
RESEARCH ARTICLE

Highlights of the Romanian Perspective of Datio in Solutum for Consumer Borrowers

Codrin Macovei*

In 2016, the Romanian Parliament voted on the final version of the *datio in solutum* law (Law No. 77/2016 *on the datio in solutum of real estate in order to settle the obligations assumed by credits*), allowing the borrowers to fully settle their liability by transferring to the banks the ownership right over mortgages used as collateral for loans. The final version of the law includes some important restrictions: the 'First Home' governmental program was excluded from the jurisdiction of the law, a ceiling amounting to the equivalent of 250,000 EUR on the size of the loan at time of origination was set and the law only applied for mortgages that qualify as dwellings and were contracted by 'consumers'. However, the law would apply to all existing contracts (retroactive applicability).¹ This article analyzes *datio in solutum* from the Romanian perspective, a new approach in the national legal system that already made the object of the constitutional control by a number of decisions. We will also review the solutions of Spanish and French legal systems regarding these particular consumer protection problems.

Keywords: Datio in solutum; giving in payment; real estate; credit agreements; imprevision

1 Introduction – Romanian Ex-post Efforts to Protect Consumers Fail

After the financial crisis, which hit worst after 2009, Romanian society has been dominated by a sentiment of strong dissatisfaction *vis-a-vis* the position of non-intervention on the financial sector adopted by the government and The National Bank. Large parts of society, severely affected by the financial crisis, pointed to the causes of their misfortune: ease of access to loans, lack of consumer information on the effects of long-time credit arrangements, lack of state supervision on the banking activity which materialized in hidden costs for the consumers, and the use of currencies not usually traded in Romania. Particularly, we can name the use of mortgages financed in Swiss francs, as the banks presented this solution as the best solution to obtain larger capital at lower rates. But when the rate of exchange climbed to historical highs because of the financial crisis, most of the consumers owing their rates in Swiss francs found themselves in desperate situations.

The need for some ex-post measures to help Romanian consumers has been in high demand since, and politicians indulged. But this time their objective was to create the most advanced laws to protect consumers from the effects of the financial crisis in Europe. The exact words of the law's author could explain even better the scope and the reason of the Romanian initiative to find a legislative solution to the difficult situation many credit consumers are facing:

'The idea of the law started form a discussion with a friend. He told me that his secretary lost her home because she took credit with her ID card and could not pay her rates, being executed by the bank. I did not believe it at first, especially since it was not written in the credit agreement that if she does not pay she can become homeless. I thought it was impossible and I asked her to see it.

* Associate professor phd., 'Al. I. Cuza' University, Iași, Romania, mcodrin@uaic.ro

¹ The article was presented at the International Conference "The Responsible Consumer in the Digital Age. International and Nordic Perspectives on Financial Consumer Protection", organized in 2018 by the Centre for Enterprise Liability, Faculty of Law, University of Copenhagen, with the support of the Carlsberg Foundation, the Dreyers Fond and the Romanian Embassy to the Kingdom of Denmark and Iceland.

It was 2013. I asked for the contract, I found that the man was right. It was a personal loan where it was not written anywhere that she guaranteed with the house. [...] I think it was one of the most debated projects since the [Romanian] Revolution. Only in Parliament it has been discussed about 12 times in specialized committees'.²

Another author praised the legislation for its potential to be easily understood and used by consumers, and therefore be effective:

'the law is made willingly so that no lawyers are required for its application nor methodological norms, requests and actions, special notary procedures, minimum fees or fees, etc. In the debate, I will provide you with models of notifications and requests, types of calculations and cost estimates of the notification or authentication of the payment contract and, respectively, of the action for obtaining a decision that takes the place of a genuine act, all elaborated of my team. We will also prepare a set of frequently asked questions and answers, as well as other materials that I consider useful to you, so that you do not have to go to lawyers except in very exceptional cases'.³

As we know, credit agreements are indeed signed for a long time, depending on the advance, more or less important, that is paid to the body to be debited by the consumer-debtor, part of this type of contract.⁴ The execution of the debtor's obligation to pay the negotiated rates with the credit institution, which provided the amount of money for the purchase of the real estate, can be disrupted by two situations, a happy one and a less happy one. The happy situation concerns the case when, after concluding the credit agreement, the borrower finds himself in a more favorable financial situation and therefore wants to free himself from his debt by executing in advance his obligation to repay the advanced amount by the credit institution. The unfortunate situation occurs when, due to serious difficulties after the conclusion of the real estate credit contract, the debtor is no longer able to meet his obligation to reimburse the rates in the initially negotiated ways.⁵

Law No. 77/2016 on the giving in payment of real estate in order to extinguish obligations under the Credit (hereinafter 'Giving in Payment Law') was adopted by the Romanian Parliament precisely as a response to the unfortunate situation in which the debtor is unable to honor obligations contracted with the credit institution. It is a law that has been welcomed and criticized at the same time. Voices rose to praise the mechanism by which the contract risk is shared between the debtor and creditor, parts of the real estate credit contract,⁶ or to denounce the 'sentimentality' of the legislator who wanted to avoid a new credit crisis in Swiss francs.⁷

Criticized or praised, the mechanism of the Giving in Payment Law responds, more or less, to the need to save the debtor who risks financial and social asphyxiation by accumulating debts. If financial asphyxiation no longer requires explanations due to the evidence of the situation generated by the accumulation of debts, the social asphyxiation can be translated as excluding the individual from the society he is part of. The purpose of the law seems, therefore, to be surrounded by a noble aura inspired by the will of the Romanian legislature which creates an exception to the binding force of the contract by imposing on the credit body a way execution of the debtor's repayment obligation that had never been negotiated in the initial contract.

Almost two years already passed from the moment that the Giving in Payment Law entered in force, so we can already look at the statistical outcome of the expected results. On the adoption of the Giving in Payment Law in the Romanian Parliament the originators claimed that 'Today, in Romania, there are 800,000 families

² Daniel Zamfir, 'Initiatorul dării în plată, despre cum i-a venit ideea acestei legi, lipsa normelor de aplicare, cum a apelat la Piperea și cum vrea să răspundă BNR civil sau penal dacă manevrează cursul', <https://economie.hotnews.ro/stiri-finante_banci-21005926-video-daniel-zamfir-initiatorul-darii-plata-despre-cum-venit-ideea-acestei-legi-lipsa-normelor-aplicare-cum-apelat-pofesorul-piperea-dar-despre-cum-vrea-raspunda-bnr-civil-sau-penal-daca-manevreaza-c.htm> accessed 5 November 2018.

³ Gheorghe Piperea, 'Pentru aplicarea legii dării în plată nu e nevoie de avocați' <<https://www.cotidianul.ro/piperea-pentru-aplicarea-legii-darii-in-plata-nu-e-nevoie-de-avocati/>> accessed 5 November 2018.

⁴ Stéphane Piedelievre, 'Droit de la consommation' (Economica, Paris, 2008) 210–337.

⁵ Lucian Bercea, 'Riscul valutar, impreviziunea și conversia creditelor în valută' (1/2017) Revista Română de Drept Privat 24–25.

⁶ Gheorghe Piperea, 'Despre darea în plată' (Universul Juridic, 4 May 2016) <www.universuljuridic.ro/gheorghe-piperea-despre-darea-in-plata-in-momentul-in-care-cineva-efectueaza-darea-in-plata-se-stinge-datoria-inclusiv-datoria-fata-de-acel-colector-de-creante> accessed 5 November 2018.

⁷ Marian Nicolae, 'Legea dării în plată: lex autentică sau simulată?' (Juridice.ro, 7 October 2016) <www.juridice.ro/471779/legea-darii-in-plata-lex-authentica-sau-simulata.html#_ftnref8> accessed 5 November 2018.

who can no longer pay their bank rates⁸. The abovementioned estimation is a good parameter to assess the success of the law. In this regard, the Romanian National Bank has made public the following figures in a response to a journalistic report in April 2018:⁹

- the total number of notifications to the Giving in Payment Law is 8,459; in the year of the entry into force of the law (2016), 6,363 notifications were filed, 1894 notifications were submitted in 2017, and 202 notifications were submitted in 2018;
- of the 8,500 notifications, 6,023 notifications (71%) were contested;
- only four banks account for about 60% of the total number of notifications;
- the value of the exposure at the date of the notification (ROL equivalent) is 2.39 billion lei, of which 6.92% ROL, 46.83% EUR, 45.18% CHF;
- depending on the credit currency, the status of notifications is as follows: RON – 617 notifications; EUR – 4,161 notifications; CHF – 3,590 notifications; other currencies – 91 notifications;
- the 8,459 notifications were submitted by 7,297 debtors, meaning that they were debtors who notified for more than one loan; 916 debtors have filed a notice for at least two credits.

