

SUBMISSION BY THE OPEN SOCIETY JUSTICE INITIATIVE, CENTRUL ROMAN DE POLITICI EUROPENE, CREDERE, AND ALEXANDRA BURADA TO THE INDEPENDENT EXPERT ON THE EFFECTS OF FOREIGN DEBT AND OTHER RELATED INTERNATIONAL FINANCIAL OBLIGATIONS OF STATES ON THE FULL ENJOYMENT OF HUMAN RIGHTS IN RELATION TO HIS THEMATIC REPORT ON PRIVATE DEBT AND HUMAN RIGHTS

31 July, 2019

Introduction

This submission is based on our experience providing legal representation and legal information to people in mortgage distress, advocating on their behalf, and conducting research. The submission includes an illustrative case study, an analysis of EU law in relation to mortgage debt, and recommendations for Romania.

A Case Study:

The case study below illustrates the plight of tens of thousands of people in mortgage distress in Romania who took out Swiss Franc denominated mortgages during the lending boom of the mid-2000s, attracted by low interest rates, only to be plunged into deep debt by the shift in currency exchange rates.

When Razvan and Filomela Bucur, a Romanian couple working as illustrators, took out a mortgage to purchase a home in 2007, they borrowed the equivalent of approximately 80,000 EUR. Despite making payments for years, the couple's credit balance has soared to over 145,000 EUR—an 80 percent increase. When their monthly payments increased by 250 percent, the Bucurs were no longer able to pay the full amount owed each month.

The reason for this staggering increase is that the Bucurs took a foreign exchange loan denominated in Swiss Francs. When the exchange rate changed, the size of their debt grew dramatically in relation to the local currency, the Romanian lei. The two artists, along with their son and Ms. Bucur's father who suffers from Alzheimers', are now on the brink of losing their home of 11 years.

The Bucurs' lawyer Alexandra Burada, is fighting an application for forced execution with support from the Open Society Justice Initiative (OSJI)¹. The Bucur's case challenges wide-spread human rights concerns arising in connection with mortgage loans in Romania.

Consumer and Human Rights Protections under EU Law

EU law contains consumer protection and human rights defenses applicable to people in mortgage distress that Romanian courts are not enforcing. The EU's Unfair Contract Terms Directive (UCTD)ⁱ aims to protect consumers against abuses of power by sellers or suppliers and, in particular, against standard terms in contracts that have not been individually negotiated, including mortgage agreements.ⁱⁱ The CJEU has also held that domestic courts must carry out an own motion assessment of the terms of the contract for fairness. Article 7 of the UCTD requires that Member States ensure that "adequate and effective means exist to prevent the continued use of unfair terms in contracts."

When states are acting within the scope of EU law, as they are when implementing the UCTD, the EU Charter of Fundamental Rights (CFREU) applies (Art. 51). Among other rights, the Charter assures the right

¹ The Open Society Justice Initiative's Abusive Lending Practices Project began to engage in Romania in 2018 with the goal of ensuring that the Romanian courts apply EU consumer and human rights law in possession cases.

to an effective judicial remedy (Art. 47 CFREU) and the right to respect for one's private and family life (Article 7 CFREU), which includes the right to respect for one's homeⁱⁱⁱ. In fact, the CJEU has applied the rights in Article 7 CFREU in mortgage consumer law cases. In Case C-34/13, *Monika Kušionová v SMART Capital as*, the CJEU held (at paras 63–65) that “the loss of a family home is not only such as to seriously undermine consumer rights (...), but it also places the family of the consumer concerned in a particularly vulnerable position”. This case stands for the proposition that domestic courts must ensure that possession is a proportionate response to the breach^{iv}. Criteria for determining proportionality were developed in social housing cases brought under Article 8 of the European Convention on Human Rights (ECHR). This body of law is also applicable in EU-law judgments^v. Amongst other things, the ECHR has considered the following factors to be relevant in determining the proportionality of an eviction case:

- individual's: identity, self-determination^{vi};
- physical and moral integrity;
- ability to maintain relationships with others and have a settled and secure place in the community;
- the extent of the intrusion into the personal sphere of the applicant;
- age and health.^{vii}

In *Ceesay v Spain*^{viii}, a case involving social housing, the European Court of Human Rights also took a proactive approach, requesting the details of what housing and social care arrangements the State of Spain was making for a household with children who were being evicted from a squatted property owned by a Spanish nationalized bank.

