

STUDIES AND COMMENTS

Comparison between the legal regime of the extinctive prescription in Romanian civil law and fiscal law

Professor **Silvia Lucia CRISTEA**¹

Abstract

This article analyses the institution of the extinctive prescription, first synthesizing the common law stated by the Romanian Civil Code (Section I) and then the special regulation given by the Romanian Code of Fiscal Procedure (Section II) in which we differentiate between the particular legal regime of the extinctive prescription in the area of the rights of claim (Section 2.1-2.2), in the area of the right to initiate the foreclosure (Section 2.3), and in that of the right to ask for compensation and restitution (Section 2.7). The comparison between the legal regime of the extinctive prescription in civil law and its regulation given by the fiscal law it is stated by the last section, structured into similarities and differences.

Keywords: *civil law, tax law, extinctive prescription, comparison.*

JEL Classification: K34, K40

1. Extinctive prescription in the civil law. Notion, regulation, functions, purpose, effects

1.1 Notion

The extinctive prescription is a legal mean of settling the obligations as an effect of the passage of time; the creditor who does not act in a certain period of time in order to fulfil his subjective right to claim shall lose the protection given by the law, namely his right to legal action². After the passage of the time established by the law, the debtor cannot be forced, legally, to perform his obligation, because the subjective right of his creditor does not enjoy anymore the **legal sanction represented by the legal action**.

As a mean of extinguishing the obligation, the extinctive prescription has as effect the loss of the right to action, in the material sense, but not the extinguish of the subjective right of the creditor; only that after the expiration of the extinctive prescription, the debtor shall perform the obligation if he wants to do so.

¹ Silvia Lucia Cristea – Bucharest University of Economic Studies, Law Department, silvia_drept@yahoo.com.

² Silvia Lucia Cristea, *Dreptul afacerilor*, third edition, revised and enlarged, Universitara Publishing House, Bucharest, 2012, p. 229.

The same thing happens if, after obtaining a court decision, the creditor does not ask for its enforcement within the legal term.

Usucapio

➤ Is a mode of acquisition of property and of other real rights by continued and regular use of an asset when the period of years and its conditions are those required by the law (in accordance with the Romanian Civil Code);

Types of usucapio: two immovable ones (a+b) and one movable:

a) Extra-tabular, because it operates in the favor of a person who is not enlisted in the Real Estate Register (according to Art 930 Para 1 of the Civil Code), is a form of real property usucapio assuming the fulfilment of the following conditions:

- i) A possession of 10 years; plus one more of the following:
- ii) The owner enlisted in the Real Estate Register has deceased (for natural persons) or has ceased its existence (for legal persons);
 - The request to waive the property was enlisted in the Real Estate Register;
 - The property is not enlisted by any Real Estate Register;
- iii) The registration of the request in the Real Estate Registrar, prior that a third party person to have registered the right in his behalf (according to Art 930 of the Civil Code).

b) Tabular usucapio (usually called usucapio by the Real Estate Register, because it operates in the favor of the person enlisted in this Register); is also a form of real property usucapio leading to the acquisition of a real right by the continuous possession of the asset for at least 5 years (unlike the extra-tabular one, it also assumes *bona fide*).

Conditions for operation, according to Art 931 of the Civil Code:

- i) The enlistment of a real right in the Real Estate Register in the absence of a legitimate case;
- ii) The continuous and of bona fide possession;
- iii) The possession for at least 5 years;

c) **Personal property** = the acquisition of the right of property of a movable asset (corporeal, but also of securities), for the case of the **person owing other one's asset** for 10 years (mala fide of the acquirer representing the knowledge of the lack of ownership of the person from whom he acquired the asset) – according to Art 939 of the Civil Code.

1.2 Practical importance

It is indisputable that the prescription of the extinction of the right to action stimulates the owners of rights to value them within the terms stated by the law. The extinctive prescription contributes to **accelerate the settlement of disputes between the parties of a legal relation**, to the **performance of the obligations and to the restoration of rights**, being an important instrument in insuring the stability of legal relations.

