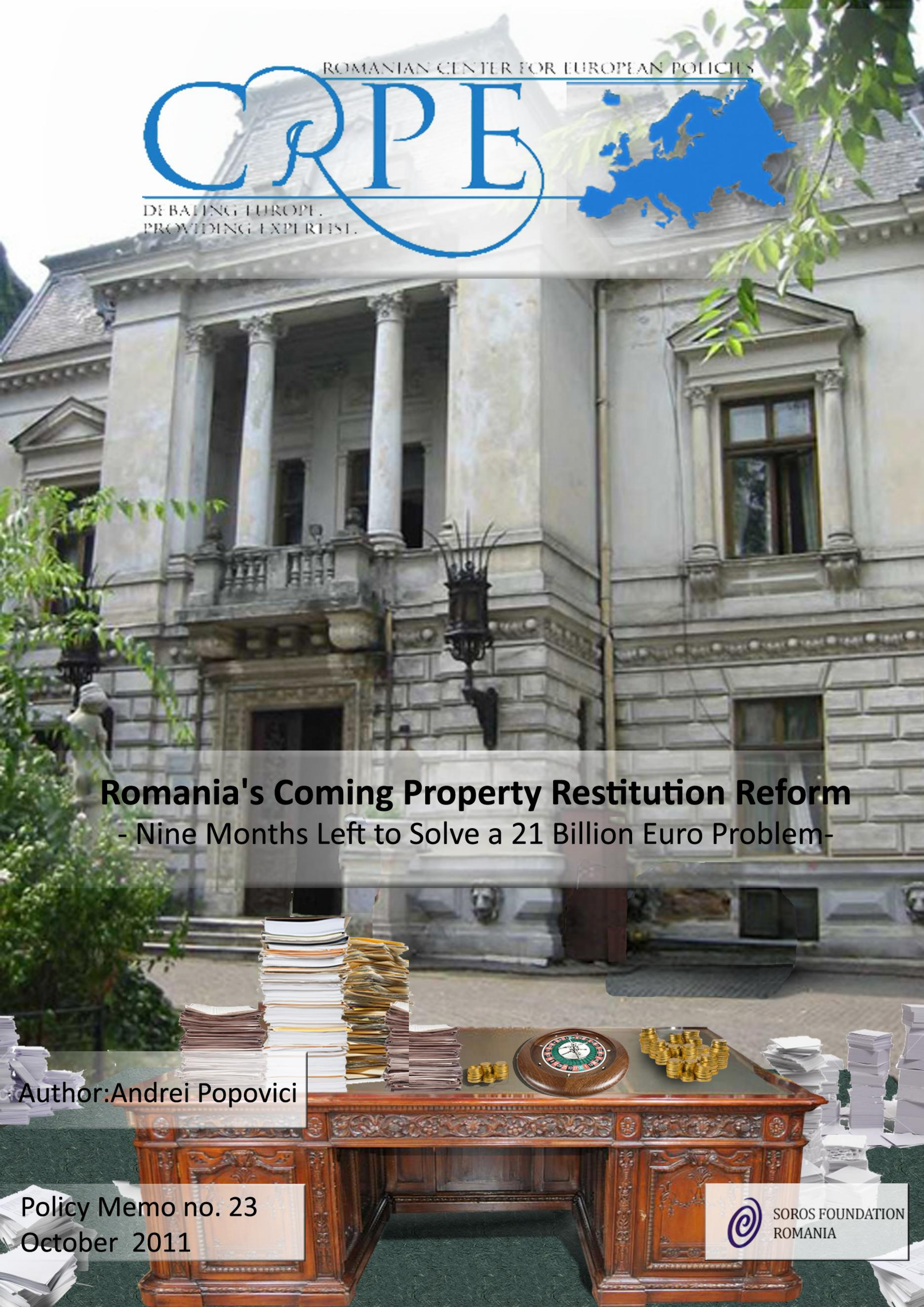

ROMANIAN CENTER FOR EUROPEAN POLICIES

CRPE

DEBATING EUROPE. PROVIDING EXPERTISE.

Romania's Coming Property Restitution Reform

- Nine Months Left to Solve a 21 Billion Euro Problem-

Author:Andrei Popovici

Policy Memo no. 23
October 2011

SOROS FOUNDATION ROMANIA

TABLE OF CONTENTS

Introduction

Romania is the number one violator of the right to the protection of property among the 47 nations of the Council of Europe. It is the third biggest violator of the right to a fair trial, after Russia and Ukraine. The root cause of these unfortunate accolades is Romania's property restitution and compensation mechanism. The dysfunctional system has consistently failed to provide swift or predictable outcomes for the victims of Communist-era property nationalization, leading to over 255 violations of the European Convention on Human Rights since 2005. In October 2010, the European Court of Human Rights exhausted its patience and filed its first pilot judgment against Romania.

The ruling in *Maria Atanasiu and Others vs. Romania* identified the "systematic" nature of Romania's problems and gave Romania 18 months to fix its restitution system. The ECHR has stopped ruling in individual cases, as it awaits systematic policy change. Thus, it has frozen 644 other Romanian property restitution cases on its docket, in the hopes that sufficient domestic reforms will preempt the need for copy and paste trials in Strasbourg. The total number of beneficiaries of such reforms would be much greater: nearly 100.000 restitution claims remain to be processed, and likely even more will be entitled to some form of compensation. With the government claiming that the total cost of compensation will reach 21 billion euros in a season of fiscal austerity, reform measures may include controversial reductions in compensation amounts already promised to dispossessed owners.

The clock began ticking when the ECHR's decision became final on January 12, 2011. Hence, the deadline is July 12, 2012. We are now halfway into this 18-month period, and time is running out. The Romanian government and parliament must act now.

This report explores what the European Court of Human Rights demands, what has been done by Romanian authorities, and what they propose. It also provides a set of recommendations for Romanian policymakers.

Acknowledgements

The author owes a debt of gratitude to those who gave interviews that served as background for the writing of this paper: *Lidia Barac* (secretary of state, Ministry of Justice), *Corneliu Bîrsan* (judge, European Court of Human Rights), *Irina Cambrea* (director, Directorate of the Government Agent of Romania to the European Court of Human Rights), *Titus Corlăţean* (senator, Romanian Parliament), *Suzana Dobre* (economic expert, Romanian Academic Society), *Crinuţa Dumitrean* (president, National Property Restitution Authority), *Mihai Furtună* (lawyer, Association of Property Owners), *Iulian Lepa* (lawyer, Iulian Lepa Law Firm), *Monica Macovei* (Member of European Parliament), *Nicolae-Ciprian Nica* (deputy, Romanian Parliament), *Corina-Ruxandra Popescu* (lawyer, Corina Popescu Law Firm), *Răzvan-Horaţiu Radu* (subsecretary of state, Department for European Affairs), *Roxana Rizoiu* (trainer, National Institute of Magistracy), *Raluca Stancescu-Cojocaru* (expert, APADOR-CH), *Laura Ştefan* (anti-corruption expert, Romanian Academic Society), *Cornel Ştirbeţ* (deputy, Romanian Parliament), *Florentin Timoianu* (lawyer, Rubin Meyer Doru & Trandafir), as well as employees of the Council of Europe who have chosen to remain anonymous. The views expressed by the author are his own.

Background

What is a Pilot Judgment?

The European Court of Human Rights (ECHR) obligates states in violation of the European Convention on Human Rights to take two kinds of corrective measures:

- Individual measures: put an end to the violation at issue (e.g., pay compensation to the petitioner)
- General measures: prevent similar violations (e.g., pass new laws, apply ECHR jurisprudence in domestic cases, change administrative practice)

Individual measures are always specified in ECHR rulings, but general measures are not. The ECHR does not tell domestic policymakers what to do. But the Committee of Ministers of the Council of Europe stops monitoring the implementation of rulings (i.e., engaging in political pressure and negotiation) only when it is satisfied that sufficient measures have been adopted.

Amid the backdrop of the expansion of the Convention system to the formerly Communist countries and of the increasing visibility of the Court in general, the total number of cases filed annually with the ECHR has increased from 6,400 in 1998 to 61,300 in 2010.[1] The ECHR's capacity has not kept pace, though, and its backlog now includes 140,000 cases.[2] Repetitive cases (ones within already well-established jurisprudence) not only slow down the work of the Court but also reflect the insufficient adoption of general measures by Convention states. Hence, the introduction of the pilot judgment procedure, first used in 2004.

