THEORETICAL AND PRACTICAL CONSIDERATIONS ON THE SUSPENSION OF ENFORCEMENT PROCEEDINGS IN THE CONTEXT OF SETTLEMENT UNDER LAW NO. 77/2016

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Abstract

In recent judicial practice, Romanian courts have increasingly been confronted with cases in which enforcement proceedings initiated at the request of creditors have been suspended following the debtor's submission of a notice of giving in payment. Although, the legislative intent behind the regulation of this suspension mechanism was to temporarily halt enforcement proceedings in order to facilitate negotiations between the parties, potentially leading to the extinguishment of the outstanding debt, recent judicial practice demonstrates that debtors frequently rely on the provisions of Article 5(3) of Law No. 77/2016 without a genuine intention to discharge the debt through the transfer of ownership of the immovable property.

A particularly sensitive issue arises where the debtor submits a notice of giving in payment, notifies the bailiff thereof, and subsequently requests the suspension of enforcement proceedings. In such circumstances, the bailiff is, in principle, obliged to apply the provisions of Article 5(3) of Law No. 77/2016, even in cases where the substantive conditions set out in Article 4 of the same law appear to be manifestly unfulfilled.

This situation raises significant questions regarding the extent to which a bailiff may exercise discretion in assessing the applicability of Article 5(3) of Law No. 77/2016, particularly in cases where the notice of giving in payment is manifestly unfounded.

This paper seeks to examine the theoretical and practical challenges arising from abusive requests for the suspension of enforcement proceedings, highlighting the potential for serious prejudice to creditors and the need for a balanced interpretation of the relevant legal provisions.

Keywords: *judicial practice, enforcement proceedings, consumer protection, immovable property, mortgaged property*.

1. Background to the enactment of the law

Law No. 77/2016 on the transfer of immovable property in lieu of payment came into force on 28 April 2016 and aims to settle the debts incurred by individual debtors who are no longer able to meet their obligation to repay the borrowed sums. It was introduced to assist those who had taken out mortgage loans but subsequently found themselves unable to honour them due to unforeseeable economic changes.

A primary cause was the economic crisis of 2007–2008, a period when property values were very high, but following this period, property prices fell considerably. This led to the depreciation of the national currency and, consequently, to rising interest rates. In this situation, debtors faced enforcement proceedings, but the proceeds from the sale of the property failed to cover the entire debt, leaving the debtor both homeless and with an outstanding loan.

In this context, which was unfavourable to borrowers, the legislature decided to intervene and enacted Law No. 77/2016 on the transfer of immovable property in lieu of payment. Thus, the main purpose of the law was to help the debtor settle the entire debt by transferring ownership of the mortgaged property. In this way, the debt was discharged and the creditor could satisfy their claim through the subsequent sale of the mortgaged property.

At the same time, the law on the transfer of immovable property in lieu of payment is not a 'rigid' law. It allows the parties to the contract, prior to the debt being extinguished through the transfer of the property in lieu of payment, to have the opportunity to adapt it through renegotiation, precisely in order to 'save' the agreement between the parties.

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Furthermore, another particularly important point to note is that this law is aimed at consumers rather than professionals. Thus, consumers are protected from any unfavourable and unforeseeable economic circumstances in relation to the other party, which is the bank, a professional.

Article 3 of the Law provides for the consumer's right to have their debts arising from credit agreements, together with ancillary costs, discharged without additional costs, by transferring ownership of the mortgaged property to the creditor, if the parties fail to reach another agreement within the time limit provided for by law. Furthermore, Article 1(3) of the Law stipulates this benefit for the consumer even where the creditor's claim arising from a credit agreement is secured by the suretyship and/or joint and several liability of one or more co-debtors or co-payers."[1]

2. Amendments to Law No. 77/2016 in the context of the Constitutional Court's decisions

Currently, Law No. 77/2016 on payment in kind has not remained in force in its original form but has been subject to constitutional review, undergoing numerous amendments. Over time, the Constitutional Court of Romania has issued several decisions clarifying, limiting or removing certain provisions of the law, without, however, declaring it unconstitutional as a whole.

In Constitutional Court Decision No. 623/2016, the Court ruled that the law is constitutional only to the extent that the courts verify the existence of the condition of unforeseeability in each individual case. In other words, the payment-in-kind mechanism cannot operate automatically, but must be assessed by the judge, who verifies whether an exceptional change in circumstances has occurred that renders the performance of the contract excessively onerous.

Subsequently, in its decision of 17 June 2021, the Constitutional Court of Romania found the provisions of Article 8(5), second and third sentences, to be unconstitutional. These provisions established, in certain situations (for example, following the enforcement of the property), an almost automatic presumption of unforeseeability. The Court considered that such an absolute presumption contravenes the principle of legal certainty and its own previous decisions, as it eliminates the specific analysis of each case. Consequently, these provisions were struck down.