The extinctive prescription removes old litigations, questionable, neglected over time, in which the proof of rights becomes more and more difficult due to the absence of certain evidences; the rights cannot remain in uncertainty under the threat of litigation, with claims arising from a distant past, and the existent relations must be consolidated. This objective need is fulfilled by the extinctive prescription. The extinction of the right to action by the extinctive prescription is **a sanction of the negligence of the owner who did not exercised it for a long time.**

Essentially, the extinctive prescription fulfils a function for the consolidation of legal relations and for removing the difficulties in administering the evidences, as well as a sanctioning function.

1.3 The effects of the extinctive prescription

What is extinguished with the extinctive prescription?

The new Civil Code has brought important clarifications in this area, Art 2500 Para 1 stating that the material right to action, further called the right to action, is extinguished by prescription if it has not been exercised within the term established by the law.

As a conclusion:

- The prescription extinguishes the right to action in a material meaning;
- Regarding the extinction of the right to action concerning the accessory rights, with the extinction of the right to action referring to a principal right is also extinguished the right to action regarding the accessory rights, unless the case in which the law would state differently (according to Art 2503 Para 1 of the Civil Code).;

- Regarding the successive extinction of the right to action; art 2503 Para 2 states that if a debtor is forced to successive services, the right to action regarding each of the services shall be extinguished by a different prescription, even if the debtor continues to perform one or other of the owed services;

- The indefeasibility of the right to action in a procedural sense. The right to action, as well as the action, has a double meaning: **material** and **procedural**. **By the right to action in a material sense** it is understood the possibility of a person to perform a subjective right against the plaintiff who violated it or contested it, obtaining with the help of the court the performance of the correlative obligation.

By the **right to action in a procedural sense** it is understood the possibility (faculty) of a person to notify the competent authority for the performance of his right.

What **is extinguished is the right to action in a material sense, and not procedural**, because just by notifying the competent authority it can be examined and verified whether or not the prescription is fulfilled.

- The survival of the subjective civil right and its correlative obligation. The subjective right and the correlative obligation. The subjective right and the correlative obligation through the effects of the prescription are transformed,

becoming imperfect rights and obligations, no longer protected by the coercion of the state.

The term of prescription is of 3 years, unless the law states differently.

The new Civil Code also states a special term of 10 years, in which are prescribed actions referring to:

- ⌘ Real rights which are not declared by the law as being imprescriptible or are not subjected to a different term of prescription;
- ⌘ Recovery of the moral or material damage caused to a person by torture or act of barbarity or, where appropriate, caused by violence or sexual aggressions committed against a minor or against a person who was unable to defend her/himself or to express her/his will;
- ⌘ Recovery of the damage caused to the environment.

In the same time it is stated a term of prescription of 2 years for the following categories of actions:

- The right to action based on a report of insurance or re-insurance is prescribed within 2 years;
- The right to action concerning the remuneration owed to the intermediaries for services provided based on the intermediation contract.

The new Civil Code also states the term of prescription of 1 year for actions regarding the following categories:

- ❖ Professionals in the area of public health or hoteliers for the provided services;
- ❖ Teachers, institutors, masters and artists for lessons taught hourly, daily or monthly;
- ❖ Doctors, midwives, nurses and pharmacists for visits, surgeries or medications;
- ❖ Retailers for paying off the merchandise sold and supplies delivered;
- ❖ Craftsmen and artisans for paying their work;
- ❖ Lawyers, against their clients, for paying off fees and expenses. The term for prescription shall be calculated starting with the day when the decision remained final, or from the day when the parties settled or his mandate has been revoked. For unfinished businesses, the term of prescription is of 3 years since the date of the last services performed;
- ❖ Notaries public and judicial executors regarding the amounts owed for acts of their position. The prescription term shall begin with the date when these amounts became payable;
- ❖ Engineers, architects, surveyors, accountants and other freelancers for paying off the amounts owed to them. The term of the prescription shall begin with the date when their service was concluded³.

