

Moratory Damages and Compensatory Damages in the Context of the Return of Foreclosure

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Abstract

The disposition of the return of the forced execution by the court, following the abolition of the enforcement title or the forced execution itself, leads to the creation of a new paradigm, in which the creditor of the forced execution, whose patrimony has increased, becomes the debtor of the obligation of restitution, to the debtor of the forced execution, and which in turn becomes the creditor of the restitution obligation. The natural consequence of the solution of admitting the return of enforced execution requires the restoration of the previous situation, which will be done in the register of the general provisions provided for in art. 1635-1649 of the Civil Code. The effective method of restoring the previous situation converges on the analysis of different civil law principles, with similar valences but different effects, especially the principle of restitutio in integrum and the principle of full repair of the damage, in the perimeter of good faith and bad faith of the debtor of the restitution obligation. In the context of the civil circuit, situations may arise, in which the main method of restitution of benefits, in kind, is no longer possible, so new practical difficulties arise in restoring the previous situation, in this framework, the incidence will be analyzed for interest - moratory damages and compensatory damages.

Keywords: moratory damages, compensatory damages, restitutio in integrum, the principle of full reparation of the damage.

JEL Classification: K15, K40

1. Preliminary considerations

The institution of the return of enforced execution, in the regulation of the Code of Civil Procedure adopted by Law no. 134 of July 1, 2010, republished, presents similar characteristics to those provided previously, in art. 4041-4043 in the Code of Civil Procedure from 1865, this institution being introduced into the national legislation by the Government Emergency Ordinance no. 138/2000. From the provisions of art. 723-726 of the Code of Civil Procedure converges the legal nature of this institution, which represents the obligation of the creditor of the forced execution to return to the debtor of the execution, everything he took from him through the enforced execution, in the event of the annulment of the enforceable title or the enforced execution itself, in other words a resumption of the way of execution in the opposite direction.

The general rule in the matter of the return of forced execution is represented by the restoration of the situation before it, in the case of the abolition of the enforceable title or of the forced execution itself, an aspect that derives from the rules of art. 723 par. (1) of the Civil Procedure Code. Wanting to circumscribe the general rule, the legislator ruled that the main method of restoring the previous situation is in kind, by restitution of the goods on which the execution was made, and in the alternative by equivalent.

a) The restitution in kind is subordinated to the restitution of the goods on which the execution was made, without prejudice to the rights definitively acquired by third parties in good faith. The restitution will be made in kind in the event that the person who acquired the movable/immovable goods is not a third party to the enforceable legal relationship, but the creditor, who acquired the property by transferring it to his patrimony, through the mechanism of seizure or forced sale, or by taking over the goods by the creditor, on account of the claim, according to the provisions of art. 779 of the Code of Civil Procedure or of art. 2460 Civil Code et seq. Thus, movable/immovable goods are subject to restitution in kind if they have been the subject of direct enforcement, provided that they have not left the property of the creditor of the enforcement, because if they are no longer in the property of the creditor, and the third-party acquirers were in good faith, the return of enforcement will be achieved by equivalent.

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b) As an exception to the main way of restoring the previous situation, if the forced execution was done through the sale of movable/immovable goods, the return will be made by the creditor's restitution of the amount resulting from the sale, which will be updated with the rate of inflation, therefore by equivalent, within the scope of the principle of full reparation of the damage.

In addition to these rules of civil procedural law, the restoration of the parties to the situation prior to enforcement must also be analyzed in the register of the provisions of art. 1635-1649 of the Civil Code which regulates the general framework of the restitution of benefits in the context of generally valid principles.

So, these are the coordinates stipulated by the legislator in this matter, without being able to deduce whether the general rule of restoring the previous situation is equivalent to the principle of full repair of the damage, included in it or only similar to it.

Therefore, we propose to answer the question of whether the debtor of forced execution, in the event of the acceptance of his appeal, by abolishing the enforceable title or the forced execution itself, and subsequently ordering the return of the forced execution, can obtain moratory damages, and if so, the moment of where he can get them. We appreciate that the novelty regulation, which has its origin in the jurisprudence of the national courts in the field of forced execution, of the fact that in the case of ordering the return of the forced execution, the execution costs for the acts carried out will be borne by the creditor, is not likely to lead to any conclusion regarding the granting or non-granting of liquidated damages, motivated by the different nature of these expenses².

Therefore, in order to answer this problem, in advance it is our task to refer to the following: the legal nature of interest-moratory damages and compensatory damages, the effects of the resolution of the appeal on execution, especially the enforceability of the judgment pronounced in this matter, the attribution by the legislator of the risk of forced execution of one of the parties to the enforcement report, the regime and effects of nullity, as well as the incidence of the principle of full restitution of benefits and full reparation of damage³.

