CONSIDERATIONS REGARDING THE GENERAL ASPECTS OF THE SUCCESSIONAL OPTION IN THE LIGHT OF THE NEW CIVIL CODE

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Abstract:
Law no. 287/2009 regarding the Civil Code, whose date of entry in force has not been established yet, brings in the successional option matter many new elements, reconfiguring it in some parts. In this paper we will analyze the general aspects of the successional option in the light of the new Civil Code dispositions. We will thus be able to reveal the novelties brought by the new regulation in the matter subjected to our analysis and to appreciate its progressive nature. As regards the general aspects of the successional option, the new Civil Code innovates mainly relative to the term of successional option.
We hope that through our approach, we enrol in the overall effort to make known and understood the disposition of the new Civil Code, until its entry in force.

Key words: *erede, successional option term, retransmission of the option right.*

1. Introduction

Our paper aims to analyze the general aspects of the successional option in the light of the new Civil Code.

Law no. 287/2009 regarding the Civil Code, published in the Official Gazette no. 511 from 24th of July 2009, whose date of entry in force has not been established yet, conveys to the successional option a new configuration. The analysis of this issue in the light of the new civil regulation presents, in our opinion, a special utility and actuality, because we believe that by making known and explaining the dispositions of the new Civil Code in this matter we bring our contribution to improve the act of justice, once this law comes into force.

Along with those who implement the justice, are also interested in knowing the dispositions of the new Civil Code in the successional option matter the justice partners, the law theorists, the public notaries, the civil servants with responsibilities in this area, Law and Public Administration specialization students. The legislator himself, being always concerned in perfecting his legislative work, is interested in *de lege ferenda* proposals stated by the legal doctrine.

In this paper we will analyze only the general aspects of the successional option in the light of the new Civil Code dispositions, the valences of the successional option right being analyzed separately in different papers. We will analyze the following aspects: the notion and the legal regulation of the successional option, the subjects of the option right, the legal characters of the act of successional option, the validity conditions of the act of successional option and the prescription of the successional option right.

About the novelty elements brought in the right to inherit matter by the new Civil Code have been written few studies in the volumes of some conferences, in the short time elapsed from the date of the publication of Law no. 287/2009 (the end of July 2009) until now. The successional option matter in the regulation of the new Civil Code was broached, from our information, only in "Noul Cod civil. Comentarii" volume, in "Continuitate şi discontinuitate în reglementarea opţiunii succesorale[1]" study, in which the author aims to observe "the level of transformations that have

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[1] Bogdan Pătraşcu, "Continuitate şi discontinuitate în reglementarea opţiunii succesorale*"* in *Noul Cod civil. Comentarii,* coordinator Marilena Uliescu (Bucharest: Universul Juridic Publishing House, 2010), 246-72.

occurred in the successional law institutions and how profound are they", "whether or not the continuity prevails in the regulation", "but without exhausting the subject"[2].

Compared to this study, we intend to analyze the general aspects of the successional option in light of the new Civil Code, in a complete and didactic manner.

Under this consideration, we appreciate that the subject we have proposed is actual and our scientific approach is useful.

2. Content

2.1. The successional option notion[3] and its legal regulation

As one of the patrimony features is that it can not remain without a titleholder, the successional patrimony is transmitted, as a consequence of *de cujus* death, to his legal heirs or to his testamentary beneficiars, independently of any manifestation of will from the latter. Under the same legal character, the successional patrimony, transmitted by law to the *de cujus erede*[4] who dies before exercising the successional option right regarding the inheritance, is retransmitted, also by law, to the own heirs (article 1105 N.C.C.).

The retransmission of the inheritance does not generate the obligation of the heirs to accept it, according to the dispositions of the article 1106 N.C.C. "Nobody can be forced to accept a rightful inheritance". As a consequence, each *erede* has the possibility to have a choice regarding the inheritance, in respect to which he has this quality, meaning either to accept it or to repudiate it, within the applicable term of the option right regarding the inheritance their author. Furthermore, the new Civil Code, in article 1105 paragraph (2) says that the part of *erede* who benefits by the retransmission of the option right and who gives it up will be taken by the others heirs of their author.

The transmission of the successional patrimony is realised in fully right at the opening date of the inheritance. However, this transmission has only a provisional character, it being considered reinforced only after one exercise his successional option right. Although it is exercised after the opening of the inheritance, the right of successional option right has no effects from the date of exercise, but it has retroactive effects from the date of the *de cujus* death [articles 1114 and 1121 paragraph (1) N.C.C.].

Like *de lege lata*, the successional option right does not either benefit in the new Civil Code of a definition, reason why we can next appreciate that it represents the subjective right, appeared at the death time of the one who leaves the inheritance, in the person of his *erede*, consisting of a choice between the acceptance and the rejection of the inheritance and which may be exercised only in accordance with the law[5].

Although the successional option right does not benefit of a legal definition, its valences are identified in a specific manner in the new Civil Code, in article 1100 paragraph (2). These are the following two ones:

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[2] Ibidem, 246.

[3] Regarding the valences of the successional option notion, ibidem, 248.

[4] The latin term "*erede*" has been used for the Romanian term "succesibil" (from the French "succecible") due to the lack of the English term that denominates a person who receives or is expected to succeed or is in line to receive a heritage due to a hereditary rank.