Consequently, the amendments made to Law No. 77/2016 by the Constitutional Court did not aim to abolish the mechanism of payment in kind, but to modify the way it is applied. The Court imposed an obligation on the courts to verify the existence of unforeseeability in each case and removed any automatic presumption that would have deprived the creditor of the right to an effective judicial review. Thus, the law remained in force, but in a form interpreted through the CCR's decisions.

However, certain aspects that are quite significant in practice have remained subject to constitutional review. One such example could be Article 5(3), Article 6(1) and Article 7(4) of this law, which regulate the suspensive effect of enforcement proceedings following the transfer of the immovable property in lieu of payment.

From the moment it came into force until now, the Law on Payment in Kind, despite all the decisions of the Constitutional Court concerning it, has never been examined by the constitutional court from the perspective of how it is applied, in the sense of taking into account the requirements that this law entails for it to be applicable and regarding the various specific situations in which it is invoked, that is, by analysing the behaviour of those persons who have come to, because the law itself has allowed them to, submit notices of payment in kind, even though they know that the legislative act in question does not apply to them."[2]

A very common example in the current judicial practice of the courts is the situation where the enforcement proceedings against a debtor are suspended following the submission of a notice of payment in kind.

As previously stated, Article 6(1) of Law 77/2016 provides that "From the date of receipt of the notice referred to in Article 5, the creditor's right to take action against co-debtors, as well as against personal or mortgage guarantors, shall be suspended." Therefore, from the moment the notice is received, any enforcement proceedings against the debtor are prevented or suspended.

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[1] Irina Sferdian. "The legal nature of the transfer of immovable property in lieu of payment under Law No. 77/2016". Romanian Journal of Private Law, No. 3/2016, p. 10.

[2] https://www.juridice.ro/500563/suspendarea-executarii-silite-in-situatia-notificarilor-de-dare-in-plata-nelegale-the-effect-of-gross-negligence-or-the-legislator's-intent.html.

However, the law has not addressed the situation where debtors acting in bad faith repeatedly and unjustifiably issue successive notices of payment in kind, thereby indefinitely preventing enforcement proceedings.

Indeed, there is a procedural remedy for this situation, namely the creditor filing an objection against the notice of payment in kind. In our view, this cannot be considered a genuine remedy, given that enforcement proceedings will be suspended for the duration of the dispute, until a final decision is handed down. Even in this situation, once the proceedings have concluded, nothing prevents the debtor from unjustifiably issuing another notice of payment in lieu, thereby suspending the enforcement proceedings against the debtor once again.

In order to devise an effective solution, the following legal issue arises concerning the bailiff's ability to prevent this abuse of rights by the debtor.

A first solution could be to recognise the bailiff's right to determine that the conditions set out in Article 4(1)(a) to (e) of Law 77/2016 are not met. We are referring to clear, straightforward conditions for which we consider that the intervention of a judge is not necessary. In our view, the bailiff has the power to verify, of their own accord, whether the debtor qualifies as a consumer, whether the amount of the debt is less than the equivalent in lei of 250,000 euros, and whether the debtor has not previously been convicted by a final judgment for offences relating to the loan for which the application for payment in kind is being sought.

In the grounds set out in paragraphs 92, 93 and 94 of Decision No. 42/2022 of 27 June 2022, the High Court states that 'the referring court, although it considered that the preliminary ruling procedure should be initiated regarding the interpretation of the provisions of Article 6(1) in relation to Article 4(1)(a) and (b) and Article 5((1) and (2) of Law No 77/2016, did not specify, in concrete terms, what the difficulty in interpreting these legal provisions consists of, nor did it assert or argue that the legal provisions at issue in the case are doubtful, unclear or open to multiple interpretations. Moreover, apart from the fact that the order of the referring court lacks any argument regarding the ambiguity, lack of clarity or multiple meanings of the legal texts whose clarification is sought, it is noted that the applicant did not encounter any difficulties in interpreting them. In the referring court's view on the point of law forming the subject of the request, the suspensive effect provided for in Article 6(1) of Law No 77/2016 applies as a matter of law even in the event of manifest failure to meet the conditions of admissibility laid down in Article 4(1)(a) and (b) (1)(a) and (b) and/or the formal requirements for the notice of payment in kind, as provided for in Article 5((1) and (2) of Law No. 77/2016, since the legislature made no distinction in this regard and established a procedural remedy for the scenario in which the debtor exercised their right to submit the notice in bad faith. According to Article 7(5)$^{(1)}$ of Law No 77/2016, in the event that the creditor's challenge to the notification procedure provided for in Articles 5 and 6 is upheld by a final judgment, penalties and any damages resulting from the notification procedure may be claimed only if the challenging creditor proves that the debtor acted in bad faith when submitting the notification."[3]

Therefore, we cannot conclude that the High Court interpreted the aforementioned provisions in such a way as to exclude the possibility of the enforcement officer refusing to suspend enforcement when the debtor issues a clearly unfounded notice of payment in kind. The decision to dismiss the referral, mentioned above, relates more to the grounds for the referral and less to the legal issue before the enforcement court.

