



# CIVIL ENFORCEMENT IN THE WESTERN BALKANS

An overview of the  
present situation and future developments  
in the various legal systems in the Western Balkans





Jos Uitdehaag

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## Glossary

ALCPC	Albania Civil Procedure Code
ALINREG	Albania Internal Regulation of the Bailiff Service (2003)
ALOBS	Albania Law on the Organisation and functioning of the Bailiff Service (nr. 8730)
ALPES	Albania Law on Private Bailiff Service (10031)
BDLEP	Law on Enforcement Procedure Brčko District
BERP	Balkan Enforcement Reform Project
BiH	Bosnia and Herzegovina
CPC	Civil procedure Code
CC	Civil Code
CCPC	Croatia Civil Procedure code
CEA	Croatia Enforcement Act (as adopted 23 November 2010); into force from 1 January 2012
CEA2011	Croatia Enforcement Code as applicable until 31 December 2011
CEPEJ	Council of Europe Committee on the Efficiency of Justice
CEPEJ (2009) 11 REV	Guidelines for a better implementation of the existing Council of Europe's Recommendation on Enforcement, European Commission on the efficiency of Justice (CEPEJ), CEPEJ (2009) 11 REV
CILC	Center for International Legal Cooperation
CISG	United Nations Convention on Contracts for the International Sale of Goods
CLPN	Croatia Law on Public Notaries
COEA	Croatia "old" Enforcement Act as amended last 67/08)
CoE	Council of Europe
CPEAA	Croatia Public Enforcement Agents Act
CSP	Comprehensive Proposal for the Kosovo Status Settlement
DLPEA	Dutch Law on Private Enforcement Agents
DMEPA	Draft Montenegro Enforcement Procedure Act; version per December 31, 2010
DMPEO	Draft Montenegro Law on Public Enforcement Officers; version per December 31, 2010
DSLES	Draft Serbian Law on Enforcement and Security
DOJ	UNMIK Department of Justice
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EPAP	European Partnership Action Plan
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
FBiHLECSO	Law on Employees in the Civil Service Organs in the Federation BiH (Official Gazette FBiH No. 49/05)
FBiHLEP	Law on Enforcement Procedure Federation of Bosnia and Herzegovina
FBiHLOC	Law on Courts Federation of Bosnia and Herzegovina (Official Gazette FBiH 38/05, 22/06).
FLALE	Fyrom Law amending the law on enforcement 2010 ("Official Gazette" br.83/2009 and 88/2010)
FLOE	Fyrom Law on Enforcement
FYROM	Former Yugoslav Republic of Macedonia

## CIVIL ENFORCEMENT IN THE WESTERN BALKANS

GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit (GTZ) GmbH (until January 1st 2011 called Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH)
HJPC	High Judicial and Prosecutorial Council (Bosnia and Herzegovina)
ICJ	International Court of Justice
KJC	Kosovo Judicial Council
KJI	Kosovo Judicial Training Institute
KJPC	Kosovo Judicial and Prosecutorial Council
KLCP	Kosovo 2008 Law on Contested Procedure
KLEP	Kosovo 2008 Law on Executive Procedure
KLPR	Kosovo Law on Property and other real rights
MLEP	Montenegro 2004 Law on Executive Procedure
NGO	Non-governmental organization
OECD	Organisation for Economic Cooperation and Development
ORF	Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH /Open Regional Fund for Legal Reforms (ORF)
OSCE	Organization for Security and Co-operation in Europe
PEO	Public (or Private) enforcement officer. This abbreviation is used to indicate in the various countries the person appointed by Law as the physical person who conducts enforcement as a (private) business activity
PISG	Provisional Institutions of Self Governance (Kosovo)
PTK	Post and Telecommunications of Kosovo
Rec 17/2003	Council of Europe Recommendation (2003)17 of the Committee of Ministers to member states on enforcement (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies)
RSLEP	Law on Enforcement Procedure of the Republika Srpska
RSLOC	Law on Courts Republika Srpska (Official Gazette RS 111/04; 115/04)
SAA	Stabilization and Association Agreement
SFRJ ZIP 2000	Law on the Enforcement Procedure 2000 of the Former Socialist Federal Republic of Yugoslavia
SFRY	Former Socialist Federal Republic of Yugoslavia
SCPC	Serbia Civil Procedure Code 2004
SLEP	Serbia Law on Enforcement Procedure 2004
SMSG	Special Representative of the Secretary General (head of UNMIK), Kosovo
STM	Stabilisation and Association Process Tracking Mechanism (EU)
UIHJ	"Union Internationale des Huissiers de Justice et des Officiers Judiciaires", the International Association of judicial officers and enforcement agents
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNMIK	United Nations Interim Administration Mission in Kosovo
USAID	United States Agency for International Development
ZIP1978	former Yugoslavian federative Law on Enforcement Procedure 1978
ZIP2000	former Yugoslavian federative Law on Enforcement Procedure 2000

