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Legal Bulletin



Banking Law

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Decision No. 2/2018 of 19 February 2018, rendered by the High Court of Cassation and Justice

The Official Journal of Romania, Part I, of 5 June 2018 published Decision No. 2/2018 rendered by the HCCJ¹ panel with power of jurisdiction over the appeal in the interest of the law in the public hearing of 19 February 2018. The Decision came after an analysis of the appeals in the interest of the law filed by the Leading Board of the Bacău Court of Appeals, the Leading Board of the Braşov Court of Appeals, and the Leading Board of the Bucharest Court of Appeals, respectively. The appeals were focused on: the extent and nature of the effects of precautionary measures ordered in criminal proceedings against the assets of an individual or a legal entity; the repercussions of such measures on enforcement proceedings previously started by a mortgagee who, in respect of such assets, owns rights that may be relied upon against third parties; and the manner how a criminal seizure interferes with the enforcement acts prepared in respect of such enforcement.

1. Background

As the relevant case law was found to lack uniformity when it came to the legal issue concerned, the Leading Board of the Bacău Court of Appeals, the Leading Board of the Braşov Court of Appeals, and the Leading Board of the Bucharest Court of Appeals, respectively, deemed it necessary to file an appeal in the interest of the law, so as to achieve a uniform interpretation of Article 712 *et seq.* of the New Civil Procedure Code, regulating the challenge to enforcement in enforcement proceedings.

The divergent practices of the courts are focused around two main opinions. On the one hand, there is the opinion that as a solution, challenges to enforcement lodged by the prosecutor's office should be dismissed, because a precautionary measure imposed in a criminal case cannot preclude the

¹ The High Court of Cassation and Justice.

start or continuation of enforcement (the majority opinion). On the other hand, there is the opinion that as a solution, challenges to enforcement filed by the prosecutor's office should be admitted in similar situations, considering *inter alia* that the disposal prohibition effect of the seizure affects the entire legal status of the concerned asset (including any real security created in favour of third parties) and concerns the effects of juridical acts, be them previous or subsequent to the implemented measure.

2. HCCJ's solution and arguments

HCCJ admitted the appeals in the interest of the law filed by the Leading Boards of the relevant courts, and decided that *"a criminal seizure on the immovable assets of an individual or a legal entity does not suspend the enforcement started by a mortgagee whose right of mortgage on those assets became enforceable against third parties before the precautionary measure was ordered in the criminal proceedings, and does not render null the enforcement acts subsequent to the ordering of precautionary measures on the same assets in criminal proceedings."*²

In support of its solution, the supreme court mainly put forward the following arguments:

2.1 Criminal seizure cannot legally suspend enforcement in case another creditor possessing an enforceable title requested enforcement of the seized immovable asset, because: (i) the grounds for legal suspension of enforcement are expressly and exhaustively provided by law, and they do not include the discussed hypothesis; (ii) a precautionary measure cannot block the enforcement of a receivable which is certain and is enforced under an enforceable title; (iii) the creditor seeking enforcement holds an asset within the meaning of Article 1 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms³, and its right must be defended and protected also by ensuring and guaranteeing the right to enforcement; and (iv) the past practice which generated the divergent case law is not in line with the hypothesis concerning the application of the "civil proceedings must await the outcome of criminal proceedings" principle.

2.2 Criminal seizure cannot lead to the nullity of enforcement acts occurring after such precautionary measure is ordered in the criminal proceedings in respect of the same assets, and cannot preclude the start and/ or continuation of enforcement, because: (i) precautionary measures ordered in criminal proceedings will create a right of preference in favour of the State before other creditors only within the limits and in the conditions provided by the applicable laws; however, such right of preference will not affect the rights that third parties acquired and perfected previously; (ii) the legality of the precautionary measure cannot affect the legality of other encumbrances previously registered with the

² The full text of Decision No. 2/2018 is available at <http://www.scj.ro/1093/Detailii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=143062>.

³ The full text of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms is available at http://www.cdep.ro/pls/legis/legis_pck.htm_act_text?id=28152.

land book, or the creditor's right to collect its receivable by enforcement; (iii) the "civil proceedings must await the outcome of criminal proceedings" principle cannot influence the concurrence between the two legal concepts under discussion, as there is no conflict between enforcement and the criminal proceedings in which seizure was ordered; and (iv) the enforcement of the assets legally seized in the criminal proceedings does not represent the criminal offence of seizure circumvention, because it lacks the specific features of such criminal offence.

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Editors

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