Pilot judgments:

- Identify the source of "systematic" problems that generate repeated applications
- Suspend similar cases before the EHCR for a certain period of time, in the hopes that states will eliminate the underlying problems, allowing for adequate redress in future cases to be provided domestically
- May suggest specific measures to be taken[3]

The 2010 *Atanasiu* ruling is the eighth such ruling by the ECHR and the first for Romania. The guidelines and suspension of cases are meant to assist respondent states. Nevertheless, the imposition of a timetable, the added gravity of the rarely used pilot judgment, and the enhanced supervision of the implementation of pilot judgments by the Committee of Ministers of the Council of Europe may also help create added pressure to for the resolution of thorny domestic policy issues.

---

[1] "Annual Report 2010," European Court of Human Rights.
[2] *Ibid.*
[3] See Rule 61 of the Rules of the Court, European Court of Human Rights. See also Leach et al. *Responding to Systemic Human Rights Violations: An Analysis of 'Pilot Judgments' of the European Court of Human Rights and their Impact at National Level*. Intersentia, 2010.

The Case of Maria Atanasiu and Others vs. Romania

The facts of the *Atanasiu* case underline the frustrating delays that former owners face when navigating Romania's complex patchwork of restitution laws and authorities.

Maria Atanasiu and Ileana Poenaru had been fighting since 1996 to regain a Bucharest building belonging to Mrs. Atanasiu's deceased husband, confiscated in 1950. After winning the restitution of eight of the building's apartments under **Law 112/1995**, in March 2005 the applicants lost an appeal for a ninth apartment based on the fact that the applicants had lodged their claim after the entry into force of **Law 10/2001**, even though previous final rulings had recognized that the building had been nationalized illegally (meaning that her husband's original title to the building remained valid). In August 2001 the applicants lodged a claim under Law 10/2001 for the entire building, but for almost nine years the Bucharest city council, despite being ordered by a court to give an immediate answer, refused to make a decision on the claim, claiming the applicant had not submitted a complete file.

They submitted their case to the European Court of Human Rights in August 2005, where it was joined with the August 2006 application of Ileana Solon. In July 2001, under **Law 10/2001**, Mrs. Solon brought legal proceedings against the University of Craiova, seeking compensation for land confiscated from her parents in 1950 and now owned by the University. After several appeals, the High Court of Cassation and Justice ruled in her favor in a final judgment in 2006. However, in December 2008 the National Agency for Property Restitution asked the University to follow the administrative procedure set out in **Law 247/2005**, and the University said the file would be sent to the Central Compensation Board of that institution; as of June 2011 Mrs. Solon had not yet received compensation.

A few of the key problems that plague property restitution in Romania are present in this case: legislative instability, the foreclosure of judicial solutions by the introduction of administrative solutions, administrative solutions which are unpredictably slow, the non-execution of court judgments, interminably long waits for compensation.

However, the two fundamental problems are condemned in *Atanasiu* are the following:

1. The violation of the right to peaceful enjoyment of one's possessions (Article 1, Protocol 1). Former owners with a recognized right to the property must be guaranteed either restitution or, if restitution is not possible, compensation. Yet those entitled to compensation have no certainty as to when they will receive it from the Romanian government.

2. The breach of the right of access to a court (Article 6 § 1). Administrative authorities fail to issue decisions within a reasonable or foreseeable amount of time, and former owners are unable to obtain a solution in court.

The case of *Maria Atanasiu and Others vs. Romania* was heard on June 8, 2010. The ECHR ruled against Romania on October 12, 2010, and the decision became final on January 12, 2011. The ruling does not develop ECHR jurisprudence in any new directions. It follows previous rulings regarding property restitution in Romania, notably those in the *Viaşu*, *Faimblat* and *Katz* cases. **Indeed, the reason we got here is because Romania has not adopted any substantial reforms to fix the problems those cases indicated**, even though over 255 nearly identical restitution cases have resulted in Convention violations since 2005.[4] The significance of the *Atanasiu* ruling lies in the fact that it uses the pilot procedure and gives a detailed exposition of problems and of potential solutions. The ruling not only awards compensation of over 180,000 euro to the three applicants but also condemns Romania's "systematically" flawed restitution system – and demands that Romania reform it within 18 months. The ECHR has suspended the other 644 Romanian cases related to restitution in the interim.[5]

What the European Court of Human Rights Requests

The ECHR's ruling does not demand specific measures, in keeping with the Court's practice of deferring to domestic lawmakers on the means of implementation. Romania is free to choose the means by which it will implement the pilot judgment, provided that they are compatible with the conclusions set out in *Atanasiu*.

Nevertheless, *Atanasiu* does cite specific contributing problems:[6]

1. There are no time limits for the processing of claims by the National Property Restitution Authority's Central Compensation Board (CCB); the HCCJ has ordered the CCB to examine claims within a "reasonable time", but there is no binding statutory time limit. The ECHR is particularly emphatic about this: "[I]n the absence of a binding statutory time limit the Court considers that the above-mentioned requirement is in danger of remaining theoretical and illusory and that the right of access to a court in order to complain of delays on the part of the CCB is liable to be deprived of its substance."
2. The Property Fund has not yet been listed on the stock exchange. (Since the ruling, this has been done; however, the fund has almost run out of money, meaning that it will not be an important compensation mechanism for long.)
3. There are delays in the procedure for payment of compensation and no guarantees about the length or outcome of proceedings before the Central Board.

---

[4] "Străin / Popescu Sabin group against Romania - 255 cases concerning the failure to restore or compensate for nationalised property," Council of Europe, April 11, 2011.

[5] "States with major structural/systemic problems before the European Court of Human Rights: statistics", Committee on Legal Affairs and Human Rights, Council of Europe, April 15, 2011. (A total of 644 cases were pending in 2010, but the number is likely to have increased, as the ECHR continues to receive new Romanian petitions regarding property restitution.)

[6] *Maria Atanasiu and Others v. Romania*, nos. 30767/05 and 33800/06, §§ 219-236, ECHR.

4. Law 247/2005, enacted to establish a single procedure for claiming compensation, "would be effective if the competent authorities, and in particular the Central Board, had sufficient human and material resources at their disposal to cope with the tasks facing them."
5. The CCB processes cases in random order, which could be construed as leading to discrimination and opening the door to corruption.
6. A general lack of legal certainty resulting from consistently inconsistent judicial interpretation of the restitution laws.

The Court also makes further suggestions:

1. It notes with "interest" the Romanian government's proposal for binding time limits at each stage of the administrative procedure, cautioning that they must be realistic and subject to review by the courts.
2. It mentions measures taken by other states that may provide "inspiration":
    a. Creating a more foreseeable compensation scheme
    b. Paying out compensation in installments over a longer period of time
    c. Capping compensation

However, it is not all good news for former property owners. Unusually, the ECHR ruled that Romania should enjoy "a considerable margin of appreciation"[7] in selecting the measures it should apply given the special backdrop of major social and economic reforms during the post-Communist period, even if those measures do not provide justice for all. Thus, one of the more interesting aspects of *Atanasiu* is that it signaled the ECHR's willingness to consider a cap on compensation levels to be an acceptable solution. The solution is not new: the ruling invoked Poland's implementation of the *Broniowksi* pilot judgment. Poland's decision to cap compensation amounts for properties located on territory lost by Poland after World War II at 20% of the original property value was received favorably by the Council of Europe and the ECHR.[8] But it is notable that the Romanian government's submission to the Court in *Atanasiu*, while citing budget concerns, proposed only the possibility of paying compensation in installments over a longer period of time; the Romanian government initially considered a cap on compensation, which would unequally affect those whose claims have not yet been processed while others have already received full compensation, to be a form of discrimination. Yet the EHCR invited Romania pragmatically to "strike a fair balance between the interests of former owners and the general interests of the community".[9] The ECHR's invocation of *Broniowksi* effectively gave a green light to compensation capping, which appears to have since become central to the government's thinking. Such a move would be unpopular with former owners and would be likely to be contested domestically.

[7] *Ibid.* §§ 233
[8] "Final Resolution CM/ResDH(2009)89", Council of Europe, September 15-16, 2009.
[9] *Maria Atanasiu and Others v. Romania*, nos. 30767/05 and 33800/06, §§ 235, ECHR.

What is At Stake?