## Preface

A more than legitimate question one can ask himself when starting to read this book is the question why this book was written. It is therefore that we first want to explain the background and the meaning of this book.

In the summer of 2008, the authors participated in the Inception Mission of the so-called “Balkans Enforcement Reform Project – BERP” (for more information on BERP we refer to Annex 1). The aim of this mission was to assess the exact state of play in the area of enforcement law in the Western Balkans region: Albania, Bosnia & Herzegovina (Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, Republika Srpska, Brcko District and the various entities), Croatia, the Former Yugoslav Republic of Macedonia, Kosovo, Montenegro and Serbia. Though in some parts of the region donor-funded projects had earlier supported reforms in the area of enforcement law or were still in the phase of actually supporting legislative drafting and training activities in the enforcement area, a comprehensive overview of the sector of enforcement law within the various legal systems was lacking.

As a result of this Inception Mission and the subsequent involvement in the sector over the next three years as key expert and director of the Balkans Enforcement Reform Project respectively, the authors collected a lot of valuable materials and information, and gained a lot of insights in how the various systems are organized and how they function in practice. The idea to compile an overview of enforcement law in the Western Balkans was born.

The book provides an overview of the present enforcement systems in the Western Balkans and of the reforms, which are unfolding in the sector at present. It provides an overview of the state of play as per December 2010 and it is exactly this context against which the book should be read. Substantial reform processes are ongoing in all legal systems in the region and these processes will certainly bring major changes in the years to come. The book will facilitate the reader in understanding what is going on and place this in a certain development context. It should be clear that the intention of the authors is not and has never been to present a comprehensive detailed overview or to prepare an academic work in this area. The authors’ intention was to highlight the major issues and to present a practical overview for those interested in what is going on in the enforcement sector in Albania, Bosnia & Herzegovina, including her entities, Croatia, the Former Yugoslav Republic of Macedonia, Kosovo, Montenegro and Serbia.

All views expressed in this book are those of us, the authors, and not those of CILC, GIZ or UIHJ. For any shortcomings and mistakes only the authors are accountable.

Finally, the authors would like to thank all colleagues from the Center for International Legal Cooperation (CILC), the German Development Cooperation (GIZ) and the International Union of Judicial Officers (UIHJ), as well as all partners in the countries of the Western Balkans for the pleasant and fruitful cooperation in the framework of the Balkans Enforcement Reform Project. In particular, the authors’ gratitude goes to BERP assistant project manager Ms. Hilde Morre and BERP coordinator in Albania Ms. Adela Llatja for their invaluable assistance in preparing this book.

Last but not least, word of thanks should go to the Netherlands Ministry of Foreign Affairs for financially supporting BERP and thus the publication of this book.

*The Hague, April 2011*

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## EXECUTIVE SUMMARY

Against the background of the EU accession process, countries of the Western Balkans are reforming their legal and judicial systems. This implies that legislation, procedures and practices have to be brought in line with the *acquis communautaire* and internationally accepted standards, as set by e.g. the Council of Europe.

An important aspect of judicial procedures, which is now under a growing attention of national authorities in Albania, Bosnia-Herzegovina, Croatia, Kosovo, FYROM, Montenegro and Serbia, is the enforcement in civil and commercial cases. Governments, legal professionals and non-governmental organizations in all mentioned countries have recognized, and this is also stressed by the various progress reports of the European Commission, that the enforcement systems as they were inherited from the socialist past in the various countries, do not meet the demands of today anymore. The problems with the enforcement systems are reflected in unnecessary lengthy proceedings in domestic courts, which become more and more overburdened with huge backlogs in enforcement cases, as well as in a growing caseload of the European Court of Human Rights related to enforcement.

