

# CONSIDERATIONS ON EXCESSIVE LIBERALITIES REDUCTION\*

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## Abstract

*Reduction of excessive liberalities represents one of the sanctions typical to succession field, which operates, on demand, as a result of forced heirship being transgressed.*

*The present work is aimed to analyze all the issues regarding this sanction, under all the aspects which the latter involves, in the light of the current Civil Code<sup>1</sup>. Thus, there will be analyzed elements such as: the way reduction operates, persons who can demand it, ways of performing reduction, statute of limitations term, order in which reduction is performed, legal effects and reduction of some special liberalities.*

*The present work will also provide a comparative analysis of reduction, by pointing out the novelty elements brought in the field under discussion by the current Civil Code, in comparison with the 1864 Civil Code. In general, when it comes to forced heirship, the current Civil Code consecrates several novelty elements, reconfiguring the matter in question. These modern elements also concern the excessive liberalities reduction issue. Consequently, one of the objectives of the current work is to point out such novelties and to assess their modern character.*

**Keywords:** *forced heirship, disposable portion, donations, legacies, imputing liberalities.*

## 1. Introduction

Law No. 287/2009 reconfigures the field of succession in general, by preserving from the former regulations only those provisions having a justness and actuality which were never doubted throughout time.

The present work is aimed to analyze the issues regarding excessive liberalities. The New Civil Code regulates this sanction typical to testamentary field in Book IV “On inheritance and liberalities”, Title III “Liberalities”, Chapter IV “Forced heirship, disposable portion and reduction of excessive liberalities”, Sanction 2 “Reduction of excessive liberalities”, articles 1091-1098. In relation to them, the new Civil Code regulates the following aspects: the way reduction operates, persons who can demand it, ways of performing reduction, statute of limitations term, order in which reduction is performed, legal effects and reduction of some special liberalities.

In this context, our aim is to analyze such aspects in a comparative manner, so as to point out the elements which the new Civil Code preserved from the former civil regulations (the 1864 Civil Code), but also the novelty elements which the same Civil Code consecrated. We will also assess the justness and appropriateness of the novelty elements consecrated by Law No. 287/2009.

Under the circumstances in which, after the new Civil Code entered into force, on October 1<sup>st</sup> 2011, it has been published only a specialized work relating to successions<sup>2</sup>, we consider that our scientific initiative is both actual and useful. We also want to popularize this way the novelties consecrated by law No. 287/2009 in the field of excessive liberalities reduction, so as to contribute, hopefully, to the good enforcement of the justice act. Moreover, we consider that the results of our

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<sup>1</sup> Law No. 287/2009 on the Civil Code was republished in Romania’s Official Gazette, Part I, No. 505 from July 15<sup>th</sup> 2011.

<sup>2</sup> The work in question was written by professor Dumitru C. Florescu and is called *Dreptul succesoral*, (Bucharest: Universul Juridic Publ. House, 2011).

current analysis can be of interest for notaries public, judges, attorneys, Law students and any other law subject interested in the field of succession.

## 2. Content

### 2.1. Short considerations on excessive liberalities

The performance of liberalities with the observance of forced heirship represents one of the limits of the right to make provisions. According to article 1086 of the new Civil Code, "Forced heirship constitutes that part of the inheritance estate to which forced heirs<sup>3</sup> are entitled, according to law, even against the deceased's will, expressed by means of liberalities and disinheritances". Consequently, forced heirship operates only in the case in which the deceased has forced heirs.

Thus, the limits of forced heirship concern, naturally, not only the liberalities ordered by the deceased, but also the disinheritance testamentary clause. Even if a deceased disinherited his forced heirs in his last will act, such heirs will obtain the forced estate, according to law.

If the deceased has only non-forced heirs, he may exert his right to decide on his assets irrespective of any other limitation.

According to provisions of article 1089 of the new Civil Code, the disposable portion represents "...that part of the inheritance estate which is not reserved according to law and which can be freely disposed of by a testator, including by using liberalities".

It thus emerges that, if a deceased has on the one hand forced heirs, while on the other hand he performed liberalities (legacies or donations), his estate shall be divided in two parts: the legal heirship, to which forced heirs are entitled, even against the deceased's will, and the disposable portion, which can be disposed of by the deceased out of his own will, without any legal restriction.

Nonetheless, if the liberalities disposed of by the deceased affect forced heirship, such liberalities shall be subject to reduction, being considered excessive.

### 2.2. Definition of excessive liberalities reduction

Excessive liberalities reduction constitutes the sanction which deprives of efficacy those liberalities made by a deceased, which affect forced heirship<sup>4</sup>. The essence of excessive liberalities reduction concept emerges from the provisions of article 1092 of the new Civil Code, according to which "After an inheritance is opened, the liberalities which transgress forced heirship are subject to reduction, on demand".

Thus, the reduction of excessive liberalities triggers only the latter's inefficacy, and not also their nullity. Consequently, the reduction of excessive liberalities must not be confounded with nullity, although both of them have the legal nature of a civil sanction. Nullity is the sanction which intervenes as a result of a donation contract or a will being concluded by ignoring the essential validity conditions, provided for by law, while reduction concerns a donation contract or a legacy, validly constituted, but which affect a legal limit, namely forced heirship. While nullity intervenes for causes which are anterior or concomitant with the conclusion of a civil legal act, the reduction intervenes for causes which are ulterior to the conclusion of a civil legal act, in a valid way.