> "The mark placed on the country's image, and the risk of being suspended, if not excluded, from the Council of Europe, are measures Romania cannot afford." - Rubin Meyer Doru & Trandafir[10]

> "There is no risk of Romania being excluded from the Council of Europe". - Razvan Horaţiu-Radu[11]

> "The ECHR has been and is a reform partner for Romania." - Razvan Horaţiu-Radu[12]

Suspension. The Council of Europe may suspend the membership of states that do not execute the rulings of the European Court of Human Rights.[13] Because suspension is an extreme and politically sensitive measure, it has never happened and has rarely been invoked, despite many instances of long delays in the implementation of ECHR rulings. Nevertheless, a flagrant lack of progress on implementation might force the Committee of Ministers to dispel the notion that suspension is a paper tiger. This could be especially true in the case of a non-implemented pilot judgment.[14] However, even the simple fact that there could be talk of an EU member state such as Romania being excluded from the Council of Europe (a larger organization that includes Russia, countries of the Balkans, and Eurasian former Soviet republics) could put in Bucharest a very embarrassing situation.

Romania has nine month left (until July 2012) to implement Atanasiu pilot judgment.

Condemnation. After the severity of suspension, the next tool in the Council of Europe's bag of tricks may seem quite limited: naming and shaming states that fall behind in implementing judgments. The Committee of Ministers monitors the implementation of rulings and issues well-publicized interim resolutions to remind states when they are behind. If Romania is cooperative but drags its feet in implementing *Atanasiu*, a loss of voting rights in the Council of Europe is less likely, but loss of international reputation is almost certain. Given the particular sensitivity of the Romanian media to Romania's international image, naming and shaming can be used to convince Romanian politicians to act. People within the Romanian administration may use this as leverage to convince higher-level officials to pay attention and implement needed solutions.

Violations. If Romania fails to implement *Atanasiu* within the 18-month deadline, it will be bombarded with new rulings that Romania is in violations of the Convention. Romania was

---

[10] "Curtea Europeana a Drepturilor Omului sanctioneaza Romania," Hotnews.ro, November 10, 2010.

[11] ."Presedintele CEDO: Hotararea pilot impotriva Romaniei este una echilibrata si nu cauta sa impuna statului rezolvari imposibile," Hotnews.ro, October 22, 2010.

[12] "Răzvan-Horaţiu Radu: Condamnările României la CEDO aduc atingere imaginii statului," Adevarul, July 4, 2010.

[13] Article 8 of the Statute of the Council of Europe. (Declares that the "serious" violation of "principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms" is grounds for suspension.)

[14] If the Committee of Ministers of the Council of Europe considers that a state refuses to implement a judgment, the ECHR may re-examine a case condemn the state that for that refusal. This is a new and unprecedented measure, and it could constitute grounds for suspension measures. (See Protocol 14, Article 16, line 4.)

granted respite with *Atanasiu*, which suspended examination of the 644 property restitution cases pending before the Court. If by July 12, 2012 Romania has not implemented the pilot judgment, the gates may again open to a flood of new rulings finding violations. The new violations would invite further embarrassment—right in time for the 2012 elections.

Good Policy. While the potential losses are clear, so are the potential gains. Property restitution is an area of post-1989 Romanian public policy that has become synonymous with incoherent political vision, insufficient legislative practice, incompetent administration, judicial unpredictability, and corruption. Implementing *Atanasiu* would be an opportunity to bring Romania's property restitution system in line with European norms.

Problems with Restitution in Romania

> "The complexity of the legislative provisions and the changes made to them have resulted in inconsistent judicial practice and in a general lack of legal certainty." – European Court of Human Rights[15]

> "When you are incapable of safeguarding equal treatment for citizens in the same situation, you are no longer a modern state. Property restitution is the best illustration of a weak state in Romania." – Suzana Dobre[16]

60% of the 719 cases Romania lost before the Court over 1998-2010 involved a violation of the right to the protection of property, and 42% also involved a violation of the right to a fair trial.[17] Most of these violations involved property restitution.

The Legislation

The underlying reason for Romanias's repeated violations, as argued in the ECHR's 2008 ruling in property restitution case *Viaşu vs. Romania*, is "overabundant and largely ineffective legislative activity".[18]

Overabundant, because Romania's first property restitution law, passed in 1991, has already been modified by **over 70 normative acts**.[19] Changes often took effect immediately, affecting claims and cases already filed but not yet resolved.

---

[15] *Maria Atanasiu and Others v. Romania*, nos. 30767/05 and 33800/06, §§ 221, ECHR.
[16] Interview with the author.
[17] "Violation by Article and by Country 1959-2010," ECHR.

[18] *Viaşu v. Romania*, no. 75951/01 §§ 72, ECHR.
[19] *Viaşu v. Romania*, no. 75951/01 §§ 31, ECHR.

Fig 1: Key Laws on the Restitution of Nationalized Properties[20]

Decree 92/1950	nationalized buildings belonging to "former industrialists, former large landowners, former bankers, former owners of large trading enterprises and other representatives of the wealthy capitalist class" but excluded workers, civil servants, intellectuals and retirees; many properties belonging to the excluded social categories were extralegally nationalized
Law 18/1991	partial restitution of agricultural land to former owners and to a new class of owners; no restitution of immovable property by law, but courts began to restitute immovable property, too
Law 112/1995	gave current tenants a right to buy lawfully nationalized properties; allowed restitution of immovable property if inhabited by the claimant or vacant; introduced capped compensation
Law 169/1997	increased the amount of agricultural land that could be restituted
Law 213/1998	recognized the state's valid title to lawfully nationalized properties
Law 1/2000	increased the amount of agricultural land that could be restituted; gave former owners a right to compensation for land that could no longer be returned
Law 10/2001	established a right to restitution for immovable properties and, where restitution was no longer possible, to uncapped compensation
Law 247/2005	established the Central Compensation Board and National Authority for Property Restitution to harmonize the administrative process for restitution claims and the determination of compensation amounts; created the Property Fund for payments
Law 1/2009	immovable property sold under Law 112/1995 can no longer be recovered, only compensated

Ineffective, because the many laws have given rise to unsatisfactory practices by local and national authorities and courts. Claimants face excessive and unpredictably long delays in receiving decisions from local authorities and compensation from national authorities. Rulings by the High Court of Cassation and Justice meant to clarify the tangle of laws have made further modifications in practice, but rulings by lower courts remain inconsistent, and the non-execution of court decisions is pervasive.

Above all, the the lack of a coherent and comprehensive approach to policymaking has been very costly.[21] Here are three examples:

[20] *Maria Atanasiu and Others v. Romania*, nos. 30767/05 and 33800/06, §§ 45-67, ECHR.; See also Societatea Academică Română.. "Restituirea proprietăţii: De ce a ieşit aşa prost în România?" Policy Brief no. 34, September 2008.

[21] This history is explored in "Private properties issues following the change of political regime in former socialist or communist countries Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Romania and Serbia." Directorate General for Internal Policies of the European Parliament. April 2010.

I. Give it away, then give it back. Romania passed its first restitution laws in 1991, concerning agricultural land only. While it capped the amount of land that could be returned, it covered restitution not only to original owners or their descendants, but also to a new class of owners who had never held a title to the land. The law was thus not only restorative but also distributive in nature. When Romania successively increased the amount of land to be restituted in 1997 and 2000, having already given land to a new class of owners in 1991, it had less to give back to the original owners. Compensation was introduced as a costly alternative, when none would have been necessary if Romania had stuck with a restorative or a distributive policy, rather than combining the two.

II. Give it away, then pay for it. Although the 1991 law did not cover the restitution of buildings, over 1990-1995 many courts began recognizing former owner's property rights under the civil code and ordering restitution. In response, legislators decided to clearly regulate the restitution of buildings, in order to limit it. Thus, Law 112/1995 allowed current tenants to buy their properties from the state for below-market prices; restitution to former owners was now explicitly allowed, but only if they resided in the property or if it was vacant, otherwise being entitled to limited compensation. Tenants began buying properties from the state, while courts were simultaneously recognizing that former owners had legitimate title to them. Overlapping property titles were created: some courts began recognizing the primacy of former owners' property titles, while others recognized those of the "tenants", who usually (but not always) bought in good faith from the government under the assumption that the property was free and clear. However, the problem did not stop there: Law 10/2001 gave former owners the right to full market value compensation for properties which could no longer be restituted to them (e.g., because they were sold to someone else under the 1995 law). On the other hand, under Law 112 the former tenants were allowed to buy properties at fractions of the market price, and the money they paid to the government mainly supported the limited compensation given to the former owners. This was eclipsed by the money now owed to former owners; many had already received limited compensation but were now entitled to ask for more. This reversal, from a minimalist policy regarding the rights of former owners to a maximalist one, came late and at a high price.

III. Buy low, lose high. Law 1/2009 paid attention to the plight of (now former) tenants who by court decision were ejected from their apartments in favor the once former (now current) owners. Although former tenants bought their apartments under Law 112/1995 at fractions of the market price, those that lost them are now entitled to their full market value today.

