

CONSIDERATIONS ON COMPENSATORY PROVISION

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Abstract

Regulated for the first time by the Civil Code from 2009, compensatory benefit seeks to compensate for a significant imbalance that the divorce produces in terms of the innocent husband's living conditions. The present study aims to analyze the necessary conditions to obtain a compensatory benefit according to the current legislation, to make a comparison with other institutions but also with the regulation from other legislation. The study uses the logical and comparative method, analyzes the legal provisions currently in force, as well as the point of view of the doctrine and the solutions derived from the judicial practice. The conclusions are in the direction of expressing concrete proposals to amend the current regulations.

Keywords: *compensatory benefit, divorce, imbalance, compensation.*

JEL Classification: K36

1. Introductory considerations

Once the marriage has been dissolved, the obligation of solidarity and material support ceases. However, in some cases, these obligations are replaced by others, such as the maintenance obligation between former spouses or the compensatory benefit.

The compensation benefit institution is currently regulated in Art. 390-395 of the Civil Code². It enables the applicant spouse to benefit from a benefit to compensate, as far as possible, for a significant imbalance that divorce would cause him in his living conditions. In order to obtain the compensatory benefit it is necessary that the marriage is at least 20 years old and that the divorce should be based on the sole fault of the defendant spouse.

Regulation is not an original one in our legislation, inspired by the provisions of art. 270-278 of the French Civil Code and the provisions of Art. 427- art. 430 of the Civil Code of the Province of Quebec³.

As regards the legal nature, the compensatory benefit has a mixed character: indemnification and food⁴. Based on the principle of equity, it has a variable character, depending on the debtor's needs as well as the means of the creditor being also inscrutable and unable to form the object of the compensation⁵.

Recovery of the right to compensatory benefit can only take place with divorce, the intention of the legislator being to limit the post-divorce litigation between former spouses and the temptation of the baffling attempts of one or the other⁶.

The study aims to make a critical analysis of how the compensatory benefit institution is regulated, highlighting the legislative loopholes that could give rise to controversial solutions in judicial practice. Following the views expressed in jurisprudence and doctrine, using the logical and comparative method, the study proposes concrete solutions to modify the provisions currently in force.

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² Law no. 287/2009 on the Civil Code published in the Official Gazette no. 409/10 June 2011 and republished in the Official Gazette no. 505 of July 15, 2011.

³ See Emese Florian, *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația*, CH Beck Publishing House, Bucharest, 2016, p. 336.

⁴ See Jean Carbonnier, *Droit civil*, volume I, Quadriga Publishing House, 2004, p. 320.

⁵ See Philippe Malaurie, Hugues Fulchiron, *La famille*, Défrenois Publishing House, Paris, 2006, p. 321.

⁶ Emese Florian, *Prestația compensatorie – post scriptum la albumul de familie*, „Studii și cercetări juridice” no. 4/2013, p. 410.

2. Conditions for granting compensation

Unlike the provisions of the French Civil Code and the Civil Code of the Province of Quebec, the Romanian legislature regulates the institution of the compensatory benefit in a different, different manner, especially as regards the conditions of granting and the modalities of enforcement.

Analyzing the conditions of the right to compensatory benefit, as it results from the provisions of art. 390 of the Civil Code, the following cumulative requirements are removed:

A first condition concerns divorce from the exclusive fault of the respondent spouse. Since the text refers expressly *verbis* to divorce from the sole fault of the respondent spouse, the question arises whether, in the event that the divorce is pronounced after a split in fact that lasted at least 2 years, according to the provisions of art. 373, letter c) of the Civil Code, it would or may not be possible to claim the compensatory benefit. The answer seems to be rather negative because the plaintiff making the request on this ground would have every reason to quit when he would be exposed to the possibility of having to pay the compensatory benefit.

In conclusion, the compensatory benefit could be granted only if the divorce is pronounced for the reason provided in art. 373, letter b) of the Civil Code, respectively, when due to good reasons, the relations between the spouses are seriously injured and the continuation of the marriage is not possible, the fault of the defendant's spouse is established or, in the case of a counterclaim, the defendant's spouse countable. It is therefore excluded that the compensatory benefit be granted in the case of jointly divorced marital or unlawful divorce.

However, in order to avoid divergent interpretations as to the applicability of the legal text, we propose that in future regulation, the assumptions applicable under art. 390, par. 1 of the Civil Code.