[5] In the same terms is defined the successional option right by: Constantin Stătescu, *Drept civil. Contractul de transport. Drepturile de creaţie intelectuală. Succesiunile* (Bucharest: Didactică şi Pedagogică Publishing House, 1967), 210; Dan Chirică, *Drept civil. Succesiuni* (Bucharest: Lumina Lex Publishing House, 1996), 200; Alexandru Bacaci and Gheorghe Comăniţă, *Drept civil. Succesiunile* (Bucharest: C.H. Beck Publishing House, 2006), 173; Veronica Stoica, *Dreptul la moştenire* (Bucharest: Universul Juridic Publishing House, 2008), 272; Ioan Popa, *Curs de drept succesoral* (Bucharest: Universul Juridic Publishing House, 2008), 266; Ion Dogaru, and the others, *Bazele dreptului civil. Volumul V. Succesiuni* (Bucharest: C.H. Beck Publishing House, 2009), 51.

a*) the acceptance of the inheritance,* under which the legal heirs and the legatees general and with general title answer for the debts and burdens of the inheritance only with the assets from the successional patrimony, proportionately to each other quote - *intra vires hereditatis* [article 1114 paragraph (2) N.C.C.].

Thus we identify a double novelty brought by the new Civil Code in the matter subjected to our analysis. So:

- the new Civil Code regulates only the acceptance of the inheritance, as a valence of the successional option right, giving up to the acceptance under benefit of inventory;

- the new regulation in civil matter assigns the effects of the acceptance under benefit of inventory to the acceptance of the inheritance from the regulation in force.

b) *the rejection of the inheritance,* which involves the retroactively abolishing the inheritance vocation of *erede* who rejects it, so that he became alien to the inheritance, not benefiting by the assets of the inheritance and not being responsible for the debts and burdens of the inheritance. According to the dispositions of the article 1121 paragraph (1) N.C.C., the person entitled to inherit who gives up to the inheritance is considered never to have been heir. The part of the giving up person is a profit for the heirs who otherwise would have been excluded from the inheritance or for the heirs whose part would have been diminished if he had accepted the inheritance [article 1121 paragraph (2) N.C.C.].

We consider as being just the legislator option to drop to the acceptance of the inheritance under benefit of inventory and to assign to the acceptance of the inheritance the specific effects of the acceptance of the inheritance under benefit of inventory from the regulation in force, ensuring in this way protection for any *erede*. Regulating the acceptance of the inheritance under benefit of inventory, the Civil Code in force assures protection for only a few categories of *erede.* Through its regulation though, the new Civil Code ensures protection for any patrimonial interests of any *erede*.

As we have shown before, in the lights of the new Civil Code dispositions, the debts of the inheritance will be paid by the acceptant heir only within the assets of the inheritance, not being available anymore, like *de lege lata*, a confusion between the successional patrimony and the one of the acceptant heir. This provides a protection to the acceptant heir, who will not have to bear in any way the debts of the succession from his own patrimony.

Another merit of the new Civil Code is that for the first time in our legislation the notion of "*erede*" is defined. So, according to the dispositions of the article 1100 paragraph (2), "By *erede* one can understand the person who meets the conditions required by law, but who was not yet exercised his successional option right". Therefore, the quality of *erede* subsists until the moment of exercising the successional option right, after this moment being replaced by the quality of successor

In fact, the notion of "*erede*" has about the same significance these days. Therefore, according to the literature, *erede* represents the person with successional vocation, but who has not yet exercised his successional option right. So, now, the *erede* quality is reported only to the successional vocation, while the new Civil Code reports the discussed quality to all the conditions of the right to inherit.

Regulation the notion of "*erede*", the new Civil Code is inspired by the relevant and fair view of the doctrine, aspect which we consider to be positive.

2.2. The subjects of the successional option right[6]

In light of the new Civil Code, are entitled to exercise the successional option right, all persons who cumulative meet the following conditions:

- have successional capacity;

- they are called to inheritance (general successional vocation), either by law (the legal heirs from the four classes and the surviving spouse), either according to the will (the legatees), no matter if their vocation is general, with general or particular title;

- they are not unworthy.

[6] Ilioara Genoiu, *Drept succesoral* (Bucharest: C.H. Beck Publishing House, 2008), 270-3.

In an exhaustive list, the persons who have the right of successional option are: legal *erede*, the legatees (general, with general and particular title) and the personal creditors of the legal or testamentary *erede*.

a) the legal heirs;

The persons with the successional option right are not only the persons with concrete inheritance vocation, being in a preferential class and kin degree, but all the persons with general legal vocation, from any classes of heirs, and also the surviving spouse.

It is obvious that to the inheritance would not come all the persons who accepted it, but those who are in a preferential class and kin degree. The required solution for *erede* in subsequent degree to exercise the successional option right stays in the possibility of the preferential degree *erede* to drop the inheritance, towards the end of the period established by law in this regard. If the preferential degree *erede* accept the inheritance, their right on the inheritance will be consolidated retroactively from the date of the inheritance opening. The option of the subsequent *erede* will thus be without any legal effects, their rights on the inheritance being retroactively abolished.

b) the legatees;

The new Civil Code recognizes, in several of its texts[7], the successional option right also for the legatees, no matter if they are legatees general, with general or particular title. The reasons that have determined the legislator to recognize such a right for the legatees are, mainly, the following ones[8]:

- the general vocation or with general title of the legatees involves, besides the achievement of the assets of the inheritance and bearing the liabilities of the inheritance, the possibility to reject the inheritance recognised to the legatee;

- the particular title vocation of the legatee, even if it usually doesn't mean bearing the liabilities of the inheritance, proportional with the value of the legacy [article 1114 paragraph (3) N.C.C.], it still involves moral judgments (nobody can be gratified against his will), and the legacy with liabilities also involves patrimonial interests.

c) the erede creditors.