These expensive policies were adopted without any accompanying budget assessments or apparent regard for the cost, setting the stage for today's contemplation of a new policy reversal: the proposal to cap compensation amount for former owners.

The Courts

Property restitution has been and remains subject to a very divided jurisprudence in Romania's court system.

Civil code actions. Starting in 1990, former owners sought restitution through Civil Code articles 480 and 481. After the introduction of Law 112/1995, some courts no longer accepted actions for restitution based on the civil code when a special restitution law was available. The introduction of Law 10/2001, introducing a special administrative procedure for restitution and compensation, led to further judicial questions about the admissibility of actions for restitution based on the civil code. Practice as to admissibility remains divided, even after an appeal in the interest of the law issued by the High Court of Cassation and Justice in 2008.[22]

Overlapping rights. With the passage of Law 112/1995, tenants gained the right to buy their state-owned apartments from the government. However, many apartments sold by the government were the subject of litigation by former owners, and in many cases former owner's legal titles to the apartments had already been recognized by courts.

This gave rise to overlapping rights to the same properties. Often guided more by individual judge's ideological leanings than by the specific circumstances of the cases, some courts favored the rights of former owners, others favored those of tenants, while different panels of the same courts often gave contradictory rulings on the same day. Law 10/2001 added to the ambiguity, allowing former owners to challenge tenants' titles if not obtained in good faith (e.g., the tenant bought an apartment despite being aware that it was the subject of ongoing litigation). Law 1/2009 attempted to resolve this problem in favor of former tenants, but practitioners report that the effects are still inconclusive.

Administrative gridlock. Although Law 10/2001 required administrative authorities to resolve claims filed with them within 60 days, this rarely happened in practice. Claimants then went to court to demand an administrative decision. Some courts would not recognize a cause of action, as administrative time limits were not binding. Some courts granted the claims, but they often remained unexecuted. Courts have also been divided about whether they could grant compensation or restitution in cases that had already been lodged with the non-performing administrative authorities. Although the latter was the subject of another High Court of Cassation and Justice appeal in the interest of the law[23], it failed to provide clear guidelines as to when courts were competent to issue such decisions.

Timing of laws. Many claims for compensation filed under Law 10/2001 were still being examined when Law 247/2005, creating a new compensation mechanism, came into effect. Some courts

[22] High Court of Cassation and Justice, Decision No. 33 of June 9, 2008.
[23] High Court of Cassation and Justice, Decision No. 20 of March 19, 2007.

ruled that the 2005 law applied even to claims filed before 2005, while others awarded compensation based on the 2001 law.[24]

Restitution with other goods. Where the restitution of original properties is not possible, Law 10/2001 calls for restitution with other goods in state possession. Some courts have held that these measures are obligatory when possible, while others hold that only local authorities can have the discretion to determine whether a property is indispensable to the public good, and thus not awardable.

The Administration

"To get ahold of a compensation title, you have two options: take them to court or bribe them." – Iulian Lepa[25]

Administrative capacity.
If restitution claims brought in court resulted in unpredictable solutions, claims filed with administrative authorities often result in no solution at all. Ten years after the passage of Law 10/2001, 40% of the 202.369 claims registered under that law remained unresolved.[26] At the local level, the greatest bottleneck is in Bucharest, where out 66% of the 42,468 registered claims remain unresolved.[27] Even when cases are processed, payment remains slow: of the 48,235 cases forwarded to the Central Compensation Board, 80% have not yet resulted in compensation certificates.

The National Property Restitution Authority was created in 2005 to coordinate the system of restitution and compensation. Claims begin with local authorities, who determine if a claim will end in restitution; if it does not, the claim go through the NPRA. The following is a basic sketch of the possible paths for an administrative claim for restitution:

- **The local administrative authority (e.g., mayor's office).**
  - Examines a file. Possible outcomes:
    - Restitutes the original property.
    - Offers compensation in the form of other properties in state possession.
    - Proposes compensation. Sends file to the prefect's office.
- **The prefect's office**.
  - Verifies legality of the mayor's office's decision (i.e., restitution in kind truly not possible). Possible outcomes:
    - Sends file back to the mayor's office if restitution is possible.
    - Sends file to the National Property Restitution Authority.
- **The National Property Restitution Authority**.

[24] High Court of Cassation and Justice, Decision No. 52 of June 4, 2007.
[25] Interview with the author.
[26] "Raport Anual de Activitate 2010," Autoritatea Națională pentru Restituirea Proprietăților.
[27] http://www4.pmb.ro/wwwt/l112jur/iapag1jur.php, accessed August 31, 2011.

- Does a second legality check. Possible outcomes:
    - Sends file back to the mayor's office if restitution or other compensation is determined to be possible.
    - Send's file back to the mayor's office if file is incomplete.
    - Send file to the Central Compensation Board (CCB) for evaluation.
- CCB designates an evaluator to determine the value according to international standards of evaluation. A compensation value is determined.
- CCB issues compensation certificates. Possible outcomes:
    - CCB issues compensation certificates redeemable for cash up to a maximum of 500,000 RON. (Cash payments were suspended in 2010.)
    - CCB issues compensation certificates redeemable for shares in the Property Fund.
- The claimant takes his compensation certificates to Department for Cash Compensation to redeem them for shares in the Property Fund, cash, or both.
    - In the case of cash: one payment is made for amounts up to 250,000 RON; if the cash sum is more, it is paid in two annual installments.
    - In the case of shares: Property Fund shares are issued.

Cases are examined individually, and, given the evidence that must be presented, and the necessary documentation can be rather complex. For example, there may be great discrepancies between the original property title, the nationalization decree, and the current property title. Not only may street names and numbers differ, but buildings may have also suffered important physical transformations. As a result, expert assessments may need to be done. To make matters worse, claimants often submit incomplete files. It can take over six months to obtain a necessary cadaster certificate. On the other hand, poor transparency by administrative authorities can result in some claimants not finding out that their files are incomplete until more than a year after lodging their claim.
Administrative authorities do not have the capacity to deal with so many claims. They lack sufficient human and financial resources. In some instances, local authorities have even claimed that they do not have enough money to pay for paper to make xerox copies of restitution files demanded by courts in claims initiated after the passing of 60-day non-binding time limits.

As a result, administrative deadlines for solutions are generally not respected. Despite this fact, in 2010 the national level the Control Body of the NPRA levied a mere 30.000 euros in fines to local authorities for "stagnation" in the processing of claims. For Bucharest, the fines levied by the NPRA in 2010 amounted to less than 0.50 euro per unresolved claim. [28]

The NPRA prioritizes the solution of certain claims, such as those of claimants proving medical hardship or old age. This discretionary power creates opportunities for corruption. It also leads to absurd outcomes, as many claimants have sold their rights to third parties, including the legal right to act in their name.

[28] "Raport Anual de Activitate 2010," Autoritatea Națională pentru Restituirea Proprietăților.

Finally, the NPRA's budget is insufficient to pay compensation to the claimants who are already determined to be entitled to it.

Restitution

"Some local authorities could not or did not want to make an inventory of their properties; some know what they own, but from the outside it's quite hard to demonstrate that there are buildings that can be given as compensation. In addition, where there is vagueness, corruption flourishes." - Suzana Dobre[29]

"Local authorities generally do not meet their alternative compensation obligations, making it so that the only means of awarding compensation is for the state to give shares in the Property Fund. The burden is thus transferred onto the shoulders of the state, while local authorities are left without any responsibility." - Florentin Timoianu[30]

Restitution is required by law when possible. In practice, it is granted in a minority of cases. Only 30% of the requests filed under Law 10/2001 which have received an administrative solution (excluding claims rejected) resulted in some form of restitution.[31]

Restitution of the original property is not possible in the case of buildings which have been demolished or apartments that are occupied by former tenants who purchased the property under Law 112/1995. In these cases, based on art. 1, al. 2-5 of Law 10/2001, local authorities are required to give other buildings owned by the state, unless they serve some critical purpose. Yet this solution was only practiced in 4% of the cases receiving a favorable administrative solution.[32] This is not because there are no buildings to give, but often because state property inventories are incomplete, despite the fact that inventories were required to be finished by the year 2000 under Law 17/1998. The problem is especially acute in Bucharest. However, there is also a conflict of interests: local authorities have no incentive to finish property inventories if it means they will have to give away their possessions.

