Restitution issues in Romania twenty years on

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1. Context

The emerging Romanian market economy is more and more consistent and observant of the rules applicable internationally with regard to business relationships, but one peculiar issue is still the marker of this country's recent history: acquiring ownership in private real estate property requires a specific standard of diligence and sometimes it is not possible to completely rule out any risks related to the ownership title.

Starting with the political changes in the Eastern European countries almost two decades ago, the changes in the legal regime of private property registered a similar evolution in almost all these states, following two main lines of development: a) creation of the new private property and b) reconstitution of the formerly nationalized private property.[1]

In this context, specific difficulties in the process of reconstitution of the private property, particularly upon real estate property, were posed by the fact that that many of the expropriated property no longer existed, while in other cases there was a need to reconcile the rights of the expropriated persons with the ones of the persons who meanwhile acquired in good faith ownership rights in the same property. Such difficulties, when not resolved through determined political decisions, became abiding issues affecting the real estate business up to the present days.

While in many of the Eastern European countries decisive measures made these conflicting interests subside in the interest of rapidly achieving stability of the legal circuit, in Romania a series of contradictory and almost every time insufficient regulations were enforced. As a result, the reconstitution of formerly nationalized property is still an opened issue after all this time and a process that is otherwise considered historically entitled is nowadays overloading the courts of justice in Romania, is overwhelming the European Court of Human Rights and ultimately, is conflicting with the interest of a sound and safe real estate practice and with the business interests of the market players.

2. Romanian legislation regarding restitution of real estate property

The Romanian legislation regarding the restitution of nationalized immovable property determined an inconsistent practice as these complex issues involved were addressed in stages, through several regulations, as was the case of Law no. 112/1995 which was the first of the relevant laws and which regulated the restitution of immovable provided they were taken over by the State "without title". These provisions generated an enormous amount of judicial practice as any refusal by the authorities of the restitution of a property in-kind was challenged in courts and as the Romanian instances built up an elaborated case law where the nationalization of each immovable had to be evaluated, on a case by case basis, in relation to the international

[1] Flavius Baias, Bogdan Dumitrache, Marian Nicolae "The legal regime of the immovable abusively taken over", Rosetti Printing House, Bucharest, 2001;

commitments undertaken by Romania at the time, by constitutional guarantees in force, by particularities of taking over properties in fact and without any legal prerequisites being observed.

Subsequently, the most important regulation enforced in Romania on the legal regime of the formerly nationalized property is Law no. 10/2001 "regarding the legal regime of immovable abusively taken over within the period from 6 March 1945 – 22 December 1989" ("Law 10") and it is aimed at establishing a definitive situation of the nationalized immovable located inside localities (*intra-muros*) in addition to the legal regime of agricultural land and other categories of land already regulated through previous laws. Essentially, opposite to the principle regulated by Law no. 112/1995, Law 10 instituted in its article 2 the presumption that immovable property taken over by state within the period established by the law was effected "without title", abusively, the contrary having to be established solely on the basis of evidence.

The solution proposed by Law 10 is that the "entitled persons" (former owners of the property, former shareholders of the companies owning the property or heirs of such persons) observe an administrative procedure of notifying the holding entity of their claim (a public authority or company) to have the immovable restituted and that they shall receive the respective property in kind free of any encumbrances. However, a lot of derogatory circumstances are provided for in order to cover the cases of destroyed property, of property affected by subsequent public utility works or falling within the assets of the privatized companies. For cases when the property cannot be restituted in kind, the regulation provides for "equivalent reparatory measures", which may be "goods and services" or more commonly a money equivalent compensation granted from public funds.

According to the law, notifications shall have been filled by the entitled persons within a period of 6 months from the entering into force of the law (prolonged several times, subsequently) this term being time barred and shall have been solved by the holding entities within a 60 days term from receiving the notifications by a decision for restituting the property or offering "equivalent reparatory measures".

While the solutions proposed appear to be simple, in practice, Law 10 generated issues that are not yet closed and shall not be any time soon since more than half of the notifications lodged on the basis of the law with public authorities and companies have not been solved after more than 7 years from the law coming into force. Such situation was brought forward by one of the major flaws of Law 10: no sanction was regulated to ensure solving of notifications within the 60 days term. In addition, the decisions offering reparatory measures were in most cases challenged in the courts of justice, thus resulting a massive case law in the Romanian instances and .

