

CURRENT ASPECTS OF BAIL IN THE LIGHT OF FREE ACCESS TO JUSTICE

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Abstract: *In the light of civil procedural law, an important place is occupied by the posting of a bond at the disposal of the court for the purpose of suspending enforcement, as a guarantee of the debtor's fulfilment of the obligation contained in the enforceable title. This study addresses the incidence of the right to a fair trial - in the form of free access to justice (as protected by Article 6 of the E.C.H.R.) - in the hypothesis of the imposition of an obligation to pay a security in an extremely high amount. Among the issues addressed are the possibility of granting exemptions, reductions and staggering of the amount of the deposit, the violation of the principles of fairness and equality of rights of the parties by exempting public institutions and authorities from the obligation to deposit bail in order to suspend enforcement, as seen in the light of domestic case law and the case law of the European Court of Human Rights.*

Keywords: *bail, access to justice, fair trial, ECHR.*

Introductory aspects:

One of the topical issues of ongoing interest on the legal scene is that of ensuring compliance with Article 6(1) of the EC Treaty of the European Convention on Human Rights (ECHR), concerning the guarantee of free access to justice.

The present study aims to analyse the extent to which the guarantees of access to justice are still respected, seen from the perspective of the institution of *bail* (mandatory in the case of provisional suspension of enforcement and suspension of enforcement in the context of a challenge to enforcement).

In the field of enforcement law, older legal literature¹ defined *bail* as "the sum of money or bearer bonds deposited in order to obtain the suspension of enforcement", which is intended "to guarantee the compensation of damages that would be caused to the pursuing creditor by the unjust suspension of enforcement".

The provision of a security deposit (a certain amount of money) in the event of an application for a stay of enforcement in the context of an appeal against enforcement or in a case concerning a provisional stay of

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¹ See in this regard Alexandru Lesviadax, *Contestation of Enforcement in Civil Matters*, Bucharest, Ed. Științifică, 1967, p. 120

enforcement is not an innovation of the current Code of Civil Procedure. Similar rules were found in the previous Code of Civil Procedure.² The payment of a deposit in the amount set by the court has given rise to both problems in practice and disputes in the literature, such as the need to deposit a bail also in the case of an application for provisional suspension provided for in Article 403(4) of the Civil Procedure Code of 1865, or the deductibility of the deposit (in the case of mandatory deposit also for provisional suspension) from the deposit due in the case of an application for suspension itself, but has also been the subject of exceptions of unconstitutionality.³

Under the Code of Civil Procedure of 1865, the establishment of only a maximum legal limit in relation to the amount of the bail gave rise to different case law solutions, with some courts setting a very high bail, while others required the debtor to bail derisory amounts. The idea of restricting the right of free access to justice has emerged and developed in relation to the amounts set as *bail* by national courts. The previous legal provisions have been the subject of many criticisms of their constitutionality, and all the exceptions raised have been rejected by the Constitutional Court (mainly on the grounds of the possibility for the party to criticise the amount of the bail through the appeal procedure⁴).

² In Art. 403 para. 1 of the Code of Civil Procedure of 1865 stated that "pending the resolution of a challenge to enforcement or other application for enforcement, the competent court may suspend enforcement if a bond in the amount set by the court is posted, unless otherwise provided by law". The original legal text did not regulate any criteria for determining the amount of the security, leaving it to the court's discretion to determine the amount. With the amendments introduced by Law 219/2005, the method of setting the bail was established, with the introduction of Article 723 ind. 1 of the previous Code of Civil Procedure, which stated that "unless the law provides otherwise, the bail shall not represent more than 20% of the value of the subject matter of the claim, and in the case of claims whose subject matter is not assessable in money, shall not exceed the sum of 20 million lei" (2000 RON, n.a.).

³ See in this regard Decision No 657/2011, published in Official Gazette No 520 of 25 July 2011, Decision No 285/2011, published in Official Gazette No 462 of 1 July 2011, Decision No 915/2012, published in Official Gazette No 864 of 19 December 2012, Decision No 1056/2012, published in Official Gazette No 70 of 1 February 2013. The objections of unconstitutionality were rejected on the following grounds in particular: the bail has a dual purpose: 1. It constitutes a "guarantee for the creditor to cover any damages suffered as a result of the delay in enforcement, through the effect of its suspension", 2. It has the role of "preventing and limiting possible abuses in the exploitation of such a right by defaulting debtors". The Court also ruled that the payment of a bond is not a condition for the admissibility of a challenge to enforcement, but only of the request for suspension of enforcement, in the sense that it cannot be considered that free access to justice would be restricted.

