Romanian Rules of Fiscal Procedure, the phrase "fiscal debt" must be understood in a broader sense, which should include any amounts of money representing damages to the public budget by perpetration of certain crimes.

e2) Also, from the literal interpretation of art. 242 para. 4 of the Romanian Rules of Fiscal Procedure, it turns out that this article of law has an impact in the case of all offenses provided by the law, not only in the case of tax evasion.

Conclusions and lege ferenda proposals

a) The civil code protects, to a certain extent, the family and the family residence, and the Romanian Code of Civil Procedure, regulating the foreclosure procedure, protects the debtor subject to this procedure, in the sense that it restricts the seizure of his/her real estate properties.

b) Unlike the Romanian Rules of Civil Procedure which does not contain express regulations regarding the protection of the family residence during the foreclosure phase, the Fiscal Procedure Code stipulates that, as a rule, the fiscal bodies may not seize the "minimum living space" of the debtor and his/her family for the recovery of tax debts.

c) In our opinion, although the domestic law contains certain regulations designed to protect the family residence, it is not fully linked to and harmonized with the case law and the vision of the European courts that pay special attention to the protection of the family residence(s).Therefore, for the purpose of protecting the debtor's residence subject to the foreclosure procedure, we consider useful that, in considering the optimization of the domestic law, the following

[36] Thus, in the acceptance of art. 1 of the Romanian Rules of Tax Procedure, the phrase of fiscal debts is not confused with the phrase of budgetary receivables, since "fiscal debts" are represented only by taxes, levies, social contributions and accessories thereof (interest, penalties and late payment increases); In contrast, budgetary receivables are represented by any amounts that are due to the public budget, except those listed above that fall into the category of fiscal debts.

proposals be analyzed, without claiming that such proposals are somehow exhaustive in terms of this subject.

Thus, we consider that a civil regulation intended to protect the personal residence in general, not just the family residence, would be welcomed, as any person has the right to live in a home, regardless of whether he / she lives alone and/or she/he is in a marriage or in domestic partnership relationship. In connection with this proposal, it would be appropriate for the future law to give the right to the unmarried persons to register the destination of the building they are living in (as family residence) with the relevant land book.

- We consider that it would be useful also for the law to regulate an order of priority regarding the foreclosure in real estate matters, so that the debtor's residence may be subject to forced sale only in the subsidiary, when the debtor does not have any other seizable assets.

- We consider it reasonable that, in the future, the debtor's exemption from the payment of the bail regarding the petition for the suspension of the foreclosure procedure be duly regulated, when the object of the foreclosure is the debtor's residence. Otherwise, as the amount of the bail may be of significant value, the debtor may be unable to defend his/her residence subject to the foreclosure procedure.

- In the light of the principle of the protection of the debtor undergoing the foreclosure phase and the right to own a house, we consider that it is advisable that, in the future, the law provides for the prohibition of the auctioned sale of the debtor's house at a price less than half the conveyance value. Otherwise, the debtor would be exposed to the speculations of third parties who could take advantage of his/her difficult financial situation.

- Finally, since the residence of the debtor and his/her family may also be represented by a rented building, we propose that, in the future, the law should include in the category of the non-seizable income also the amounts of money the debtor intended to pay the rent. We believe that, by such a measure, the debtor's right to housing is effectively guaranteed.

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