Unlike the French legislator, the Romanian one attaches great importance to the culprit in the dissolution of marriage. In the French doctrine it was underlined the idea that the culprit in the dissolution of marriage does not constitute an impediment to the compensatory benefit. However, the judge may refuse to grant such a benefit, if the principle of fairness is required, where the divorce has been the exclusive fault of the spouse requesting such a benefit, taking into account also the particular circumstances of the case. Therefore, it can not be considered appropriate to force the innocent husband to maintain the other husband who abandoned him or treated him badly because the divorce objectively revealed a difference in the level of life between former spouses.

The solution of the Romanian legislature goes further than the provisions of art. 427 of the Civil Code of the Province of Quebec which refers to the possibility of granting the compensatory benefit even in the case of the invalidity of the marriage.

A second condition concerns the duration of marriage, which must have been at least 20 years old. The condition was not rigorously formulated by the legislator, making no reference to the method of calculation, ie whether the minimum duration of 20 years should be reported at the date of filing the request for legal action or at the date of the final decision divorce. The doctrine⁷ states that it is not necessary that this period, calculated from the moment of the marriage, has been fulfilled at the time the application is made, but that this period must be fulfilled at the date of the dissolution of the marriage, ie at the date of the final decision divorce.

In my view, the condition relating to the method of calculating the duration of 20 years of marriage should be expressly provided for in the legal text. Although it would seem logical that the duration should relate to the date of the final divorce decree, the fulfillment of this condition will depend on the duration of the process which, to a certain extent, may be influenced by the parties and by the judge. Also, having regard to the meaning of the final decision⁸ phrase referred to in art. 634 of the Code of Civil Procedure, it would be possible to reach the situation in which, in the first

⁷ See Eugen Chelaru, Flavius Baias, Ioan Macovei, *Noul Cod civil. Comentariu pe articole*, CH Beck Publishing House, Bucharest, 2012, p. 331.

⁸ According to this legal text, there are final judgments: 1. decisions not subject to appeal or appeal; 2. judgments given at first instance, without a right of appeal, not settled; 3. judgments given at first instance, which have not been appealed; 4. the decisions given in the appeal, with no right of appeal, as well as the unresolved ones; 5. the decisions given in the appeal, even if the case was settled; 6. any other decisions which, according to the law, can no longer be appealed against.

instance, an unfavorable decision was issued, for the reason of the non-fulfillment of the 20-year requirement, and in the appeal the solution was completely modified for the hypothesis in which this time has long been fulfilled. Therefore, we consider that the intention of the legislator was rather that this condition would be fulfilled at the date of filing the appeal. However, as mentioned above, it is necessary to regulate clearly the way of calculating this duration.

The requirement relating to the duration of marriage is to avoid marriages concluded solely for pecuniary interests⁹ and is likely to significantly reduce the number of applications for the compensatory benefit.

This condition is not found in French law, where the duration of marriage is relevant only in determining the amount of the compensatory benefit.

The third condition concerns the fact that, due to divorce, the innocent husband suffers a significant imbalance¹⁰ in his living conditions. The existence and significant character of the imbalance experienced in the husband's living conditions are matters of fact left to the judge's discretion¹¹. We appreciate that it is necessary to highlight by the legislator a value amount of this significant imbalance, otherwise the margin of appreciation by the judge is very high. In all cases, the compensatory benefit is not intended to equalize the fortunes of the two former spouses, but only to diminish a significant imbalance in the living conditions of the innocent husband that would appear as a consequence of divorce¹².

A similar requirement is not found in the provisions of art. 728 of the Quebec Provincial Civil Code, which provides that at the time of the divorce or nullity of the marriage, the right to obtain the compensatory benefit presupposes that the married couple had a beneficial contribution to the other spouse during her marriage¹³.

3. Criteria for determining the compensatory benefit

When determining the compensatory benefit, account shall be taken both of the resources of the spouse who so requests and of the means of the other spouse at the time of the divorce, of the effects of the matrimonial regime, or of any other foreseeable circumstances nature, such as the age and health of spouses, the contribution to childbearing that each spouse has to have, the professional training, the possibility of carrying out a revenue-generating activity and the like¹⁴.

With regard to the criteria established by the French Civil Code for granting compensatory benefits, they refer to: the duration of marriage, the age and health of spouses, their qualifications and professional status, the consequences of choices made by one of the spouses during their common life of education children and the time he devoted to foster the careers of his consort, the estimated or predictable heritage, their situation in the matter of old-age pension.

The enumeration made by the Romanian legislature is an enunciative character, and the court may also consider other circumstances similar to those mentioned. Therefore, the court has a rather difficult role to appreciate and evaluate not only the current spouses' resources but also their future evolution.