2. Moratory damages and compensatory damages

Moratory damages have the legal nature of a sanction applied to the debtor of the legal obligation, in the event of non-execution of the obligation incumbent upon him. The provisions of the Civil Code regarding the possibility of the creditor to benefit from interest-moratory damages are distinguished according to the nature of the unexecuted obligation, respectively i) the non-execution of a monetary obligation or ii) other obligations to perform except for pecuniary ones, their regulation being found in art. 1535 and 1536 of the Civil Code. Without expanding the analysis on the issue of interest-moratory damages, we show that in terms of substantive law, they are subsumed under the condition that the debtor of the obligation is in arrears, regardless of whether it is the result of the procedural attitude of the creditor or the establishment by the legislator of a legal presumption of delay of the debtor in the execution of the assumed obligation.

The legal provisions previously exposed converge to the conclusion that the moment from which default interest damages are due differs in relation to the nature of the debtor's obligation. Thus, if in the case of monetary obligations, the moment from which default damages are due is that of the maturity of the obligation, the debtor being in default, as regards the obligations to perform, other than pecuniary ones, the moment is the moment from which the debtor is in arrears, on the monetary equivalent of the unexecuted obligation.

Thus, the conclusion is drawn that the debtor's bearing of interest-moratory damages has its origin in the idea of his fault in the execution of the obligation, fault which derives, among other things, from non-compliance with the fundamental principle of civil law, that of good faith which must characterize throughout the execution of the obligation. This working hypothesis is of particular

² For some particular aspects see Cătălin-Radu Pavel, *Constitutional references related to the guarantee of the right of a person aggrieved by a public authority in Romania*, in „Juridical Tribune - Tribuna Juridica”, Volume 8, Issue 1, March 2018, pp. 114-129.

³ James B. Sales and Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, „Vanderbilt Law Review”, vol. 37, Issue 5, October 1984, p. 1119.

significance, because in the analysis of the possibility of granting some damages-moratory interest, in the situation of ordering the return of the forced execution, the fault of the creditor of the forced execution should be taken into account, whose quality changes to that of the debtor of the obligatory legal relationship which arises, in the context of ordering the return of execution.

Regarding compensatory damages, the principle of full repair of the damage, stipulated by art. 1531 of the Civil Code, imposes coverage not only of the actual damage (*damnum emergens*), the direct consequence of non-execution, but also of the unrealized benefit (*lucrum cessans*), which represents the real value of the obligation, updated with the inflation rate, at the time of its execution. As the High Court of Cassation and Justice also held in the recitals of Civil Decision no. 593/2016, the legal nature of interest-moratory damages is different from the legal nature of compensatory damages, the first representing a sanction, and the second representing the real value of the obligation at the date of execution, the cumulation between them being possible, by virtue of the principle of full repair of the damage.

3. Effects of the resolution of the appeal on execution

In view of the general effects of the court decisions listed by the rules of art. 429-435 of the Civil Procedure Code, respectively the disinvestment of the court from the settlement of the dispute, the *res judicata* authority, the executive power, the probative force, as well as their obligation between the parties and their successors and the opposition in relation to any third person, the resolution of the challenge to the execution presents specific effects, listed mainly in art. 720 of the Civil Procedure Code.⁴

Without intending to present all the particularities of the effects of the resolution of the challenge to the execution, not being relevant for the solution of the present topic of discussion, we note that the judgment pronounced in the first instance in the challenge to the execution enjoys an executory character, by way of derogation from the general rule provided by art. 633 Civil Procedure Code, as it appears from the provisions of art. 651 par. (4) Civil Procedure Code. However, the enforceable effect of the decision of the first instance pronounced in the matter of the challenge to execution, cannot be extended to other secondary solutions, which are supported and determined by the main solution, a conclusion that derives from the corroborated and systematic interpretation of the rules of art. 726 and art. 651 par. (4) Civil Procedure Code and the rules of art. 449 Civil Procedure Code.

Therefore, the solution on the request to restore the previous situation, formulated by the debtor of the forced execution, limited to the return of the forced execution, does not have the specific enforceable attribute of the main solution on the appeal to the execution, following that it will produce effects from the definitive form of the decision, subject to approval provisional judicial enforcement regulated by art. 449 Civil Procedure Code.

This distinction of the moment from which the decision on the main solution of the challenge to the execution and on the solution regarding the return of the execution, acquires the enforceable attribute is of interest in the restoration of the situation before the execution, especially from the moment from which the debtor could request the payment of damages-moratory interests.