⁴ See Decision No 150/2002 (criticism of Article 403 of the Civil Procedure Code of 1865 concerning the setting of bail by the court), Decision No 15/2003 (concerning the

Both in the light of the previous regulations and in relation to the current legal provisions, bail was and is a question of the admissibility of the request for settlement and not of the admissibility on the merits of the claim for the suspension of the provisional enforcement of the enforcement order or the suspension of enforcement in the context of the appeal against enforcement.

In the current legislation, the seat of the subject matter of the institution of bail is found in Articles 719-720, 1057-1064 of the Civil Code. It is based on the "idea of risk"⁵, due to its purpose, which is to repair any damage caused to the creditor by delaying enforcement.

In the light of the new Code of Civil Procedure, we find expanded legal provisions on bail, regulating aspects relating to the method of calculating the amount of bail (both for claims that can be assessed in money and for those that cannot be assessed in money), as well as to situations in which no bail is required. The latter is an innovative element compared to the provisions of the previous Code of Civil Procedure.

In addition to its beneficial purpose - to provide protection for the bona fide creditor in the context of enforcement proceedings - the institution of *bail* has aroused interest both in the legal literature and in the practice of the courts in terms of its correlation with the principle of the right to a court or free access to justice.

National case law on the granting of legal aid in bail matters:

In the judicial practice developed after the entry into force of the current Code of Civil Procedure, the condition of admissibility of an application for a stay of enforcement or a provisional stay of enforcement has raised the issue of respect for free access to justice - as defined and protected by the provisions of Article 6(1) of the ECHR.

The problem arose from the establishment by the Romanian legislator of an extremely high amount of bail (compared to the previous legal provisions⁶ where only a maximum ceiling could be set⁷, but the court had

obligation to post bail in relation to the right to a fair trial), Decision No 346/2003 (concerning free access to justice), Decision No 47/2005 (grounds for the application for a stay of execution in relation to the right to a fair trial), Decision No 389/2006 (concerning the provisional stay of execution in relation to the right to a fair trial).

⁵ Evelina Oprina, in Viorel Mihai Ciobanu, Marian Nicolae coord., *New Code of Civil Procedure, commented and annotated*, Bucharest, Universul Juridic Publishing House, 2016, vol. II, p. 687.

⁶ We point out that even in the light of the previous Code of Civil Procedure, there were discussions on the need to grant facilities such as public legal aid, especially in cases where the courts established the obligation for the plaintiff to pay the maximum ceiling of 20% of the value of the claim.

⁷ The previous Code of Civil Procedure provided in Article 723 ind. 1 for a maximum amount up to which the bail could be ordered: "unless otherwise provided by law, the bail

the power/alternative to impose on the debtor the obligation to pay bail in a percentage that also protects the contestant) which must be recorded at the court's disposal⁸ in order to allow an application for suspension (including provisional suspension) of enforcement.

The existence of these new regulations, which legally determined the amount of the security bail (the amount was no longer left to the discretion of the court), dissatisfied the debtor of the bond, as it was considered to be an interference with his right to have a claim against him settled. In addition, the practice of the courts has been to arrive at a divergent range of solutions regarding the payment of security.

We can thus see two pillars in the solutions handed down by national courts:

1. Decisions on the admissibility of applications for exemption/reduction/scheduling/deferment of bail

The courts (quite a few in number) that have embraced the idea of granting relief in respect of the application for exemption/reduction/scheduling/deferment have based their solutions either on the idea of priority application of international conventions - in which sense they have opted for the prevalence of the provisions of Article 6 par. 1 of the ECHR over domestic law, or on the grounds that the provisions of GEO 51/2008 refer in point C3 of the Annex to the possibility of granting public legal aid not only in the case of stamp duty but also for bail⁹.

shall not represent more than 20% of the value of the subject matter of the claim, and in the case of claims whose subject matter is not assessable in money, shall not exceed the sum of 20 million lei" (2000 RON, n.s.).

⁸ The regulation contained in Article 719 para. 2 and 3 C. pr. civ. indicates the method of calculating the bail, establishing a distinctive criterion for the amount, depending on the value of the subject of the challenge to enforcement. Thus, the security is calculated as follows: "10% if the value of the object of the appeal is up to 10,000 lei; 1,000 lei plus 5% for what exceeds 10,000 lei; 5,500 lei plus 1% for what exceeds 100,000 lei; 14,500 lei plus 0.1% for what exceeds 1,000,000 lei". In the case of an appeal against execution having a non-monetary object, the bail is 1,000 lei, unless the law provides otherwise.