"We had a case for a family in Prahova County in a city in which I identified assets that belonged to city hall and could be awarded as compensation. The city hall's list said there was no property. With the help of a man that worked for city hall I identified some plots of land in the city, and I showed them to the court. Within a month they managed to find a destination for each of them, except one. Here's how they justified it. (1) Such and such plot is near some exploration rig of Petrom's: can't build on it. (2) For plot two, they quickly got in touch with the Ministry of Public Works, it was proposed for building ANL apartment buildings. (3) The third plot is a playground for kids. (4) And for the last one they didn't find any other justification and said, "proposed for sanitation." It was full of garbage. And I told the court, "Give me that one. I'll clean it myself!" - Mihai Furtuna

[29] Interview with the author.
[30] *Ibid.*
[31] "Raport Anual de Activitate 2010," Autoritatea Națională pentru Restituirea Proprietăților.
[32] *Ibid.*

Corruption

Broad discretion by administrative authorities in determining which claims get processed faster, together with the potential to influence evaluators, leads to corruption. Given the hundreds of thousands of euros at stake in urban property restitution claims, this can be quite lucrative.

In August 2011, Remus Virgil Baciu, vice president of National Property Restitution Authority (NRPA), together with accomplices, was arrested on charges of receiving over 200,000 euros in bribes in exchange for speeding up the processing of several compensation payments.[33] Baciu was a member of Romania's Interministerial Committee for the Process of Property Restitution Legislative and Procedural Reform created to facilitate the implementation of the European Court of Human Rights pilot judgment. This highly visible case of corruption at the highest levels of the administrative authority in charge of coordinating restitution and compensation is not an isolated one. Long alleged by restitution lawyers, former owners, and even government officials, corruption has now also begun to be documented and investigated. In February 2011, an intermediary claiming to have influence with the NPRA was caught receiving a 15,000 euro bribe.[34] In August 2011, several intermediaries were indicted for allegedly requesting a bribe.[35] The going rate for a illegally prioritized compensation payment appears to be roughly 15-30% of the cut.[36]

Despite the abuse to which the prioritization gives rise, in May 2011 the government adopted a decision[37] to give NPRA officials even greater discretion in granting priority compensation for "medical cases, social cases, etc." This comes in a moment in which the government has few shares of the Property Fund left to give as compensation, and there is talk of capping future compensation amounts (see below). Thus, discretion over the order in which compensation is given may also help decide who receives full market value compensation and who receives the leftovers.

Influence can also be used to blackmail. Some claimants allege having received threats that if they do not sell the rights to their claims cheaply to intermediaries their administrative claims will be blocked.[38] Other claimants have alleged that they have been threatened that if they do not end lawsuits against certain former tenants, their administrative claims for other properties will be blocked.

---

[33] "Vicepreşedintele Autorităţii Naţionale pentru Restituirea Proprietăţilor, arestat pentru corupţie. Baciu, demis de premierul Boc," România Liberă, August 29, 2011.

[34] "Trafic de influenţă la angajaţii ANRP," Evenimentul Zilei, March 1, 2011.

[35] "Preot trimis în judecată pentru că a promis rezolvarea unor cazuri de despăgubiri, în schimbul unui comision," România Liberă, August 12, 2011.

[36] "Afacerea ANRP: cât te costă ca să nu mai stai la coadă pentru acţiunile FP? Un vicepreşedinte ANRP, acuzat că ar fi primit 200.000 de euro mită," Ziarul Financiar, August 30, 2011.

[37] Government Decision 462/2011.

[38] See Societatea Academică Română. "Restituirea proprietăţii: De ce a ieşit aşa prost în România?" Policy Brief no. 34, September 2008. See also "Alianţa PSD-PD pentru vile şi terenuri", *Cotidianul*, February 15, 2006.

Compensation amounts are determined by independent evaluators accredited by the Romanian National Association of Evaluators, who are paid a flat fee per evaluation. Although they use standard evaluation criteria, those criteria give evaluators great latitude through the discretionary application of a range of coefficients, which can more than double the ultimate value of a property. There are allegations that evaluators have received specific instructions from NPRA officials, who have the power to deny the evaluators future work. Thus, claimants who offer officials a certain percentage of their compensation amounts may also go home with more.

"There are situations in which requests that have been recently filed, but which have the support of certain people, are resolved favorably and with priority over the claims that have been in the waiting line for a long time. This is what in colloquial language is called 'know-how' or even 'know-where.' These practices are clear evidence of corruption." - Corina-Ruxandra Popescu

"We had cases where my clients were contacted by various people. 'You have an interesting property. We propose a deal. You sell us your rights for 20%, 30%, 50%, and we'll handle it from there. You don't like it, we'll give you the joy of having your file blocked. What do you say about that?' That's the way it's put. There's a famous phrase from *The Godfather*: 'I'll make you an offer you can't refuse.'" - Mihai Furtuna

"To get ahold of a compensation title, you have two options: take them to court or bribe them. They want a 40% advance on the compensation ceded by notary. Then the case is resolved in a week. Want to get a decision from city hall? First you sell the rights to your case, then the person that bought them gets a decision the next day. I'll tell you how it is at the NPRA. I buy my file, or I compel someone to give me 40%, and then the file is evaluated and sent for compensation. The evaluation will be 5 times bigger. The state pays. They are hand in hand with the evaluators." – Iulian Lepa

"The people at the NPRA are hand in hand with the evaluators." – anonymous government official

The Cost

> "[The] State had clearly become a victim of its own good intentions." – European Court of Human Rights[39]

No estimates. In its May 2010 submission to the Court for the *Atanasiu* case, the Romanian government declared that over that **21 billion euros** would be needed to pay all compensation claims related to the restitution laws, noting that Romania's GDP in 2009 was 120 billion euros.[40] This estimate was prepared by the the NPRA, although that institution has recognized that, in fact, "it is not possible to arrive at a global estimate" given the very many unknowns involved.[41] Nevertheless, what is clear is that the financial resources that have been allocated will surpass the total cost. The root of the problem is Law 10/2001, which created an enormous financial

[39] *Maria Atanasiu and Others v. Romania*, nos. 30767/05 and 33800/06, §§ 205, ECHR.
[40] *Maria Atanasiu and Others v. Romania*, nos. 30767/05 and 33800/06, §§ 200, ECHR.
[41] Interview with the author.

obligation for the Romanian in the absence of any budget impact study or estimates of the cost. (The same may be true of the recent Law 1/2009.)

Property Fund underfunded. Law 247/2005 created the Property Fund, an initially government-held fund that owned shares in state-owned companies and Communist-era debt collected from foreign countries. It was meant to be the primary vehicle for the compensation of claimants when restitution is not possible. The government issued shares in the fund in lieu of cash compensation, at the rate of 1 RON per share. The 2005 law stipulated that the Property Fund would be capitalized at the total estimated value of the Romanian state's obligations under the restitution laws. Nevertheless, it was initially capitalized at approximately **3.2-3.7 billion euros**.[42]

Delayed listing and the "gray market". The 2005 law also stipulated that the Fund would be listed on the stock market within six months. However, this did not happen for another 66 months.[43] In the interim, many former owners sold their unlisted shares on the informal market, after the long listing delay prompted the government to legalize such transactions. Large volumes of shares changed hands between 2008 and 2010[44] for prices ranging between 0.10-0.62 RON per share[45] and averaging around 0.40 RON per share. [46] Estimates of the number of shares that passed from the hands of former owners to those of investors during this time range from 20% to 50%.[47]

The price of Property Fund shares. Despite the initial 1 RON conversion price, on the first day of trading shares traded at 0.65 RON (effectively devaluing the Fund to **2.2 billion euros**), and they have continued to fall, reaching 0.43 RON on September 24, 2011.[48] Thus, after listing, former owners ended up with 35-55% less than what the government owed them, never yet able to redeem their shares at the conversion price. Some former owners have gone to court, demanding to be given the cash they were promised in exchange for giving the government back its shares. The fall in price has also ensured that the government would run out of shares in the Property Fund more quickly. The conversion rates of compensation certificates issued after the listing of the Property Fund were based on the 60-day average trading price of the Fund. Thus, to pay out 100.000 euros in compensation at a hypothetical 60-day average trading price of 0.50 RON per Property Fund share, the government would have to give out twice as many shares as before the listing.

Property Fund plundered. Compensating former owners was not a priority during the financial

[42] 3.2 billion euros based on 13,778,392,208 shares worth 1 RON each, at 4.3 RON/EUR exchange rate. A higher value estimate, 3.7 billion euros, is in "Inainte de a „vinde“ FP investitorilor straini, Templeton a incercat sa convinga analistii locali," Fin.ro, January 11, 2011.