³ See also Camelia Stoica, *Dreptul afacerilor. Contracte*, Bucharest University of Economic Studies Publ.-house, Bucharest, 2012, pp. 78-90.

2. Extinctive prescription in the fiscal law

Given that also in the fiscal law the extinctive prescription operates regarding the right to establish the fiscal obligations, as well as the right to request the foreclosure, we shall debate them separately, emphasizing their **specific features**.

2.1 *The prescription of the right to assess tax obligations*

The right of the fiscal authority to assess tax obligation is prescribed within 5 years, except the case in which the law states differently⁴. This term begins from **1st January of the year following the one in which the debt emerged according to Art 23 of the Code**. We are talking about the fact that the rights of claim and the tax obligation are born in the moment in which, according to the law, it is created the tax basis generating them. **Practically**, it is born the right of the fiscal authority to establish and determine the fiscal debt owed.

Thus it is asked the question why the term of 5 years begins with the 1st of January of the year following the one in which the debt was born?

We believe that it is considered, inter alia, the principle of the annuity of the public budget, stated by Law No 500/2002 on public finances⁵ (Art 11)⁶. This means that the period for which the Parliament authorizes the Government to cash in the public incomes and to pay the public expenses is limited to 1 year.

The Fiscal Procedure Code states, in the same time, **the term of prescription of 10 years of the right to assess tax obligations if are the result of an offence stated by the criminal law**. This term of 10 years **begins from the date when the offence was committed (the offence must be sanctioned by a definitive judicial order – Art 91 Para 3 of the Fiscal Procedure Code)**.

2.1.1 *Interruption and suspension of the term of prescription of the right to assess tax obligation*

According to Art 90 of the Fiscal Procedure Code, the term of 5 and 10 years are interrupted and suspended **for the cases and under the conditions stated by the law for the interruption and suspension** of the term of prescription of the right to action according to the civil law. Art 92 of the Code envisages the provisions of the Civil Code.

Other cases for the interruption of the term of prescription stated by Art 92 Para 1 are:

⁴ Art 91 of the Fiscal Code.

⁵ Official Gazette of Romania, Part I, No 597/13 August 2002.

⁶ For details, see Ioan Condor, coord., *Drept financiar, bugetar și fiscal*, 1st Volume, Condor Consulting&Taxation Publ.-house, Bucharest, 2003, p. 102.

- a) When the taxpayer submits his annual financial statement after the expiration of the legal term, case in which the interruption operates from the moment of submission of the statement;
- b) The correction of the financial statement or of a voluntary act of debt acknowledgement, the interruption date being the date of the submission of the declaration for rectification or of the act of acknowledgement.

Art 93 of the Fiscal Procedure Code states **the effects of the fulfilment of the term of prescription**. Thus, if the fiscal authority ascertains the fulfilment of the term of prescription of the right to assess tax obligations, it shall proceed to the termination of the procedure to issue to debt security.

2.2 Prescription of the right to ask the forced execution

2.2.1 The initiation and term of prescription

The material right to ask for the forced execution of debt securities shall be prescribed within 5 years from the **1st of January** of the year following the one in which this right was born. This term shall be applied also for debts originating from civil fines, according to Art 131 Para 2 of the Fiscal Procedure Code.

2.2.2 Suspension of the term of prescription

The term of prescription of 5 years, above mentioned, shall be suspended:

a) In the cases and under the conditions established by the law for the suspension of the term of prescription of the right to action. The text considers the cases for suspension of the extinctive prescription stated by the above mentioned Civil Code;

b) In the cases and under the conditions in which the suspension of the execution is stated by the law or has been ordered by a court or by other competent authority, according to the law;

c) During the validity of the relief provided by the law⁷. We consider that the suspension operates during the time stated by the act of provision or approval of the relief for payment;

d) For as long as the debtor eludes his incomes and goods from forced execution. We notice that, unlike the previous regulation, the Fiscal Procedure Code **gave up the condition of “*mala fide*”**, element known very difficult to prove. The suspension reason considers, in my opinion, acts and facts as they are, for instance, the misleading of the enforcement organ, hiding the goods and incomes etc. Ascertaining these acts and facts of the debtor is made by an official report of the enforcement organ.