⁹ By the Judgment of 07.04.2009, pronounced in case no. 1125/221/2009, the Deva Court held the admissibility of granting a facility for the payment of bail in the light of the content of GEO 51/2008 - which, although it does not expressly provide for this possibility, however, in the Annex form, concerning "granting legal assistance in a Member State of the European Union" also refers to *bail*. This aspect shows precisely the legislator's intention to include bail in the scope of the institutions for which applications for legal aid may be admitted. Also, in the case registered at the European Court of Human Rights under No 60727/10 - SC ECO INVEST S.R.L. and Ilie Bolmadar v. Romania, the Government has submitted several judgments delivered by national courts granting applications for reduction of the amount of bail or exemption from its payment (see final judgments of: 26 August 2008 of the Court of Brăila, of 4 September 2012 of the Court of Botoșani, of 23 March, 3 July and 11 December 2012 of the Court of Sector 2 Bucharest, of 20 July 2012 of the Court of Sector 3 Bucharest, of 15 October 2010, 16

2. Rejection of requests for bail relief:

Other courts have been firm in their view that no relief, reduction, deferment or postponement of bail can be granted, and the applications have been dismissed as inadmissible or unfounded. The reasons were various, including the following: there are no legal provisions in Romanian law conferring a right to benefit from the granting of public legal aid in respect of the payment of bail; free access to justice is not hindered by the possibility for the party to have the merits of his right examined in the context of a challenge to enforcement¹⁰; it will not be possible to apply the provisions of Article 6 par. 1 of ECHR in the case of proceedings for suspension of enforcement, as these are only applicable in situations where the merits of the case are finally determined¹¹.

The issue of uneven judicial practice regarding the admissibility of the application for legal aid in relation to the exemption or reduction of bail was also the subject of discussion *at the meeting of representatives of the Superior Council of Magistracy with the presidents of the civil divisions of the High Court of Cassation and Justice and the courts of appeal, held*

January 2012 and 15 May 2012 of the Court of Sector 5 Bucharest, of 2 March 2009 of the Court of Slatina, of 6 December 2012, 21 February 2013 and 19 February 2013 of the Court of Galați).

¹⁰ See in this regard the judgment of 25.02.2014, delivered by the District Court of Sector 4 Bucharest in case no. 4915/4/2014, in Claudiu Drăgușin, *Obligation to pay bail and the right of access to justice, in Enforcement. Difficulties and practical solutions*, vol. I, Bucharest, Legal Universe Publishing House, 2016, p. 527: "The impossibility of granting public legal aid in the form of exemption, reduction, staggering or postponement of the payment of the bail pursuant to the provisions of Article 6 of GEO 51/2008 does not affect the right of access to justice of the petitioner, as long as this situation does not prevent analysis of the merits of the challenge to enforcement in relation to which the request for provisional suspension of enforcement was made". In the case in question, having found that there had been no breach of Article 6(1) of the European Convention on Human Rights, the application for relief was rejected as inadmissible.

¹¹ See in this regard the Judgment of 01.04.2013 of the District Court of Sector 4 Bucharest, delivered in case no. 3438/4/2013, unpublished, where it was held that "the level of the bail is established by law, and the text in question cannot be removed from application in the specific case of the applicant, based on Article 20 of the Constitution, given that Article 6 par. 1 of the Convention does not apply in this case, since the application for provisional suspension of enforcement does not concern a challenge to a civil right or obligation", in C. Drăgușin, art. cit, p. 529; In another case, the court held that "in view of the amount of the security to be lodged, the defences put forward in the case by the plaintiffs in support of their request to be exempted from payment of the security, the court holds that the mere fact that the company is undergoing reorganisation proceedings does not necessarily justify the claim that it has no real possibility of paying it, in the absence of other elements leading to that conclusion. Thus, the court holds that this aspect is not such as to prevent the petitioner's free access to justice"- Bucharest Court, Civil Section IV, Civil Decision no. 3292 A/16.10.2019, extracted from rolli.ro

on 14-15 November 2019 in Pitești, where they discussed legal issues that have generated uneven practice in civil matters¹².

Following the contradictory debates, the opinion drawn up by the representatives of the National Institute of Magistracy (N.I.M.) - agreed by all the participants in the discussion - was that public legal aid is not admissible if it is requested for exemption or reduction of bail. The arguments developed by the representatives of the N.I.M. referred to the provisions of Article 6 of GEO 51/2008, which "lists the forms of legal aid in a limitative manner", and the amount of money representing the bail required to be bailed for the settlement of applications for stay of execution does not fall within the situations established by those legal rules. It was also held that the reference to the time limit for *bail* in para. C letter e) of the form-annex to GEO 51/2008 could not extend the limits set by the content of the normative act, the annex representing a transposition of Council Directive 2003/8/EC, which means that there may be states in the European Union whose domestic legislation gives the power to regulate public legal aid even with regard to the bail required for the resolution of applications for stay of execution. The view of the participants in the *Meeting* was that the case of *Iosif v. Romania* (application No 10443/03, Judgment of 20.12.2007, published in the Official Journal No 561/24.07.2008)¹³ is not such as to provide the possibility of granting a form of legal aid for the posting of bail. At the same time, the considerations of the judgment in *Boldamar v. Romania* (application no. 60727/10, inadmissibility decision of 06.12.2016) did not persuade the participants that the granting of legal aid in the case of bail would be justified, given that the case before the Court was governed by the old *bail* procedure, which did not provide for the possibility of the creditor being paid out of the sum bailed.