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<sup>3</sup> According to provisions of article 1087 of the new Civil Code, forced heirs are the surviving spouse, the deceased's privileged descendants and ascendants.

<sup>4</sup> The excessive liberalities reduction is defined in the same terms also by: Francisc Deak, *Tratat de drept succesoral*, II edition, updated and completed (Bucharest: Universul Juridic Publ. House, 2002), 340; Stanciu Cârpenaru, „Dreptul de moștenire” in *Drept civil. Contracte speciale. Dreptul de autor. Dreptul de moștenire*, Francisc Deak and Stanciu Cârpenaru (Bucharest: Bucharest University, 1983), 477; Ioan Adam and Adrian Rusu, *Drept civil. Succesioni*, (Bucharest: All Beck Publ. House, 2003), 346; Dan Chirică, *Drept civil. Succesioni*, (Bucharest: Lumina Lex Publ. House, 1996), 186, a.s.o.

Are subject to reduction not only the donations made by a deceased during his life, but also legacies<sup>5</sup>, irrespective of the fact that they are universal, by universal title or by particular title.

In all cases (regarding donations or legacies), the reduction issue is raised only after the inheritance opening, article 1092 of the new Civil Code clearly stating it. At the same time, the reduction issue is raised irrespective of the fact that the beneficiary of the excessive liberality is a third party or heir – forced heir or non-forced heir.

### 2.3. Person who can invoke excessive liberalities reduction

According to article 1093 of the new Civil Code, “Reduction of excessive liberalities can be demanded only by forced heirs, by their successors and by the unsecured creditors of forced heirs”. It thus emerges that the reduction of excessive liberalities can be invoked only by the following persons<sup>6</sup>:

- forced heirs, who are effectively entitled to inheritance (those who accepted inheritance);

If there are more forced heirs, they can collectively demand the reduction of excessive liberalities. Still, the way of exerting the right on demanding reduction, which can be individual or collective, must not be mistaken with the character of such a right, which is always individual. As a result of the individual character of the right to reduction, if one of the forced heirs waives the use of such a right, the result is that liberalities are reduced only if forced heirship is replenished by the other forced heirs.

- if a forced heir dies, after the opening of the inheritance in relation to which had such a quality, but before exerting his right on demanding reduction, his right is passed on to his own heirs;

If a forced heir has only one heir, the latter has the choice to exert or waive the right on reduction. If he has more heirs, in order to avoid any difficulty, is preferable for heirs to have a unitary option for the right to reduction, namely either to waive or to exert it. Difficulties emerge only when the heirs of the forced heir do not state the same option regarding their inherited right, so that some of them want to use such a right, while others waive it. Nonetheless, in all cases, since the right to reduction has an individual character, the fact that some of the forced heir’s successors waive such a right does not affect the right of the others to exert it<sup>7</sup>.

- unsecured creditors of forced heirs.

According to the provisions of article 848 of the 1864 Civil Code, it was possible to demand the reduction of excessive liberalities, apart from forced heirs and their successors, also by those “presenting their rights”. Consequently, according to the former Civil Code, the sanction under scrutiny could be invoked by the universal successors or successors by universal title of the forced heir, but also the creditors of the forced heir, as persons “presenting the rights” of that forced heir. Thus, the notion “persons presenting the rights of a forced heir” designated the so-called “having cause” persons. The successors by particular title of the forced heir (such as the buyer or the donor of

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<sup>5</sup> Article 848 of the 1864 Civil Code contained an inadvertence, since it only referred to liberalities among alive persons, under the circumstances in which, from other provisions of the same normative act (such as articles 850, 852 and 853) resulted without any doubt that reduction also concerned legacies. Yet, specialized literature unanimously considered that reduction generally regards liberalities, namely donations and legacies. For that matter, see: Dan Chirică, *quoted works*, 187; Francisc Deak, *quoted works*, 341, Alexandru Bacaci and Gheorghe Comăniță, *Drept civil. Succesivitate*, (Bucharest: C.H. Beck Publ. House, 2006), 163, footnote 4. Article 1092 of the new Civil Code refers to liberalities, thus to both donations and legacies. It can be thus seen that, by taking into account the criticism within legal doctrine, the new Civil Code removes any doubt regarding liberalities subject to reduction.

<sup>6</sup> The list of persons who can invoke reduction has a limitative character, so that other persons than those nominated by the lawmaker at article 1093 of the new Civil Code cannot exert such a right. As a result of such reasoning, it was criticized the solution admitting the request of privileged collaterals for the reduction of excessive liberalities. See P. Savu and others, „Notes on the civil decision No. 3743/1957 of the Regional Court of Craiova”, in „*Legalitatea populară*” Magazine (2/1958): 110.

<sup>7</sup> Francisc Deak, *quoted works*, 341.

an individual good established from the inheritance), by not being “having cause” persons, could not exert the right to reduction.