According to the dispositions of the article 1107 N.C.C., „The *erede* creditors may accept the inheritance on oblique way, in the limit of their satiated claim".

Equally, the new Civil Code, in article 1122, also regulates the possibility of *erede* creditors who rejected the inheritance in their fraud to ask the court to revoke the rejection on their part, but only within three months from the date they found out about that rejection. The admission of the action in rejection produces the effects of the inheritance acceptance by the debtor *erede*, but only in respect with the complainant creditor and in the limit and in the limit of his claim.

We thereby identify another strong point of the new regulation in successional matter, which offers a fair solution to situations commonly encountered in practice, but that are now not legally regulated. Moreover, the solutions established by the legislature in these cases are those that currently enjoy the majority doctrinal support.

Compared to these legal dispositions, we consider that the successional option right has not an exclusive personal nature, being able to be exercised by the *erede* creditors.

2.3. The legal characters of the successional option act

The act of successional option represents the manifestation of will of the holder of the successional option right, expressed in the legal term, towards an acceptance or a rejection of the inheritance.

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[7] We mention, as examples, article 1102 paragraph (2), article 1103 paragraph (2), article 1114 etc.

[8] Francisc Deak, *Tratat de drept succesoral,* second edition, updated and completed (Bucharest: Universul Juridic Publishing House, 2002), 382.

New Civil Code refers to the legal characters of the successional option right, in article 1101, stating that: "Under the sanction of the absolute nullity, the successional option is indivisible and can not be affected in any way". It is worthwhile the legislature's choice to identify the legal characters of the successional option act but as far as we are concerned, we consider that, under this aspect, the law in question records a decline, being at least incomplete[9]. In fact, the successional option act has the following legal characters:

a) it is an *unilateral legal* act, being available only through the successional option right holder's manifestation of will. In case of multiple *erede*, they can not collectively exercise the right of successional option.

From the unilateral character point of view, although similar to the will, the successional option act is different from the latter since it isn't essentially a personal act. As a consequence, *erede* can realise the successional option act either in person, either by using a legal or a conventional representative[10].

b) it is a *legal voluntary act,* since nobody is obliged to accept a rightful inheritance (article 1106 N.C.C.), and *erede* can choose any of the valences of the successional option right, without being held to demonstrate the reasons for his choice[11]. In the case of multiple heirs, each may choose differently on the same inheritance.

Specific to the successional option act, freedom of choice manifested on the three planes is diminished, as we have shown, by the possibility of *erede* creditors to exercise the oblique action, respectively the action in the revocation of the fraudulent rejection.

Moreover, in the light of the new Civil code, this principle entails the following exceptions:

- the forced acceptance of the inheritance, regulated by the article 1119 N.C.C.;

According to the mentioned dispositions of the new Civil Code, *erede* who, in bad faith, has concealed or has stolen assets from the successional patrimony or has concealed a donation subject to the report or to the reduction, is deemed to have accepted the inheritance, even though he had previously rejected it;

- the retransmission of the option right, regulated by the dispositions of the article 1105 N.C.C.

Under these legal dispositions, the heirs of those who died without having exercised the successional option right exercises it separately, each for his part, in the applicable term of the option right regarding the inheritance of their author.

If, however, *erede* made acts of tacit acceptance of the inheritance, his right being exercised, it is not likely to transmit to his own heirs.

In the absence of such papers, *erede* heirs have the possibility to exercise two option rights: the own option right regarding the deceased *erede* inheritance and the retransmitted option right, aiming the previous opened inheritance The second option right can be exercised only if the inheritance of the deceased *erede* has been accepted. The rejection of his inheritance doesn't give the possibility to the rejecting person to accept the retransmitted inheritance.

In conclusion, the option regarding the two inheritances need not be identical, but in order to be accepted the retransmitted inheritance, one must not abandon the inheritance of the deceased *erede*.

Regarding the retransmitted inheritance, the option right must not be exercised by the unitary coheirs, the new Civil Code regulating the possibility that one or more *erede* to reject the retransmitted inheritance, by the part of the rejecting persons taking advantage the others successors of their author.

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[9] See also Bogdan Pătraşcu, *op. cit.,* 263.

[10] Civil Court, civil collective, decision no. 778/1962, in *Culegere de decizii pe anul 1962*, 162-5.

[11] Mihail Eliescu, *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România* (Bucharest: Academiei Publishing House, 1966), 91.

The text of the article 1105 N.C.C. is inconsistent. In the first paragraph of this law text it is stated that "the heirs of the person who deceased without exercising the successional option right, exercise it separately, each for his part…", and in the second paragraph, the legislator contradicts himself and states that "from the part of *erede* who rejects the inheritance profit the others successors of their author".

As a result, the following question needs to be answered: How can benefit the others successors of their author of the rejecting person's part if the latter have accepted only their part, so they have a vocation limited only to their part of inheritance? So that the others successors of their author benefit of the rejecting person's part, the former should have vocation to the generality of the inheritance, meaning to choose (to accept) in respect with the whole retransmitted inheritance, and not only for a part of it[12].