This data shows with no doubt that the law does not have the effect the originators hoped for. Statistically, the law did meet a 1% benefit rate from the 800,000 expected beneficiaries. More than that, out of that 1%, three-quarters did not gain anything but a long and difficult law suit, as the banks did not believe their claims that they could no longer make payments. This overall image of the law's effectiveness, and the fact that the number of notifications made now under the provisions of the law is diminishing drastically, makes a very clear point that the intended impact of the law was not fully realized.

In order to explain the failure of this ex-post effort to protect credit consumers, we will present the general provisions of the law and its shortcomings.

2 General Provisions of the Law No. 77/2016 Regarding the Giving in Payment of Real Estate for the Payment of Obligations Assumed by Credits

Law No. 77/2016 regarding the giving in payment of real estate for the payment of obligations assumed by credits, which entered into force, according to its Art. 12, on 13th May 2016, provides that, by way of derogation from the provisions of the Civil Code, the consumer has the right to pay off his debts arising from credit agreements with accessories without additional costs by giving in payment the mortgaged property in the creditor's favor if, until the first day of convening to the public notary, the parties to the credit agreement do not reach another agreement.

Regarding the conditions for the consumer's right to extinguish the bank claims and the correlative debts, first, Art. 1 para. (4) stipulates that the payment procedure does not apply to credits granted under the 'First Home' program, approved by the Government Emergency Ordinance No. 60/2009 on some measures for the implementation of the 'First Home' program, approved with amendments and completions by Law 368/2009, as subsequently amended and supplemented.

Second, Art. 4 para. (1) of the Law No. 77/2016 governs the conditions for the 'admissibility' of the claim for the settlement of the claim arising from a credit agreement and its accessories by means of giving in payment, which must be fulfilled cumulatively as follows:

- a) the creditor and the consumer are among the categories provided for in the art; 1 para. (1), as defined by the special legislation;
- b) the amount of the borrowed amount, at the time of granting, did not exceed the equivalent in lei of 250,000 EUR, the calculated amount and the exchange rate published by the National Bank of Romania on the day of the conclusion of the credit agreement;

⁸ Daniel Zamfir, 'Initiatorul dării în plată, despre cum i-a venit ideea acestei legi, lipsa normelor de aplicare, cum a apelat la Piperea și cum vrea să răspundă BNR civil sau penal dacă manevrează cursul', <https://economie.hotnews.ro/stiri-finante_banci-21005926-video-daniel-zamfir-initiatorul-darii-plata-despre-cum-venit-ideea-acestei-legi-lipsa-normelor-aplicare-cum-apelat-profesorul-piperea-dar-despre-cum-vrea-raspunda-bnr-civil-sau-penal-daca-manevreaza-c.htm> accessed 5 November 2018.

⁹ Dan Popa, 'Darea în plată la doi ani de la promulgare', <https://economie.hotnews.ro/stiri-finante_banci-22397621-darea-plata-doi-ani-promulgare-primul-depus-6363-notificari-2017-depus-1894-notificari-iar-primele-3-luni-din-acest-202-notificari.htm> accessed 5 November 2018.

- c) the credit has been contracted by the consumer in order to acquire, construct, expand, modernize, modify, rehabilitate a dwelling or, irrespective of the purpose for which it was contracted, is guaranteed by at least one building destined to housing;
- d) the consumer has not been convicted by a final judgment for offenses in connection with the credit for which the application of this law is requested.'

It is noted that two of the conditions provided by Art. 4 para. (1) of the Law No. 77/2016 for the settlement of the claim arising from a credit agreement and its accessories by way of payment relates to the parties to the credit agreement [namely the conditions provided by Art. 4 para. (1) (a) and (d)], and the other two conditions refer to the amount, Art. 4 para. (1) letter b), respectively the purpose of the loan/destination of the mortgaged property, Art. 4 para. (1) letter e).

Article 4 para. (2) establishes that in the particular case where the execution of obligations under the credit agreement has been secured by two or more assets, the debtor shall provide all the mortgaged goods in favor of the creditor for payment.

We consider that, although the legislator establishes by Art. 5 para. (1) that these conditions, referred to in Art. 4 are 'admissibility' conditions of the giving in payment claim, they are genuine conditions for the right to settle the claim arising from a credit agreement and its accessories, together with the correlated debt, by giving in payment the real estate. If these conditions were simple conditions for the admissibility of the payment claim, it might be concluded that the mechanism established by law would be pre-existing to this new regulation, it would have existed before the law came into force, and for its mere birth it would have been sufficient for those conditions to be fulfilled. In fact, the right to extinguish the claim arising from a credit agreement and its accessories, together with the correlated debt, by giving in payment the real estate, is set up by Law No. 77/2016 and the rise of this right may take place only after at least the conditions provided by Art. 4. As prerequisites for the actual creation of the right, and not mere conditions of admissibility, they should be met both at the time of the conclusion of the credit agreement and throughout its execution.¹⁰

As stated in the doctrine, the right to extinguish the bank claim and the correlated debt, even if it appears to be, cannot be a potestative right. However, this might not be the case of the right to set aside the original obligatory ratio by the unilateral will of the debtor.¹¹ Understanding the parties is the first way that these debts can be extinguished. A second way may be the hypothesis of imprecision, which brings together the special provisions of Law No. 77/2016 and the general provisions contained in Art. 1.271 of the Civil Code, insofar as no exemption has been made.¹²

Also in the doctrine it was considered that Art. 11 of Law No. 77/2016 –'in order to balance the risks arising from the credit agreement as well as from the devaluation of immovable property, this law applies both to credit agreements in progress at the time of its entry into force and to contracts concluded after that date' – establishes a substantive condition essential to the application of the pay-as-you-go mechanism, in addition to the general admissibility conditions set out in Art. 4 of the Act, namely the existence of risks

¹⁰ Marieta Avram, 'Mai există darea în plată forțată, după Decizia Curții Constituționale?' (1/2017) *Revista Română de Drept Privat* 15–24.

¹¹ Valeriu Stoica, 'Natura juridică a dreptului de a stinge creanța bancară ipotecară și datoria corelativă, conform Legii nr. 77/2016', in V. Stoica (ed) 'Legea dării în plată. Argumente și soluții' (Ed. Hamangiu, București, 2016) 28–29.

¹² Art. 1.271 Romanian Civil Code:

- (1) The parties are required to perform their obligations, even if their execution has become more onerous either because of the increase in the cost of fulfilling their obligation or because of the decrease in the value of the consideration.
- (2) However, if the performance of the contract became excessively onerous due to an exceptional change in the circumstances that would make it manifestly unfair to order the debtor to discharge the obligation, the court may order:
 - a) Adaptation of the contract in order to distribute fairly between the parties the losses and benefits resulting from the change of circumstances;
 - b) the termination of the contract at the time and under the conditions it establishes.
- (3) The provisions of para. (2) are applicable only if:
 - a) the change of circumstances occurred after the conclusion of the contract;
 - b) the change of circumstances and the extent thereof have not been and could not reasonably have been taken into account by the debtor at the time of the conclusion of the contract;
 - c) the debtor did not take the risk of changing the circumstances and could not reasonably be considered to have assumed that risk;
 - d) the debtor has attempted, within a reasonable time and in good faith, to negotiate the reasonable and equitable adjustment of the contract.

stemming from the credit agreement and the devaluation of immovable property, a significant imbalance between the rights and obligations of the parties.¹³

It should be noted that, in addition to the risks deriving from the credit agreement, the Giving in Payment Law also aims to 'balance' the risks arising from the devaluation of real estate. The explanatory statement of the law states that the situation is 'unfair' as credit institutions have granted loans when the value of the building was determined by the valuers (evaluation experts) approved by the creditors. Regarding the evaluation of the property purchased with money from the credit agreement, it is relevant only if the return of the loan was secured by that asset, given the Constitutional Court held that, in assessing imbalances benefits resulting from the credit agreement, the Court may consider the devaluation of the asset brought into collateral and purchased with the amount of the credit agreement. However, the Court must also take into account the fact that the devaluation of the property is not an unforeseen situation in the execution of the credit agreement, the Constitutional Court expressly acknowledged that the devaluation is not related to the execution of the credit agreement. On the contrary, it can only be considered in the analysis of the imbalance of benefits, which means that the premise situation of the incidence of an unexpected external event during the execution of the contract, other than the decrease of the value of the buildings, will still have to be proved. It is also unnecessary to determine the current market value of the real estate, if the value from the date of the loan is not checked as well, in order to determine if there is a real decrease in the value of the real estate, the argument of the 'notoriety' of the decline in the real estate market not being sufficient for the judgment of the fairness of the case.