Still, it can be noticed that the new Civil Code, in the limitative list contained by its article 1093, refers only to unsecured creditors of forced heirs, and not also to the whole category of “having cause” persons. As a consequence, by *lege lata*, the universal or by universal title successors of the forced heir cannot demand the reduction of excessive liberalities, to such a right being entitled only the unsecured creditors of the forced heir.

Given that the right to reduction concerns precisely donations and legacies, donors and legatees themselves cannot demand the reduction of liberalities from which they benefited. If there are more persons on behalf of whom a donation was performed, they can demand only the observance of the legal order regarding the reduction of excessive liberalities<sup>8</sup>.

It can be thus seen that Law No. 287/2009 innovates in terms of those persons who can demand the reduction of excessive liberalities, by acknowledging this right only to forced heirs, their successors and unsecured creditors.

#### 2.4. The order in which excessive liberalities are reduced

It is necessary to know the order in which the reduction of excessive liberalities operates, only if the deceased carried out more liberalities. The new Civil Code, at article 1096, establishes the rules regarding the order in which liberalities are subject to reduction. Thus:

a) *Legacies are reduced before donations* [article 1096 paragraph (1) of the new Civil Code].

The institution, by the lawmaker, of such a rule with an imperative character, which cannot be changed by the deceased’s will, is based on two ways of reasoning:

- legacies have effects from the moment an inheritance is opened, unlike donations, which have effect from the moment they are performed. Thus, in time, donations precede legacies, so that is assumed that donations, at least in part, are done from the disposable portion and that is natural for reduction to concern primarily the last liberalities ordered by a person.

- if donations were to be reduced with priority, in competition with legacies, the principle on the irrevocability of donations would be affected;

- by reversing the order imposed by the lawmaker, it would also be affected the principle *prior tempore potior iure*.

b) *Legacies are reduced all at the same time and in a proportional manner*, except for the case when a testator ordered for some legacies to have priority, case in which the other legacies shall be reduced first [article 1096 paragraph (2) of the new Civil Code].

Therefore, as a rule, legacies are reduced all at the same time and in a proportional manner, irrespective of being universal, by universal or particular title and being included in the same or in different wills. Still, by exception, a testator may dispose for some legacies to have priority, case in which the other legacies will be first of all reduced.

The institution, by lawmaker, of such a rule having an imperative character, which can be changed by the deceased’s will, is based on the reasoning that all legacies produce effects starting with the same date (the testator’s death).

c) *Donations are successively reduced, in the opposed order of their date, starting with the most recent* [article 1096 paragraph (3) of the new Civil Code].

As a result of this rule, if the last donation is not enough for completing the quota of the entire forced heirship, it shall be moved on to the reduction of the following donation.

The reasons which determined the institution of such an imperative rule are determined, just as in the case of the one mentioned above, by the preoccupation of not affecting the principle on the irrevocability of donations, but also to the principle *prior tempore potior iure*. Also in this case, there are presumed to have affected forced heirship the donations more recently performed.

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<sup>8</sup> Ibidem, 343.

Being related to public order, the rule according to which donations are subject to reduction in a reversed chronological order cannot be modified by donor's will, irrespective of the latter being expressed by means of *inter vivos* or *mortis causa* liberalities<sup>9</sup>. Still, by exception, the donor has the acknowledged right to establish the order in which concomitant donations (having the same date) are reduced. If the donor expresses no will for that matter, concomitant donations shall be subject to reduction, just like legacies, all at the same time and proportionally with their value. Thus, according to the provisions of article 1096 paragraph (4) of the new Civil Code, "Concomitant donations are reduced all at the same time and in a proportional manner, except for the case when the donor ordered for certain donations to have preference, case in which the other donations shall be first of all reduced".

If the beneficiary of the donation which should have been reduced is insolvent, it shall be moved on to the reduction of the former donation [article 1096 paragraph (5) of the new Civil Code]. Consequently, if the beneficiary of the donation alienated the donated asset and has no other assets which could be pursued, the former donation is reduced<sup>10</sup>.

It can be thus identified another novelty element brought in the field subject to analysis by Law No. 287/2009. Under the incidence of the former Civil Code, which contained no provision for that matter, such a solution was being proposed by most of specialized literature<sup>11</sup>.

As it could have been seen, the moment when a donation is carried out is very important. This aspect does not raise difficulties in the case of actual donations (performed by authentic act). In the case of other donations (non authentic donations, such as indirect donations, simulated donations or even handed in gifts), the reduction shall take into account the moment when such donations received a certain date, according to article 1182 of the 1864 Civil Code<sup>12</sup>.

Specialized literature<sup>13</sup> has also raised the issue regarding the reduction of indirect liberalities<sup>14</sup>, the latter representing the duties relating to direct liberalities. Indirect liberalities are subject to reduction only if they meet two conditions:

- the duty is provided for in favor of a third party and not of donor's, therefore constituting a stipulation for another person;
- the donor's intention was to gratify.

In the light of the principle *accessorium sequitur principale*, the reduction of a direct liberality shall also trigger the reduction of indirect liberality. Since indirect liberalities have the same date as direct liberalities, which they entail, their reduction shall be performed simultaneously and proportional with their value.

As to us, we consider that such an opinion can be upheld also at present.