Solutions to the divergent problem in the case law of the European Court of Justice:

The admissibility of granting facilities in the form of public legal aid based on respect for the principle of *the right to a fair trial* could not be absent from the analysis of the European Court of Human Rights.

¹² The divergent issue is not entirely new, as it was also the subject of discussions during the *Meeting of the representatives of the Superior Council of Magistracy with the Presidents of the Civil Divisions of the High Court of Cassation and Justice and of the Courts of Appeal, held in Iasi on 7-8 May 2015*.

¹³ The argument that the judgment in *Iosif v. Romania* was not taken into account was based on the Court's alleged confusion between bail and stamp duty, the latter being in fact the issue in this case and in relation to the resolution of the appeal against enforcement and not the suspension of enforcement.

The matter was settled by two decisions of the Court, which found that the Romanian State had violated the right to a fair trial by suppressing free access to justice. In the first case to be presented (*Iosif and others v. Romania*¹⁴) the decision was to condemn the Romanian State for violation of Article 6 par. 1 of the European Convention on Human Rights, while in the second case (*Boldamar v. Romania*¹⁵), the decision was to reject the application as inadmissible, but the reasoning reveals precisely the violation of the right to a fair trial, by restricting free access to justice.

a. Iosif and Others v. Romania:

In the present case, the applicants Aurel Iosif, Doina Maria Iosif and Daliana Magdalena Bobosila Iosif entered into a mortgage agreement with Bank B. in 1995 concerning a holiday home, thereby constituting security for a loan granted to a third party. Subsequently, the bank and the third party entered into an agreement to amend the subject-matter and maturity of the original contract, without the applicants' knowledge. In 1999, the Bank's claim is transferred to the Authority for the Valuation of Bank Assets (AVBA), which in 2001 issues a summons to the claimants to pay the loan.

The plaintiffs bring an action for annulment of the mortgage and the claim is qualified as a challenge to the execution. The first court (Bucharest Court of Appeal) requires the plaintiffs to pay a security bail of 20% of the value of the loan (calculated on the basis of the full value of the claim and not on the basis of the value of the collateral). As the amount was extremely high (it exceeded the value of the mortgaged property), the claimants failed to pay the security and the court rejected the claim without going into the merits. Although the first court's judgment is appealed, the Supreme Court dismisses the appeal on the grounds of non-payment of security. The execution against the plaintiffs continues in the form of a distress on immovable property, and the plaintiffs again lodge an appeal. The Bucharest Court of Appeal once again requests payment of a 20% bail. The bail is not paid, the court rejects the appeal and the property is sold at auction. Following the final judgment dismissing the appeal for non-payment of the security, the plaintiffs brought an action before the European Court of Human Rights for infringement of the right to a fair trial on the ground of the obligation to pay security.

The Court declares the application admissible and proceeds to judgment on the substance.

The Romanian Government defended itself by arguing that the obligation to pay bail is an interference *allowed* by the principle of the right to a court, since bail is intended to guarantee the speedy enforcement

¹⁴ Published in M. Of. No 561 of 24 July 2008.

¹⁵ Application No 60727/10, Inadmissibility decision of 06.12.2016.

of the judgment, being a means of protection for the creditor, and its amount is fixed by law, which the courts cannot change.

Analysing the considerations of the case, the Court held that the provisions of Article 6 par. 1 of the ECHR. While noting the possibility for national legislation to include certain limitations on certain rights and freedoms, it nevertheless considers at paragraph 54 that "despite the margin of appreciation which the State enjoys in the matter, the Court emphasises that a limitation on access to a court is compatible with Article 6 § 1 only if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means used and the aim pursued (Weissman and Others v. Romania, no. 63.945/00, 24 May 2006, § 36)". In this regard, it is held that only the establishment of the applicant's personal circumstances is decisive for the assessment of the violation of the right to justice.