⁷ Listed by Art 125 of the Fiscal Procedure Code.

Other cases for suspending the term of the prescription, according to Art 92 Para 2 are:

- a) For the period between the initiation of the fiscal audit and the date of issuance of the notice of assessment, as an effect of the audit;
- b) During the eluding of the taxpayer from the fiscal audit;
- c) During the period between the date of declaration of a taxpayer as inactive and the date of his reactivation.

After the suspension ceases, **the extinctive prescription retakes its course**. In the determination of the fulfillment of the term of extinctive prescription **shall be considered also the period (term) flown prior the suspension**.

2.2.3 Interruption of the term of prescription

The term of prescription shall be interrupted:

- a) In the cases and under the conditions established by the law for the interruption of the prescription of the right to action. We are talking about the cases for interruption stated by the new Civil Code already examined and we shall not resume them;
- b) On the date when the debtor, before the initiation of the forced execution or during it, concludes a **voluntary act** of payment of the obligation stated by the enforceable title or acknowledged in any other way the debt.

We **suggest** that this provision corresponding to Art 133 Let b) **to be eliminated**. This text states **the interruption of the term of prescription** of 5 years, if there is a **voluntary act of payment or an acknowledgment** by any means of the debt security. The effect should be that from that date would begin a **new term of 5 years**, which means that the prescription **could have 9 years** and 363-364 days, almost 10 years.

This provision shall also have as consequence the voluntary non-payment of the tax obligation and the non-recognition of the debt. Who will lose? The budgetary creditor (the state, etc.).

It is known that to avoid the payment of interest rates and of delayed payment penalties' flowing also after the submission of the appeal, **the taxpayer is willing to pay his tax obligation to stop the accumulation of interest rates** and delayed payment penalties.

For the same purpose, the taxpayer is willing to acknowledge his debt, but in the same time he cannot perform the full payment.

These are a few situations in which **the extension of the term of prescription is not favorable for the state**.

- c) During the conclusion, in the course of the forced execution, of an act of forced execution. For instance, are acts of forced execution: the summons notifying to the debtor, the garnishment notice sent to the garnishee, the notice of foreclosure etc.;
- d) Other cases stated by the law.

The effects of the interruption of the prescription have been examined above.

2.2.4 The effects of the fulfilment of the term of prescription

The enforcement organ assessing the fulfilment of the term of prescription of the right to ask for the forced execution of the debt security shall proceed to:

- The cessation of the measures to perform it
- Their deletion from the analytical evidence as payers.

The Fiscal Procedure Code also states that the amounts paid by the debtor in the account of some debt securities, after the fulfilment of the term of prescription, **are not refunded**.

The above provision is argued by the fact that the subjective right of the creditor is not extinguished, even if the debtor has paid the amounts after the fulfilment of the term of prescription, he still owed them. Even if the obligation to pay becomes imperfect with the lapse of the term of extinctive prescription, the debtor willingly paying shall perform a valid payment.

In this regard, there should be no confusion between the effects of the fulfilment of the term of extinctive prescription and the undue payment which has as effect the *condictio indebiti* (recovery of the undue payment). In the above mentioned case, the sum is owed also after the fulfillment of the term of prescription, which has been paid *de bona fide*, shall not be recovered.

Implementing Regulations 130.1 and 130.2 state the conditions in which the debtors can be erased from the analytical files. Thus, the erase from the analytical files of the debt securities' payers for which the term of prescription of their right to ask for the forced execution has been fulfilled, shall be made based on a minutes of ascertaining the completion of the term of prescription, appropriated by the chief of the specialized department, approved by the legal department of the same fiscal authority or of the superior authority, submitted for approval together with the case file to the manager of the fiscal authority.