[43] Law 247 published on July 22, 2005; Property Fund listed on January 25, 2011.

[44] http://www.depozitarulcentral.ro/home/statistici/Cesiuni%20Fondul%20Proprietatea%202008%20RO.htm, accessed August 31, 2011. (Over 7 billion shares traded.)

[45] "Fondul Proprietatea se listeaza la Bursa," Fin.ro, January 25, 2011.

[46] "Jumatate din actiunile Fondului Proprietatea au fost tranzactionate pe piata gri. Cat mai detin fostii proprietari despagubiti de stat?" Fin.ro, January 25, 2011. (651 million euro est. value of 7,273,011,234 shares traded.)

[47] *Ibid.* (Upper bound, over 50% of shares traded; some of these may have been repeat sales of the same shares. Lower bound: almost 20% of shares were in the hands of institutional investors by the end of 2010.)

[48] http://www.bvb.ro/ListedCompanies/SecurityDetail.aspx?s=FP, accessed September 24, 2011.

crisis. Yet during this time the Romanian government also raided the Property Fund. In November 2010 the Ministry of Economy, 85% shareholder in Romgaz, voted for Romgaz to transfer 400 million RON in profits to the state budget, in effect taking 60 million RON from the Property Fund, the 15% minority stakeholder.[49] More consequentially, although required by Law 247/2005 to transfer all Communist-era external debt recovered by the Romanian state to the Property Fund, in 2010 the government adopted an emergency ordinance canceling the transfer of 865 USD in debt payments from Iraq to the Property Fund.[50]

Cash compensation. Given the slow pace of listing the Property Fund on the stock exchange, in 2008 the government passed an emergency ordinance establishing the right to cash compensation up to 500,000 RON in two tranches paid over two years. Yet even the cash compensation that has been granted is paid slowly. The latest figures on the NPRA website show that the government had issued compensation certificates worth **550 million euros** in cash, of which only **140 million euros** had been paid.[51] Cash compensation is paid based on an annual budget allocation. The Minister of Public Finances proposed a budget of roughly **140 million euros** for 2011-2013.[52]

No money left in the Property Fund. Cash compensation was suspended in 2010, leaving the Property Fund as the only compensation vehicle. However, as of August 2011, the state had only 150m euros left to give from the Property Fund[53]. While the Property Fund as a compensation vehicle has almost been exhausted, the government has not yet announced any new sources of compensation.

Given the complete uncertainty as to when, if, and from what sources the remaining **17 billion euros** needed to compensate tens of thousands of former owners might come, former owners who have not yet received compensation are understandably anxious about their prospects.

A Cap on Compensation?

The European Court of Human Right's pilot judgment's support for the capping of compensation offered Romania a simple solution to the impending budget problem. Romanian government officials, like the ECHR, argue that the state must balance the different needs of society. A euro given to former owners is a euro that cannot be invested in other sectors, such as education or medicine. Officials argue that honoring Romania's promise to former owners is not only unfair to future generations, but also not possible. They say that Romania simply promised more than it can give.

---

[49] "Fondul Proprietatea a pierdut procesul cu Romgaz," Bursa.ro, June 3, 2011.
[50] "Statul refuza sa plateasca FP 865 mil. $, datorie recuperata din Irak," Fin.ro, August 1, 2011.
[51] http://www.anrp.gov.ro/sct_1/m_12/pag_38/Despagubiri%20in%20numerar.htm, accessed September 24, 2011.
[52] "Statul a onorat sub 20% din despăgubirile în numerar pentru naţionalizări," Săptămâna Financiară, January 11, 2010.
[53] "Statul mai are acţiuni FP de doar 150 mil. € pentru despăgubiri," Ziarul Financiar, August 26, 2011.

Former owners and human rights activists argue that capping compensation now, after thousands have already benefited from the current law and tens of thousands more have relied upon it, would be discriminatory and retroactive. Although the Association of Private Property Owners argued this in its brief to the European Court of Human Rights for the *Atanasiu* case,[54] the Court was silent, giving no counter-argument. A cap on compensation would violate the principle that rights that have been gained should not be taken away. It is certainly an aggravating circumstance that the current restitution system suffers from corruption and the underutilization of compensation with properties in the possession of the state.

Public debate is needed about the future form, amount, and sources of compensation. To that end, a full and transparent accounting of the cost of restitution and the resources available will be necessary.

Reforms

What Has Been Done?

Romania's first violation of the European Convention of Human Rights in a property restitution case was found in *Brumărescu* (1999). At issue was the fact that final court decisions establishing the right to have nationalized property restored could be annulled by the prosecutor general, creating permanent legal uncertainty. It was followed by 30 similar Convention violations. Romania finally eliminated the practice in 2003.[55] The Committee of Ministers of the Council of Europe expressed its satisfaction with this solution through a final resolution in 2007.[56]

Romania's failure to restore or compensate for nationalized property has been the issue in 255 Romanian violations before the European Court of Human Rights in the newer *Străin* (2005) / *Popescu Sabin* (2004) group of cases. *Viaşu* (2008) was the first Court ruling to identify a "structural" problem underlying the cases,[57] while over 644 similar cases are pending before the Court. The added pressure applied by the Court with the *Atanasiu* (2010) pilot judgment is the result of a lack of credible progress by Romanian authorities.

Between *Străin* and *Atanasiu*, little progress was made toward a comprehensive solution. The main legislative initiative in this period, Law 1/2009, arguably made things worse, by again entitling a new class of people to compensation without any consideration of the cost. More constructively, in 2009 a government working group was created to propose solutions. A rapid and comprehensive solution was not forthcoming, however. In February 2010, only at the insistence of the Committee of Ministers, Romanian authorities submitted an action plan to the Court, which noted the lack of any timetable for implementation.

According to the ECHR, the government's action plan recommended the following:

[54] *Maria Atanasiu and Others v. Romania*, nos. 30767/05 and 33800/06, §§ 208, ECHR.
[55] Government Emergency Ordinance 58/2003
[56] "Resolution CM/ResDH(2007)90," Council of Europe, June 20, 2007.
[57] *Viaşu v. Romania*, no. 75951/01 §§ 50, ECHR.

- the creation of an interministerial commission to recommend solutions
- the amendment of restitution legislation, including the introduction of time limits for each administrative phase and penalties for failure to respect those time limits, an increase in the surface area of land which could be returned and an increase in the number of staff working on restitution cases
- the approval by Parliament of Government Emergency Ordinance 81/2007 allowing cash compensation as a faster alternative to receiving shares in the Property Fund (four months after the action plan was submitted, Government Emergency Ordinance 62/2010 suspended these cash payments for two years)
- discussions with civil society and associations of former owners

The pilot judgment may have helped create a greater sense of urgency, although results are still limited.

Visit. In October 2010, immediately following *Atanasiu*, the president of the ECHR and other Court officials visited Bucharest at the invitation of the Ministry of Foreign Affairs, meeting with the Minister of Justice and members of Parliament. The visit was meant to build high-level support for the requested reforms.

Working group. December 2010. Prime minister Emil Boc created a new interministerial working group to propose solutions and draft a property restitution reform law.[58]

Property Fund listing – and devaluation. January 2011. The Property Fund was finally listed on the Bucharest stock exchange, over five years after its creation. Compensation titles were issued by Central Compensation Commission at the conversion rate of 1 RON = 1 share, but the fund closed at 0.65 lei per share after the first day of trading – a 35% loss in value compared to the compensation value promised by the Romanian government.[59] As of September 24, 2011, the fund was worth 0.43 RON per share.[60]

Conference. February 2011. The Ministry of Foreign Affairs organized a conference with the participation of representatives from 20 post-Communist states and the ECHR to discuss best case practices in property restitution. A series of measures were proposed, including the

[58] Established by Prime Minister's Decision 270 of December 3, 2010.

It is composed of the following institutions: National Authority for Property Restitution, Ministry of Justice, Ministry of Public Finance, Ministry of the Interior, Ministry of Agriculture and Rural Development, Ministry of Environment and Forests, Ministry of Foreign Affairs.

[59] "Prima zi de tranzactionare pentru Fondul Proprietatea: 333,2 milioane actiuni tranzactionate, cu o valoare de 50 milioane euro," Hotnews.ro, January 25, 2011.
[60] http://www.bvb.ro/ListedCompanies/SecurityDetail.aspx?s=FP, accessed September 24, 2011.

affirmation of judicial review, a cap on compensation, enhanced budgets for administrative authorities, and impact assessments of any changes to the restitution laws. [61]

Draft law. July 2011. The interministerial working group had a complete working draft of a legislative proposal. The draft had not been made public or shown to members of Parliament, and no timeline has been set for its public release. The Ministry of Finance was working on budget projections.