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<sup>9</sup> Specialized literature acknowledges that a donor can stipulate for the donation made in favor of his spouse, who is revocable anyway, to be subject to reduction before other donations subsequently disposed. See: Matei B. Cantacuzino, *Elementele dreptului civil*, (Bucharest: All Educational Publ. House, 1998), 312; Francisc Deak, *quoted works*, 345, footnote 1.

<sup>10</sup> National Union of Notaries Public, *Codul civil al României. Îndrumar notarial*, volume I, (Bucharest: Monitorul Oficial Publ. House, 2011), 412.

<sup>11</sup> For that matter, see: Constantin Hamangiu and others *Tratat de drept civil român*, (Bucharest: 1929), 679; Mihail Eliescu, *Moștenirea și devoluțiunea ei în dreptul Republicii Socialiste România*, (Bucharest: Academiei Publ. House, 1966), 370; Dan Chirică, *quoted works*, 193; Alexandru Bacaci and Gheorghe Comăniță, *quoted works*, 166. Specialized literature has also stated another opinion, much more equitable, which nonetheless did not benefit from the same support as the first one. According to it, the consequences of the insolvency of a person receiving a donation subject to reduction should have been borne not only by the former person receiving the donation, also by forced heirs. Such fact could have become possible by excluding the donation in question from the estate subject to calculation. For that matter, see: Matei B. Cantacuzino, *quoted works*, 313; Francisc Deak, *quoted works*, 345, footnote 2.

<sup>12</sup> Its correspondent in the new Civil Procedure Code is article 272.

<sup>13</sup> This issue, not at all deprived of theoretical and practical use, was for the first time brought in attention by Fr. Deak, *quoted works*, p. 346-7.

<sup>14</sup> Indirect liberalities are called II degree liberalities.

### 2.5. Procedural ways to exert the right to reduction

According to provisions of article 1092 of the New Civil Code, reduction does not operate by right, *ex officio*, but it must be demanded<sup>15</sup>. Reduction can be carried out both by agreement and by judicial ways.

#### A) *Reduction by good agreement*

Between forced heirs, on the other hand, and the legatees on favor of whom the deceased left certain provisions, can take place an agreement regarding excessive liberalities which overcame the limits of the disposable quota. By being a genuine contract, the convention of the parties on reduction can be revoked only unilaterally, but it can be annulled or declared null for not observing the essential validity conditions.

The ways of performing reduction by good agreement (extra-judicial), regulated by the provisions of Law No. 36/1995 are the following:

- a) reduction of liberalities until the limits established by law are reached, by a notary public, on the basis of the agreement between the person interested in it [article 82 paragraph (3)];
- b) division of assets by good agreement [article 81 paragraph (3)].

#### B) *Judicial reduction*

In the absence of the agreement expressed by the interested persons, the reduction of excessive liberalities can be invoked in front of the court, by exception or by an action method, as the case may be [article 1094 paragraph (2) of the new Civil Code]. The method to be followed differs, just as the assets which constituted the object of the liberality in question are in the possession of the person of the person receiving that liberality or of forced heirs.

a) The hypothesis frequently encountered in practice is characterized by the fact that the assets constituting the object of a liberality are founded at the person receiving that liberality (usually, the donee and only exceptionally the legatee). In this case, forced heirs are entitled to take the legal action for reduction, which has a personal and patrimonial character. Since such an action is not a real one, the forced heir cannot pursue the goods which constituted the object of the excessive liberality while they are possessed by third parties which obtained them<sup>16</sup>.

From the personal and patrimonial character of the legal action for reduction, the following consequences result:

- the quality of plaintiff can be assigned only to the heir whose forced estate was affected by the excessive liberality;
- the legal action for reduction can be promoted only between the limits of the forced heirship to which the plaintiff is entitled;
- the beneficiary of the legal action for reduction admission can be only the plaintiff.

According to provisions of article 1094 paragraph (3) of the new Civil Code, "If there are more forced heirs, reduction operates only between the limits of the forced quota to which is entitled the person who demanded reduction". It thus emerges that the legal action for reduction is divisible.

We mention that the former Civil Code contained no provision for that matter, so that judicial practice was the one to adopt such a solution<sup>17</sup>. Under these circumstances, we consider praiseworthy

<sup>15</sup> Supreme Court, civil sentence, decision no. 1253/1989, in „*Dreptul*” Magazine (4/1990): 71.

<sup>16</sup> Supreme court, Civil section, Decision No. 33/1967, in „*Culegere de decizii pe anul 1967*”, 129; Supreme court, Civil section, Decision No. 2019/1967, in „*Revista română de drept*” Magazine (5/1968): 161.

<sup>17</sup> Supreme court, Civil section, Decision No. 780/1973, in „*Culegere de decizii pe anul 1973*”, 202; Supreme court, Civil section, Decision No. 743/1985, in „*Culegere de decizii pe anul 1985*”, 93-6. In the light of the 1864 Civil Code, jurisprudence admitted nonetheless that the reduction demand made by one of forced heirs was to be befitted from also by the other heirs from the same category, only if, by having this quality, the demand in question was being promoted within the partition action and only if the other forced heirs were within the term of statute of limitations, which they themselves could promote. See for that matter: Supreme Court, civil section, decision no. 1119/1977, in „*Culegere de decizii pe anul 1977*”, 92-5.

the fact the new Civil Code takes over the former orientation of jurisprudence, providing a legal character to it.