3. Practical difficulties in applying Law No. 77/2016

Furthermore, we consider that a mere document on which Law No. 77/2016 is mentioned and which bears the marginal heading 'notice of payment in kind' should not have the power to block the entire enforcement proceedings. In this situation, the bailiff would be reduced to a mere data collector with no discretion as to the legality of the acts performed by the debtor. Indeed, the bailiff cannot take the place of the court; however, given that an entire enforcement procedure would be blocked by a manifestly unfounded act on the part of the debtor, we consider that the bailiff has the power to rule on the fulfilment of certain simple conditions, such as those listed above (Article 4(1)(a)-(e) of Law 77/2016).

Furthermore, the remedy to which the High Court refers may, in the case of a debtor acting in bad faith, constitute a false solution. Thus, although the creditor lodges an objection to the notice of payment in kind, enforcement proceedings will in any event be suspended until the judgment becomes final. Furthermore, once enforcement proceedings are resumed, nothing prevents the debtor from issuing a new notice of payment in

[3] Decision No. 42/2022, handed down by the High Court of Cassation and Justice, Panel for the Resolution of Legal Issues, paras. 92, 93, 94.

kind, which will have the effect of suspending enforcement. This course of action by the debtor could be perpetuated, as the legal provisions, strictly interpreted, permit it.

A rigid interpretation of the legal rules could lead to significant abuses of the law by debtors acting in bad faith. Not even a judicial fine for submitting notifications in bad faith would be likely to cause them significant concern, as the vast majority of these debtors do not hold cash assets that could be seized.

In legal doctrine[4] , it has been stated that 'the right to obtain the discharge of the debt through the compulsory transfer of ownership of the mortgaged property is a right of claim, which presupposes both the fulfilment of the (formal) conditions of admissibility provided for in Article 4 of Law No. 77/2016, as well as the fulfilment of the elements substantiating unforeseeability, a condition implied pursuant to Article 11 of this law."

Among the conditions set out in Article 4 of Law No. 77/2016 is the condition of the existence of unforeseeability. Through the amendments made by Law No. 52/2020 to Law No. 77/2016, the legislature has expressly enshrined unforeseeability as the legal basis for the mechanism of payment in kind, transposing into law the approach already established in constitutional case law and in the practice of the courts.

Thus, unforeseeability is defined as that exceptional situation, arising after the conclusion of the credit agreement, independent of the parties' will, which causes a significant imbalance in the performances and renders the performance of the obligation excessively onerous for the debtor. In this context, the court is required to verify the existence of a substantial change in the circumstances taken into account at the time of contracting, which exceeds the inherent risk assumed by the agreement.

The new element introduced by Law No. 52/2020 consists in the establishment of legal presumptions of unforeseeability, intended to ease the burden of proof on the debtor. These include, in particular, a fluctuation in the exchange rate exceeding 52.6% compared to the time the contract was concluded, as well as an increase in the monthly payment obligation of more than 50%. However, these quantifiable criteria do not remove the role of the court, which retains the power to assess whether the legal conditions are met and to determine whether the contractual burden is in fact excessive.

Therefore, with regard to the condition set out in Article 4(1)(e) of Law 77/2016, we consider that the assessment of unforeseeability is a matter for the court. Consequently, whenever the other conditions are met, when it comes to assessing the condition regarding unforeseeability, the bailiff is obliged to suspend enforcement proceedings, in accordance with the provisions of Article 7(7) of Law No 77/2016.

4. Methods of applying the law on payment in kind in judicial practice

In judicial practice, it has been established that 'the debtor S.E.D. benefited from the provisions of Article 6 of Law 77/2016; enforcement was suspended until the final resolution of the objection lodged against the initial notices, however, the issuance of successive notices can no longer produce this effect, given that they are identical in content. Law 77/2016, which regulates this procedure, is not limited to the possibility of issuing a single notice and does not stipulate that the suspension applies only once during this extrajudicial procedure, nor does it provide debtors with a procedure that can be used repeatedly, without proof that new circumstances have arisen, distinct from those initially invoked, such as to lead to a different outcome of the objection. It noted that the respondent debtor had submitted successive notifications, identical in content, which leads to the conclusion that the notification of 3 December 2021 was submitted solely to obtain a stay of enforcement. The purpose of the procedure provided for by Law 77/2016 is not to suspend enforcement for a period of time, but to extinguish the debt through payment in kind, a purpose which cannot be said to have been pursued by the respondent as it was aware of the grounds for upholding the appeal lodged against the initial notices."[5]