The Failure of Romania to Protect Human Rights

Borrowers' human rights^{ix} are systematically violated in Romania as summary court procedures and excessive court fees make it virtually impossible for people to challenge forced execution in their cases. Borrowers like the Bucur's receive notice by mail of the lender's intent to seek an order for forced execution and have fifteen days to hire a lawyer to file a challenge. Along with their written submission, borrowers must pay a stamp duty amounting to a percentage of the value of their home to stay execution. For instance, based on a valuation of their home, the Bucurs had to pay approximately 3,500 Euros to even mount a legal challenge to the loss of their home. The cost of paying the fee is prohibitive for most borrowers. When borrowers do not mount a challenge, the execution order is automatically granted if the paperwork is in order—despite the clear mandate in EU law that judges conduct own motion assessments for unfair terms before taking away people's homes.

Even when borrowers are able to file a court submission and challenge forced execution, Romanian judges still fail to comply with their EU law obligation^x to conduct own motion assessments for unfair terms. When borrowers themselves raise unfair terms in their mortgages, there is a lack of consistent judicial interpretation of unfair terms to borrowers with mortgage loans. Towards the end of 2018, the Romanian Parliament modified the Code of Civil Procedure. Thereby, the institution of "challenge of enforcement" was dramatically changed to the detriment of the consumers. Under the new law, if the consumer challenges the enforcement, throughout this procedure he can't request the court to eliminate the unfair terms and he must open a separate trial only for unfair terms.^{xi}

For the reasons outlined above, the current procedure governing forced execution cases does not provide borrowers with the opportunity to argue that eviction is not a proportionate response to the breach and raise human rights defenses.

Government Emergency Ordinance (GEO) no. 50/2010,^{xii} eliminated some of the shortcomings of the regulatory response to unfair loans. From 2010 onwards, banks and other financial services providers were required to make addenda to their credit agreements in order to comply with the ordinance. Of course, abusive practices and terms did not cease all at once, but a decrease was significant and visible.

Nevertheless, one of the most problematic aspects of many mortgage agreements, the exchange rate risk, which is usually entirely born by the consumer, has yet to be regulated in Romania.^{xiii} Moreover, borrowers' circumstances have been aggravated by the more than 50 percent decrease in the market value of the mortgaged property, which makes it impossible to repay the loan even in the case of foreclosure. Importantly, personal bankruptcy, which would probably be the most appropriate solution for such situations, exists under Romanian law, but in practice is not available to borrowers due to a lack of rules for the implementation of associated legislation.^{xiv}

Under social and political pressure, the Romanian Parliament adopted Law no. 77/2016 on *datio in solutum* or debt discharge. In theory, this regulatory act provides the consumer with an alternative for resolving their cases and staying in their homes.^{xv} Unfortunately, Romanian Courts are not granting borrowers the relief available under this law. Anecdotal evidence suggests that fewer than 20% of borrowers are successful in their claims.

The Widespread Consequences of Romania's Failure to Protect Human Rights:

The Bucurs' mortgage is just one of the many thousands taken in the 2006-2008 period, during which banks granted the largest number of mortgage loans ever granted in Romania. During this time, banks aggressively promoted foreign currency loans without adequately explaining the risks or assessing the ability of borrowers to pay these loans back when the currency rate fluctuated.

Following the 2008 global financial crisis, many consumers were doubly hit in Romania, suffering not only from the consequences of an economic recession but also from the extreme currency fluctuation (the Swiss currency has strengthened by over 50% against the euro since 2007). Some of these mortgages also contained variable interest rates that were not indexed. As a result, there have been massive rates of default and a considerably high rate of forced execution procedures.

Official statistics indicate that household indebtedness continues to increase in Romania and tens of thousands of Romanians still owe more than 30 billion lei (or approximately 6,336,000,000 EUR) under mortgage-secured loans with nearly a third of borrowers with housing loans earning low incomes. At the same time, non-performing housing loans are on the rise, leading to home foreclosures and transfer of property ownership rights to lenders.