Relative to the solutions that the enforcement court can pronounce, for the assumed purpose, it imports only those solutions by which the enforceable title or the forced execution itself is abolished, since only these create the prerequisites for admitting the return of the forced execution. The notion of annulment of the enforceable title should not only mean the situation of its total annulment, but any legal way by which it is devoid of legal effects, such as annulment, cancellation, change, modification, etc.

Apart from the previously mentioned procedural effects, the court decision also produces substantial effects⁵, which are characterized by a change in the legal situation between the parties, a

⁴ Boroi G., Stancu M., *Drept procesual civil*, 5th edition, revised and added, Hamangiu Publishing House, Bucharest, 2020, p. 693; Deleanu I., Mitea V., Deleanu S., *Tratat de procedura civila*, vol. III, Universul Juridic Publishing House, Bucharest, 2013, p. 321.

⁵ Ibid, p. 693.

change that appears more prominently in the case of court decisions establishing rights. In the scope of this type of effects, we appreciate that following the solution of admitting the challenge to the execution, by abolishing the executory title or the forced execution itself, an obligatory legal relationship is born, based on which, the one whose patrimony has increased becomes the debtor of the obligation to restitution, to the one who, accordingly, has reduced his patrimony and who in turn becomes the creditor of the same obligation. In other words, we initially have a mandatory legal relationship that led to the birth of the enforceable title, on the basis of which the forced execution is carried out, but following the decision to admit the appeal to the execution and the ordering of the return of the forced execution by restoring the previous situation, the quality of the parties to the report legal obligation is reversed, the pursuing creditor becoming the debtor of the restitution obligation, and the pursued debtor will become the creditor of the restitution obligation.

However, the natural question arises of the moment of the birth of this new mandatory legal relationship, in the context of the previous mentions relative to the procedural effects of the resolution of the enforcement appeal. We consider that the birth of the new mandatory legal relationship is related to the moment when the court decision ordering the return of the execution becomes final, and not to the time of the resolution of the appeal to the execution, in the hypothesis that the request for the return of the enforced execution would be formulated in the context of the appeal to the execution. Moreover, the creditor of the return of the execution could not request the forced execution of the decision by which the restoration of the previous situation was ordered under the conditions of art. 637 Civil Procedure Code, because the solution does not enjoy the attribute of provisional enforceability.⁶

4. The risk of enforcement

In terms of the risk that the creditor assumes at the time of the enforcement of an enforceable title, a distinction must be made between i) the enforcement of a title that enjoys a provisional enforceability and ii) the enforcement of titles that do not enjoy the feature of provisional enforceability and which can be enforced only at the time of their finalization.

Relative to the first category, according to the provisions of art. 637 of the Civil Procedure Code, the risks of the enforcement of enforceable titles that have not been finalized belong to the creditor, the latter being required to restore the debtor to his rights, to the extent of the modification or abolition of the enforceable title. The fact that the risk of execution is placed on the creditor of the execution leads to the consequence that, in the case of ordering the restoration of the previous situation, the restitution obligation comes from his fault, and the cause of the restitution is imputable to him.

Correlatively, in the hypothesis in which the debtor of the obligatory legal relationship makes a voluntary payment on the basis of an enforceable title that is not definitive, the risks of premature execution rest with him, with all the consequences arising from it.

Per a contrario, in the case of the execution of an executory title that also has a definitive character, we appreciate that the risk of forced execution will be borne by the debtor of the execution, the titles enjoying the presumption of legality and validity, a conclusion that has its foundation in the coordinates of the principles legality and stability of legal relations.

5. The foreclosure return paradigm

As I showed previously, the general rule in the matter of the return of enforced execution is represented by the restoration of the situation before it, through the main method of restitution of the goods in kind and subsidiarily through the equivalent.

By restoring the previous situation or returning to the previous situation, adapted to the matter

⁶ Oprina. E., Bozeșan V. (coord.), *Executarea silită, dificultăți și soluții practice*, vol. 2, Universul Juridic Publishing House, Bucharest, 2017, p. 26.

of the return of forced execution, we understand that rule of law, enshrined as a principle by the provisions of art. 1254 par. (3) of the Civil Code, according to which everything that was executed on the basis of a canceled enforceable title or a enforced execution that was cancelled, must be returned, so that the parties of the legal relationship reach the situation prior to the execution of the enforced execution. This principle is the consequence of the substantial effects of the decision to admit the challenge to execution, by abolishing the writ of execution or the forced execution itself, which are circumscribed by the principle of retroactivity of the effects of nullity found/ordered by the court.