Under these circumstances, we advise the legislator to reconsider this law text and to remove the obvious contradiction between these two paragraphs.

c) it is, in principle, an *irrevocable legal act,* as it is not possible for *erede* to reconsider the choice made;

Actually, only the acceptance act of the inheritance is absolutely irrevocable, as the heir who accepted the inheritance can no longer reconsider the choice he made (*semel heres semper heres*)[13], the subsequent rejection of the inheritance having no efficiency[14].

Irrevocability, which characterizes the rejection of the inheritance, is not, however, absolute, so that the owner can reconsider it, by accepting the inheritance, only if the prescription term of the option right has not expired and only if the inheritance has not been accepted meanwhile by other *erede* (article 1123 N.C.C.).

d) it is an *indivisible legal act, erede* being forced to choose unitarily for the entire inheritance;

Considering this nature of the successional option act, it is not allowed to *erede* to accept only a part of the inheritance and to reject the other part[15].

Not only the successional option act of the legal heirs, but also the legatees' one, no matter if they are general legatees, with general or particular title, has an indivisible character.

Trough the indivisible nature of the successional option act it must not be understood that if there is a plurality of heirs they must choose unitarily, this requirement not being characteristic anymore even for the retransmission of the inheritance, in the light of the new Civil Code.

So *erede* can choose differently in the same inheritance matter, some of them accepting it and some of them repudiating it. The indivisibility of the option aims only the inheritance, and not the heirs' person[16].

The indivisibility principle of the successional option includes, in the light of the new Civil Code dispositions, the exception of the multiple vocation to the inheritance[17]. Therefore, according to the dispositions of the article 1102 paragraph (1) N.C.C., "The heir who, under the law or the will, accumulates more vocations to the inheritance has for each of them a separate option right". So, the legatee called to the inheritance as a legal heir could exercise his option in any of these qualities, regarding the same inheritance, exercising two right of successional option and making two papers of successional option. This is possible due to his double call to the inheritance: bosth legal and

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[12] See also Bogdan Pătraşcu, *op. cit.,* 256.

[13] *Semel heres, semper heres* = once became heir, stay heir forever.

[14] See as an example: Civil Court, civil division, decision no. 1968/1972, in *Repertoriu II pe anii 1969-1975,* 200; Supreme Court, civil division, decision no. 1984/1991, in *Deciziile Curții Supreme de Justiție pe anii 1990-1992,* 126-8; Galați District Court, civil decision no. 878/1976, in *Revista Română de Drept* (12/1976): 61.

[15] Civil Court, civil collective, decision no. 1778/1960, in *Culegere de decizii pe anul 1960*, 241-2.

[16] Francisc Deak, *op. cit.,* 392.

[17] In the recent literature is assessed that the multiple vocation to inheritance is not a true exception from the indivisibility character of the successional option act. See in this regard Bogdan Pătraşcu, *op. cit.,* 266.

testamentary. Such *erede* can, in respect with his interests, to accept the legal inheritance and to reject the legacy or vice versa.

However, if it results from the will (which does not affect the successional reserve) that the deceased wanted to diminish the quote of the legatee as a legal heir, the latter may choose only as a legatee [article 1102 paragraph (2) N.C.C.].

e) it is a *legal act unsusceptible by means,* so that it can not be affected by term or condition. The presence of a mean attracts, according to the dispositions of the new Civil Code, the absolute nullity of the successional option act.

As far as we are concerned, we consider that the successional option act, although unsusceptible by means, can not be absolutely considered just an act, because such a qualification would lead to ignoring *erede* will farther in class and kinship degree. The latter, *erede* in the meaning of the new Civil Code, can not accede to the inheritance, unless *erede* in preferable class and degree reject the inheritance. Therefore, the successional option act of *erede* farther in class and kinship degree is affected by the condition that *erede* in preferable class and kinship degree not to accept the inheritance. We can even appreciate that this condition is the essence of the successional option act, being implicit, and that the act in discussion can not be affected by any other condition than the previous mentioned one.

f) it is a *legal declaratory act of rights,* the effects of exercising the option right occurring, according to the dispositions of the article 1114 and 1121 N.C.C., retroactively, from the opening of the inheritance time, regardless of the chosen option (acceptance, rejection or even revocation of the rejection).

Exceptionally, however, the rights acquired by the third parties of good faith between the time of rejecting the inheritance and the revocation of the rejection will be respected [article 1123 paragraph (2) N.C.C.].

In respect with the regulation of the new Civil Code, we appreciate that, under the legal characters of the successional option right, this is totally inappropriate.

2.4. The validity conditions of the successional option act

The successional option act must comply with all the legal validity conditions. Thus, the successional option act must come from a capable person, his consent must be valid, his object must be determined, possible and lawful, the cause must be available and according to the law (article 1197 N.C.C.). These conditions will be analyzed next only under the particular aspects.

2.4.1. The required capacity to exercise the successional option right

The new Civil Code does not qualify the successional option act as a disposition act. In the literature[18] though, to whose opinion we agree, it is generally accepted that the persons without legal exercise capacity (minors under the age of 14 years old and person under interdiction) exercise their successional option right trough their legal representants and with the authorization of the guardianship court, and those with limited exercise capacity (minors with the ages beween 14 and 18 years old) exercise by themselves that right, but they still need the approval of their legal representatives and the authorization of the guardianship court (article 41 and next N.C.C.).