- the legal action for reduction, by being subject to the statute of limitations, must be taken within the statute of limitations term, which is of 3 years. According to provisions of article 1095 of the new Civil Code, the term mentioned above starts to elapse, as a rule, from the moment succession is opened or, as the case may be, from the date when forced heirs lost the possession of the assets constituting the object of liberalities. In exceptional cases, such as those in which a forced heir does not know, out of reasons of which he is not guilty, about the existence of some excessive liberalities, the statute of limitations term starts to operate from the moment the forced heir learns about the existence of the liberalities in question and their excessive character.

We mention that the 1864 Civil Code made no reference to the issue presented above. Consequently, jurisprudence was the one to adopt a certain orientation. As a result of the latter, the legal action for reduction had to be taken within the general statute of limitations term, of 3 years, which started to elapse from the moment inheritance was opened<sup>18</sup>. In case a forced heir did not know about the existence of some excessive liberalities, for reasons of which he was not guilty, the statute of limitations term started to operate from the moment the forced heir became aware of the excessive liberalities or should have learnt about their existence<sup>19</sup>.

It can be therefore noticed that new Civil Code provides a legal character to most of the jurisprudential orientation regarding legal action for reduction. Yet, some different elements can be identified. Thus, according to the new Civil Code, the 3 year term starts to operate, as a rule, not only from the moment an inheritance is opened, but also, according to the case, from the moment forced heirs lost possession of the assets constituting the object of liberalities. Then, in the exceptional case in which a forced heir does not know about the existence of some excessive liberalities, the term starts to elapse, according to the new Civil Code, only from the moment the forced heir learns about the liberalities in question and about their excessive character.

b) If forced heirs are in the possession of assets which constituted the object of excessive liberalities (a fact which can be encountered in case of legacies), the beneficiaries of excessive liberalities can demand for such assets to be handed in, by resorting to legal action (for getting back legacy, heredity petition, a.s.o.). In his defense, the forced heir can invoke reduction<sup>20</sup> in front of the plaintiff or can resort to a counterclaim action for that matter<sup>21</sup>.

We mention that the reduction exception does not benefit from statute of limitations [article 1095 paragraph (3) of the new Civil Code]. Before the new Civil Code entered into force, legal doctrine and jurisprudence also adopted the same solution regarding the fact that the reduction exception could not benefit from statute of limitations. According to them, a forced heir found in such situation could not be subject to statute of limitations, by considering that he had exercised in fact all his prerogatives deriving from his quality, so that he could not be accused of negligence<sup>22</sup>.

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<sup>18</sup> See Supreme Court, civil section, decision no. 1457/1973, in „*Revista română de drept*” (7/1974): 59-60.

<sup>19</sup> See, for example: Supreme Court, civil college, decision No. 33/1967, in „*Culegere de decizii pe anul 1967*”, 129; Supreme Court, civil section, decision No. 1884/1974, in „*Repertoriu II 1969-1975*”, 206; Supreme Court, civil section, decision No. 1665/1976, in „*Repertoriu III 1975-1980*”, 134 a.s.o.

<sup>20</sup> See: Mihail Eliescu, *quoted works*, 371; Stanciu Cârpenaru, *quoted works*, 478; Eugeniu Safta-Romano, *Dreptul de moștenire*, (Iași: Grafic Publ. House, 1995), 336; Dumitru Macovei, *Drept civil. Succesiuni*, (Iași: „Chemarea” Publ. House, 1993), 126; L. Stănculescu, *Drept civil. Contracte și succesiuni*, 4<sup>th</sup> edition revised and completed, (Bucharest: Hamangiu, Publ. House, 2008), 408.

<sup>21</sup> See: Dan Chirica, *quoted works*, 191; Alexandru Balaci and George Comanita, *quoted works*, 168.

<sup>22</sup> See: Francisc Deak, *quoted works*, 349; Dan Chirică, *quoted works*, 191; Stanciu Cârpenaru, *quoted works*, 478; Dumitru Macovei, *quoted works*, 126; Alexandru Bacaci and Gheorghe Comăniță, *quoted works*, 168; Ioan Adam and Adrian Rusu, *quoted works*, 352, a.s.o. The same provisions were also enforced by judicial practice. See, for example, the Supreme Court, civil section, decision No. 700/1972, in „*Repertoriu II 1969-1975*”, 206-7.

### 2.6. Effects of excessive liberalities reduction

According to provisions of article 1097 paragraph (1) of the new Civil Code, “The effect of reduction is the inefficacy of legacies or, as the case may be, the annulment of donations, in order to replenish forced heirship”.

Thus, the effects of reduction are accomplished in a different manner, depending whether liberalities regard legacies or donations.

A) Reduction of legacies triggers their inefficacy, either partially or totally, jus as forced heirship can be replenished or not only with a part from their value. In such case, the replenishment of forced heirship shall be done in kind, a fact which is possible as a result of the assets which constituted the object of excessive legacies existing in the testamentary estate.