According to the 2017 Report of the National Committee for Macprudential Oversight (CNSM) in Romania,^{xvi} **in 2017, total household indebtedness was on the rise, increasing by 8.1 percent from the previous year** amid the further swift-paced growth of bank lending, which was up by 7.5 percent. The stock of household non-performing loans continued to decrease in 2017 (at a slower pace than before) from 7.1 percent in December 2016 to 5.5 percent in December 2017. The number of new debtors with overdue payments of more than 90 days has decreased in the case of housing loans and mortgage-secured consumer loans (by 19 and 31 percent, respectively).

The Stability Report of the National Bank of Romania (BNR) of December 2018 shows the total household debt continued to grow in 2018 at a sustained pace, up 8.3 percent, to 147 billion Lei in June 2018.^{xvii} BNR

statistics also indicate that the number of mortgage-backed loans and the amount owed under them gradually decreased from 130,845 loans and 46,711,732,881 lei owed in 2015 to 74,725 loans and a debt of 34,851,086,010 lei in 2018.^{xviii}

Regarding the debt-service-to-income ratio, in its 2017 Report, the BNR states that “a significant number of households report worrying indebtedness levels in the event of adverse developments, considering that 29 percent of the debtors with housing loans earn incomes between the economy-wide minimum wage and the economy-wide average wage.” Therefore, the European Systemic Risk Board (ESRB) deemed that the indebtedness level of low-income borrowers exceeded half the income in 2017, reaching an alert level.^{xix}

According to the annual BNR Report for 2017, the analysis of the estimated household loan probability of default for December 2017-December 2018 shows an increase of non-performing housing loans. Additionally, data from the BNR demonstrate that between September 2016 and September 2018, the enforcement of nearly 1,000 mortgage-backed loans led to the foreclosure of residential buildings.^{xx} BNR data also reveal that until 2018, more than 8,000 borrowers gave notice of intention to discharge their debt under Law no. 77/2016 on debt discharge.^{xxi}

Recommendations:

In light of the foregoing, the submitters recommend that:

- The Romanian legislature amend the civil procedure code to require that courts consider and respect EU consumer law and human rights defenses available to borrowers with mortgage loans under EU law and explicitly require that judges comply with their EU law obligations to review loan documents on their own motion and void unfair terms in *datio in solutum* (debt discharge) and forced execution (possession) cases, and conduct proportionality assessments to ensure that eviction is a proportionate response to the breach by the borrower;
- The Romanian legislature amend the *datio in solutum* law to clarification of the conditions to which is applies.
- The Romanian legislature take steps to meet its EU obligation to ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts as required by the UCTD by, for instance, legislating the creation a database of terms deemed unfair and to harmonize judicial practices in forced execution and *datio in solutum* cases.
- The Romanian National Consumer Protection Authority ensure that the Bankruptcy of Natural Persons Act is operationalized through the creation of implementing rules and creation of insolvency commissions.

Submitted by:

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ⁱ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

ⁱⁱ For Spain, see for example: Judgment of 14 March 2013, *Aziz*, C-415/11; for Slovakia, see: Judgment of 10 September 2014, *Kušionová*, C-34/13; for the Czech Republic, see: Judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14; for Romania, see for example: Judgment of 3 September 2015, *Costea*, C-110/14; for France, see: Judgment of 23 April 2015, *Van Hove*, C-96/14; for Hungary, see for example: Judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13.

ⁱⁱⁱ Other relevant fundamental rights from the CFREU include the right to human dignity (Art. 1); rights of the child (Art. 24); rights of the elderly (Art. 25).

^{iv} Case C-34/13, *Monika Kušionová v SMART Capital*, p. 63.

^v Art. 52(3) of the Charter of Fundamental Rights of the European Union.

^{vi} In *Yordanova and Others v. Bulgaria* (Application no. 25446/06).

^{vii} *Bjedoc v Croatia* (Application No. 42150/09) 29 August 2012.

^{viii} *Ceesay and Others v Spain*, (App. No 62688/13), Interim Decision 15 October 2013.

^{ix} These include the following provisions of The Charter of Fundamental Rights of the European Union (CFREU), most of which are protected under other regional and domestic laws: Art.1 (human dignity), Art. 7 (respect for private and family life, interpreted by the CJEU to include the right to accommodation), Art. 33 (family and professional life), Art. 24 (the rights of the child), Art. 25 (the rights of the elderly), Art. 26 (the rights of people with disabilities), Art. 34 (social security and social assistance, including housing assistance, so as to ensure a decent existence for all those who lack sufficient resources), Art. 38 (Union policies shall ensure a high level of consumer protection), and Art. 47 (right to effective remedy and to a fair trial).