Although the circumstances of the case do not refer to an application for a stay of enforcement, but only to the resolution on the merits of the appeal against enforcement, we consider that it cannot be interpreted that the security is in fact a stamp duty. The text of Article 83 of GEO 51/1998, in the form applicable at the time, expressly stipulated the payment of a security, and there can be no confusion with the payment of a judicial stamp duty - which was governed by the provisions of Law 146/1997.

b. Case of S.C. ECO INVEST S.R.L. and Ilie BOLMADAR against Romania:

In the second relevant case on bail, examined by the European Court of Human Rights, the applicants ECO INVEST S.R.L. and Ilie BOLMADAR (the company's administrator) concluded a credit agreement with Bank C in 2007. As the debtor company SC ECO INVEST SRL did not comply with its obligations to pay the instalments, the Bank started enforced execution against it and the debtor's accounts were seized. The claimant company lodged an appeal against enforcement in which, in addition to seeking the annulment of the unfair terms (in the credit agreement which constituted the enforceable title), it also sought a stay of enforcement and, at the same time, filed an application for a provisional stay of enforcement. The appeal against enforcement is dismissed for non-payment of the stamp duty, but on the file at the European Court of Human Rights, the claimants do not submit that judgment or proof that it has become final by not being set aside or by the dismissal of the appeal. In the case for suspension of provisional enforcement, in order to examine her application, the court required the appellant to pay a security in the amount of 10% of the sum subject to enforcement, and the appellant, being unable to pay, took the view that the right to justice was restricted by setting the amount of the security at such a high level. Although the appellant applied for a reduction of the amount of

the security, her application was rejected. The applicant also failed to pay the security and the court rejected the application for a provisional stay of execution. The applicant company did not submit a copy of the application for provisional suspension of enforcement or evidence of the company's financial situation to the European Court of Justice.

In the light of the above, the applicant company claims that its right of access to a court has been infringed by the setting by law of such a high amount of bail (10%), and therefore lodges a complaint with the European Court of Human Rights.

In its defence, the Romanian Government argued that the amount of the security was lawful, in view of the possibility for States to regulate certain limitations, in view of the purpose of the security (to protect the creditor against the bad faith debtor) and in view of the fact that the judgment in the provisional suspension case did not affect the merits of the case. The Government argued that the appellant company had the possibility of obtaining an instalment or exemption from the payment of the security, but had failed to prove the lack of financial means.

The Court dismissed the application as inadmissible. However, in spite of this decision, the reasoning of the judgment on the admissibility of legal aid is relevant when the amount of bail is deemed to affect the right of access to justice. Even if the Court acknowledges that the States may impose restrictions and limits, it was nevertheless considered necessary for the courts to examine the applicant's solvency in a situation where he is required to pay certain sums of money, in order to verify whether the party has the possibility of having access to the courts. The grounds of the judgment revealed that the amount to which the applicant was obliged to pay security "constitutes an interference with the party's right of access to a court" (paragraph 35), even though the purpose of the security payment was to protect the interests of the creditor.

The rejection of the application was based on the Court's finding that the applicant company had not demonstrated a financial situation which would not allow it to bail the security (not as the applicant had argued that the implementation of the contractual clauses would be such as to result in a negative financial situation). However, it was held in the grounds of the judgment that there was a legal basis and leverage for allowing an application for legal aid in the form of exemption from payment of the security.¹⁶ The rejection of the application for a judgment against the

¹⁶ See in this regard par. 41 of the Court's judgment: "domestic law gave the persons concerned the possibility of applying for and obtaining, if they supported their application with specific evidence, a reduction, exemption or deferment of the payment of bail (supra, para. 22), by bringing a separate application before the domestic courts based on GEO No 51/2008 (supra, para. 20)".

Romanian State was also justified by the fact that the applicant company was at fault for not having understood to pay the judicial stamp duty relating to the appeal against execution (a modest amount of approximately 50 euros) - which led to the rejection of the appeal against execution, which is also relevant to the application for provisional suspension of enforcement. In the light of those circumstances of the case, the drawing of the obligation to bail the security and a possible impossibility of payment did not *per se* constitute a restriction of free access to justice, but the applicant was procedurally at fault.

Even in the absence of a favourable solution for the applicant, we consider that the reasoning of the Court's judgment plays a decisive role in subsequent decisions on applications for legal aid in respect of the exemption, reduction or postponement of bail.

Although the judgment concerned a case under the old rules - the previous Code of Civil Procedure - the Court's considerations cannot be omitted or set aside, as they are more than up-to-date. This also derives from the fact that the new provision establishes an amount of 20% of the value of the subject-matter of the claim (thus much more burdensome for the debtor), double the amount applicable to the case under consideration.