For exercising the right to extinguish the bank debt and the correlative debt by means of giving in payment, according to Art. 5 of the Law No. 77/2016, the consumer shall send the creditor, through a bailiff, a lawyer or notary, a notice informing him that he has decided to transfer ownership of the property in order to settle the debt arising from the mortgage credit agreement detailing the 'admissibility' of the application as set out in Art. 4. The notification must also include a time limit of at least 30 days and a time interval within two different days in which the legal or contractual representative of the credit institution to be submitted to a public notary proposed by the debtor for the purpose of concluding the translative act of ownership. At least three days prior to the first day of convocation to the notary, the parties shall send to him the information and documents necessary to conclude the act of giving in payment.

Thus, the Law establishes the formalities and the means of communication of the notice sent by the consumer to the creditor, namely: its transmission in writing through a bailiff, notary or lawyer; transmitting it to the creditor's premises; setting a deadline for the creditor's notary to be presented for at least 30 days after receipt of the notice, in two different days and with the relevant hours; the annexation to the notification of all supporting documents, in original or at least in a certified copy for compliance with the original, in order to prove the 'admissibility' conditions established by Art. 4 of the Law.

Following the ex-post control of constitutionality, the Constitutional Court, through Decision No. 623 of 25 October 2016, admitted the exception of unconstitutionality and found that the phrase 'as well as the devaluation of immovable property' in the first sentence of Art. 11 of Law No. 77/2016 is unconstitutional and that the provisions of Art. 11, first sentence, Art. 3, second sentence, Art. 4, 7 and 8 of Law No. 77/2016 are constitutional inasmuch as the Court verifies the conditions relating to the existence of unpredictability. As the Court observed at para. 103 of that Decision, it is clear from the analysis of the legal provisions that the court, according to Art. 4 para. (1) of the Law, verifies the cumulative fulfillment of certain conditions (the persons to whom the legal provisions apply, the amount of the loan amount, the purpose of contracting the loan, pronounced in a final judgment for offenses related to the credit for which enforcement is sought) and that in a restrictive interpretation of the law, would not have the right to check other conditions, such as the conditions relating to the existence of unpredictability.

3 Special Conditions to the Application of the Law No. 77/2016 Regarding the Giving in Payment of Real Estate for the Payment of Obligations Assumed by Credits

3.1 The Notions of 'Creditor' and 'Consumer' – Art. 4 para. (1) letter a

Law No. 77/2016 provides, at Art. 1, that it applies to legal relationships between consumers and credit institutions, non-banking financial institutions or the transfer of claims on consumers [Art. 1 para. (1)] and consumers are the persons defined by G.O. No. 21/1992 on consumer protection, republished, with subsequent

¹³ Marieta Avram, 'Despre legea privind darea în plată: între folclorul juridic și rațiunea dreptului' (Juridice.ro, 8 July 2016) <www.juridice.ro/455084/despre-legea-privind-darea-in-plata-intre-folclorul-juridic-si-ratiunea-dreptului.html> accessed 5 November 2018.

amendments and completions, and Law No. 193/2000 on unfair terms in contracts concluded between professionals and consumers, republished, with subsequent amendments and completions [Art. 1 para. (2)].

With regard to the notion of 'creditor', it is noted that this is defined in Art. 1 of the law, which regulates its scope. Thus, creditors within the meaning of Law No. 77/2016 are: credit institutions, non-banking financial institutions or the assignment of receivables on consumers.

Concerning the notion of 'consumer', this is defined by the special laws as follows:

- according to Art. 2 point 2 of the Romanian G.O. No. 21/1992 on consumer protection, 'consumer' means any natural person or group of natural persons constituted in associations, acting for purposes other than commercial, industrial or productive, craft or liberal;
- according to Art. 2 para. (1) of the Romanian Law No. 193/2000 on unfair terms in contracts between professionals and consumers, 'consumer' means any natural person or group of natural persons constituted in associations which, by virtue of a contract falling within the scope of this law, acts for purposes other than its commercial, industrial or productive activity, craft or liberal.

By analyzing the legal definitions of the 'consumer', it follows that the essence of the qualification of a natural person or a group of natural persons as a consumer is that the purpose of his action will be, outside his commercial, industrial or production activity, liberal. Thus, in order for Law No. 77/2016 to be applicable, a natural person or a group of natural persons constituted in associations, which are parties to a credit agreement, must act for purposes other than its commercial, industrial or commercial activity production, be it craft or liberal. If it is not effectively demonstrated that the beneficiary of the credit acted, both at the time of the loan being contracted and during the course of the credit, for purposes other than its commercial, industrial or production, craft or liberal business, then it is obvious that the Law No. 77/2016, the condition provided by Art. 4 para. (1) letter a) concerning the consumer's quality of the debtor who wishes to extinguish the debts arising from the credit agreement by paying the mortgaged property in favor of the creditor. So, if the loan was contracted for use in economic activities on a professional basis, the provisions of Law No. 77/2016 are not applicable.

According to the European Union (EU) law, the 'consumer' was defined in the 1968 Brussels Convention on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters as the person who concludes a contract outside his commercial or professional activity. Art. 2 in point 1 of Directive 2011/83/EU of the European Parliament (EP) and of the European Union Council (Council) of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the EP and of the Council repealing Council Directive 85/577/EEC and Directive 97/7/EC of the EP and of the Council lays down the definition of 'consumer' as any natural person who, under contracts covered by that Directive, acts for purposes which are located outside the commercial, industrial, craft or professional business.¹⁴

The Court of Justice of the European Union (CJEU) held, in Case C-89/91 'Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH', that consumer protection provisions that have been established at European level and subsequently have been transposed at national level have resulted from the concern to protect them as a more vulnerable economic part: less experienced in legal matters than the other party.¹⁵ The application of these provisions should not be extended to persons whose protection is unjustified. It follows that the applicant acting in a professional capacity, and therefore not a consumer, does not benefit from the rules of special jurisdiction.

As regards the quality of the consumer in Case C-348/14, 'Maria Bucura v Bancpost SA', having as object an application brought by the Câmpulung District Court for a preliminary ruling on the interpretation of certain provisions of Directive 93/13/EEC on unfair terms in consumer contracts and Directive 87/102/EEC on consumer credit, the CJEU found, that according to Directive 93/13/EEC, the term 'consumer' means a natural person who is in the position of co-debtor under a contract with a professional as long as he acts for purposes which can be regarded as outside his profession or job.¹⁶

According to Art. 6 para. (3) of the Law No. 77/2016, the giving in-payment procedure may also be undertaken by coders and personal or mortgage guarantees of the principal consumer, with the agreement of the principal or his successors.

¹⁴ See also Gilles Paisant, 'Essai sur la notion de consommateur en droit positif' (1993) JCP G, I. 3655.

¹⁵ Case C-89/91 Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH [1993] ECR I-139.

¹⁶ Case C-348/14 Maria Bucura v Bancpost SA ECLI:EU:C:2015:447.

Therefore, in the case of Law No. 77/2016, the debtor may transmit to the creditor the notification by which he informs him of the intention to pay, but must prove the existence of the consent of the principal debtor, an agreement which, in our view, if the immovable property is in the debtor's patrimony as it concerns the decision on the transfer of ownership of a building, must be manifested by the conclusion of an authentic document.