The case file must contain all documents and information necessary to ascertain of the completion of the term of prescription, as well as the minutes of ascertaining.

2.3 Prescription of the right to compensation or restitution

Art 135 of the Fiscal Procedure Code states that the right of the taxpayers to the compensation or restitution of their debt securities shall be prescribed within 5 years from 1st of January of the year following the one in which the right to compensation or restitution was born (see Art 116-117 of the Fiscal Procedure Code).

It must be noted that, for equal treatment, the date from which starts the term of prescription of the right to compensation or restitution of the debt security is also 1st of January of the year following the one in which it was born, as well as

it is stated for the cases in which the term of prescription flows in the favor of the creditor⁸.

3. Instead of conclusions: comparison between the extinctive prescription in the civil and fiscal law

A. *Similarities:*

- Both the civil and fiscal extinctive prescription represent a mean to extinguish the obligations due to the passage of time;
- Effects for:
 - a) Creditor:
 - ◆ The extinctive prescription extinguishes the material right to action; the **right to action**, as well as the action, has a double meaning: material and procedural. The **material** meaning represents the possibility of a person to perform a subjective right against the plaintiff who violated or contested it, obtaining with the help of the court the performance of the correlative obligation; the **procedural** right to action represents the possibility (faculty) of a person to notify the competent court for the performance of his right;
 - ◆ With the extinction of the right to action referring to a principal right is also extinguished the right to action referring to the accessories;
 - ◆ If the debtor is compelled to continuing services, the right to action referring to each of these services shall be extinguished by a special prescription;
 - ◆ The indefeasibility of the procedural right to action; what is extinguished is the material right to action, not the procedural one, because by the notification of the competent authority it can be examined and controlled if the prescription is fulfilled or not;
 - ◆ The survival of the civil subjective right; this right is not extinguished, but it loses the protection insured by the forced execution;
 - b) Debtor: the perfect civil obligation becomes imperfect, namely, after the passage of the time established by the law, the debtor cannot be forced, by the coercion of the state (legally) to perform his obligation; thus, after the fulfilment of the term of prescription the debtor shall perform the obligation **only if he desires to**.
- Also, both in the civil and fiscal law are applicable, as means of modifying the prescription, the suspension, interruption and reinstatement!

⁸ See I. Condor, S. Cristea-Condor, *Prescripția extintivă în dreptul comun și în domeniul fiscal*, in „Revista de Drept Comercial” („the Commercial Law Review”) No. 7-8/2001, pp. 51-62.

B. Differences:

➤ The general term of the extinctive prescription in the civil law is of 3 years (with the exceptions stated by the law), while in the fiscal law the general term is of 5 years (with the exception stated by the law, of 10 years, for the cases in which the tax liabilities resulted from the commission of an offence stated by the criminal law);

➤ The date when the prescription begins is different; thus, while in the civil law the prescription begins from the date when the owner of the right to action was aware or, according to circumstances, should have known of its birth (with the special application, valid for the contractual obligations to give or to do, of calculating the prescription from the date when the debt became payable), in the fiscal law the prescription begins with the 1st of January of the year following the one in which the debt was born (for the right of the fiscal authority to establish the fiscal obligation, as well as of the right to ask for the forced execution);

➤ In the fiscal law the creditor acting for the fulfilment (calculation and performance) of the rights of claim is not the state, but, in its behalf, as legal representative, the fiscal administration authority;

➤ Only the fiscal law expressly states the situation in which the creditor is the taxpayer, because only in the fiscal law the rights of claim have the special form of the right to compensation and restitution;

➤ Though also in the civil law we can talk equally about the prescription of the right to forced execution, only in the fiscal law the cases for the suspension and interruption of the prescription are different (as a general rule also for the prescription of the right to assess fiscal claims, and for that of the right to forced execution, the general cases for the suspension and interruption are the ones stated by the civil law, but in addition, appear cases specific for the fiscal law).

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