Such tendency was encouraged by the numerous flaws encountered in the application of Law 10, particularly by the substantial delays in solving the notifications and by the fact that as of today, no viable system of granting equivalent reparatory measures was instated.

3. Specific issues in cases of nationalized immovable property currently owned by privatized companies

Regarding the issue of immovable property held by privatized companies, Law 10 provides for the obligation of the entitled persons to notify the company currently owning the property about their claim to have the property restituted while providing sufficient proof of their rights. According to article 21, the obligation to restitute the immovable is mandatory for all state companies and for companies in which the Romanian

state, a local authority or any other public entity holds the majority of shares. The same is applicable for companies where the above entities are minority shareholders, but the value of the shares is at least equal or larger than the value of the immovable property of the respective company.

A completely different solution is upheld in the case of privatized companies. While the general rule enforced by Law 10 is the restitution of the immovable property in-kind by the current holders to the entitled persons, when such current holders are privatized companies, the rule becomes the compensation of the entitled persons through reparatory measures granted from public funds, such measures being proposed by the entity in charge with the privatization process (the Authority for State Assets Recovery or AVAS). It is understood that *ratio legis* of such provision, contained in article 29 of Law 10 is the protection of the rights of privatized companies in the interest of economic stability.

The same interest is secured through the correlative provision in article 45 of the rule according to which "all selling deeds, including the ones concluded within the privatization process, having as object immovable property falling under the scope of the law, shall be deemed valid provided that the provisions of the applicable laws and regulations in force at the time moment were observed".

Such provisions are aimed at securing the interest of the privatized companies even at the price of not distinguishing in respect of the immovable property being taken over with a valid or invalid title by the State.

Furthermore, as often decided by courts of justice when an immovable property taken over by state without title is an asset of a company fully privatized, all subsequent transfers of ownership are safeguarded. .

As such, when confronted with restitution claims, the sole obligation of the privatized companies shall be to communicate to AVAS the respective notification, the latter being bound to issue a decision offering equivalent reparatory measures to be born from state funds. Subsequently, as no reduction of the company's assets is at stake, guarantee claims usually filed by privatized companies against AVAS are commonly dismissed by courts.

However, it shall be mentioned that judicial practice has established stricter rules for the evaluation of a privatized company which shall benefit from the favourable rule mentioned above. Thus, the judicial practice established the following rules in order for a privatized company to qualify for the applicability of article 29:

- The company shall be entirely privatized; In all cases where privatization was performed through partial sale of shares, article 21 described above shall apply;
- Prior to privatization, the company shall have been established on the basis of the Law no. 15/1990 (through which all former socialists enterprises were transformed into state owned companies) as such companies only were susceptible of holding among their assets formerly nationalized immovable property;
- The respective immovable property shall have been accounted for among the assets of the respective company throughout the process of turning the socialist enterprise into a state owned company

As stated by the judicial practice, the rule according to which immovable assets owned by privatized companies shall not be restituted in kind is the exception, when related to the general aim of Law 10 whereby all immovable abusively taken over by the state shall be restituted in kind, in consideration of the fact that these immovable were taken over without a valid title. As such, the exception shall be applied under strict observance of these rules.

To the contrary, in all circumstances where the immovable was acquired in different circumstances (e.g. companies established after 1990, acquiring ownership of the immovable through tenders organized by former state companies or through purchases, etc) the courts still follow the rule to order such companies to restitute the immovable to the entitled persons, free of any encumbrances, in the state current at the date of notification.

Among the many various cases known in practice and not specifically regulated by the law, the judicial practice is taking notice recently of the cases where companies are privatized after having received notifications from entitled persons, subsequently prevailing themselves of the provisions of article 29 on the basis of which they shall be entitled to refuse restitution in kind and propose reparatory measures to be granted by the state. It may even be speculated that such option is contemplated and undertaken by the company management at stake as a strategy of avoiding restitution of immovable assets. Such practice makes obvious another flaw of the regulation: there is no sanction for actions taken on the purpose of avoiding application of the restitution legislation.

All specific issues mentioned above led to the Real Estate divisions in Romanian law firms developing specific expertise in the field of research of historical titles in immovable properties in order to reduce all risks regarding later restitution claims to the maximum extent possible.

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