3.2 Amount of Credit – Art. 4 para. (1) letter b)

The second condition that must be fulfilled for the right to settle the claim arising from a credit agreement and its accessories by way of payment refers to the amount borrowed.

According to Art. 4 para. (1) letter b) of Law No. 77/2016, the amount borrowed at the time of granting must not exceed the equivalent in lei of 250,000 EUR, calculated at the exchange rate published by the National Bank of Romania on the day of the conclusion of the credit agreement.¹⁷

Thus, the two rules established by law for the calculation of the loan amount are: 1) the amount to be the one at the time of the grant and 2) the exchange rate to be the one published by the National Bank of Romania on the day of the conclusion of the credit agreement.

3.3 Housing Destination of the Real Estate

Art. 4 para. (1) letter c) Art. 4 (1) letter c) of Law No. 77/2016 establishes two alternative conditions that must be fulfilled in order to give rise to the right to settle the claim arising from a credit agreement and its accessories by means of giving in payment, namely: a) the credit has been contracted by the consumer with the purpose of acquiring, constructing, extending, upgrading, modifying, rehabilitating a dwelling or b) regardless of the purpose for which it was contracted, the credit shall be guaranteed by at least one dwelling.

As regards the first condition, namely that the loan was contracted for the purpose of acquiring, building, extending, upgrading, modifying and rehabilitating a dwelling, first of all, it should be noted that, whether in the credit contract and mortgage contracts, clauses showing/indicating that the purpose of the credit fulfilled the first condition, the consumer has to prove the existence of this scope. Thus, in order to be able to apply the provisions of Law No. 77/2016, the consumer has to prove that the purpose of the credit agreement is in accordance with the first condition by presenting an urban planning certificate, a building permit issued under Law No. 50/1991 regarding the authorization of the execution of the construction works, of the minutes of reception at the completion of the works, of a land book extract, etc., as the case may be. It would, therefore, not be enough to only mention said purpose in the notification to the creditor. For example, if the immovable property secured upon the conclusion of the credit agreement has the land or urban arable land, without a building permit in force at the moment of granting the credit, the condition provided in Art. 4 para. (1) letter c) the first sentence of the Law would not be fulfilled.

Second, the consumer must prove that the property in question is meant to become his home. With regard to the notion of 'dwelling', Art. 2 (a) of the Law No. 114/1996 of the dwelling defines it as 'that one or several living quarters with the necessary facilities and utilities, which meets the living requirements of a person or family'. If the consumer has several dwelling buildings and does not live in the real estate that is subject to the payment, we consider that the purpose of the Law No. 77/2016. Thus, as stated in the Explanatory Memorandum of the draft law becoming Law No. 77/2016, it is also in line with the tendencies of the European Court of Human Rights (ECtHR) (Case 20/7/2004, *Back v. Finland*) and the CJEU (Case C-34/13, *Kušionová*) in the sense of protecting the right to the debtor's family home.

By judgment of 10 September 2014 in Case C-34/13, '*Monika Kušionová v SMART Capital as*', paras. 62–65, the CJEU has stated that 'particular attention must be paid to the fact that the property subject to the extrajudicial procedure of the guarantee at issue in the main proceedings is real property which is the family home of the consumer. Thus, the loss of family home is not only likely to seriously undermine consumers' rights (Case C-415/11 *Aziz*, point 61),¹⁸ but also puts the family of the target consumer: in a particularly fragile situation see in this respect the order of the President of the Court of Sanchez Morcillo and Abril Careta, EU:C:2014:1388, point 11).¹⁹ In that regard, the ECtHR held, on the one hand, that the loss of a dwelling is one of the most serious infringements of the right to domicile and, second, that any person at risk of being subjected to such an interference must, in principle, be able to request that the proportionality

¹⁷ Ioan Ciprian Chiorean, 'Condiții prevăzute de Legea nr. 77/2016 pentru nașterea dreptului la stingerea creanțelor bancare prin dare în plată' (1/2017) *Revista Română de Drept Privat* 68.

¹⁸ Case C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Cataiunyacaixa)* EU: C: 2013: 164.

¹⁹ Case C-34/13 *Monika Kušionová v SMART Capital as*, ECLI:EU:C:2014:2189.

of the measure be examined (see the ECtHR *Man, McCann v The United Kingdom*, No. 19009/04, §50 and ECtHR, *Rousk v. Sweden*, No. 27183/04, §137) in EU law, the right to housing is a fundamental right guaranteed by Art. 7 of the Charter to be taken into account by the referring court in the context of the application of Directive 93/13.

Therefore, we consider that the notion of 'dwelling destination' provided for in Art. 4 (1) letter (c) of Law No. 77/2016 should have been related to what is meant by the family home, that is, the dwelling in which the consumer actually lives with his family, because the current legislative solution is unfair in relation to the situation of the debtor who has more than one housing estate.

The second alternative condition regulated by Art. 4 paragra. (1) letter c) of Law No. 77/2016 is that, irrespective of the purpose for which it was contracted, the credit is guaranteed by at least one dwelling. Therefore, the consumer no longer needs to prove the purpose of the credit, but only that the property with which the credit has been guaranteed is his home, with respect to the qualification of the concept of 'dwelling'.

3.4 The Special Hypothesis Provided by Art. 4 para. (2)

According to Art. 4 para. (2) of Law No. 77/2016, where the execution of the obligations assumed under the credit agreement was secured by two or more assets, in order to apply the giving in payment procedure, the debtor will offer for payment all the mortgaged goods in favor of the creditor.

From the analysis of the Law No. 77/2016, it can be noted that the perspective of a loan secured by several buildings is the only regulated special circumstance, although, in addition, in practice, the following situations were encountered: several credits contracted from the same creditor by the same consumer, secured with the same property; more credits contracted from different creditors by the same consumer, guaranteed by the same building; more credits contracted by the same consumer from the same creditor, secured by different buildings; several credits contracted by different consumers from the same creditor, secured with the same property. Neither the hypothesis of several loans contracted by the same consumer nor the hypothesis of several credits contracted by different consumers – we consider that Law No. 77/2016 can not be applied, since the transmission to the lender of the right of ownership of the immovable property with which the credit obtained by the consumer has been guaranteed, in order to settle the debt arising from the conclusion of a mortgage loan – is a way to clear the payment obligation emanating from the credit agreement. If the notification to the creditor concerns the settlement of two distinct claims arising from the conclusion of two distinct credit agreements, we consider that both the literal interpretation and the systematic interpretation of Law No. 77/2016 show that it can not be applied, since the conditions relating to the existence of only a credit agreement are not met. From the terminology used by Art. 4, clearly showing the legislator's intent to target a single credit agreement, the possibility of extinguishing two or more receivables stemming from two or more credit agreements concluded by the same debtor or different debtors is not governed by law. To interpret the law in another way is to add to the law by granting the consumer far more extensive rights than the legislator wished, to the detriment of the creditors, which is not allowed by the rule of law.²⁰

4 Control of Constitutionality by the Romanian Constitutional Court

Following the publication in the Official Journal of Decisions No. 623/2016 and No. 639/2016 of the Constitutional Court, the interpretation and application of the Law No. 77/2016 have been extensively reconfigured with regard to the proposed doctrinal solutions and the jurisprudence delivered so far. Summarizing the considerations of the Constitutional Court Decision No. 639/2016, the following punctual ideas come out:

- the hypothesis regulated by Art. 8 para. (5) of the Law No. 77/2016 refers to the situation in which the forced execution of the debtor's mortgaged property was not completed, and it was not adjudicated, the property remaining in the debtor's patrimony (para. 16);
- not only for the hypothesis of the action regulated by Art. 8 para. (1), but also for the purpose of Art. 8 para. (5) it is necessary to observe all the conditions established by law in Art. 4 and Art. 5, including the notification of the debtor to the creditor (para. 16).

From the Constitutional Court's argument set out in the Decision No. 623/2016 we can outline the following:

²⁰ See also Ionuț-Florin Popa, 'Impreviziunea și creditele oferite consumatorilor. Constituie darea în plată și conversia valutară remedii ale impreviziunii?' (1/2017) *Revista Română de Drept Privat* 104–129.