2.4.2. The uncorrupted consent

In the successional option act, *erede* consent must be serious, freely and knowingly (article 1204 N.C.C.). The corruption of the consent problem, in the successional option matter, rarely appears in practice due to the notary successional procedure.

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[18] Mihail Eliescu, *op. cit.,* 92-4; Stanciu Cărpenaru, „Dreptul de moştenire" in *Drept civil. Contracte speciale. Dreptul de autor. Dreptul de moştenire,* Francisc Deak and Stanciu Cărpenaru (Bucharest: The University of Bucharest, 1983), 492; Francisc Deak, *op. cit.,* 385; Dumitru Macovei, *Drept civil. Succesiuni* (Bucharest: „Chemarea" Publishing House, Iaşi, 1993), 144; Dan Chirică, *op. cit.,* 204.

Although the new Civil Code (in article 1124) refers only to violence, we consider that the vitiation of the consent in this matter can be achieved also through fraud and error (both the fact one and the law one). Through the error of law it can be obtained the annulment of the successional option, only if it is excusable and represents the determinant cause of the option act.

Fraud, like the others vitiations of consent, can corrupt both the acceptance act of the inheritance and the rejecting one, and while the successional option act has is unilateral, it may come from any person.

As far as we are concerned, we believe that, in the light of the new Civil Code's regulation, the lesion can not be invoked by *erede*, in the successional option matter.

The vitiation of *erede* consent in the matter subjected to our analysis attracts the annulment of the option act.

2.4.3. The object of the successional option act

Like any legal act, the successional option act must have a determined and lawful object, under the penalty of absolute nullity [article 1225 paragraph (2) N.C.C.]. It is considered to be unlawful, according to the dispositions of the article 956 N.C.C., the acts through which is accepted or rejected the inheritance, before its opening.

2.4.4. The cause of the successional option act

The cause of the successional option act must exist, must be moral and lawful [article 1236 paragraph (1) N.C.C.]. The cause of the successional option is unlawful when it is against the law and public order and when the acceptance or the rejection of the inheritance represents only the mean to dodge the application of an imperative legal norm. The cause of the successional option is immoral when it is contrary to morality.

The unlawful and unmoral cause of the successional option act attracts its absolute nullity. But the lack of cause in the successional option matter attracts its relative nullity.

2.4.5. The form of the successional option act

The express acceptance of the inheritance can be achieved either through an authentic document or in writing under private signature. So, the solemn form in the acceptance of the inheritance case is not about its essence but about its nature. But the declaration of non-acceptance, regulated by the new Civil Code in article 111, represents an authentic act of notary. The rejection of the inheritance represents in all cases an authentic act of notary, which can be done by any public notary or by the diplomatic missions or consular offices of Romania. The absence of the form required by law in the successional option act's case attracts its absolute nullity.

In addition, for the third party information, the declaration of renunciation of the inheritance will be posted, on the expense of the rejecting person, on the national notary register, kept in electronic format.

2.4.6. The sanction for the non-observance of the validity conditions of the successional option act

Following the intervention of the nullity (absolute or relative), the option act is retroactively abolished, *erede* being allowed to opt again[19], under the law.

2.5. The prescription of the successional option right

2.5.1. The term of successional option

According to the article 1103 N.C.C., "The right of successional option is exercised in term of one year since the inheritance opening".

[19] Mihail Eliescu, *op. cit.,* 115; Francisc Deak, *op. cit.,* 387.

Thus we notice that the new Civil Code extends the deadline in which *erede* can choose about the inheritance to which they have the vocation. In this way it is assured for *erede* a longer term to exercise the option right, thing that can be considered as another positive aspect of the new regulation in the successional matter. It is true though that, in respect with the deadline of the successional option, we can equally identify also a negative aspect. So, by extending the deadline for exercising the successional option right to one year, it is also prolonged the uncertainty about the owners of the successional rights over the assets of the deceased. But we consider that, as far as the deadline of the successional option is concerned, it prevails the positive aspect identified above.

The one year term in which the successional option right must be exercised and which is regulated by the new Civil Code in article 1103 paragraph (1) should not be confused with the term in which is prescribed the right to action in the annulment of the acceptance or of the rejection, regulated by the legislative act mentioned in article 1124. The deadline for exercising the right to action in the annulment of the successional option has the legal nature of an extinctive prescription term and lasts six months, starting as follows:

- in case of violence, since it stops;
- in the other cases, from the moment when the owner of the right to action knew the relative nullity cause.

2.5.2. The legal nature of the successional option term

We appreciate that the new Civil Code, through the dispositions of the article 1103 paragraph (3), simplifies the problem of the legal nature of the successional option term. According to the legal mentioned dispositions, to the one year term is applied the provisions of the new Civil Code regarding the suspension and the reinstatement in the extinctive prescription term.

So, as far as we are concerned, the one year term is an extinctive prescription term.

2.5.3. The subject area of the successional option term

About the subject area of the 6 months option term, from the civil regulation in force, in the literature have been formulated different opinions. According to the majority's opinion, the six months term is applicable to all the *erede,* even to the legatees with private title.