No obligation to bail security in the case of debtors from public institutions or authorities:

Although the courts have the power to give priority to the application of European law (referring in this respect to the provisions of Article 6(6) of the EC Treaty), the Court of Justice is not empowered to do so. 1 of ECHR - respect for free access to justice) and, in the absence of an express legal text in national law, may grant the possibility to the debtor to benefit from exemptions, reductions, instalments of the payment of the security, however, the optic is that of rejecting some applications for the granting of legal aid and the obligation to bail the security for the admissibility of an application for suspension of enforcement. This is the case where the debtor is a natural person or a private legal person.

In the case of legal persons governed by public law, the situation is quite different, since the provisions of Article 7 of the OG 22/2002 on the enforcement of payment obligations of public institutions, established by enforceable titles, which states that "requests, regardless of their nature, made by public institutions and authorities in the enforcement procedure of claims established by enforceable titles against them are exempt from the payment of stamp duty, judicial stamp duty and the amounts established by way of security". At the same time, in accordance with Article 6(6) of Directive 4 and 5 of the same act, the court may order the suspension of enforcement until a final decision has been taken on the

application for the granting of the time limit(s) for payment of the amount due or the provisional suspension of enforcement until the decision on the application for suspension in the first sentence, but without the payment of any security.

As a result, the question arises whether the *principles of fairness and equal rights/treatment of the parties are violated* in the area of bail *by exempting public institutions and authorities from the requirement to post bail in order to suspend enforcement?*

The rationale for establishing such a regulation is that public institutions and authorities are always solvent and no additional security is required to cover any damage.

We consider¹⁷, however, that by regulating such privileges granted to public institutions and authorities, both the principle of equality of the parties in civil proceedings and the principle of fairness¹⁸ are infringed.

The purpose of regulating the institution of security was to represent a "guarantee" for the creditor in good faith; the current Code of Civil Procedure has established that in the event of rejection of the challenge to enforcement, the security is to be used to cover the claims in the enforceable title, as well as the compensation caused by the delay in enforcement. The legal provisions of GEO 22/2002 are precisely contrary to the provisions of the Code of Civil Procedure, since, in the absence of an obligation on public authorities and institutions to bail the security in the event of an application for a stay of execution, further damage will be caused to the creditor who will be late in paying. In this regard, we point out that the text of Article 2 of GEO 22/2002 provides for a six-month standstill period in respect of enforcement, established in favour of the debtor public institution or authority.

In the light of the above, it cannot be argued that the principle of fairness and equal treatment before the courts is applicable to debtors who are natural and legal persons governed by private law, as compared with debtors who are legal persons governed by public law. This leads us to say that it would be justified to regulate public legal aid with regard to the first category of debtors.

¹⁷ This position has also been expressed by the author at the National Conference of Law Students, Master and PhD Students, in the framework of the paper *Discussions on bail in the case of suspension of enforcement*, Sibiu, 2016.

¹⁸ It should be noted that Article 7 of GEO 22/2002 has been examined from the constitutionality point of view by the Constitutional Court, but all the exceptions of unconstitutionality submitted were rejected: for example, Decision no. 529/2013, published in M. Of. no. 55 of 22.01.2014, Decision no. 331/2013, published in M. Of. no. 454/24.07.2013, Decision no. 332/2013, published in M. Of. no. 452/23.07.2013, Decision no. 253/2013, published in M. Of. no. 395/01.07.2013, Decision no. 236/2013, published in M. Of. no. 365/19.06.2013.

Conclusions and proposals *de lege ferenda*:

We believe that the idea of granting a facility for the payment of *bail* should also be accepted.

De lege lata, there is no express legal provision establishing the possibility of granting effective bail aid.

In the literature¹⁹ it has however been accepted that the court, depending on the financial and family situation of the contestant, could still grant certain reductions in the amount of bail. As a result, the court, which is sovereign in determining the actual amount of the security, will be called upon to assess whether the granting of certain facilities under the provisions on public legal aid will be applicable to the security set during the enforcement phase²⁰, with reference, of course, to European case law.

However, there were also views that bail and legal aid were mutually exclusive.²¹ This stems from the different purpose of the regulation of the two institutions: while legal aid is a guarantee to facilitate access to justice for certain persons in a precarious financial situation, the purpose of bail is to cover possible damages that the creditor might suffer as a result of delays in enforcement due to the suspension of enforcement, while at the same time constituting a means of preventing and limiting possible abuses in the enforcement of a right by defaulting debtors. The lack of facilities granted in the area of bail was justified by the different purpose of bail compared to stamp duty: whereas the purpose of introducing stamp duty is to bear the costs of the administration of justice, the purpose of setting bail is to prevent possible damage which the creditor might suffer as a result of the debtor's delay in enforcing his claim.²²

We consider that, in order to grant public legal aid in respect of bail, the judge should start from the provisions of Article 3 of the Civil Procedure Code (para. 1. "In matters governed by this Code, the provisions on the rights and freedoms of persons shall be interpreted and applied in accordance with the Constitution, the Universal Declaration of Human

¹⁹ Evelina Oprina, Ioan Gârbuleț, *Theoretical and Practical Treatise on Enforcement*, vol. I. *General Theory and Enforcement Procedures under the New Code of Civil Procedure and the New Civil Code*, Bucharest, Legal Universe Publishing House, 2013, p. 386, A.C. Mitrache, *Commentary on the conclusion of 2 March 2009* pronounced by the Slatina Court, in R.R.J. no. 6/2009, p. 130-131.