In order to answer the problem raised in the present article, namely whether the debtor of the enforced execution, following the order of the return of the enforced execution, can obtain moratory damages, and if so, the moment from which he can obtain them, the distinction must be made between the principle of full restitution (*restitutio in integrum*) to which art. 723 par. (1) Code of Civil Procedure and the principle of full reparation of the damage, regulated mainly by the rules of art. 1531 Civil Code. The trap of confusing the two specific principles of substantive law is laid even by the legislator, since in art. 723 par. (3) of the Civil Procedure Code, combines the principle of full restitution with a component of the principle of full repair of the damage, as a way of restoring the situation before the execution.

Thus, if the principle of full restitution instituted in the matter of the return of enforced execution has its coordinates of applicability in the register established by the rules of art. 1635-1649 Civil Code⁷, the principle of full repair of the damage corresponds to the limits of application from art. 1516-1557 Civil Code. It appears that the purpose of these institutions of civil law, the full restitution of benefits and the full reparation of the damage, is different, without excluding, however, the merging of these principles as a way of restoring the previous situation, the principle of the full repair of the damage being grafted onto that of *restitutio in full*.

Determined by the possibility established by the rules of art. 637 of the Civil Procedure Code, for the enforcement of an enforceable title prior to its finalization, as well as the manner of enforcement, the return of enforcement has the following characteristics:

a) the situation of putting into execution a provisional enforceable title, prior to the definitive stay, through the method of direct forced execution. In this case, according to 637 of the Code of Civil Procedure, the risk of enforcement rests with the creditor, and in the event of the cancellation of the enforcement title, he will be required to restore the debtor to his rights, to the extent of the modification or cancellation of the enforcement title. Therefore, the legislator establishes an absolute legal presumption of the imputability of the cause of restitution to the execution creditor, who, without waiting for the finalization of his title, proceeded to execute a title, under the resolute condition of its subsequent validation. The assignment of the risk of execution to the creditor does not remain without legal consequences, to which, in the register of the provisions of art. 1635-1649 Civil Code, the scope of the debtor in bad faith is assigned to him.

Therefore, he will have to, in case of loss or alienation of the asset, return the highest value from the moment of delivery or from the moment of alienation/loss; in case of accidental loss of the asset, to prove that the asset would have been lost and if, on the date of the loss, it had already been handed over to the creditor of the obligation, as well as other consequences that the law attributes to the debtor in bad faith.

Correlatively, in relation to the method of execution, that of forced surrender, the restoration will be carried out in kind, provided that the goods are still there, at the time of ordering the restoration of the previous situation in the patrimony of the creditor of the forced execution, because if they are no longer in the creditor's patrimony and the third party acquirers were in good faith, the return of the forced execution will be achieved by equivalent.

With regard to the moment from which the debtor of the forced execution, who has meanwhile become a creditor of the restitution, could request the restitution of the goods/their equivalent, is represented by the date of finality of the judgment ordering the restitution, subject to the approval of

⁷ Ibid, p. 29.

the provisional judicial execution regulated by Art. 449 Civil Procedure Code.

Regarding the incidence of the principle of full repair of the damage, we appreciate, on the one hand, that the risk of execution imputed to the creditor, as well as the consequences arising from it, cannot be transmuted into the plan of fault specific to the non-execution of the obligation, and on the other hand, the damages moratorys are subordinated to the debtor's condition of being in arrears with regard to the execution of the obligation.

Given as a premise, the moment from which the debtor of the execution becomes the creditor of the restitution of the asset in kind/equivalent, namely that of the definitive stay of the solution on the return of the enforced execution, the condition of being in arrears cannot be prior to this moment. Consequently, the moment from which the moratory damages could be granted to the creditor of the restitution is represented by the date of the final decision on the restoration of the previous situation, regardless of whether the restitution will be made in kind or by equivalent.

On the other hand, motivated by the legal nature of compensatory damages, that of updating the real value of the obligation at the date of execution, an institution that we appreciate as being independent of fault, to the extent that the restoration of the situation is achieved by equivalent, the equivalent of the good should be updated with inflation, on the date of execution of the obligation.

A first argument for updating the equivalent with inflation is given by the rules of art. 723 par. 3 of the Code of Civil Procedure which stipulates that if the forced execution was done through the sale of movable property, the return of the execution will be made by the creditor's restitution of the amount resulting from the sale, updated according to the inflation rate. Another argument for updating the equivalent is given by the very principle of the full restitution of benefits, restitution which could only be full in the situation of updating the equivalent with inflation, the result of this update being corresponding to the value of the good at the time of restitution. A final argument in support of this solution is represented by the fact that the legislator, in the matter of restoring the previous situation, merges the limits of the principle of full restitution with a component part of the principle of full repair of the damage, represented by *lucrum cessans*, this being equivalent to the mechanism of updating a claim in relation with the inflation rate.