For this situation a number of causes can be identified. First of all, one has to point at the legislative framework which is outdated. Just to mention one aspect of the legislative framework: with the exception of Albania, the legislative basis for enforcement can be found in the 1978 Federal Yugoslav Law on Enforcement Procedure, which – against the background of the socialist system – had a high degree of debtor protection in enforcement cases. A second reason for today's problems is related to the organization of the enforcement process, which in most of the countries is still organized through the courts of first instance. In these courts, enforcement seems to have a low priority, people dealing with enforcement are insufficiently trained and the courts seem to be inadequately structured to deal with enforcement in an efficient and effective way. A third aspect that needs to be mentioned is that, as a result of the economic situation in the region in the last twenty years, creditors have not organized their debt collection systems properly enough and seem to put the problems of receiving their money on the shoulders of the courts. At the same time, governments have tolerated a general culture of not paying debts in time for too long.

The economic aspects of a good enforcement system should not be underestimated. For economic growth a vibrant and competitive business sector is necessary. When businesses are not able to collect their outstanding debts, a number of those businesses are forced into bankruptcy, and others must fire employees or pass on costs to the consumers. Besides, for foreign investors it will probably not be tempting to invest in such a country. Thus an inefficient system of enforcement has a detrimental impact on the country's economy.

These are just a few of the issues which can be mentioned when looking at the broader picture of enforcement law in the countries of the Western Balkans.

It is against this background, and of course also accelerated by the EU accession process, that authorities in the various countries have started the discussion on a fundamental change, and in most of the countries first steps towards a more efficient and effective system of enforcement have been taken. In this context also the case-law of the European Court of Human Rights should be mentioned. In the landmark case of *Hornsby v. Greece* (19 March 1997) the European Court of Human Rights ruled that article 6 of the European Convention on Human Rights does not only apply to the right to bring proceedings before a court in civil matters, but also to the right to secure enforcement of a judgment or decision. Since then, the European Court of Human Rights has given numerous rulings directly or indirectly connected to problems with enforcement in many countries. There is also a huge caseload regarding the countries of the Western Balkans in this area with sometimes a very specific case content like e.g. cases related to the restitution and compensation for nationalized property in Albania during the communist past.

Based on this case-law of the European Court of Human Rights, the Council of Europe itself has taken the initiative in 2001 to formulate some standards for enforcement in its member states. On 9 September 2003, the Committee of Ministers of the Council of Europe adopted Recommendation (2003)17 On Enforcement. The Recommendation provides for some guiding principles concerning enforcement proceedings in civil matters, including commercial, consumer, labour and family law, as well as criminal matters which are not connected to the deprivation of liberty. Furthermore, the Recommendation presents a number of accepted principles concerning the position, role and functioning of enforcement agents. More detailed guidance for the implementation of the principles of the Recommendation has been further elaborated by the European Commission on the Efficiency of Justice (CEPEJ) in its 2009 Guidelines for a better implementation of the existing Council of Europe's Recommendation on Enforcement.

The standards of the Council of Europe, though still of a recommendatory nature, are also relevant for the accession process to the European Union. In accordance with the 'Memorandum of Understanding between the Council of Europe and the European Union (May 2007)' and the 'Decision of the Council of the European Union relating to the conclusion of an Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe (June 2008)' standards of the Council of Europe have also become benchmarks for the European Union in the area of human rights, the Rule of Law and democracy in Europe.

The enforcement systems in Albania, Bosnia & Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Kosovo, Montenegro and Serbia, as presented in this book, are in its present stage to a varying degree not entirely meeting the European Union's and Council of Europe's standards and benchmarks.

As one will see, the problems and challenges in the area of enforcement law in the countries of the Western Balkans are caused by an inter-related set of elements: an outdated legislative framework, weak institutions dealing with enforcement, economic and social circumstances, as well as the absence of some much desired secondary conditions like the existence of complete and accessible civil registers and the efficient functioning of postal services in these countries. Furthermore, problems from the past (communist past in Albania, the wars of the nineties and the conflict around Kosovo) are still heavily influencing the present enforcement practice. Adding to these circumstances the still very much existing debtor's attitude of not paying bills, the low esteem and material equipment of enforcement agents, as well as the insufficient training of enforcement agents, and one can understand why almost all countries are still faced with huge backlogs in enforcement cases.

The good thing is that governmental institutions, NGO's, the international community and last but not least the professionals themselves have realized that something needs to be done.

