

Financial Services Alert

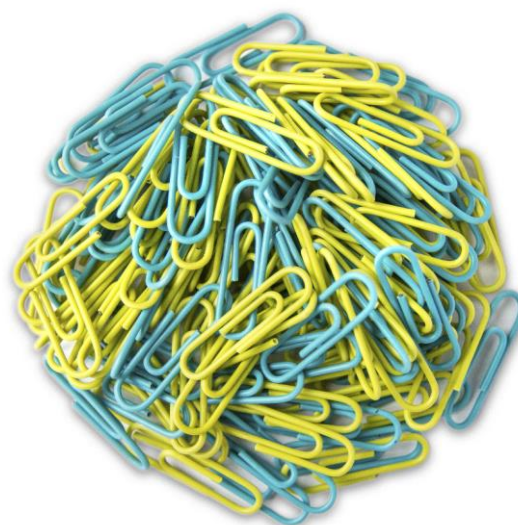
19 January 2017

In this issue:

The Decision of the Romanian Constitutional Court in relation to the Datio in Solutum Law

In the Romanian Official Gazette no. 53 dated 18.01.2017, Part I, was published the Decision of the Romanian Constitutional Court ("RCC") (the "**Decision**") no. 623 dated 25 October 2016 in relation with certain pleas of unconstitutionality related to the Law no. 77/2016 on *datio in solutum* for the extinction of certain obligations deriving from credits ("**Datio in Solutum Law**").

The *Datio in Solutum* Law is a piece of legislation regulating a special mechanism regarding this institution applicable to credit agreements concluded with consumers and subject to certain statutory conditions.



The Decision of the Romanian Constitutional Court in relation to the *Datio in Solutum* Law

1. The RCC's Decision in brief

The RCC has decided that the *Datio in Solutum* Law is partially unconstitutional and that the Romanian courts of law shall apply the hardship conditions when called to decide upon a *datio in solutum* (in English "giving in payment") case based on this law.

2. Main provisions of the *Datio in Solutum* Law

2.1 By way of introduction, the *Datio in Solutum* Law allows consumers to hand in the immovable asset and any other assets, if applicable, subject to a mortgage securing a credit agreement (except for the "*Prima casa*" credit agreements) concluded with a creditor (as defined below), in order to cancel their loan debt (principal and accessories).

The conditions the debtor willing to access this solution needs to meet are:

- The credit agreement is concluded between a consumer (*i.e.* an individual who has concluded the credit agreement outside his professional activity) and a creditor (*i.e.* a credit institution, a non-banking financial institution or the assignees of the receivables related to the credit agreements);
- The value of the credit does not exceed the RON equivalent of EUR 250,000;
- The purpose of the credit is to acquire, build, modernise or rehabilitate an immovable asset used as accommodation, or, independently of the purpose of the credit agreement, it is secured with a mortgage over an immovable asset used as accommodation; and
- The consumer was not definitively convicted for a crime in relation with the credit agreement for which he requires the benefit of the *Datio in Solutum* Law.

2.2 A creditor having received a request for the application of the *Datio in Solutum* Law may either (i) sign in front of a notary public the transfer agreement and release the consumer of all his obligations in relation with the credit agreement; or (ii) challenge the notification from the consumer in a court of law on the grounds that the eligibility conditions under the *Datio in Solutum* Law are not met.

2.3 In case the creditor does not pursue any of the abovementioned solutions, a consumer may file a court claim, requiring a court to pronounce a decision that will replace the transfer agreement and will release the consumer of all his obligations under the credit agreement.

3. The main aspects envisaged in the RCC's Decision

3.1 The RCC has declared unconstitutional the phrase "as well as from the devaluation of the immovable assets" comprised in Article 11, first thesis of the *Datio in Solutum* Law – "*in view of balancing the risks rising from the credit agreement, as well as from the devaluation of the immovable assets, this law is applicable to both ongoing credit agreements [...]*". In deciding so, the RCC has considered that the application of this criteria (*i.e.* the devaluation of immovable assets) independently would cause a breach of the ownership right of a creditor in relation with the amounts it is entitled to receive from the debtor and it is incompatible with the hardship theory to be applied in relation with the *Datio in Solutum* Law.

In practice, this means that, following the RCC's Decision, in case the imbalance between the parties' obligations in relation with the credit agreement is only a consequence of a devaluation of the secured immovable asset and not a

consequence of the risks of the credit agreement, the *Datio in Solutum* Law will not be applicable.

Furthermore, 45 days from the publication of the Decision in the Official Gazette such unconstitutional provisions will no longer produce any legal effects.

3.2 Separately, the RCC's Decision states that the provisions in Article 11, first thesis, regarding the application of the *Datio in Solutum* Law to ongoing credit agreements, are constitutional only if and to the extent that the courts of law will verify the applicability of the hardship conditions.

The RCC highlights that the applicability of the hardship theory derives from the recitals of the *Datio in Solutum* Law and of Article 11, first thesis, which mentions that the purpose of the *Datio in Solutum* Law is to balance the risks under credit agreements. Moreover, the RCC underlines that the courts of law shall verify the incidence of the hardship conditions; the RCC further highlights that should such verification would not be performed and the *Datio in Solutum* Law would apply *ope legis*, it would be a breach of the constitutional provisions regarding the right to a fair trial, as well as those regarding the instrument of justice.

In relation with the applicability of the hardship conditions, we shall distinguish between those credit agreements concluded before 1st of October 2011_(this is the date of the entry into force of the Law no. 287/2009 regarding the Civil Code) and the credit agreements concluded after 1st of October 2011. For the credit agreements concluded with consumers before 1st of October 2011 (which fall under the Romanian Civil Code from 1864) the RCC has stated that, although there was not an express provision in relation with the hardship in the Romanian Civil Code from 1864, the hardship theory would be applicable by way of interpretation of the provisions regarding the execution of the agreement in accordance with the principles of equity and good-faith, and, as such, the courts of law shall apply the conditions envisaged in the legal doctrine in relation with hardship for the credit agreements concluded under the provisions of the Romanian Civil Code from 1864.

This interpretation of the RCC will be mandatory starting with the publication of the Decision in the Official Gazette and, consequently, the courts of law will analyse, apart from the conditions specifically regulated in the *Datio in Solutum* Law, the applicability of the hardship conditions.

3.3 The RCC has rejected the plea of unconstitutionality in relation to Article 11, first thesis in correlation with Article 3, first thesis, as well as Article 11, second thesis of the *Datio in Solutum* Law – the application of the *Datio in Solutum* Law to the agreements concluded after its entry into force, as inadmissible, in consideration of the fact that the plea of unconstitutionality was raised in relation with credit agreements concluded under the Romanian Civil Code from 1864 and the derogation stated under Article 3, first thesis refers to the Law no. 287/2009 regarding the Civil Code, which is not applicable to these agreements.

3.4 The RCC has rejected the plea of unconstitutionality in relation to the provisions of Article 11, first thesis, in correlation with the others articles, as ill founded, underlining that the Romanian legislator may, in view of the constitutional provisions, establish the content and the limitations of the ownership right, but such limitations are not equivalent with the suppression of the ownership right. Furthermore, by reference to the hardship theory, it is not actually a limitation of the ownership right, as the adaptation/the termination of the credit agreements does not have such effect.

For further questions regarding the aspects mentioned in this alert, please contact us.

Andrei Burz-Pînzaru

Partner Reff & Associates

+40 21 2075 205

aburzpinzaru@reff-associates.ro

Alina-Mara Tihan

Senior Managing Associate Reff & Associates

+40 21 2075 405

atihan@reff-associates.ro



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