The Government's Proposal

In the course of our research, we obtained details from government representatives on the proposed legislative changes. They are presented commented on below. *We would like to specify that we have been told that all details of the proposal are subject to change.*

The law proposed by the government concerns *compensation* for land and buildings where restitution is not possible. It does not attempt to modify the conditions of restitution itself.

Principles:

1. **A comprehensive law**. Laws governing compensation for buildings and agricultural land will be consolidated in a single normative act, with the aim of eliminating inconsistent administrative and judicial practice.
2. **A balance between what ought and what can be done.** The economic capacity of the state will be balanced against the imperative to do what previous laws promised.
3. **A simplified procedure**. The process of determining compensation amounts must be predictable, equitable, and transparent and help bring the process to an end as quickly as possible.
4. **Payments in installments.** Compensation will be paid in *installments* established by the law. (An initial proposal calls for a minimum annual payment of 3% of total compensation value and for payments to be finished within 15 years.)
5. **Capped compensation.** Compensation amounts will be *capped* using a standardized *evaluation matrix*. (An initial proposal calls for a flat cap of 300,000 RON per property; this figure is tentative and may be revised following further calculations by the Ministry of Finance.)

[61] "Round table: Property Restitution/Compensation:General measures to comply with the European Court's Judgments," Council of Europe, February 17, 2011, accessed September 12, 2011, http://www.coe.int/t/dghl/monitoring/execution/Source/Documents/HRTF/TR%2002.11/Conclusions14022011_ENG.pdf.

Specific Policies:

1. **Time limits for claimants.** Claimants will have 90 days to complete their files. This may be extended once, at the claimant's request, by 60 days.
2. **Time limits for local authorities.** Statutory time limits will be created for decisions by local authorities. The proposed time limits depend on the number of unresolved cases at the time the law enters into force:
    a. 12 months for authorities with fewer than 2500 unresolved cases.
    b. 24 months for authorities with between 2500 and 5000 unresolved cases.
    c. 48 months for authorities with over 5000 unresolved cases. (This basically affects only Bucharest.)
3. **Time limits for the CCB.** Cases registered with the CCB "will be" resolved within a certain amount of time, depending on when it was registered with the Secretariat of the CCB:
    a. 48 months for cases already filed with it by the time the law entered into force.
    b. 24 months for cases forwarded to it after the law takes effect.

    It is worth noting that in its present form, the government's proposal would not make these time limits binding, as in the case of the time limits for the local authorities.
4. **Penalties.** NPRA's Control Body and the Prefect's Control Body will monitor the respecting of statutory time limits and enforce penalties.
5. **Judicial review**. If local authorities do not issue decisions within the time limits specified by law, former owners will have a right, which is clearly defined by law and subject to a 3-year statute of limitations, to bring a claim in court. Courts will be empowered to determine the existence and extent of property, order property restitution, or order compensation. Cases resulting in final court decisions will not be sent back to administrative authorities for further review. If courts order compensation, the Central Compensation Board would determine compensation levels on the basis of the evaluation matrix and relevant documents submitted to the CCB by claimants.
6. **Evaluation matrix**. A simplified matrix to determine compensation values for buildings will based on factors such as the type of property, construction materials, location, age, type of construction, condition, and surface area. A matrix for land compensation values will be based on factors such as usage type, surface area, and location.
7. **No prefect review**. Eliminate the intermediate step of having the prefect verify the legality of local administrative decisions before the NPRA verifies it a second time.

Analysis of the Government's Proposal

Judicial review and time limits. The centerpiece of the government's proposal—instituting binding administrative time limits subject to judicial review, and empowering judges to make final decisions on restitution claims—is in line with the European Court of Human Rights' most emphatic recommendation. Bringing some predictability to the restitution process and ensuring the judicial review of administrative decisions (or lack thereof), these measures would undoubtedly help Romania to put an end to its Article 6 § 1 violations of the right of access to a court.

Yet it appears that the time limits proposed for the CCB are mainly an expression of wishful thinking, given that they do not appear to have binding force in the proposal. Such illusory time limits have existed all along for local authorities, and their ineffectiveness has already been demonstrated. Non-binding time limits may lead to more lawsuits and divided judicial opinion. And, recently, ever more cases are stuck precisely at the CCB. It would also appear that there are no time limits for the NPRA's legality check. If that is the case, it would be an important lacuna, for it this is also an important administrative stage.

Moreover, a 150-day (90+60) limit for claimants to complete their files is too short. In some cases, necessary documents may take six months or more to obtain from other administrative authorities. It would be unfair to foreclose their claims where other administrative authorities are at fault, and substantially longer time limits for claimants would be preferable.

Other steps to smooth the administrative process are also interesting. The NPRA does a second verification of the legality of local authorities' restitution decisions, and the elimination of the redundant step of the legality review by the prefect should remove an unnecessary delay. Administrative measures are not the subject of the legislative proposal, but it is worth remembering that, as the ECHR points out, time limits must be accompanied by the necessary budget and personnel increases.

Sanctions for missed time limits are also welcome, but they must have a dissuasive effect. The level of sanctions currently imposed by ANRP is quite low and do little to incentivize institutions or employees.

Compensation. Ending Romania's Article 1, Protocol 1 violations of the right to peaceful enjoyment of property, which can only be done by creating an effective and predictable compensation system, is somewhat more complicated.

First of all, it is worth noting that sending final court orders back to the CCB for the determination of the compensation amount (and subsequent payment under Romania's convoluted scheme of compensation titles, followed by shares/cash later down the road) is a solution that may not necessarily give claimants rapid redress. Consider the 90-year old Bucharest claimant who has already waited 10 years for a solution before the new law takes effect and may wait four years more with no notification from the Mayor General's Office before obtaining the right to go to court. After the court has ruled in his favor, this person may wait two more years for the Central Compensation Board to issue a compensation certificate, with no result, and then be forced to return to court again for compensation. Supposing that the CCB gave no decision within 24 months, judges would have to be competent to grant compensation anyways. It would be much more efficient to let the court do so at the first trial following the expiration of administrative limits.

The apparent lack of an attempt to increase compensation with state-owned property, as provided for under Law 10/2001, is a mistake. This may have been omitted in the interest of expediency: completing the necessary property inventories is perceived as difficult, and compensation with state-owned property cannot solve the entire problem. There are not good enough reasons not to try, given that these solutions could significantly lower the cost of compensation to the state budget and minimize the impact of any potential capping of compensation.

The cap on compensation is likely to be the most controversial aspect of the project. The European Court of Human Rights has given its nod of approval to such a solution. This means that a level of compensation reasonably related to the value of claimants' nationalized property, even if it is not the amount promised by Law 10/2001, would probably not result in a violation of the Convention. This does not mean that it will be accepted by Romanian courts.

Given two hypothetical claimants who both filed a restitution claim in 2005 for villas in Bucharest worth the same amount, the one that had the luck (or connections) to have his claim resolved by Romanian authorities before a compensation cap took effect would receive much more generous compensation. Such a policy change may meet with two problems:

1. **Constitutionality**. The compensation cap would be applied after the old compensation laws promising full market value compensation were already in effect. When restitution claims were filed with local authorities within the legal filing terms, claimants gained rights under law 10/2001, including the right to compensation at full market value. The Romanian constitution guarantees against retroactive laws (art. 15 al. 2). A retroactive cap on compensation may be challenged at the Constitutional Court.
2. **Judicial review**. The civil code (art. 1) also guards against retroactive laws. Claimants dissatisfied with the cap are likely to go to court, and some judges are may recognize the rights gained under the old laws. This may contribute to yet more chaotic jurisprudence and court overload.

Thus, as well as being unpopular with former property owners, a policy of capping compensation may undermine key policy goals for restitution reform: unburdening the Romanian court system of these cases, promoting coherent judicial practice, and instituting a durable and final solution. In addition, it would repeat the vice of Romania's restitution laws: policy instability.

There is also the issue of fairness, which the European Court of Human Rights and the government have indicated to be a concern that must be "balanced" with other interests. In this case, the unfairness of receiving less than that to which you are entitled because the government ran out of money before it was your turn is doubled by the unfairness of remaining at the back of the line because others had the influence to cut to the front of the line. Thus, if the government is to make a case for the capping compensation, it would do well to show good faith efforts to maximize restitution, maximize possible capped compensation levels, and fight corruption.