Starting in the Former Yugoslav Republic of Macedonia in 2003, a process leading to the reform of enforcement systems has been unfolding over the past years. This process is still going on. In some countries it has already led to radical changes, other countries are in the process of introducing these changes to legal practice and in a number of other countries, alternative systems are still being fine-tuned at the drawing table.

As of 1 January 2009 a two track system exists in Albania. A public enforcement agents' system has been operating by the Department for Enforcement of the Albanian Ministry of Justice since 2001. With the introduction of the Law on Private Judicial Enforcement Service, a private enforcement agents' system was created (on paper) as of 1 January 2009. Many challenges still remain to make this system functioning in an efficient and effective manner in Albania's practice.

It is clear that the one of the main obstacles for a more efficient enforcement system in Bosnia and Herzegovina is the constitutional set-up of the country. Therefore, it is not to be expected that major changes to the still court-based enforcement systems in the various entities of Bosnia and Herzegovina will occur in the coming years.

Croatia has had a number of reforms in the enforcement system in the last ten years. As a result, the role of public notaries has grown in the enforcement system. However, in 2009 the Croatian Government decided that all of these changes were not enough and that more radical solutions need to be applied. As a result a new Enforcement Code and a Law on Public Enforcement Agents were adopted by the Croatian parliament in November 2010. The new system will be introduced as of 1 January 2012.

The Former Yugoslav Republic of Macedonia is clearly the frontrunner in the region. The country introduced a private enforcement agents' based system in 2006 and since then this system has been consolidated and strengthened. Generally speaking, the experiences in the Former Yugoslav Republic of Macedonia with the private enforcement agents' system are very positive. However, for a number of years the issue of transfer of the old cases (pre-2006) has been pending and as a result created some negative image problems for the enforcement professionals.

In Kosovo, a new Law on Executive Procedures was introduced in 2008. However, as this law was more or less a remake of the Yugoslav ZIP of 1978, many problems in the area of enforcement still exist in Kosovo. The situation is further complicated by the mixed and sometimes unclear legislative framework and the difficult legal system with the various international elements. Therefore, supported by the international community, initiative was taken by the Kosovar Government in 2010 to start preparing an alternative enforcement system for the future.

Montenegro and Serbia have more or less followed the same path of reform at the same time. In both countries, the reform of the present legislative framework started in 2008. In Montenegro, the starting point was the Judicial Reform Strategy and based thereon an Assessment of the enforcement system. Since then, a working Group under the auspices of the Ministry of Justice started to elaborate a new Enforcement Code and a Law on Public Enforcement Officers. Serbia followed a different legislative technique and codified the procedural aspects and the organizational issues of enforcement in one new Law on Enforcement and Security. It is to be expected that the mentioned laws in both countries will be adopted in 2011 and that the new systems will have to be implemented in the years to come.

The general conclusion one will draw after reading the overview, is that in almost all countries a process aimed at the reform of the outdated enforcement system has started but that as a result of a number of issues, a lot of challenges still remain. However, it is clear that the decisions most of the countries have taken in this process can not be turned back.





## Chapter 1: Introduction

### 1.1. Terminology

In 1808 August Zeune<sup>1</sup> defined “the Balkans” to describe those areas that remained under Turkish rule after 1699, namely: Bulgaria, Serbia (south of Sava and Danube rivers), Macedonia, Thrace, Albania, Wallachia, Moldavia, Epirus, Bosnia and Herzegovina, Montenegro (except for the Boka Bay and Budva), continental Greece, and European Turkey. Nowadays the term “Balkans” is not only used to indicate the geographical region, but also the political and cultural environment.

In this publication we use the words “Balkans” and “Western Balkans” strictly to indicate the geographical concept.

It is unclear who started using the words “Western Balkans”. It is used by international institutions, policy makers and journalists. There are however differences in the interpretation of the words. For example, the interpretation of the European Bank for Reconstruction and Development (EBRD) does not always include Croatia. Furthermore, the European Union (EU) defines the “Western Balkans”<sup>2</sup> as Albania, Bosnia-Herzegovina (BiH), Croatia, the Former Yugoslav Republic of Macedonia (FYROM alternatively Macedonia), Kosovo, Montenegro and Serbia. In this publication we will use the wording “Western Balkans” as interpreted by the European Union (EU)<sup>3</sup> and thus indicating the previously mentioned region.