B) Reduction of donations triggers their annulment, either partially or totally, jus as forced heirship can be replenished or not only with a part from their value

Due to the abolishment of a donation as an effect of reduction, the forced heir becomes owner of the asset which allowed the replenishment of his forced heirship and, in such quality, he can demand the restitution of that asset, in principle in kind [article 1097 paragraph (2) of the new Civil Code]<sup>23</sup>. Consequently, a testator cannot dispose of forced heirship to be insured by means of an equivalent.

The exceptions which characterize the rule presented above are provided for in a clear, limitative manner by article 1097 paragraphs (3) – (5) of the new Civil Code. Thus, the replenishment of forced heirship is carried out by equivalent in the following cases<sup>24</sup>:

a) before the opening of the inheritance, the donee alienated the asset, or instituted real rights upon it, or the asset disappeared due to a cause of which the donee is not guilty [paragraph (3)];

In such case, forced heirs are entitled only to the counter equivalent in money. This solution is just, since reduction has effects only from the moment inheritance is opened, while alienations and responsibilities emerging from duties created by the donor before that moment remain valid. The solution mentioned above is completely applicable, in case a donee has the quality of third party before inheritance or non-forced heir.

It must also be mentioned that the duty to pay the counter equivalent in money does not also belong to the donee, who cannot be accused of the disappearance of the asset. In this case, the asset will no be included in the testamentary estate, being presumed to have disappeared also from donee’s possession.

In all the cases regarding restitution by equivalent, operates the rule instituted by article 1091 paragraph (2) of the new Civil Code, according to which it will be taken into account the state of the assets at the moment they were donated and their value at the moment inheritance is opened.

<sup>23</sup> See also Supreme Court, civil section, decision No. 1314/1994, in *Revista „Dreptul”*, (7/1995), 87.

<sup>24</sup> According to the 1864 Civil Code, the replenishment of forced heirship could be performed by equivalent, in clear and limitative cases provided for by law:

a) the excessive donation was ordered in favor of a descendant or the surviving spouse, with the exemption to be reported;

In this case, the donee had the right, according to the provisions of the 1864 Civil Code, to perform reduction, by taking less from the forced heirship, if hereditary assets were of the same nature with the assets received by donation.

b) excessive donation, having as object a building, was ordered in favor of a potential heir, without the exemption to be reported, and the part necessary for the replenishment of forced heirship was smaller than half the value of the asset;

On the basis of article 770 paragraph (2) of the 1864 Civil Code, the donee had in this case the choice between:

- keeping the asset and compensating the other forced heirs, by taking less from other hereditary assets;

- paying the financial equivalent of the surplus;

c) the donee alienated the object of donation or instituted duties upon it, before inheritance was opened;

d) the donated asset perished out of donee’s guilt.



Beneficiaries must obtain full ownership of forced heirship, without the latter being subject to other duties or supplied by granting a usufruct right<sup>25</sup>.

Therefore, it can be noticed that the new Civil Code reunites two exceptional situations regulated by the 1864 Civil Code (the donee alienated the object of donation or instituted other duties upon it, before inheritance was opened, and the donated good perished out of donee's guilt), in only one. Otherwise, the new Civil Code would not have brought any other innovative element until this point of our analysis.

b) the donation which is subject to reduction was done on behalf of a forced heir, who is not bound to report that donation [paragraph (4)];

In this situation, the donee – forced heir, who is not bound to report the donation – will be allowed to keep that part which overcomes the disposable portion, inside his estate.

The equivalent of the situation motioned above in the 1864 Civil Code regards the hypothesis in which an excessive donation was left on behalf of a descendant or surviving spouse, with the exemption to be reported.

It can be thus noticed that the new Civil Code expands the group of persons which can use such an exception, from descendants and surviving spouse, to forced heirs category. But besides the surviving spouse and descendants, the quality of forced heir is also held by the deceased's privileged ascendants. Still, the duty to report donations belongs only to the surviving spouse and the deceased's descendants, who come effectively and together to the legal inheritance [article 1146 paragraph (1) of the new Civil Code].

c) If a donee is prospectively bound to report and the part subject to reduction represents less than half from the value of the donated asset, then the forced donee can keep the asset, whereas the reduction which is necessary for replenish the estate of the other forced heirs shall be performed by taking less or by a financial equivalent.

Therefore, the case mentioned above regards only the surviving spouse and descendants, when coming effectively and together to the legal inheritance, since they are prospectively bound to report. It is necessary for them not be exempted from the obligation to report donations out of testator's will. We also mention that this option is acknowledged by law, in relation to prospective heirs who are bound to report, only with the view to replenish the estate of the other forced heirs, namely of privileged ascendants.

The correspondent of this exceptional case in the former Civil Code regards the situation in which an excessive donation, having as object an immovable asset, is ordered in favor of a prospective heir, without exemption from report, whereas the part necessary for replenishing forced heirship is less than half the value of the asset.

It can be therefore noticed another different element between the former and current regulations in the field of reduction. Unlike the 1864 Civil Code, the new Civil Code does not restrict the field of the hypothesis described above only to immovable goods.

On the basis of provisions of article 1097 paragraph (5) of the new Civil Code, the donee has in this case the possibility to chose between:

- keeping the asset and offering compensations to the other forced heirs, by taking less from the other inheritance assets;

- paying the financial equivalent of the surplus.