Therefore, the creditor of the restitution obligation will be entitled to the restitution of the asset, if it is still in the debtor's patrimony, or to the restitution of its equivalent, updated with the inflation rate at the time of the effective restitution, as well as to the counter value of damages-moratory interest, from the date the definitive stay of the solution regarding the return of enforced execution and until the restitution of benefits, relative to the monetary equivalent of the obligation.

b) the situation of putting into execution a provisional enforceable title, prior to the definitive stay, through the method of indirect forced execution. This hypothesis is similar to the one presented previously, the only notable difference being represented by the premise of the method of restoring the situation prior to the execution, that by equivalent.

Although the provisions of art. 723 par. (3) of the Civil Procedure Code stipulates that the return of execution will be made by the creditor's return of the amount resulting from the sale, updated according to the inflation rate, only if the execution was made through the sale of movable property, we appreciate that this solution will be applicable regardless of whether the property that cannot be restituted in kind is movable or immovable and regardless of whether its sale is carried out by the executor or by the creditor, prior to the solution of admitting the return of enforced execution.

It must be specified that even if the property that was the subject of enforcement was forcibly sold or alienated by the enforcement creditor, restitution in kind is possible, but only if, previously, the sale was abolished, in the first case only if the fraud of the third adjudicator is proven, and in the second case, if there are grounds for nullity, according to common law. Similar to the case previously presented, the restitution will be made by equivalent, updated with the inflation rate at the time of the actual restitution, and the creditor of the restitution is also entitled to damages-moratory, from the date of the definitive stay of the solution regarding the return of enforced execution and until the restitution of benefits, related to the monetary equivalent of the obligation.

c) the situation of putting into execution a final enforceable title, through the method of direct enforced execution. Different in relation to the cases presented previously, the enforceable title whose

execution is requested by the creditor, is definitive, so that the rules of art. 637 of the Civil Procedure Code regarding the risk imputed to the creditor of execution are no longer applicable.

Per a contrario, the risk of enforced execution is transferred to the debtor of the execution, his fault being presumed by the voluntary non-execution of the obligations stipulated in the enforceable title. Additionally, this judgment also derives from the attribute enjoyed by the enforceable title, namely the presumption of legality and soundness that has its foundation in the coordinates of the principles of legality and stability of legal relations.

The fact that the restitution of benefits is carried out in the matrix of the provisions of art. 1635-1649 Civil Code, converges to the conclusion that the execution debtor will bear the consequences arising, among others, from the loss or alienation of the asset, the accidental loss of the asset, partial loss, etc., between the moment of the start of the enforced execution and that of the definitive stay of the solution of the return of enforced execution, the creditor of the execution enjoying the position of the debtor in good faith.

Regarding the rules for awarding interest-moratory damages and compensatory damages, they are similar to the situation presented in the first point, both with regard to the method of restitution of benefits and with regard to the moment from which compensation can be granted.

Finally, with regard to *d) the situation of the execution of a definitive enforceable title, through the method of indirect forced execution*, the restitution will be made by equivalent, updated value with the inflation rate, and the creditor of the execution is also entitled to default damages, of on the date of finality of the solution regarding the return of enforced execution and until the restitution of the benefits, relative to the monetary equivalent of the restitution obligation.

6. Conclusions

Without intending to exhaust the enumeration of all the cases in which damages, interest, interest or compensatory damages can be granted, in other words, the incidence of the principle of full repair of the damage, in the matter of the return of enforced execution, we specify that the analyzed situations are circumscribed to the direct consequences of the admission of the request for the return of forced execution. Thus, those situations in which the debtor of the enforced execution requests the reparation of the damage caused as a result of the execution of the enforced execution, based on other institutions of civil law, such as the tortious civil liability of the creditor who set in motion the enforced execution, were not the subject of the analysis⁸.

In the end, the granting of interest-moratory damages or compensatory damages requires the analysis of different principles of civil law, with similar valences but different effects, effects that merge in most legal situations, including in the matter of the return of enforced execution, without, however, disregards the good faith or bad faith of the debtor or the procedural and substantive effects of the court decision regarding the return of enforced execution.

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⁸ See J. O'Sullivan, *Remedies I: compensatory damages*, in O'Sullivan & Hilliard's, *The Law of Contract*, Oxford University Press, 2022, p. 387 or a case analyse in Carol MacMillan Stanley, *Punitive Damages -- No Recovery When Compensatory Damages are Compromised*, „University of Miami Law Review”, volume 23, number 1, 1968, pp. 261-265.

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