- in the absence of agreement between the parties on payment, the Court has the power and obligation to apply unpredictability if it finds that the conditions for its existence are met (para. 119);
- the provisions of Law No. 77/2016 should apply only to debtors who, although acting in good faith, in accordance with the provisions of Art. 57 of the Constitution, are no longer able to fulfill their obligations resulting from the credit agreements following the intervention of an external event and which they could not foresee at the date of conclusion of the credit agreement (para. 119);
- the provisions of Art. 11 thesis I related to those of Art. 3, second sentence, Art. 4, Art. 7 and Art. 8 of the Law No. 77/2016 are constitutional only insofar as the Court, in the circumstances of the creditor's opposition, can and must apply the theory of imprevision to the contracts in progress (para. 120);
- from the procedural point of view, the Court, in the conditions of the contestation by the creditor or the action to be established by the debtor, will verify the fulfillment of the condition of the notification of the creditor as provided by Law No. 77/2016, the fulfillment of the criteria provided by Art. 4 of the Law, necessarily applying the theory of imprevision in Art. 7 of the Law, respectively Art. 8, or in Art. 9 of the same law (para. 120);
- the Court which, under the law, is independent in its assessment, will be able to apply the unprovision until the upper limit imposed by Law No. 77/2016 (handing over the property and deleting the principal debts and accessories); in the absence of agreement between the parties and under Art. 969 and Art. 970 of the Civil Code of 1864, respectively of Law No. 77/2016, the court will issue a judgment ordering either the adaptation of the contract in the form it decides or its termination (para. 121);²¹
- even in the forced execution phase, the Court can assess whether the conditions for the existence of unpredictability are met (para. 123).

According to Art. 147 para. (4) of the Constitution of Romania, the decisions of the Constitutional Court are generally binding and have power only for the future.

In interpreting this provision, the Constitutional Court has held in its case-law that the power of judgment accompanying the jurisdictional acts, and thus the Court's own decisions, attaches not only to the decision in itself but also to the considerations on which it is based; so, both the considerations and the structure of the decisions of the Constitutional Court feel obligatory, according to Art. 147 para. (4) of the Constitution, and the same is true of all subjects of law.

By Decision No. 639/2016, the Constitutional Court rejected as inadmissible the objection of unconstitutionality of the provisions of Art. 1 para. (3), Art. 3, Art. 8 para. (5), Art. 10 and Art. 11 of Law No. 77/2016, noting that they are unrelated to the settlement of the case pending before the court, since Law No. 77/2016, as a whole, can not formally form the basis of the action brought by the applicant, since he has not made any notification and has not requested the transfer of ownership of his good.

As a result of this Decision, the scope of Art. 8 para. [5] of the Law No. 77/2016 has undergone a substantive change – the forced execution of the mortgaged property must not have been completed by adjudication at the time of the promotion of the action to obtain the forced execution of the contract, and it is necessary for the ownership of the property to continue to exist in the debtor's patrimony.

The Court also held that, even in this case, the debtor is required to follow the procedure regulated by Art. 5 of the Law, notifying the creditor of the giving in payment of the immovable property.

This interpretation, of the scope of Art. 5 and of the conditions for admissibility of the action, also has important consequences on the subject matter of the action, since it is not only represented by the settlement of debt arising from credit agreements but also by the transfer of the right of ownership over the mortgaged property from the debtor's patrimony to that of the mortgagee.²²

Under these circumstances, the object of the action regulated by Art. 8 para. (5) of Law No. 77/2016 is confused with that of the action mentioned in Art. 8 para. (1) of the same normative act. Thus, Art. 8 of the

²¹ Art. 969 Romanian Civil Code: The legally established conventions have the power of law between the Contracting Parties. They may be revoked by mutual consent or by causes authorized by law; Art. 970 Romanian Civil Code – Conventions must be performed in good faith. They oblige not only to what is express in itself, but to all the consequences, what equity, habit or law gives to the obligation, by its nature.

²² See also Valeriu Stoica, 'O lectură constituțională, dincoace și dincolo de Legea dării în plată' (1/2017) *Revista Română de Drept Privat* 185–214.

Act regulates, in fact, only one action, remaining as the para. (5) is only to specify that the action provided for in para. (1) also applies in the case in which forced execution against the debtor on the mortgaged property has begun.

By Decision No. 623/2016, the Constitutional Court, among other provisions, accepted the objection of unconstitutionality invoked and found that the provisions of Art. 11 Thesis I referring to Art. 3, second sentence, Art. 4, Art. 7 and Art. 8 of the Law No. 77/2016 are constitutional inasmuch as the Court verifies the conditions for the existence of unpredictability. Such a decision is interpretative, indicating the constitutional meaning of the criticized legal provision, and the courts have an obligation to apply it in strict observance of the interpretation of the Constitutional Court set out in both the device and the considerations that explain it.

It should be mentioned that the hypothesis envisaged by the Constitutional Court is that of the credit agreements in progress at the moment of the entry into force of Law No. 77/2016, referred to in Art. 11 the first sentence and not that of the contracts concluded after this moment, being rejected the exception of the unconstitutionality of the provisions of Art. 11 second sentence as inadmissible.

In this context, the considerations of the interpretative decision, which have a binding force, are only those that explain the clause, and are therefore only applicable to credit agreements in progress at the date of entry into force of Law No. 77/2016.²³

From the entire explanation of the Constitutional Court's arguments, it is clear that the institution of payment, including in the sense of Law No. 77/2016 but with regard to the credit agreements specified above can not be conceived without the consent of the mortgagee toward the transfer of ownership of the immovable property for the settlement of the debtor's debts and that the only remedy for the parties to a credit agreement for counterbalancing benefits is the application of the institution of imprevision, as it was deducted from doctrine and jurisprudence under the Civil Code of 1864, respectively, as it is currently regulated under Art. 1.271 of the new Civil Code.

The Constitutional Court did not only indicate that the courts would analyze the conditions of the imprudence for the incidence of the regulation of the Law No. 77/2016, but, moreover, has imposed on the courts the obligation to apply the unpredictability in the conditions in which it will find that the requirements of its existence have been fulfilled, within the framework of the actions provided by Art. 7, 8 and 9 of the Law, pronouncing a judgment ordering either the adaptation of the contract or its termination.

In this context, the essential issue that arises is whether the courts have the right to modify the object of the action regulated by Art. 8 of the Law, in the absence of a request by the parties for the adjustment or termination of the credit agreement, provided that the object of the specified actions, in the regulation of the special law, concerns the disposal of the discharge of obligations and the transfer of the right of ownership.

We appreciate that the Court, in the absence of its investiture with an application for the adjustment or termination of the credit agreement, will not be able to mention such a solution in the ruling of the Court, but will merely refer to the consideration of unpredictability because a contrary solution would ignore the principle of party availability in the civil process.

At the same time, it is worth mentioning that the Court's solution to the demand in disposing of the discharge of obligations and the transfer of the right of ownership (therefore, in the case of the Court's notification with an action strictly delimited by Art. 8 of the Law), without the consent of the mortgagee, will be invariably a rejection regardless of whether or not the conditions of unpredictability are met, precisely because the creditor's consent to the activation of the payment mechanism is lacking.

Under the circumstances in which Law No. 77/2016 regulates within Art. 8 a legal action whose object is expressly stated (ordering the debtor's debts to be extinguished and the transfer of the right of ownership over the mortgaged property), we consider that this article no longer has practical applicability, the action in unpredictable common law can not borrow the special procedural conditions mentioned in the law for one action having a distinct object.

The Constitutional Court states in its argument that the Court which, under the law, is independent in its assessment, will be able to apply the imprudence to the upper limit imposed by Law No. 77/2016 (handing over of the real estate and the deletion of principal debts and accessories).

However, surrendering property and deleting principal debts and accessories of the debtor implies the application of the giving in payment institution, which, in the opinion of the Constitutional Court, is not allowed without the creditor's consent. The deletion of the debtor's debts can not constitute, on the one

²³ See also Radu Rizoiu, 'Paradoxul călătorului în timp a fost evitat... la timp: Condițiile (constituționale ale) dării în plată' (1/2017) *Revista Română de Drept Privat* 138–185.

hand, a way of adjusting the credit agreement, because in that case its effects would not be maintained and, on the other hand, can not be rigorously subsumed to the termination of the contract, since, for the credit contract hypothesis, this would mean repaying the amount borrowed by the debtor to the lender.