It has been pointed out that the reduction of donations triggers their retroactive abolishment. The moment until which abolishment remains retroactive is, in this case, represented by the date when inheritance is opened. Thus, it is being consecrated an exception from the common law rule, according to which the abolishment of a civil act goes back in time, up to the date that act was concluded. The preservation of this exception is upheld with text arguments. Thus:

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<sup>25</sup> See also Supreme Court, civil section, decision No. 760/1969, in „*Repertoriu II 1969-1975*”, 206.

a) according to the provisions of article 1097 paragraph (3) of the new Civil Code, the documents by means of which the assets donated to third parties are alienated, before the opening of inheritance, remain valid;

b) on the basis of article 1097 paragraph (6) of the new Civil Code, in case forced heirship is replenished in kind, the person who received the donation keeps the fruits from that part of the asset which overcomes the available portion, obtained by the date the persons entitled demanded reduction.

### 2.7. Reduction of some special liberalities

Liberalities in usufruct, use, habitation, annuity or life maintenance, which are hard to evaluate, as they depend on a casual element, namely the length of beneficiary's life, are subject to a special legal regime, consecrated by the provisions of article 1098 of the new Civil Code<sup>26</sup>. Thus: "If the object of a donation or legacy is an usufruct, use, habitation, annuity or life maintenance, forced heirs have the possibility either to exert that liberality as it was stipulated or to abandon the possession of the disposable portion on favour of the beneficiary of that liberality or to demand reduction according to common law".

Therefore, from the legal provisions mentioned above, it results that forced heirs, whose forced estate is affected by a liberality consisting in usufruct, use, habitation, annuity or life maintenance, have the following possibilities:

- a) to comply with liberalities as they were instituted by the deceased;
- b) to give up to the disposable portion, so that the beneficiary of usufruct, use, habitation, annuity or life maintenance becomes, under these limits, owner;
- c) to demand reduction according to common law;

The new Civil Code also provides that, if forced heirs do not reach an agreement regarding their options, the reduction shall be performed according to common law.

In comparison with the correspondent provisions of the 1864 Civil Code (article 844), article 1098 of the new Civil Code brings two novelty elements:

- expands the area of special liberalities subject to reduction, from usufruct and life annuity, to liberalities consisting in usufruct, use, habitation, annuity and life maintenance;
- offers three possibilities to forced heirs whose forced estate is affected by a liberality consisting in usufruct, use, habitation, annuity or life maintenance. The 1864 Civil Code offered instead to forced heirs only the possibility to comply with liberalities as they were ordered by the deceased and the possibility to give up to the disposable portion. In addition, the new Civil Code offers also a third possibility, that of demanding reduction according to common law.

Consequently, the new Civil Code offers to forced heir the possibility to choose between three forms of action. An apparent advantageous situation seems to be created for the forced heir. In reality, the solution provided by the legal provisions under discussion has a reasonable character for both parties involved. On the one hand, forced heir is advantaged as a result of the fact that he has the possibility to adopt a course of action out of three, according to his personal interests, while on the other hand the beneficiaries of usufruct, use, habitation, annuity or life maintenance cannot make any reproach to lawmaker, given that their interests are guaranteed, irrespective of the solution adopted by the forced heir. If the forced heir decides to comply with the liberality in question, as it was ordered by the deceased, the beneficiaries of that liberality cannot express discontent, since they received precisely the rights conferred by that liberality. At the same time, the beneficiaries of the liberality have no reasons to declare themselves under-privileged not even in the case in which the

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<sup>26</sup> Its correspondent in the former Civil Code was represented by article 844. According to the latter: "If the disposition relating to alive persons, left by documents or by will, constitutes an usufruct or life annuity having a value which overcomes the disposable portion, then forced heirship have the capacity to comply with such dispositions or to abandon the possession of the disposable portion".

forced heir decides to give up, on their favour, to the property of the disposable portion. On the contrary, in such an eventuality, for beneficiaries is created a favourable and profitable situation, superior to deceased's real intention, since they obtain more than the testator intended them to. Moreover, beneficiaries' interests are completely protected also if the forced heir decides to demand reduction according to the conditions of common law.

Exerting the right regarding the reduction of excessive liberalities in usufruct, use, habitation, annuity or life maintenance can be done either in a friendly manner, according with the non-litigation procedure, or in a judicial manner, with the correct application of the rules analyzed.

The provisions with a derogatory character of article 1098 of the new Civil Code become applicable only in those situations which meet the following conditions:

a) the object of excessive liberality is usufruct, use, habitation, annuity or life maintenance;

The legal text mentioned above is not applicable to the excessive liberalities having as object simple property or the property bearing life annuity in favour of the forced heir<sup>27</sup>. Moreover, the legal provisions already mentioned make no direct reference to the hypothesis in which the beneficiary of the liberality in usufruct, use, habitation, annuity or life maintenance is the forced heir, hypothesis which would regard co-heirs<sup>28</sup>.

b) the deceased instituted only one liberality;

Only in the case in which the deceased made only one excessive liberality in usufruct, use, habitation, annuity or life maintenance, become applicable the provisions of article 1098 of the new Civil Code, valuation not being necessary<sup>29</sup>. On the contrary, valuation is necessary in case the deceased made several liberalities, among which one in usufruct, use, habitation, annuity or life maintenance.

c) each forced heir, in case there are more forced heirs, has the possibility to choose, in an individual way, one of the legal solutions applicable to excessive liberalities consisting in usufruct, use, habitation, annuity or life maintenance, given that the legal action for reduction has a divisible character. The consensus of forced heirs is necessary, only if the object of liberality involved is an indivisible good. In the absence of this consensus, there will become applicable the provisions of article 1098 paragraph (2) of the new Civil Code, according to which reduction shall be done according to common law.

d) if a forced heir gives up to the possession the disposable portion, in favour of a donee or legatee, the latter remain donee and, respectively, legatee by particular title, not having the duty to take upon themselves the debts relating to inheritance<sup>30</sup>.