However, according to the minority's opinion, the six months term is applicable only to the general transmissions or to those with general title, meaning to the legal heirs, to the legatees general or to those with general title. Consequent to this view, for the legatees with particular title are applicable the common law dispositions regarding the prescription.

The new Civil Code, in article 1103 about the successional option term, does not realise any distinction between the general transmissions and those with general title, on one hand, and those with particular title, on the other hand. On the contrary, in this law text, the new Civil Code uses terms like "legatee", "*erede*", which allow us to believe that the successional option term in discussion is applicable both to the general successional transmissions and to those with general title, and also to those with particular title.

This term is equally applicable to the state and to the administrative-territorial units, as the legatee general, with general or particular title. But if the state, the commune, the city, or where appropriate, the municipality collects *ope legis* a vacant inheritance, the legal option term becomes inapplicable[20].

2.5.4. The beginning of the successional option right prescription

As a rule, the successional option term starts from the date of the inheritance opening, meaning since *de cujus* death [article 1103 paragraph (2) N.C.C.].

[20] Ilioara Genoiu and Olivian Mastacan, "Moştenirea vacantă în lumina Legii nr. 287/2009 privind Codul civil", *Dreptul* (1/2010): 51.

Any option related to the inheritance, made before this moment, represents a pact not allowed on a future succession and it is, according to the disposition of the 956 N.C.C., null and void. *Erede* who chose so can choose differently, after the date on the inheritance opening, but this time his choice will produce legal effects, as it is exercised under the law conditions.

Similarly, it isn't valid the obligation undertaken before the inheritance opening, to choose in a certain sense about the inheritance. As a consequence, *erede* can choose at the opening date of the inheritance.

The rule according to which the successional option term starts from the date of *de cujus* death, regardless of the moment of his inclusion in the civil status registers, operates also in the following assumptions:

- *erede* found out latter about *de cujus* death;
- *erede* lives in another place than the opening place of the inheritance[21];
- *erede* doesn't know the composition of the successions;
- *erede* has only general vocation to the inheritance, but not specific vocation;
- *erede* inherits not only by himself, but also by representation or retransmission.

In case of retransmission, the must exercise his successional option right within the remained term, which is within the date of *erede* death and the date whent the one year term expires. The heirs of the death *erede,* after the opening date of the inheritance, but before exercising the successional option right, can not benefit of a longer term than the one of the death *erede*. For example, if the opening date of *de cujus* inheritance is 1st of January 2010, the successional option term expires on 1st of January 2011. *De cujus erede* dies on 1st of April 2010, before exercising the successional option right in respect with the opened inheritance. The option right of the deceased *erede* is transmitted to his own heirs. The latter ones have the right to choose in respect with the retransmitted inheritance in a nine months term. The non-exercitation of the option right in the remained term means the extinguishment of this right and also the extinguishment of the heir title.

In contrast, regarding the inheritance of the deceased *erede* and not the retransmitted one, his heirs have the right to choose in the one year term, which starts on 1st of April 2010 (which represents the opening date of the inheritance in respect to which they choose).

The following waivers from the rule that governs the beginning of the successional option right prescription are admitted by the new Civil Code:

a) for the child conceived at the opening date of the inheritance, but born afterwards, the option term starts at his birth [(article 1103 paragraph (2) letter a) N.C.C.];

b) in case of the legally declared death person's inheritance, the term starts from the date of registration of his death in the civil status register, under the declaratory judgement of death, unless if *erede* knew the death or the declaratory judgement of death at an earlier date, case in which the term starts from this latter date [(article 1103 paragraph (2) letter b) N.C.C.];

c) for the hypothesis in which the will that contains legacies is discovered after the inheritance opening, the term starts from the date when *erede* knew or should have known his legacy [(article 1103 paragraph (2) letter c) N.C.C.];

d) in case in which the kinship relationship on which is based the *erede* vocation is not known at the date of the inheritance opening, the option term starts from the date when *erede* knew it or should have known it [(article 1103 paragraph (2) letter d) N.C.C.].

Thus, we see that the new Civil Code also innovates regarding the exceptions of the rule about the beginning of successional option right prescription. We believe that the novelties brought by the legislator regarding this aspect may be considered positive aspects of this new regulation in civil matter.

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[21] Civil Court, civil division, decision no. 1413/1973, in *Revista Română de Drept* (12/1973): 156-7; Civil Court, civil division, decision no. 213/1987, in *Revista Română de Drept*, (10/1987) 74-5.

2.5.5. The suspension and the reinstatement in the prescription term of the successional option right

According to the express dispositions of the article 1103 paragraph (3) from the new Civil Code, the prescription term of successional option right is liable of suspension and reinstatement in term. The problem of interruption the prescription term of the successional option right is not valid, since it is being exercised in the legal term, the successional option right is "consumed"[22].

A) The suspension of the successional option right prescription

The new Civil Code contains special dispositions regarding the suspension of the prescription in successional matter, being innovative under this aspect too. Therefore, causes that usually entail the suspension of the extinctive prescription are not applicable in the successional matter, it having specific causes of suspension. So, according to the dispositions of the article 2533 N.C.C., the prescription does not run in the following cases:

a) against the creditors of the deceased regarding the claims they have on the inheritance, as long as the inheritance has not been accepted by *erede* or, in the lack of the acceptance, while a guardian was not appointed to represent them;

b) against the deceased's heirs, as long as they haven't accepted the inheritance or a guardian was not appointed to represent them;

c) against the heirs, regarding the claims they have on the inheritance, from the date of the inheritance acceptance until its liquidation.