“The Former Yugoslav Republic of Macedonia” (FYROM) is a temporary name pending settlement of the difference that has arisen over the name of that State. In Greece there is a province of Macedonia and there are fears that the constitutional name “Republic of Macedonia” might imply a claim on Greek territory. That is why Greece disputes the constitutional name “the Republic of Macedonia” of its northern neighbor. The United Nations have undertaken numerous attempts to achieve a resolution, however, so far without success. After gaining independence from the Socialist Federal Republic of Yugoslavia (SFRY) a compromise was found in the use of the wording “Former Yugoslav Republic of Macedonia” (FYROM). Both the UN and its member states have agreed to accept any final agreement resulting from negotiations between the two countries.<sup>4</sup> Although a number of countries already recognized the constitutional name, so far both the EU and the Dutch Government have not done so. For that reason we will use the term FYROM in this publication.

### 1.2. Challenges for the enforcement systems

As a result of the process of accession to the European Union, the Western Balkans are involved in a comprehensive process of reforming their legal and judicial systems. This in order to meet the so-called EU “Copenhagen criteria” and Council of Europe standards as far as the judicial system is concerned.<sup>5</sup>

The area of enforcement law, as the final piece in the judicial chain, is one of the priorities of the reform of these countries’ legal systems. This is not surprising as practice in the different countries has shown that the existing systems (of enforcement judges and court clerks responsible for enforcement of civil and administrative judgments) seem to be outdated and do not meet the criteria of an efficient and effective judicial process anymore.

According to article 6 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security

1 A. Zeune, *Göa: Versuch einer wissenschaftlichen Erdbeschreibung* (Berlin, 1811).

2 See for example: the EU-Western Balkans Summit – Declaration, Thessaloniki, 21 June 2003 and “Western Balkans: Enhancing the European perspective”, Brussels, 5 March 2008, COM(2008) 127 final.

3 With the term former Yugoslavia we refer to the Socialist Federal Republic of Yugoslavia (SFRY) (1974-1992).

4 See: United Nations and UNGA resolution 225 (1993).

5 For the area of the Rule of Law, the European Union clearly set the Council of Europe standards as benchmarks. In the area of enforcement law the main documents are Recommendation (2003)16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law issued on 9 September 2003 and Recommendation (2003)17 of the Committee of Ministers to member states on enforcement, also issued on 9 September 2003. Recommendation (2003)17 sets the standards for enforcement of judgments in civil and commercial matters. It also applies to other judicial and non-judicial enforceable titles and covers enforcement procedures as well as enforcement agents. Most recently the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe published in addition to these Recommendations the Guidelines for a better implementation of the existing Council of Europe’s Recommendation on enforcement CEPEJ (2009) 11 REV (see annex 3 and 4).

in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

In 1997 the European Court of Human Rights (ECtHR) in the landmark case *Hornsby v. Greece*<sup>6</sup> decided that the guarantee of the right to a fair trial as mentioned in the above quoted article 6 ECHR also applies to enforcement, as “[i]t would be inconceivable that Article 6 par. 1 should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions”. For that reason “execution of a judgment given by any court must therefore be regarded as an integral part of the “trial” for the purposes of article 6” of the European Convention on Human Rights, it being understood that the right of access to a court “would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party” (par. 40).

Except for Kosovo, all countries described in this book are member of the Council of Europe and are bound as such by the ECHR. All countries need to provide fair and efficient enforcement structures and procedures. Not implementing enforceable titles can also be considered to be a violation of other substantive human rights. In the landmark case *Immobiliare Saffi v. Italy*<sup>7</sup> the ECtHR found that the alleged violation was not only a violation of article 6 ECHR with respect to the reasonableness of the time needed. The Court also concluded that “the balance that had to be struck between the protection of the right of property and requirements of the general interest” had been upset. Not implementing enforceable titles is also considered a violation of the right to protection of property as guaranteed by Article 1 of Protocol No. 1 to the Convention, i.e. the right to the peaceful enjoyment of possessions. However, not just the creditor’s rights are protected by the Convention and its Protocols, also debtors’ rights such as human dignity and privacy are protected by article 8 ECHR.

As we shall see later in this publication (Chapter 3) there is a growing number of cases submitted to the ECtHR from the participating countries as a result of lengthy trials and un-enforced judgments (and thus concerning the interpretation of articles 6 and 8 of the ECHR and Article 1 of Protocol No. 1 to the Convention).