The natural question arises as to how the judge can decide on the effects that the matrimonial regime has or will have in the case when the spouses have not filed an application for the liquidation of the matrimonial regime together with the divorce application.

⁹ Bogdan Dumitru Moloman, *Prestația compensatorie – sprijin acordat soțului inocent și vulnerabil urmare a divorțului*, „Revista Română de Jurisprudență” no. 6/2013, p. 171.

¹⁰ In the absence of significant imbalance, the applicant's claim must be rejected. See Targu Mures Court Sentence no. 140/2018 issued in file no. 11974/320/2017, unpublished.

¹¹ See Emese Florian, *op. cit.*, 2016, p. 338.

¹² Cristiana-Mihaela Crăciunescu, *Efectele divorțului cu privire la raporturile dintre soți, precum și dintre părinți și copiii lor minori*, published on http://www.inm.lex.ro/fisiere/d_175/Efectele%20divortului%20cu%20privire%20la%20raporturile%20dintre%20soti%20si%20dintre%20soti%20si%20copii%20minori.pdf. (consulted on September 10, 2018).

¹³ Similar regulations are found in our legislation in art. 328 of the Civil Code, which provides for the right of the spouse who has effectively participated in the professional activity of the other spouse to obtain compensation insofar as it enriches the latter if its participation exceeded the limits of the material support obligation and the obligation to contribute to the costs marriage.

¹⁴ See art. 391, par. 2 of the Civil Code.

Consequently, the criteria for granting the compensatory benefit are likely to give the judge wide limits, which may even result in arbitrary solutions. I therefore appreciate that the specification of criteria that can be judged by the judge in a concrete manner would be such as to prevent the creditor spouse deliberately avoiding the improvement of his material status.

Also, when determining the compensatory benefit, consideration should be given exclusively or at least in the main on current issues and not on the marital status of the spouses. This is because there is a possibility of changing the compensatory benefit under Art. 394 of the Civil Code for the hypothesis of significantly modifying the resources of the creditor and the means of the debtor.

4. Form of the compensatory benefit

The Romanian legislator provided for a liberal solution regarding the granting of the compensatory benefit, mentioning that it can be established in cash, in the form of a sum of money or a lifetime, or in kind, in the form of usufruct on movable or immovable property belonging to the debtor¹⁵. Even though the legal text establishes that the benefit can be determined in cash or in kind, it can not be ruled out that an intermediate option, that is, a portion of money and a part in kind, can not be ruled out¹⁶.

However, the legislator did not foresee how the compensatory benefit would be chosen, depending either on the creditor's request or on the possibilities offered by the debtor. The French legislator¹⁷ provided that the judge would decide on the arrangements for the enforcement of the compensatory benefit, choosing between the following forms: remitting an amount of money or assigning property to the property or establishing a temporary or lifetime right, a right of abduction or usufruct, the judge having a forced assignment in favor of the creditor. In all cases, the consent of the debtor spouse is necessary for the assignment of property received as a result of a succession or donation.

We also consider that it would have been necessary to regulate a priority order or the criteria and modalities of choosing such a form in the choice of the form of the compensation benefit.

Similarly to the French law, the obligation of the parties to provide the judge with a statement certifying the accuracy of their resources, income, patrimony and living conditions should be mentioned. In order to determine the needs and resources of the parties, the sums received as compensation in the event of an accident at work or the sums paid as disability allowances are not taken into account, which naturally have a special purpose.

Regarding the life rent regime, this will be indexed by right, quarterly, depending on the inflation rate, according to the provisions of art. 394, par. 2 of the Civil Code. Regarding the length of time for which the rent and usufruct may be established, the benefit may be determined over the life of the beneficiary or for a shorter period.

5. Guarantees in respect of the granting of the compensatory benefit

The establishment of the guarantee is optional, the court, depending on the circumstances of the case, may judge whether or not the guarantee is to be constituted or given a bail and only at the request of the creditor's spouse. The provision of the guarantee can only take place when the compensatory benefit has been set as a rent, because the aim is to ensure the payment of the rent¹⁸.

¹⁵ See Art. 392, par. 1 of the Civil Code.

¹⁶ See Emese Florian, *op. cit.*, 2016, p. 340.

¹⁷ See Art. 274 of the Civil Code.

¹⁸ See Bogdan Dumitru Moloman, *op. cit.*, p. 174.

6. Change and termination of the compensatory benefit

If the debtor's means and the creditor's resources are significantly changed, the court may increase or decrease the compensatory benefit¹⁹. Analyzing the legal text, it follows that a mere change in the debtor's resources and the creditor's resources is not sufficient, but it must be significant. As regards the appreciation of the significance, this notion is to be analyzed in concrete terms by the court, being left to the judges' lights and wisdom.