However, we do not exclude the possibility that the court, in applying the theory of unpredictability, may appreciate that the contractual balance can be restored only if the debtor no longer fulfills the contractual obligations, considered too onerous, in which case he will terminate the contract and, at the same time, the debtor's debts. It is obvious that such a solution can be ordered by the Court through an action having that object (termination of the credit agreement and settlement of the debtor's debts). Such an action, not having the composition of its object and the disposal of the transfer of the right of ownership over the mortgaged property, does not constitute the action regulated by Art. 8 of the Act, but the action in unpredictable common law governed by the procedural rules provided by the Code of Civil Procedure.

5 Comparative Law

It should be questioned, however, whether the law of the Romanian legislature intervenes beyond the limits set by the principle of binding force of the contract, which states that it has the power of law between the contracting parties of the valid contract concluded. In order to answer this question, it is necessary to consider whether the freedom that the Romanian legislator has given in the drafting of the Giving in Payment Law is an isolated case in the overall panel of the Roman-German legal systems, or whether the adoption of this attitude of protection of the more vulnerable party in a consumer contract, as in the case of the real estate credit agreement, can be found in the case of other legal systems. From this point of view, it seems appropriate to analyze the legislation in this area within the Spanish and French legal systems.

5.1 Spanish Law

Another Member State of the EU that has adopted *datio in solutum* legislation as a way to settle the obligation to pay a mortgage is Spain. Thus, Decree-Law No. 6 of 9 March 2012 on urgent measures to protect debtors without resources, provides for measures to restructure debts and facilitate the enforcement procedure; it applies only to those banks that voluntarily adhere to the Code of Best Practice (established as an annex to the Decree).²⁴

The measures provided by Decree-Law No. 6 of 9 March 2012 are only applicable to social cases of debtors in vulnerability, termed by the law 'on the threshold of exclusion'. Debtors who are considered by Spanish law as such, and therefore may benefit from the payment of mortgaged property, are those who are in the following situations: all family members and all coders have no income to enable them to fulfill their obligation of payment; the monthly payment amount represents more than 60% of the net income received by all family members and all co-debtors; the mortgage was constituted on the property that is the debtor's home and the loan was contracted for the purpose of its purchase; the loan has no other guarantees or there is another guarantee, but the guarantees do not have sufficient assets or the monthly payment amount represents more than 60% of the net income received by them.

Another condition for the application of the Code of Good Practice is that the purchase price of the mortgaged property does not exceed: 200,000 EUR (for municipalities over one million inhabitants), 180,000 EUR (for municipalities between 500,001 and one million inhabitants), 150,000 EUR (for municipalities between 100,001 and 500,000 inhabitants) and 120,000 EUR (for municipalities of up to 100,000 inhabitants).

The measures that may be required by the debtor of the creditor, provided by Decree-Law No. 6 of 9 March 2012 include three successive stages to be performed in order as follows: flow rate restructuring measures (such as rate cuts or increased repayment periods); complementary measures to reduce the primary debt (when debt restructuring is not viable, as the amount of payment is still too high, it is important to note that debt relief measures may or may not be accepted by the lender); giving in payment (applicable to debtors who did not benefit from the two previous measures, it is noteworthy that in this case the creditor is obliged to accept the payment made with the right to the property).

The analysis of the Spanish regulation shows us that the pay-out procedure can only be applied if the banks have adhered to the Code of Good Practice. Then, this possibility of extinguishing the payment obligation is established as a last resort for consumers in difficulty.

²⁴ Mădălina Popa, Ioana Deju, 'Darea în plată – debitorul inoportun la "supa cu grimase"' (Centrul Robertianum 25 october 2016) <www.centrulrobertianum.ro/scoala-dreptului-organic/prelectiuni.html> accessed 5 November 2018.

5.2 French Law

At a first glance over the matter, it could be said that the French legislator carries out the same struggle with that of the Romanian legislature in order to protect those who cannot pay their credits. The legislator provided various legal measures to help the debtor of the obligation to repay the real estate credit. These legal measures help the debtor to execute his obligation under the real estate loan contract, intervening if his patrimonial situation does not allow him to cope with the manner of execution initially foreseen.

A more detailed look over the matter, however, shows that the French legislature seems to have adopted a more nuanced attitude than that of the Romanian legislature. The panoply of legal measures meant to help the debtor fulfil the repayment obligation resulting from the real estate credit contract being organized revolves around two elements. First of all, these measures take into account the possibility of obtaining an agreement on the part of the contracting parties with a new way of executing the contract in the event of difficulties of reimbursement by the debtor. We are talking here of a conventional debt extinction, when the agreement of the contracting parties for such execution or a conflictual withdrawal from debt is obtained when such an agreement was not possible. Second, the legal measures envisaged to help the debtor fulfil his repayment obligation take account of his indebtedness, French law distinguishing between the indebted debtor, the excessively indebted debtor, the excessively indebted and insolvent debtor.²⁵

If all these legal measures contribute to the good execution of the real estate credit contract in case of difficulties, only some of them resemble the solution retained by the Romanian legislator in the law of giving in payment, while others have a notable difference in the report with the mechanism of the previously mentioned law. That is why we chose to present, in the first part, the measures that, despite the differences that it presents *vis-a-vis* the solution of the Romanian law, participate in the creation of a set of legal rules protecting the debtor of a real estate credit contract, while, in a second part, we will analyze the measures that resemble the solution of the giving in payment law.

5.2.1 Legal Measures of French Law Differing from the Mechanism Provided by the Giving in Payment Law

French law has legal provisions on the legal protection of the debtor of a credit agreement, based on the agreement between the contracting parties. These measures are, in practice, aimed at ensuring that the debtor's repayment obligation is fulfilled despite difficulties encountered during the performance of the contract.

The measures can, therefore, look either at the indebted debtor or at the excessively indebted debtor. In what concerns the indebted debtor, the extinction of his credit repayment obligation is performed by renegotiating²⁶ the contract with the credit institution to modify the conditions for the execution of the credit agreement such as its duration, interest or rates. In this respect, Art. L. 313–39 of the French Consumption Code provides that in case of renegotiation of the loan, the changes to the original loan agreement must be inserted in the form of an additional act. This law only targets the primary consumer debtor and not the guarantors, the solution being criticized in the prospect that if the situation of the principal debtor is improved when the contract is renegotiated, the guarantor's obligation should be reduced, correlatively.

When the debt situation concerns an excessively indebted debtor, partially reformed by the entry into force of Law No. 2010-737 of 1 July 2010,²⁷ there is a procedure for the conventional extinction of the obligation of reimbursement under the authority of the Commission on excessive indebtedness of private individuals (Commission for *surendettement des particuliers*) and which can also benefit the debtor of a real estate contract. If, under this procedure, an agreement is obtained both on behalf of the debtor and its creditors, a conventional recovery plan for the debtor-consumer of real estate credit can be achieved. Two conditions are required for the Commission to initiate this procedure: first, the consumer must be excessively indebted²⁸ and, second, it must be in good faith. The French Consumption Code provides that the Commission's decision declaring admittance of the claim made by the debtor leads to the suspension and prohibition of all enforcement procedures regarding the debtor's assets and the payments accepted by the debtor regarding other claims besides food. Therefore, the creditors can no longer carry out any forced

²⁵ Stéphane Piedelievre, 'Droit de l'exécution' (Thémis, Droit, PUF, Paris, 2009); Denis Mazeaud, Stéphane Piedelievre, 'Crédit immobilier' [April 2016] Répertoire de droit immobilier 147.

²⁶ RTD civ. 2003, 521, obs. Gautier.

²⁷ For the situation before the reform, see Rémy CABRILLAC 'Conditions d'ouverture d'une procédure de surendettement des particuliers et couples mariés', in *Études de droit de la consommation, Liber Amicorum Jean CalaisAuloy* (Daloz, 2004) 217.