The present enforcement systems have resulted in unnecessary backlogs at the national courts and thus in an unnecessary burden on the national judiciary. It should be clear that this situation is not very appealing to foreign investors, who are looking for countries with a stable and reliable legal and judicial system. Evidently, the need for change has become clear for the respective national authorities and international structures.

The region realized that serious efforts should be undertaken and that a substantial reform of enforcement law is necessary. National authorities in all countries of the Western Balkans have adopted the necessary policy frameworks over the past years. These strategies and in particular the ensuing action plans are to be seen as road maps within which the reform process is to further unfold. Developments are not running parallel and are at different stages in the various countries.

### 1.3. The importance of regional cooperation in the area of enforcement law

In addition to the specific situation in each of the seven countries, something should also be said here about the importance of regional cooperation in the sector. With the exception of Albania, all countries share a common past in the Socialist Federal Republic of Yugoslavia.

In February 2007 a regional seminar on enforcement law was organized in Skopje under the EU/Cards Program. The leading experts at the roundtable, among whom one of the authors of this book concluded that “... it is necessary that there is a follow-up to this round-table. There seems to be a need for better understanding the EU standards and other international standards and best practices. All Cards countries seem to have an enforcement system where changes (some smaller, some basic, some fundamental) are necessary to make the systems more efficient and effective. Also from an EU point of view.”<sup>8</sup> Although nowadays the reform processes in the sector are in different stages of development, the countries in the

<sup>6</sup> *Hornsby v. Greece*, ECtHR 19 March 1997, no. 18357/91.

<sup>7</sup> *Immobiliare Saffi v. Italy*, ECtHR 28 July 1999, no. 22774/93.

<sup>8</sup> Cards Regional Project “Establishment of an independent, reliable and functioning judiciary and the enhancing of the judicial co-operation in the Western Balkans” (82-231).

region are still faced with similar problems. As such one could argue that to find answers to address these problems, the countries in the region should cooperate and facilitate an exchange of the various solutions found.

Despite the atrocities in the nineties of the last century, it is also clear that still many familial and business ties exist between the countries. With the 'normalization' of the last years, economic cooperation, including cooperation with Albania, is growing. This will also lead to more judicial proceedings between the countries of the Western Balkans. At present, however, legal and practical obstacles are hampering an efficient and effective cross-border enforcement and service of documents. This situation is recognized by all countries in the region and it is clear that unless an appropriate regional mechanism will be established, this situation will not change. In order to ensure that such a regional mechanism is effective, it should consist of an appropriate regulatory framework, but no less important is that officials entrusted with enforcement can find each other. As such the establishment of formal and informal networks should also be regarded as a success factor to ensure an effective and efficient cross-border enforcement and service of documents.

In the political context of integration into Euro-Atlantic structures, regional cooperation in the wider South East European region is becoming more and more important. This process of integration into bigger structures like the European Union and the Council of Europe also increases the importance of the relevant international standards in the sector.

It is for these reasons that the authors want to plea for a strong focus on strengthening regional cooperation in the years to come.



## Chapter 2: General overview

### 2.1. Introduction

The present publication will provide a global overview of the present state of play in the enforcement systems in the various countries (situation per 1 April 2011). In this description the focus will be on the one hand on how the system is organized on paper in the countries' legislation and on the other hand on the functioning of the various systems in daily practice. The countries' description will start with providing the political context under which the enforcement systems are operating. Then the main features of the present systems will be shortly described. The main shortcomings and challenges in the area of enforcement law will be identified in each country. Furthermore, it includes an overview of the past, future and present (donor supported) interventions to the sector. Finally, it will describe the reform process in each of the participating countries. The actual developments, possibly leading to amendments of the current systems, will also be shortly highlighted.

### 2.2. Political context

Although this publication is of a technical nature, it cannot be avoided to provide for some political context within which the reform processes are to be unfolded.

The legal framework for an application for membership of the EU is based on article 49 and 2 of the Treaty on European Union. Article 49 of the Treaty on European Union states: "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account." Article 2 states that "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

The Feira European Council acknowledged in June 2000 that Western Balkan countries participating in the Stabilisation and Association Process were 'potential candidates' for EU membership. This European perspective of Western Balkan countries was further confirmed by the Thessaloniki European Council in June 2003. During this Council the "Thessaloniki Agenda for the Western Balkans" was endorsed.