The option right consecrated by the provisions of article 1098 of the new Civil Code has a personal character, so that it cannot be transmitted by inheritance<sup>31</sup>. Consequently, this right can only be exerted by the forced heir, whereas no successor or creditor of a forced heir can use the option conferred by the exceptional legal provisions, already mentioned.

The provisions of article 1098 of the new Civil Code have no imperative character<sup>32</sup>, so that, one the one hand, parties can decide upon another way of reducing excessive liberalities consisting in usufruct, use, habitation, annuity or life maintenance, while on the other hand the deceased can decide for the derogatory system in question not to be applied. By forbidding the transformation of

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<sup>27</sup> For the solution which must be adopted in this hypothesis, see: Constantin Hamangiu and others, *quoted works*, 1012; Mihail Eliescu, *quoted works*, 381; Francisc Deak, *quoted works*, 353; Dan Chirică, *quoted works*, 198-9.

<sup>28</sup> See Francisc Deak, *quoted works*, 354.

<sup>29</sup> See Matei B. Cantacuzino, *quoted works*, 315.

<sup>30</sup> See Francisc Deak, *quoted works*, 355.

<sup>31</sup> See Dimitrie Alexandresco, *Explicațiunea teoretică și practică a dreptului civil român*, volume IV, part II, (Bucharest: Socec & Co Publ. House, 1912), 624.

<sup>32</sup> See: Constantin Hamangiu and others, *quoted works*, 686; Francisc Deak, *quoted works*, 355; Dan Chirică, *quoted works*, 197.

the right on usufruct, use, habitation, annuity or life maintenance in full ownership, the person ordering that makes possible the come back to common law, in the field of excessive liberalities reduction.

### 3. Conclusions

At the end of our analysis, we are listing the novelty elements consecrated by Law No. 287/2009 in regard to reduction of excessive liberalities. Thus:

- Law No. 287/2009 innovates in relation to persons who can demand the reduction of excessive liberalities, by acknowledging this right only to forced heirs, to their successors and unsecured creditors of forced heirs. According to the former civil regulation, the whole category of „having-cause” persons could use this right.

- According to the new Civil Code, if the beneficiary of the donation which must be reduced is insolvent, then it shall be moved on to the reduction of the former donation. Under the incidence of the former Civil Code, this solution was being proposed by most of specialized literature.

- According to the new regulation in the civil field, the legal action for reduction has a divisible character. Such character was being imposed to legal action for reduction also by the regulations which preceded the entry in force of the new Civil Code, under the circumstances in which the 1864 Civil Code contained no provisions for that matter.

- The new Civil Code regulates in great part the former orientation of jurisprudence when it comes to the statute of limitations applying to legal action for reduction. Thus, the maximum period of time within which the legal action must be filed is of 3 years and starts to elapse, as a rule, from the moment inheritance is opened or, as the case may be, from the moment forced heirs lost the possession of the goods constituting the object of liberality but also, as an exception, from the moment forced heirs became aware of the existing liberalities and their excessive character. According to the new Civil Code, the exception from reduction cannot be subject to statute of limitations.

- In what concerns the exceptional cases, in which reductions is performed by equivalent, the new Civil Code reunites two exceptional circumstances, regulated by the 1864 Civil Code (the donee alienated the object of donation or instituted duties upon it, before inheritance was opened, and the asset in question perished out of donee's guilt) in only one. Moreover, the new Civil Code expands the group of persons who can keep inside forced heirship that part of donation subject to reduction, which overcomes the disposable portion, from descendants and surviving spouse to the category of forced heirs.

- In what concerns the reduction of some special liberalities, in comparison with the 1864 Civil Code, the new Civil Code brings the following novelty elements: expands the area of special liberalities subject to reduction, from those consisting in usufruct and life annuity, to liberalities consisting in usufruct, use, habitation, annuity and life maintenance; offers three possibilities to forced heirs, whose reserve is affected by a liberality consisting in usufruct, use, habitation, annuity or life maintenance. The 1864 Civil Code offered instead to forced heirs only the possibility to comply with liberalities as they were ordered by the deceased or to give up to the disposable portion. Moreover, the new Civil Code brings a third possibility, namely that of demanding reduction according to common law.

Finally, we consider that, by bringing together the proposals made by legal doctrine and jurisprudential orientation, which were shaped by the former Civil Code, but also by using an updated language, the new Civil Code provides the reduction of excessive liberalities with a modern, just and flexible regulation.

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