²⁸ Article 711-1 of the French Consumption Code provides that the excessive indebtedness of the individual is characterized by the inability of the good faith debtor to deal with all his non-professional, exigible and liquid debts.

execution on the debtor's assets, but at the same time the latter can no longer make any act of disposition regarding his patrimony,²⁹ except for the authorization of the judge, being hit by a kind of incapacity for the entire period of suspension of forced execution procedures. If the Commission carries out its mediation mission, a conventional recovery plan of the debtor will be carried out, a plan that is basically a new credit agreement between the debtor and the creditors who signed it. Art. L. 733-1 of the Consumption Code provides that the plan may include measures of rescheduling of payment, forgiveness of debt, reduction or total removal of interest.

These measures do not necessarily imply that the creditor is not fully repaid of his claim, since the guarantor's duty is not affected by the success of the procedure provided for in Art. L. 731-1 et seq. of the Consumption Code. In this respect, the solution of the first civil court of the Court of Cassation of 13 December 1996³⁰ is clear: the guarantor can not take advantage of the measures accepted by the lender for the principal debtor under the conventional plan elaborated in the mediation phase. The guarantor's debt is therefore not affected by the principal debtor's obligation and the creditor may thus claim the full payment of the debt. The problem is that this solution, as shown in the specialty literature,³¹ seems to forget about the *accessorium sequitur principale* rule, which is still the essence of the guarantee. Moreover, it sacrifices the interest of the guarantor who supports the consequences of this procedure and implicitly the risk of a possible excessive indebtedness of the debtor. At the same time, the solution leads to a weakening of the purpose of the conventional recovery plan in the sense that the guarantor who has paid the debt to the creditor will bring a personal action against the principal debtor, which threatens the extinction, initially decided, of the debtor's debt.

We must not forget at the same time that the purpose of the procedure before the Commission is to fight against the precariousness and social exclusion of the excessively indebted debtor. The measures taken in this regard must therefore be regarded as having a strictly personal application and the effects of the procedure should not be extended to the debtor's guarantees.

To sum up, even if these measures do not resemble the *datio in solutum* mechanism, they nuance and complement the legal protection of the debtor-creditor in a real estate credit contract, taking into account the situation in which the parties agree to modify the reimbursement method of the borrowed amount. From this point of view, the legal measures that resemble the mechanism provided by the law of giving in payment concern precisely the contrary situations in which no agreement is reached or no agreement is necessary.

5.2.2 Legal Measures of French Law Similar to the Mechanism Provided by the Giving in Payment Law

The legal measures of French law that may be considered to resemble the mechanism provided for by the Giving in Payment Law concern the assumptions in which the parties' agreement is not necessary, and sometimes is even against their will, in order to execute the obligation to repay the credit in a way different from the one originally established through the real estate credit contract. We are talking about conflicting debt extinction in this case.

However, of all these measures, only one, specific to the debtor of the real estate credit contract, can be considered as the twin, as imperfectly identical, the mechanism provided in the Giving in Payment Law. This does not prevent us from presenting the less similar solution regarding the situation in which the debtor of a real estate loan can no longer meet the obligation to repay the installments in the way initially stipulated and which, according to Art. L. 724-3 of the Consumption Code, may ask the judge to grant a grace period. If the judge deems justified both the situation of the debtor of the repayment obligation and the needs of his creditors, he may first, for a period of two years, give the debt to be carried over or redeployed, while the forced execution is suspended. The judge may also decide that the interest is reduced or even eliminated, or that the interest rates are mainly imputed to the capital.

Finally, the French solution of the Giving in Payment Law, is the case when the debtor of a real estate loan is in a situation of excessive indebtedness. Thus, in such a situation, the debtor has the possibility to ask the Commission for over indebtedness to carry out the excessive indebtedness procedure.³² If, at the end of

²⁹ French Consumption Code, Art. L. 742-9. Thus, the sale of the real estate that it has purchased due to the real estate loan is unthinkable; the creation of a new warranty on this good is, as well, impossible.

³⁰ Denis Mazeaud, 'Note sous Cass. civ. 1re, 13 November 1996, nr 94-12.856' (1997) *Dalloz* 141.

³¹ Valérie Avena-Robardet, 'Surendettement des particuliers' (*Dalloz*, coll. *Dalloz action*, 4^e éd. 2012).

³² Jérôme Julien, 'L'évolution des procédures de surendettement' (2012) *RD banc. et fin.* n° 3, 83.

the mediation phase, the Commission finds that no agreement has been reached between the debtor and its main creditors and that, as a consequence, the development of a recovery plan is impossible, it will issue recommendations to address the excessive debt of the debtor. It should be noted that Law No. 2010-737 of 1 July 2010 reformed the matter by widening the range of measures that can be taken by the Commission, while the legal guardianship remains in the case of the most important measures.

The recommendations presented by the Commission³³ can be classified into recommendations subject to approval by the judge and recommendations for which such approval is not necessary. If the recommendations do not require approval, the judge checks only their legality, not exercising, in this sense, a real control on the merits. He will therefore only check whether the recommendations were formulated by the Commission in accordance with the dispositions of the Consumption Code. Art. L. 733 et seq of the Consumption Code, and on the other hand, list the measures for which the judge's approval is required, the latter examining, besides the legality of the recommendation, also its legal basis.³⁴

Irrespective of whether the change in the manner in which the debtor's repayment obligation is executed under the authority of the Commission or the judiciary, the measures taken may be common to all excessively indebted borrowers but also specific to the debtor-consumer, part of the real estate credit agreement.

The measures in the first category are limited by Arts. L. 331-7 and L. 331-7-1 of the Consumption Code. The list is therefore exhaustive, neither the Commission nor the judge is free to decide on a measure that is not on that list, such as a total debt forgiveness.³⁵ So what are the limitations provided by the Consumption Code? Three measures common to all excessively indebted debtors are laid down in Arts. L. 331-7, para. 1, 2o, L. 331-7, para. 1, 3o and L. 331-7-1, 2o of the Consumption Code. It is possible to extend the debt repayment term contracted by the indebted debtor in the form of a simple rescheduling or rescheduling combined with a rate reportage. The transfer of rates leads to a debt suspension and a prolongation of the real estate credit agreement until the date fixed by the Commission or by the judge. At the end of the period of suspension of the debtor's performance of the repayment obligation, the debt will become liquid and exigible. Rescheduling future rates consists of recalculating credit rates according to the new loan depreciation period.

Other measures common to all the excessively indebted debtors can either look at debt reduction by eliminating interest³⁶ or partial debt forgiveness.³⁷

With regard to the excessively indebted real estate credit consumer, the French legislature provided a specific measure characterized by a reduction in capital debt. In this respect, the Consumption Code provides that the measure may be granted to the debtor in the case of the forced sale of the principal dwelling (...), encumbered by a mortgage benefiting a credit institution which has made available the sum necessary to acquire it and consists in the reduction of the debt by deducting from the due capital the selling price of the building, insofar as its payment, accompanied by the reallocation calculated in accordance with para. 1^o of Art. L. 733-4 of the Consumption Code, to be compatible with the debtor's income. This measure is also applicable to amicable sales, agreed by the debtor and the credit institution, to avoid forced execution.

These provisions must be invoked within two months from the date of the debtor's notification of payment of the remaining amount of the owed property, unless the Commission has been appointed by debtors in order to carry out the procedure for the excessively indebted.

In order to better understand the underdevelopment of this measure, it is necessary to analyze both its scope and its legal regime. Determining the scope of the special measure provided in the case of the excessively indebted debtor implies some clarification regarding the persons concerned by the legal text and the meaning of the legal terms used in the drafting of this law.

Regarding the persons addressed by the law, it should be noted that they are represented exclusively by debtors who are indebted to a contract of credit (real estate contracts). It is only about that consumer-borrower in the real estate credit contract that occupies the house he bought with the amount of money he himself borrowed from the credit institution. Thus, the members of a real estate civil society can not claim protection of this measure even if they were occupying the property sold, since only the company, in its capacity as a legal person carrying out a professional activity and not as a natural person, had borrowed the funds for home purchase.

³³ Denis Mazeaud, Stéphane Piedelièvre, *op. cit.* 144.

³⁴ French Consumption Code, Art. L. 733.1.