Summary

Nine months since *Atanasiu* became final, the most significant measure taken by Romanian authorities was the listing of the Property Fund on the stock exchange in January 2011. On the face of it, this is an important step to Romania making its compensation mechanism more effective, as explicitly suggested by the European Court of Human Rights. It ensured that (1) shares in the Property Fund can be sold immediately at market prices and that (2) new shares are issued by NPRA at market prices, rather than the old index price of 1 RON per share, which has proven to be illusory. However, today the Property Fund no longer retains much relevance as a compensation vehicle. As of August 2011, the state had only 150m euros left to give from the Property Fund[62] and had not yet announced any new sources of compensation. In addition, low FP stock market prices have created a *de facto* 50% cap on compensation for earlier claimants, resulting in lawsuits

The drafting of legislation by the interministerial working group, and the undertaking of budgetary projections by the Ministry of Finance, are important steps in the right direction. Nevertheless, we recall that the 2009 working group's labors never solidified into a legislative proposal, for lack of political will,. Romania has 9 months left until the expiration of the pilot judgment deadline not only to adopt the new administrative measures and legislation, but also to publicly debate their substance and to implement them.

[62] "Statul mai are acţiuni FP de doar 150 mil. € pentru despăgubiri," Ziarul Financiar, August 26, 2011.

Recommendations

Taking into account the problems with the restitution and compensation mechanism and the guidelines set out by the European Court of Human Rights, we recommend several reform measures for implementation before July 12, 2012.

Administrative Measures

Administrative time limits.
Statutory time limits for each administrative step are critical to unblocking claimants' access to a court, one of the fundamental requirements of *Atanasiu*. The government's intention to propose them for local authorities is highly encouraging, but should be required for all administrative phases.

Increase the personnel and budget of the NPRA and local authorities.
Time limits and must be correlated with sufficient capacity at the NPRA and at local authorities with large numbers of unresolved cases, such as those in Bucharest City Hall, which are also responsible for the blockage at the national level. The capacity to process claims within a reasonable and predictable amount of time will also serve to limit corruption.

Audits.
An independent audit should be conducted to assess the institutional, staffing, and financial bottlenecks that keep the NPRA and local authorities (notably those in Bucharest) from processing claims within proposed time limits. The necessary human and financial resources should be allocated. Internal processes should also be made more efficient.

Administrative sanctions and incentives.

With sufficient resources in place, incentives should be adjusted. The previous approach of applying modest fines to institutions has been ineffective. Instead, salary penalties should be levied on individual employees of local and central restitution authorities who do not meet performance quotas within deadlines, and they should be combined with bonuses when targets are substantially exceeded.

Process restitution claims in the order in which they were received. No exceptions.
Some claimants have a legitimate interest in obtaining a prioritized solution. Nevertheless, this is greatly outweighed by the potential for abuse and discrimination that is created by exceptions to processing of claims in the order in which they were registered. The NPRA's discretion in pulling some claims out of line has supported corruption and led to frustration and cynicism among former owners. If compensation is

limited for former owners entitled to compensation who have not received it yet, dissatisfaction will further deepen. A secure online portal allowing all claimants to check on the status of their claims would also promote transparency and help build trust.

Treat former owners and former tenants equally.

Under Law 1/2009, former tenants who bought their apartments under law 112/1995 and then lost their apartments to former owners gained the right to receive market value compensation. This is paid in cash from an extrabudgetary fund, whereas compensation to former owners is paid through shares in the PF and through funds allocated to the NRPA. There is no reason for this unequal treatment. Former owners should also be compensated through NRPA, and their place in line should also be determined by the date on which their claims were received.

Judicial Measures

Judicial review.

Former owners must be able to seek redress in court when authorities do not give responses within a reasonable amount of time, and binding time limits are essential to this. The statutory right to receive final court decisions on the merits should be established. Courts should also be authorized to rule on compensation levels, perhaps applying a standard evaluation matrix themselves, to avoid further administrative delays.

Clear rules.

A new restitution law must give clear rules to help eliminate the sources of the conflicting jurisprudence around restitution, such as whether the special restitution laws preclude restitution claims based on the civil code.

Constitutionality check.

Any attempts to cap compensation are likely to be challenged as unconstitutional, because they would, in effect, be a retroactive limitation placed on rights claimants' gained under Law 10/2001 when they filed their claims within the legal time limits. Parliament or the government should seek a constitutional review by the Constitutional Court before adopting any measures to limit compensation amounts so that there are no big surprises later.

Budgetary Solutions

Conduct impact studies and publish transparent cost analyses.

The practice of legislating large government outlays without estimating or allocating the necessary funds has caused Romania to promise what some observers say is more than it can afford. Romania must credibly assess the remaining cost of implementing its restitution laws if it is to bring property restitution to a final and foreseeable conclusion.

This is a complex undertaking, with very many unknowns. A standard property valuation matrix and a cap on compensation amounts could reduce some but not all of the unknowns. However, any attempt to limit compensation needs to be well justified.

The Ministry of Finance should publish cost analyses and make its assumptions transparent. The government has estimated total costs at an astounding 21 billion euros, but it has not published its methodology. Although this number was prepared by the NPRA, this institution has recognized that "it is not possible to arrive at a global estimate."[63] Good estimates are critical to public debate on this important issue, and a well-argued case may promote public acceptance of otherwise controversial measures.

Identify the available sources of funds.

The value of Property Fund shares in government hands is below the estimated valued of total claims by billions of euros. The government has not identified what it will do when PF shares run out, which is very likely to happen in 2011. The Ministry of Finance should make public a plan for handling the remaining claims.

Increase compensation with public property.

Law 247/2005 calls for compensation by local authorities with "other goods or services", meaning private property held by the state (as opposed to property in the public domain). This happens very little in practice.

Increasing this practice would allow for more restitution of property at no cost to the national budget. Local authorities are already required to do this, but incomplete inventories allow them to claim that they do not have properties to give. It should be clarified in law that this is obligatory until private goods held by local authorities are exhausted.

Complete an inventory of public property in 2 years.

To support compensation with private property held by the state, an inventory must be complete, or else local authorities may continue to erroneously state that they do not have properties to give.

Law 17/1998 required an inventory to be complete by 2000, but it has not been done. There is little incentive for local authorities to catalog the good in their possession if it means they must give them away. The task should be contracted out to an independent institution or company given access to all necessary databases and archives. The greatest number of unresolved claims and the most valuable uninventoried municipally-owned properties are in Bucharest, which should receive priority.

[63] Interview with the author.

Offer to pay less, sooner.

> "If you ask my clients if they want to recover their lost property in 10 years or receive 50% of the value tomorrow, the answer will be 50% tomorrow." – Mihai Furtună[64]

Capping compensation amounts should be avoided as much as possible. Many former owners would be willing to accept a smaller payment sooner rather than a larger payment later. The wide-spread selling of Property Fund shares at 0.10-0.62 RON per share prior to the PF's listing on the stock exchange demonstrates that many former owners would voluntarily accept discounts of between 40% and 90%. Crafting an *individual option* to limited compensation could not only avoid discrimination but also spare the state protracted battles in court.

Political Solutions

Publish proposed measures, seek consensus, and meet the July 2012 deadline.

It is important to meet the July 2012 deadline imposed by the European Court of Human Rights. Romania's 18-month period for implementation was the longest ever for a pilot judgment, and Romania's responsibility to implement general measures began in 2005 with the *Străin* case. There is no excuse for Romania to miss the deadline and draw further international condemnation and embarrassment.

Previous restitution laws suffered from a lack of a unitary vision, which lead to legislative instability. A partisan solution now may unravel later. A strong majority would send a signal to future lawmakers that the comprehensive reforms have a broad base of support. The government should not delay public debate of its proposal any longer, even if there is room for fine-tuning.

Ideally, the government would begin public consultations no later than January 2012, leaving at least six months before the deadline for debate and the adoption of necessary reforms. With elections coming in 2012, sooner is better, and the worst possible solution is to pass difficult decisions to the next administration

[64] Interview with the author.

About the Author

Andrei Popovici is a graduate student at Columbia Law School and the Harvard Kennedy School of Government. He holds a BA in Economics from Yale University.

This report was issued as part of the project **"Romania Active in European Debates II"**, coordinated by the Romanian Center for European Policies (CRPE) and financed by the **Soros Foundation**, part of the Foreign Affairs Initiative.

Cover photo credit: Reinhold Stadler

Romanian Center for European Policies (CRPE)
Știrbei Vodă 29
ap. 4, București - 1
office@crpe.ro
Tel +4 0371.083.577
Fax. +4 0372.875.089
For further details about CRPE, please visit our website: www.crpe.ro