In December 2006 during the European Council in Brussels the EU's commitment was renewed: "the future of the Western Balkans lies in the European Union". The Council reiterated that "each country's progress towards the European Union depends on its individual efforts to comply with the Copenhagen criteria and the conditionality of the Stabilisation and Association Process. A country's satisfactory track-record in implementing its obligations under a Stabilisation and Association Agreement (SAA), including trade related provisions, is an essential element for the EU to consider any membership application".

These Copenhagen criteria were a conclusion from the European Council in Copenhagen in June 1993: "Accession will take place as soon as a country is able to assume the obligations of membership by satisfying the economic and political conditions required.

Membership requires:

- that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union;
- the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union".

On 2 June 2010 a ministerial meeting was held in Sarajevo. At this Sarajevo EU-Western Balkans ministerial meeting the EU once again reiterated its unequivocal commitment to the European perspective of the Western Balkans and stressed that the future of these countries lies in the European Union.

All participating countries, with the exception of Kosovo, are thus in a process of accession to the European Union, although the current stage of the accession process differs tremendously in the various countries:

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Country:	EU Accession status:
Albania	The Stabilization and Association Agreement was signed on 12 June 2006. The SAA entered into force 1 April 2009. On 28 April 2009 Albania submitted its application for EU membership. The entry into force of the SAA means a close cooperation between the EU and Albania in a number of EU policy areas, including justice, aiming at the introduction of the EU acquis in its legislation and to cooperate with the EU on joint policy objectives. Those objectives are outlined in the Albanian National Strategy for Development and Integration (2007-2013), the key strategic policy document of the Albanian Government outlining its long-term national development and EU integration objectives. The Strategy comprises a synthesis of the medium and long-term sector and inter-sector strategies.
Bosnia and Herzegovina	The Stabilization and Association Agreement was signed on 16 June 2008. The SAA did not enter into force yet. So far (December 2010) the SAA has been ratified by 25 EU Member States. The Interim Agreement (IA) which focuses on trade and trade related matters of the SAA entered into force in July 2008. The obligations under the IA are a European Partnership priority. However, as the 2010 Progress Report concluded, "The country is in breach of the IA due to non-compliance with the European Convention on Human Rights and due to the absence of a state aid authority. Moreover, in February, Bosnia and Herzegovina unilaterally changed most-favoured nation (MFN) duties for a number of agricultural and industrial products by adopting Amendments on the Law on Customs Tariffs. No prior consultation with the European Commission took place, which goes against the provisions of the Interim Agreement."*
Croatia	The Stabilization and Association Agreement was signed on 29 October 2001. The SAA entered into force as of 1 February 2005. The application for EU membership was presented on 21 February 2003. The opinion of the European Commission regarding the Application for EU membership was published on 20 April 2004. The decision of the European Council to grant status of candidate for EU membership was taken on 17 and 18 June 2004. The start of Accession Negotiations was on 3 October 2005. This process is not yet fully completed. A new Accession Partnership was adopted by the Council on 12 February 2008. On 5 November 2008, the European Commission proposed an indicative road map for reaching the final stage of accession negotiations with Croatia by the end of 2009, provided Croatia fulfilled all the necessary conditions. Delays in Croatia itself in certain areas meant certain chapters have not progressed in line with the roadmap. This delay also concerns the chapter on the judiciary and fundamental rights. The accession negotiations with Croatia are still continuing and are entering their final phase. Negotiations have been provisionally closed on 25 out of 35 chapters and remain to be closed on the remaining chapters, including on judiciary and fundamental rights and on justice, freedom, security.
FYROM	The Stabilization and Association Agreement was signed 9 April 2001. The SAA entered into force as of 1 April 2004. The application for EU membership was presented on 22 March 2004. The opinion of the European Commission regarding the Application for EU membership was published on 9 November 2005. The decision of the European Council to grant the status of candidate for EU membership was taken on 16 December 2005. The Accession Partnership was adopted on 18 February 2008. In October 2009, the European Commission recommended to the Council to open negotiations with the country, as well as to move to the second phase of SAA Implementation. The Council has not yet taken a position on these proposals.
Kosovo	On 20 April 2005 the European Commission adopted the Communication on Kosovo 'A European Future for Kosovo' which reinforces the Commission's commitment to Kosovo. Furthermore, on 20 January 2006, the European Council adopted a European Partnership for Serbia and Montenegro including Kosovo as defined by United Nations Security Council Resolution 1244. The Provisional Institutions of Self-Government (PISG) adopted in August 2006 an Action Plan for the Implementation of the European Partnership. This document formed the working basis between the EU and Kosovo. In June 2008 the European Council recalled EU's "willingness to assist the economic and political development of Kosovo through a clear European perspective, in line with the European perspective of the region". At this moment Kosovo is participating in the Stabilisation and Association Process. Plenary meetings of the Stabilisation and Association Process Tracking Mechanism (STM) were held in December 2008 and June 2009. In January 2010 the stabilization and association dialogue was launched.
Montenegro	The Stabilization and Association Agreement (SAA) was signed on 15 October 2007. The ratification process is not yet completed. In June 2008 the Government of Montenegro adopted its National Programme for Integration in the European Union for the period of 2008-2012. This document represents a plan for the adoption of the acquis, providing for short-term and medium-term priorities. On 15 December 2008 Montenegro submitted its application for EU membership. The SAA entered into force in May 2010.
Serbia	The Stabilization and Association Agreement and an Interim Agreement on trade-related measures with the EU was signed on 29 April 2008. The Interim Agreement entered into force 1 February 2010. On 22 December 2009, the Serbian President and Prime Minister handed over the country's application for EU membership. On 14 June 2010, the Council agreed to launch the ratification process for the SAA.