The compensatory benefit ceases by the death of one of the spouses, by the remarriage of the spouse, as well as when it obtains resources capable of providing life conditions similar to those of the marriage²⁰.

The termination of the compensatory benefit through death is due to the person's intuition, the payment obligation not being passed on to the successors.

As regards the general causes of cessation of compensation, they are almost identical to the general causes of cessation of the maintenance obligation between former spouses²¹.

7. Delimitation of compensation benefit from other institutions

The innocent husband who suffers harm by marriage can ask the guilty party to compensate him. In order to grant the right to compensation, the following conditions must be met: divorce may be based on the sole fault of one of the spouses, the innocent spouse suffered moral or material damage and the loss suffered as a consequence of the dissolution of the marriage.

The significant imbalance that divorce would determine in the living conditions of the claimant is close to the significance of the material damage caused by the dissolution of the marriage. However, the granting of the compensatory benefit may be cumulated with the indemnification provided in art. 388 of the Civil Code²².

Both the claim for damages and the claim for the compensatory benefit are formulated together with the divorce application and are settled by the guardianship court.

As regards the conditions for awarding compensation and for granting compensatory benefits, there are common requirements regarding the exclusive fault of one of the spouses as well as the related material damage resulting from the dissolution of the marriage.

Both the compensatory benefit and the right to compensation have patrimonial character and the legal nature of the indemnity. However, the compensatory benefit aims to materially balance the situation of the innocent spouse, while the compensation comes to compensate for damage caused by the dissolution of the marriage.

The right to maintenance of the former husband is also a right of patrimonial nature, as is the right to the compensatory benefit. However, the maintenance obligation subsists only if the divorced spouse is in need because of a work incapacity before marriage or during marriage. The right to maintenance also exists when the incapacity arises within one year of marriage, but only if the incapacity is caused by a circumstance related to the marriage²³. Concerning the causes of cessation, these are common to the two institutions.

Unlike the compensatory benefit, the right to maintenance has an amount set by the legislator, which can not exceed one quarter of the net income of the person liable for payment and, together with child maintenance, half of the net income of the person liable for payment.

The right to maintenance can also be obtained when the divorce has been pronounced on the sole fault of one of the spouses, but this is limited to a period of one year after the dissolution of the marriage, according to the provisions of art. 389, par. 4 of the Civil Code.

¹⁹ See Art. 394 of the Civil Code.

²⁰ See Cristian Mareș, *Efectele desfacerii căsătoriei prin divorț în lumina noului Cod civil*, „Dreptul” no. 8/2013, p. 50.

²¹ See Art. 389, par. 5, art. 531, art. 514, par. 2 of the Civil Code.

²² See Alexandru Bacaci, Viorica-Claudia Dumitrache, Cristina Codruța Hageanu, *Dreptul familiei în reglementarea NCC*, CH Beck Publishing House, Bucharest, 2012, p. 174.

²³ Article 389, paragraph 2 of the Civil Code.

Since both statutory compensation and maintenance obligations are intended to balance the material situation of one of the spouses, the claim for compensation can not be aggregated with an application for maintenance²⁴.

8. Conclusions

The compensation institution regulated in the current Civil Code is intended to compensate for a significant imbalance in the patrimonial aspect that divorce would determine in the living conditions of the person requesting it. Inspired mainly by the French Civil Code, the institution benefits from our own legislation in terms of its terms and conditions of execution.

Although apparently simple and easy to enforce, considering the provisions in detail, it can be seen that they can create difficulties in practice. Thus, the conditions for granting the compensatory benefit are insufficiently specified, as it is not clear how the 20-year term on the duration of marriage is calculated, nor is the significance of the significant imbalance syntagm. It would therefore be necessary to clarify and clarify how to calculate the 20-year term, but also quantify the imbalance.

With regard to the determination of the compensatory benefit, in view of the criteria mentioned by the legislator, the judge has a particularly difficult task to interpret and apply, and it is possible to make arbitrary decisions.

Nor has our legislator proved more rigorous about the form of compensatory benefit because it provided a number of ways in which it can be established, but without making any reference to how to choose the most appropriate option.

In conclusion, in the absence of details regarding the provisions I have referred to in this study, their application will prove very difficult in the practice of the courts.

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²⁴ See also the decision of Suceava Court of Appeal no. 993 of 18.09.2013 published on <https://www.jurisprudenta.com/jurisprudenta/speta-kwst9ha/> (consulted on September 10, 2018).