After the cessation of the suspension cause, the prescription resumes its course, taking into account the time passed before its intervention, but it will not be fulfilled, before the expiration of a six months term, reckoned from the cessation of the suspension cause [article 2534 N.C.C.].

The new Civil Code keeps therefore from the regulation in force the effects of the prescription's suspension, including the special effect, but keeping all other causes of suspension. Moreover, we consider that the legislator has done just, adapting the causes of the extinctive prescription to the specific of the successional matter.

The suspension causes of the extinctive prescription mentioned above, generally applicable in successional matter, are also about the statute of limitations in the annulment of the successional option act.

B) The reinstatement in the prescription term of the successional option right

The reinstatement in the prescription term of the successional option right may be ordered by the jurisdictional body, under the dispositions of the article 2522 paragraph (1) N.C.C., only if it finds for good reasons that *erede* didn't exercise the successional option right in term. *Erede,* who overcome the legal term of successional option, may ask the reinstatement in term and the prosecution of the case, only within 30 days, starting from the day when *erede* knew or should have known the end of the reasons that justified the overcoming of the prescription term [article 2522 paragraph (2) N.C.C.].

From the analysis of these legal dispositions it result another novelty brought by Law no. 287/2009 – the reinstatement in the extinctive prescription term must be requested by the entitled person with 30 days and not a month, as the Decree no. 167/1958 regarding the extinctive prescription states.

Furthermore, either the new regulation in civil matter does not determine the legal nature of the 30 days term in which can be ordered the reinstatement in the extinctive prescription term, reason for which, next, this aspect will be judged by the doctrine and by the jurisprudence[23].

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[22] Francisc Deak, *op. cit.,* 406.

[23] Regarding the legal nature of the reinstatement term, see also Ion Deleanu and Gheorghe Beleiu, "Repunerea în termen, în condiţiile art. 19 din Decretul nr. 167/1958", *Revista Română de Drept* (9-12/1989): 32-44.

Likewise, Law no. 287/2009, and the Civil Code in force, doesn't define the notion of "good reasons" and either offers examples. As a consequence, "good reasons" may be considered those circumstances with the following features:

- prevents *erede* to exercise his successional option right;
- they are not imputable to *erede*;
- they does not meet the force majeure character, as they are not absolutely invincible.

So, by "good reasons" should be designated the fortuitous cases, those cases which, although not absolutely prevent *erede* from exercising the successional option right within the legal term, however, they can not be imputed to him.

For example, such cases are:

- hiding in bad faith the *de cujus* death, from the heirs[24];
- *de cujus* death occurred abroad, and the links between him and his heirs were abnormal;
- death in a prison[25];
- non-exercising by the mother, by leaving the child, of the parental rights and duties[26];
- wrong direction by the notary, followed by delays on the part of local administration[27];
- not knowing the will by the legatee[28];
- subsequent finding of the kinship with the deceased[29];
- state of long and serious illness[30].

Competent to order the reinstatement in the prescription term of the successional option right are only the jurisdiction bodies and not the public notaries or the state administration bodies[31]. The reinstatement in the prescription term produces effects, not only for *erede,* but also for the third parties.

Regarding the effects produced by the admission of the request of reinstatement in term by the competent jurisdiction body, we consider that this fact has the significance of an implicit acceptance of the inheritance by the plaintiff *erede,* so that the jurisdiction body will not grant a new term for exercising the successional option right.

In respect with the dispositions of the new Civil Code, that regulates as valences of the successional option right only the acceptance of the inheritance and its rejection and according to which the acceptance of the inheritance has as effect the successional liabilities within the limits of the inheritance assets, it is obvious that *erede* who asked for the reinstatement in the prescription term intends to accept the inheritance and not to reject it.

So, the question of granting a new term, within *erede* to choose, can not be put in the light of the new regulation in successional matter.

2.5.6. The reduction of the option term

Law no. 287/2009 in article 1113 regulates the possibility to reduce the one year successional option term. So, "For good reasons, at the request of any interested person, *erede* may be asked to, under the appliance of the procedure provided by law for the injunction, to exercise his successional

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[24] Miron Costin, "Principiul prescriptibilităţii dreptului de opţiune succesorală", in *Contribuţia practicii judecătoreşti la dezvoltarea principiilor dreptului civil român,* Aurelian Ionaşcu, and the others, (Bucharest: Academiei Publishing House, 1973), 211.

[25] Ibidem.

[26] Civil Court, civil division, decision no. 590/1986, in *Culegere de decizii pe anul 1986,* 82-5.

[27] Civil Court, civil division, decision no. 470/1970, in *Culegere de decizii pe anul 1970*, 167-70.

[28] Supreme Court, civil division, decision no. 129/1993, in *Buletinul Curţii Supreme de Justiţie pe anul 1993*, 81-8.

[29] Francisc Deak, *op. cit.,* 407.

[30] Ibidem.

[31] Supreme Court, civil division, decision no. 129/1993, in *Buletinul Curţii Supreme de Justiţie pe anul 1993,* 81-3.

option right within a period specified by the court, shorter than the one provided in article 1103", meaning shorter than one year. Furthermore, *erede* who does not chose during the term established by the court is considered to be a rejecting the inheritance person.