²⁰ Florin Radu, *On the reduction or exemption from the payment of bail in the matter of suspension of enforcement*, R.R.E.S no. 4/2010, p. 55-62.

²¹ See Denisa Livia Băldean, Gabriela Cristina Frențiu, *Public Legal Aid in Civil Matters*, The Legal Universe Publishing House, Bucharest, 2010, note to the conclusion of 12 May 2009 of the Deva Court, p. 313.

²² E. Oprina, I. Gârbuleț, *op. cit.*, vol. I, p. 384, Bogdan Dumitache, note to the conclusion of 2 March 2009 pronounced by the Slatina Court, in R.R.J. no. 6/2009, p. 132-134.

Rights, the Covenants and other treaties to which Romania is a party.", para. 2 "if there are inconsistencies between the covenants and treaties on fundamental human rights to which Romania is a party and the present Code, international regulations shall take precedence, unless the present Code contains more favourable provisions") and Article 4 of the Civil Procedure Code, which establishes as a fundamental principle the priority application of international treaties on human rights and the precedence of European Union law over domestic law. Article 6 para. 1 of the European Convention on Human Rights establishes the fundamental right of everyone to have free access to justice.

By regulating certain limits - such as the obligation to pay a security - for the resolution of an application for a stay of enforcement and not a condition for the admissibility on the merits of the application for a stay (including provisional) of enforcement, the possibility for the person to benefit from free access to a court to resolve his application is precisely hindered. This is justified not only by the rules governing the institution itself, but also by the particularly high amount of the security.

De lege ferenda, we consider it imperative to intervene in the legislation to settle definitively the issue of the incidence of legal aid in the area of bail.

Similar to the possibility of granting certain facilities in the field of stamp duty, we believe that the legislator should lay down certain cumulative conditions, differentiated according to the individual and the private legal person, for the admission of such a request. However, only an express regulation would exclude the uneven national practice with regard to bail.

With regard to the forms of legal aid, we are of the opinion that, in view of the purpose for which bail was established, only *exemption* and *reduction of bail* would be admissible.

With regard to a possible *instalment* or *postponement* of the payment of the bail, we consider that these are in no way based on bail. Thus, for the debtor of the fee it does not constitute an effective benefit since he would still be obliged to bail the amount and, in addition, the resolution of the suspension request would be delayed. As regards the creditor, granting the application for deferment of payment of the security would only delay the enforcement proceedings. As a result, none of the parties to the enforcement relationship would have an interest in the deferment or postponement of the payment of the security.

However, we do not dispute that a possible regulation of legal aid with regard to the institution of *bail* also has disadvantages:

A first problem is that it would be contrary to the very reason why it was established, namely as a means of protection for the bona fide creditor against the defaulting debtor.

Another difficulty that would be involved is the delay in the resolution of the application for a stay of execution. If the view were to be taken that the applicant is entitled to benefit from certain facilities in the form of legal aid, it would be imperative that the applicant should also be subject to certain cumulative conditions under which he would be exempted from payment of the security/the amount of money owed under this title would be reduced or deferred. However, proving that the conditions are met can often lead to an extension in time of the resolution of the suspension claim. Although in a favourable situation (as it would benefit from a pecuniary advantage), the claimant/ respondent/ debtor himself may no longer be interested in obtaining the facility, as delaying the resolution of the application for a stay of enforcement would lead to the likelihood of his enforcement (in whole or in part) until the resolution of the application for a stay of enforcement. Moreover, it would also violate the principle of an optimal and predictable resolution of the case, which is undesirable.

However, in spite of all the negative effects, we believe that it is fundamental to ensure free access to justice and, in the area of bail, this goal can only be effectively achieved through legislative intervention that also takes into account the protection of the debtor's rights and legitimate interests.

References

Băldean, Denisa Livia; Frențiu, Gabriela Cristina, (2013), *Noul Cod de procedură comentat* (New Annotated Procedural Code), Bucharest, Hamangiu Publishing House.