^x Pursuant to the Court of Justice of the European Union's interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and the Charter of Fundamental Rights of the European Union. Specifically, in March 2013, the Court of Justice of the European Union (CJEU) ruled in the *Aziz* case that evictions carried out in Spain violated EU consumer protection laws because they did not allow national courts to stop evictions taking place due to possible unfair terms in mortgage agreements. The court concluded that Spain's harsh property repossession laws did not comply with the right to an effective remedy and a fair trial as guaranteed under the EU Charter of Fundamental Rights (Article 47). The *Aziz* case was the first to demonstrate CJEU decisions are capable of addressing (at least part of) the abusive lending problem in Europe. Then in 2014, in two further important decisions, the CJEU applied procedural protections from the Charter to protect consumers' rights (*Morcillo*) and stated that a fundamental right under the Charter—in that case, the right to accommodation (Article 7)—must be considered when member states implement EU law (*Kusionova*).

^{xi} The new law was proposed by the Superior Council of Magistracy because judges were complaining about the complexity of the challenge of enforcement case files. Credeare submitted a petition to the President of Romania requesting a challenge the new regulation at the Constitutional Court, but was unsuccessful.

^{xii} This required that all credit agreements be aligned to the rules and principles laid down by Directive 2008/48/EC on credit agreements for consumers. Moreover, unlike Directive EC 2008/48/EC, GEO no. 50/2010 also covered credits for immovable property.

^{xiii} This is a significant shortcoming given the EUR/RON exchange rate has gone up by some 50 percent since 2006 and the CHF/RON exchange rate by more than 100 percent. Furthermore, the CHF/RON exchange rate significantly

increased in January 2015, following an administrative measure taken by the Swiss authorities, which surprised even knowledgeable consumers.

^{xiv} In Credere's opinion, the personal bankruptcy legislation in Romania was not promoted by the National Authority for Consumer Protection and the law has many gaps. In June 2019, following Credere's request, the National Authority for Consumer Protection responded that only 45 consumers appealed to personal bankruptcy legislation, a year and after the legislation was implemented and none of these cases has been resolved to date.

^{xv} The requirements to be met include *inter alia*: (i) capacity as consumer, (ii) loan not exceeding EUR 250,000 at the time of granting, (iii) loan used for buying a home or to secure debt against a mortgage and (iv) no convictions for offences related to the loan.^{xv} Most consumers meet these requirements.

^{xvi} National Committee for Macroprudential Oversight, Annual Report 2017, available at http://www.cnsmro.ro/res/ups/Raport-anual-CNSM_2017.pdf

^{xvii} National Bank of Romania, Financial Stability Report Year III (XIII), no. 6 (16) December 2018, available at <https://www.bnr.ro/DocumentInformation.aspx?idInfoClass=6896&idDocument=30053&directLink=1>

^{xviii} Data provided by BNR to Open Society Justice Initiative consultant, Romanian Center for European Policies (CRPE):

Year	Number of loans	Amount owed (lei)
April 2015	130 845	46 711 732 881
2016	120 073	49 323 407 950
2017	108 723	50 954 654 863
2018	74 725	34 851 086 010

According to the BNR, information on real property collateral has been reported since April 2015.

^{xix} National Bank of Romania, Annual Report 2017, available at

<https://www.bnr.ro/DocumentInformation.aspx?idDocument=28553&idInfoClass=6874>

^{xx} Data provided by BNR to Open Society Justice Initiative consultant, Romanian Center for European Policies (CRPE):

Year	Number of loans	Amount owed (lei)
2016	236	47 546 251
2017	435	158 114 862
2018	310	187 231 716

According to the BNR, information on foreclosure of real property securities has been reported only since September 2016.

^{xxi} Data provided by BNR to Open Society Justice Initiative consultant, Romanian Center for European Policies

(CRPE):

Year	Total number of loans for which borrowers notified debt discharge	Number of building-secured loans	Number of loans by currency			
			in Lei	in Euro	in USD	other
2016	6 319	3 868	524	2 924	59	2 812
2017	1 442	1 041	131	597	28	686
2018	449	317	54	264	13	118
<i>Total</i>	<i>8 210</i>	<i>5 226</i>	<i>709</i>	<i>3 785</i>	<i>100</i>	<i>3 616</i>