Thus we identify another novelty brought by Law no. 287/2009. The reduction of the option term is has, therefore, an exceptional character, intervening only in situations where it is imposed the ascribing of the successional assets in terms shorter than one year. Such reasons may be, for example, the risk of destruction, degradation or deterioration of the successional assets.

2.5.7. The extension of the successional option term

As a novelty, the new Civil Code regulates in article 1104 the possibility to extend (to prolong) the successional option term. So, "In the case in which *erede* asked the inventory before exercising the successional option right, the option term is not completed before two months earlier than the date on which it is communicated to him the inventory minutes. While performing the inventory, *erede* can not be considered an heir unless he has accepted the inheritance".

Erede, the creditors of the inheritance or any interested person can ask to the competent public notary for an inventory of the successional assets [article 1115 paragraph (1) N.C.C.]. Only *erede* request to perform the inventory of the successional assets can generate the extension of the successional option term. In order for the extension to interfere, it is necessary that the inventory application of the successional assets to be made between the successional option term limits of one year, so before the exercitation of the successional option right. In such a case, the option term is extended with two months from the date when to *erede* is communicated the inventory minutes.

Therefore, we meet in practice the following situations:

- the inventory minutes is communicated to *erede* two months before the expiration of one year option term, so that the extension of the option term is no longer necessary;
- the inventory minutes is communicated to *erede* after the expiration of the one year option term, so that the extension of the option term with two months is no longer necessary;
- the inventory minutes is communicated to *erede* before the expiration of the one year option term, but until the end of this period are less than two months, becoming necessary the extension of the option term, so that when the inventory minutes is communicated it have to run another two months term.

We believe this addition of the legislature to be fair, thus providing protection for the interests of *erede* and allowing the latter to choose in respect with the inheritance for which he has vocation, being fully informed.

2.5.8. The prescription's effects of the successional option right

As a consequence of the non-exercising of the successional option right in the legal term, *erede* is presumed by law (article 1112 N.C.C.), until proven guilty, to has rejected the inheritance. So, the legislator treats *erede* who doesn't exercise the successional option right similar with the person who rejects the inheritance. By this assumption, which has only a relative character and can be countered by the contrary evidence, is concerned only *erede* who, despite knowing about the inheritance opening and his quality of *erede*, as a result of his notification under the law conditions, does not accept the inheritance in the legal term.

On the contrary, *erede* who did not know about inheritance opening and about his quality, not being notified under the law conditions and who does not accept the inheritance in the legal term of the successional option, can not be considered a person who rejects the inheritance, he being able to retain under the law conditions the tacit acceptance of the inheritance or to claim to the competent jurisdiction institution the reinstatement in the period of limitation, under the law conditions.

Stating this, the new Civil Code removes the present doctrinal controversy concerning the effect of the prescription of successional option right. So, by prescribing the successional option right, *erede* is considered to be a person who rejects the inheritance, being considered never to be

heir. The rejection of the inheritance produces *erga omnes* effects, and it can be invoked by any interested person and to any person (such as co -heirs, subsequent heirs, legatees, creditors and debtors of the inheritance).

3. Conclusions

From the analysis undertaken in this paper regarding the general issues of the successional option in light of the new Civil Code's dispositions, it obviously results quasi-total reconfiguration of the successional option.

Law no. 287/2009 keeps from the regulation in force only the items whose correctness and timeliness have not been denied in the literature and in the judicial practice. But the new Civil Code brings many novelty elements in the successional option matter, imposed by the new social realities.

As for the general aspects of the successional option, we reveal the following new aspects brought by Law no. 287/2009: for the first time is defined the term of "*erede*"; it regulates the retransmission of the successional option right, clearly distinguishing in this way this institution from the successional representation one to which it resembles; it doesn't regulates anymore, as a valence of the successional option right, the acceptance under benefit of inventory and ascribes to the acceptance of the inheritance new effects, so that the liabilities of the inheritance will be considered only in the limits of its assets; regulates the possibility of exercising the successional option right in the oblique way by the *erede* creditors, and also the possibility of revocation by the *erede* creditors of the fraudulent rejection of the inheritance; in comparison with the regulation in force assigns a longer period of time for successional option term, equally regulating the its possibility of reduction and extension; clarifies in a greater degree than the Civil Code in force the problem of the legal nature of the successional option term, stating that it is liable for suspension and for reinstatement in term; in comparison with the regulation in force establishes new exceptions to the rule about the beginning of the prescription of the successional option right and new causes of suspension of the prescription in successional matter; identifies the prescription effect of the successional option right.

All these aspects are, in our view, the advantages of this new regulation in successional matter, constituting its strengths. Unfortunately, the new Civil Code improperly regulates the legal characters of the successional option act. Although the legislature's intention to regulate the legal characters of the successional option right is commendable, it can not be understood his option to retain only two of them, seeming to prioritize them. Then, although the new Civil Code establishes, under the penalty of nullity, the purely and simply character of the successional option act, in our view, this is illusory.

Second, the expression of the legislator used in article 1105, which regulates the retransmission of the option right, is obviously contradictory. As a consequence, we recommend to the legislator to reconsider the discussed law text and to reformulate it, taking into account the criticisms and suggestions in the literature.

We conclude therefore that, far from perfect, but only perfectible, the new Civil Code, currently using a specialized language, ensures a proper, a complete, a consistent and a fair regulation for the successional option.

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