³⁵ Cour de Cassation, Première chambre civile, 8 November 1994, nr 92-04.125, (19994) *Defrénois* 352, obs. Dennis Mazeaud.

³⁶ French Consumption Code, Art. L. 733-4 1^o.

³⁷ French Consumption Code, Art. L. 733-4 2^o.

And the notion of the main house, the object of the sale, had to be clarified by jurisprudence, which decided that it is necessary for the indebted debtor to live effectively in the main dwelling at the time of this sale.³⁸ The measure can not therefore be applied when the dwelling was leased by debtors to a third party at the time of sale,³⁹ or when that dwelling was merely intended to become the main home of the debtor who, at the time of sale, lived elsewhere.⁴⁰

It should also be noted that not every type of sale of a major home of the excessively indebted real estate credit consumer may lead to a reduction in its debt. It must either be a forced sale or an amicable sale intended to avoid forced execution and which has been the subject of an agreement regarding the avoidance of forced execution and the way in which it will be achieved.⁴¹ The conditions for applying the credit review measure are thus not met if the amicable sale was made due to the consumer's personal reasons or if the credit institution agreed only to change the way the debt is repaid.⁴²

Also, the subject of the credit contract must look at the purchase of a main home. However, the Court of Cassation gave a favorable interpretation to the consumer (a solution also adopted in the Romanian law on giving in payment in Art. 4, para. 1, letter c) that the measure may be adopted if the loan concerned only simple works of the building and rehabilitation of the building.⁴³

Two elements need to be clarified in relation to the legal regime of the specific measure provided for in the case of the excessively indebted debtor under a real estate credit contract: the term and the ways of executing the debt. First of all, the period within which the debtor can act to obtain the reduction of the amount due from the real estate credit is two months from the moment of receipt of the notification of reimbursement of the remaining amount. However, if within this period the Commission for excessive debt of individuals is notified in order to start the excessive indebtedness procedure, the debtor will be able to file the debt reduction claim until the end of the procedure. This rule is quite different from the previous one, which provided that the debtor had to submit the application within one year from the day of the sale or from the moment the Commission was notified. Also, with regard to debt reduction methods, the law specifies that the sale price will be deducted from the remaining capital due, the solution being part of the French legislator's fight against interest accumulation. In addition, the judge can not infringe the rights of creditors holding a real guarantee, such as a mortgage, their right of preference being respected. In a general manner, the procedure does not influence the order in which creditors will be paid: mortgage lenders will have preference in relation to the chirographs.

This method of repayment of the remaining debt may be accompanied by the remedy provided for in Art. L. 733-4 1^o of the Consumption Code, which provides that the debt thus reduced may be redeployed for a period not exceeding eight years; or half of the overdue term of the initial period for repayment of the real estate credit. At the same time, the debtor may also benefit from the debt reduction measure, the only criterion taken into account by the judge is the compatibility of the reduced debt with the income and maintenance obligations of the excessively indebted real estate credit consumer. Therefore, the debt reduction of the debtor must be made in such a way as to allow the payment of the remaining but rescheduled fraction to be compatible with the debtor's income, up to the last rate. The Court of Cassation went even further considering that the overdue amount can be not only reduced but even totally forgiven if this measure is compatible with the indebted debtor's economic situation.⁴⁴ This solution therefore expresses the point of difference of treatment between the common law debtor and the debtor of a real estate credit contract, in the first case, as mentioned above, neither the Commission nor the judge have the freedom to decide on a measure that is not on the limitation list provided for in Art. of the Consumption Code.

This measure specific for the discharge of the debt of the debtor-consumer receiving a housing loan and being excessively indebted can not be opposed by the first to the guarantor, after paying the creditor, exerting a personal action against the debtor for whom he guaranteed.⁴⁵ Thus, if the debt relief measure affects the creditor's claim, it does not affect the claim the guarantor has against the debtor he has guaranteed.

³⁸ Cour de Cassation, Première chambre civile, 19 mai 1999, no 97-04.149, (1999) D. Affaires 1069.

³⁹ Cour de Cassation, Première chambre civile, 21 février 1995, no 93-04.050, (1995) RTD com. 480, obs. Paisant.

⁴⁰ *Ibid.*

⁴¹ Cour de Cassation, Première chambre civile, 13 juin 1995, no 93-04.247, (1995) Dalloz 199.

⁴² Cour de Cassation, Première chambre civile, 21 mars 1995, no 93-04.165, (1995) Dalloz.

⁴³ Cour de Cassation, Première chambre civile, 2 mai 1994, no 09-40.004, (1994) RTD com. 554, obs. Paisant.

⁴⁴ Cour de Cassation, Première chambre civile, 31 mars 1992, no 90-04.023, (1992) RTD com. 678, obs. Paisant.

⁴⁵ Cour de Cassation, Première chambre civile, 15 juillet 1999, no 97-04.129, (1999) Defrénois 1336.

6 Conclusions

A *sine qua non* condition applying to the *datio in solutum* procedure is the proof of the debtor's impossibility to pay; a condition confirmed by the Romanian Constitutional Court by Decision No. 623/2016, para. 100, stating that according to the constitutional and legal architecture, in the event of a misunderstandings between the parties, the assessment of the existence of the unexpected situation (objective condition) and its effects on the execution of the contract, the good faith in the exercise of the contractual rights and obligations of the parties (subjective conditions) as well as equity (which involves both an objective and a subjective one) must be carried out with the utmost rigor and falls to the Court, a body that enjoys the guarantee of independence and impartiality and which, in this way, acquires an important role in determining the conditions for the execution of the contract. The consequence of taking the criterion of good faith into account is a widening of the role of the judge in the contract, but legal certainty will not be jeopardized, as judicial intervention is limited by the fulfillment of the conditions specific to the contractual imprevision.

The natural consequence of the analyzed Constitutional Court decisions is that the legislator can not directly apply the contractual imprevision for a certain category of contracts, such as the consumer credit contract, in the form of the loan. Such an intervention by the legislator, made by the Giving in Payment Law, is unconstitutional. In this respect, in the motivation of Decision No. 623/2016, it is emphasized that the legislator has configured the legal framework represented by Law No. 77/2016 taking into account an *ope legis* applicable to all ongoing credit agreements deforming the conditions for the application of unpredictability. Thus, the only interpretation underlying the constitutional framework in the case of a general rule of imprecision in the execution of credit agreements is that the Court, in the absence of agreement between the parties, has the power and obligation to apply the institution of imprevision if it finds that its conditions exist. The Court reiterates that, in relation to the legal framework existing at the time of the conclusion of credit agreements, the legal provisions criticized must apply only to debtors who, although acting in good faith, are no longer able to fulfill their obligations resulting from credit agreements following an external event and which they could not foresee at the conclusion of the credit agreement. As a result, in the future, the Romanian legislator will have to take into account that it is unconstitutional any attempt to apply the law of the institution of improvision to an entire category of contracts, regardless of their nature, by removing the role of the judge, the only one who enjoys the power to analyze in particular, in a present case, independently and impartially, to what extent the necessary conditions for the imprevision are proven and which are the most appropriate solutions for the rebalancing of the parties' benefits.

The French legislator provides for more specific measures concerning the obligation of reimbursement of a housing loan only if the parties fail to reach any agreement with the creditor after the proceedings before the special Commission on the indebtedness of individuals. Additionally, the debt forgiveness, following the sale, whether forced or not, of the mortgaged real estate, is exceptional, given the priority of the redeposition of the debt or its possible reduction depending on the debtor's income. At the same time, the French legislator provided clear and restrictive conditions for the application of this measure, which eliminates (or greatly reduces) the possibility of possible abuses from the debtor and which, in the future, could prove to be a better model for the EU Member States.

Competing Interests

The author has no competing interests to declare.

How to cite this article: Codrin Macovei, 'Highlights of the Romanian Perspective of Datio in Solutum for Consumer Borrowers' (2019) 24(1) *Tilburg Law Review* pp. 89–104, DOI: <https://doi.org/10.5334/tilr.136>

Published: 21 February 2019

Copyright: © 2019 The Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited. See <http://creativecommons.org/licenses/by/4.0/>.



Tilburg Law Review is a peer-reviewed open access journal published by Ubiquity Press.

OPEN ACCESS