Furthermore, in the same decision, the Court of Appeal held that "In such circumstances, the trial judge correctly found that the notice sent on 9 December 2022, identical in content to that previously sent on 3 December 2021, was drawn up for the sole purpose of delaying enforcement proceedings and not for the purpose provided for in Article 5 of Law 77/2016, namely to transfer ownership of the property in order to settle the debt arising from the mortgage loan agreement.

[4] https://www.juridice.ro/642863/suspendarea-executarii-silite-in-temeiul-legii-nr-77-2016-cand-masura-este-nejustificata-exista-oare-remedii-legale-pentru-inlaturarea-ei.html#_ftn7, op. cit. V. STOICA, *The Law on Payment in Kind. Arguments and Solutions,* Hamangiu Publishing, Bucharest, 2016, pp. 26–27.

[5] Civil Decision No. 292/AP of 28 March 2024, handed down by the Brașov Tribunal.

Therefore, in the absence of any new elements in the notice sent on 9 December 2022, the bailiff, and subsequently the court of first instance, correctly found that the requirements set out in Article 6(1) of Law 77/2016 for the suspension of enforcement proceedings were not met."[6]

The solution outlined above contains certain nuances established by the court. Thus, the court ruled that the bailiff was correct in refusing to suspend enforcement when the debtor gave notice of the payment in kind for the second time. In practice, it was found that only upon the second notice of payment in kind was the bailiff entitled to refuse the request to suspend enforcement. This approach was also supported in light of the grounds for upholding the challenge against a previous notice of payment in kind, brought before a court of law.

Consequently, certain scenarios may arise regarding the bailiff's ability to refuse to suspend enforcement proceedings where the basic conditions, listed above, concerning the notice of payment in kind are clearly not met. On the one hand, the bailiff could refuse to suspend enforcement proceedings as early as the first notice of payment in kind, where the substantive conditions thereof are manifestly unfounded (barring unforeseeable circumstances, as previously noted). On the other hand, there is the possibility that the bailiff might refuse to suspend enforcement only when the second notice is worded identically to the first, against which the creditor's objection had previously been upheld.

5. Conclusions

From our point of view, neither option is incorrect. Where the debtor acts in bad faith and submits a notice of payment in kind, the bailiff may refuse to suspend enforcement proceedings from the very first notice that is manifestly unfounded. For example, if the notice is not issued by a consumer but by a professional, we consider that the bailiff, as a legal professional, is capable of assessing this condition and refusing the suspension of enforcement proceedings requested by the debtor. Otherwise, the creditor will be obliged to lodge an objection against the notice of payment in kind, and enforcement proceedings will be suspended until a final decision is handed down by the court. Even if the challenge against the notice of payment in kind is heard under urgent proceedings, in accordance with Article 7(2) of Law 77/2016, the creditor loses valuable time in terms of satisfying their claim.

One possible way to optimise the functioning of the enforcement system and, by extension, to relieve the burden on the courts, is to recognise a limited but effective role for the bailiff in filtering out clearly unfounded notices of payment in kind. In the context of the regulations established by Law No. 77/2016, the mechanism for suspending enforcement operates, in practice, as a tool susceptible to abuse, generating a significant volume of litigation, such as challenges to enforcement or applications for suspension, which overload the courts without, in most cases, raising complex legal issues.

To the extent that the bailiff could refuse to suspend enforcement in cases where notifications contain obvious defects of legality, this would serve as a genuine preliminary filter against abusive or dilatory applications. Such an intervention, limited exclusively to a summary review of apparent legality, would have the effect of reducing the number of cases brought before the courts, restricting their jurisdiction to situations involving a genuine legal dispute.

At the same time, it could reduce the number of unfounded notices of payment in kind, used in practice to delay enforcement proceedings, which would contribute to making enforcement procedures more efficient and to strengthening the certainty of legal relationships. The reduction in the courts' workload would manifest itself not only through a decrease in the volume of cases, but also through the possibility of allocating judicial resources to complex cases requiring in-depth analysis.

However, such a solution must be designed in accordance with the functional limits of the bailiff, who cannot substitute the court in examining the merits of the case. Consequently, their competence should be strictly limited to identifying situations of manifest illegality, so as not to undermine the debtor's right of access to justice. Conceived in this way, the mechanism could serve as an effective tool for balancing the need for speed in enforcement proceedings with fundamental procedural safeguards.

[6] *Ibidem*.

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