Băldean, Denisa Livia; Frențiu, Gabriela Cristina, (2010), *Ajutorul public judiciar în materie civilă* (Public Legal Aid in Civil Matters), Bucharest, The Legal Universe Publishing House.

Boroi, Gabriel; Spineanu-Matei, Octavia; Constanda, A.; Negrilă, A., Dănilă, V., Theohari, D.N., Răducan G., Păncescu F.G.; Eftimie, M., (2013), *Noul Cod de procedură civilă. Comentariu pe articole* (The New Code of Civil Procedure. Commentary on articles), vol. II, art. 527-1133, Bucharest, Hamangiu Publishing House.

Ciobanu, Viorel Mihai, Nicolae, Marian (coord.), Baias, Fl., Belegante, V., Briciu, T.C.V., Dinu, C.C., Dumitache, B., Florea, Gh., Fodor, M., Gîlcă, I., Ghinoiu, D., Irimia, C., Nicolae, A., Rădoi, A., Stancu, M., Ștefănescu, A., Tăbârcă, M., Turcu, N., Ursuța, M., Zidaru, L., (2016), *Noul Cod de procedură civilă, comentat și adnotat* (New Code of Civil Procedure, commented and annotated), Bucharest, The Legal Universe Publishing House.

Deleanu, Ion; Mitea, Valentin; Deleanu, Sergiu, (2013), *Tratat de procedură civilă. Noul cod de procedură civilă (Treatise on Civil Procedure. New Code of Civil Procedure)*, vol. III, Bucharest, The Legal Universe Publishing House.

Hurubă, Eugen, (2011), *Contestația la executare silită în materie civilă (Contestation to enforcement in civil matters)*, Bucharest, Legal Universe Publishing House.

Lesviodax, Alexandru, (1967), *Contestația la executare în materie civilă (Contestation of enforcement in civil matters)*, Bucharest, Scientific Publishing House.

Leș, Ioan; Jugastru, Călina; Lozneanu, Verginel; Circa, Adrian; Hurubă, Eugen; Spinei, Sebastian, (2015), *Tratat de drept procesual civil. Vol II: Căile de atac, Procedurile speciale, Executarea silită, Procesul civil internațional (Treatise on Civil Procedural Law. Vol II: Remedies, Special Procedures, Enforcement, International Civil Procedure)*, Bucharest, The Legal Universe Publishing House.

Leș, Ioan, (2007), *Legislația executării silite. Comentarii și explicații (Legislation of Enforcement. Comments and explanations)*, Bucharest, C.H. Beck Publishing House.

Leș, Ioan, (2013), *Noul Cod de procedură civilă, Comentarii pe articole art. 1-1133 (The New Code of Civil Procedure, Comments on Articles 1-1133)*, Bucharest, C.H. Beck Publishing House.

Lucaciuc, Ștefan Ioan, (2014), *Contestația la executare în reglementarea noului Cod de procedură civilă (Contestation of enforcement in the regulation of the new Code of Civil Procedure)*, Bucharest, Hamangiu Publishing House.

Lucaciuc, Ștefan Ioan, Fildan, S., (2011), *Des aspects concernant la suspension de l'exécution forcée par rapport à la réglementation proposé par la Loi nr. 134/2010 concernant le Code de Procédure civile (Aspects concerning the suspension of the forced execution in relation to the regulation proposed by Law no 134/2010 regarding the Code of Civil Procedure)* in *Volume of the International Conference of PhD. Students in Law*, 3rd Edition, West University - Timișoara, Bucharest, Legal Universe Publishing House.

Oprina, Evelina; Gârbuleț, Ioan, (2013), *Tratat teoretic și practic de executare silită*, vol. I. *Teoria generală și procedurile execuționale conform noului Cod de procedură civilă și noului Cod civil (Theoretical and Practical Treatise on Enforcement, vol. I. General Theory and Enforcement Procedures under the New Code of Civil Procedure and the New Civil Code)*, Bucharest, Legal Universe Publishing House.

Oprina, Evelina, Vasile Bozeșan (coord.), (2016), *Executarea silită. Dificultăți și soluții practice (Enforcement. Difficulties and practical solutions)*, Bucharest, Legal Universe Publishing House.

Piperea, Gheorghe et alli, (2012), *Noul Cod de procedură civilă. Note. Corelații. Explicații (New Code of Civil Procedure. Notes. Correlations. Explanations)*, Bucharest, C.H. Beck Publishing House.

Radu, Florin, *Despre reducerea sau scutirea de la plata cauțiunii în materia suspendării executării silitelor (On the reduction or exemption from the payment of bail in the matter of suspension of enforcement)*, R.R.E.S, no. 4/2010, pp. 55-62.