\* Bosnia and Herzegovina 2010 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2010-2011, European Commission, 9 November 2010, SEC(2010) 1331, page 5-6.

Accession to the European Union is a political issue for the governments of the Western Balkan countries.

All countries, with the exception of Kosovo, are member of the Council of Europe: Albania since 13 July 1995, Bosnia-Herzegovina since 24 April 2002, Croatia since 6 November 1996, FYROM since 9 November 1995, Montenegro since 11 May 2007 and Serbia since 3 June 2006, the last two countries had been Council of Europe member as the State Union of Serbia and Montenegro since 3 April 2003.

Against this background these countries are expected:

- a) to harmonize their legislation with the *acquis communautaire* in many areas of their economy and society;
- b) to reorganize the respective legal and political institutions; and
- c) to redefine the functioning of these institutions so that they qualify under the so-called “Copenhagen criteria” of the European Union, which among others require ensuring the Rule of Law.

As a result of the membership of the Council of Europe, the countries have committed themselves to adhere to and uphold the various standards set by the Council of Europe.

Here it should immediately be mentioned that the standards on the Rule of Law set by the Council of Europe, are also fully endorsed by the European Union. As a matter of fact, as a result of the “Memorandum of Understanding between the Council of Europe and the European Union”<sup>1</sup> and the “Decision of the Council of the European Union relating to the conclusion of an Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe”<sup>2</sup> standards of the Council of Europe have also become benchmarks for the European Union in the area of human rights, the Rule of Law and democracy in Europe.

For the area of enforcement law, the European Union itself has developed some *acquis* like “Directive 1348/2000 On the service of Judicial and Extra-Judicial documents”, “44/2001 European Enforceable Title”, “805/2004 European Enforcement Order for Uncontested Claims”, “1896/2006 European Payment Order Procedure”, “35/2000 Late Payment Directive” and “87/2005 Small Claims Procedure”. These instruments serve a more efficient and effective service of documents and cross-border enforcement within the member states of the European Union itself and can certainly be used as reference for the improvement of enforcement in the Western Balkans. In terms of more concrete benchmarks, it makes more sense to look - in line with the above described framework for cooperation between the European Union and the Council of Europe - at the instruments as developed by the Council of Europe. When we speak about the Council of Europe, this also includes the European Court of Human Rights.

The fundamental right to a fair trial within a reasonable time is guaranteed by article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). The European Court of Human Rights has ruled in the landmark case *Hornsby vs. Greece* in 1997<sup>3</sup> that such a right to a fair trial within a reasonable time, as enshrined by article 6, also covers the enforcement of court decisions.<sup>4</sup>

As this publication will clarify, authorities in the Western Balkan countries, as well as the European Commission in their monitoring exercise of the candidate countries and the future candidate countries, have come to the conclusion that the present enforcement systems are far from efficient and effective. This is also underlined by the growing number of cases related to enforcement procedures in the countries of the Western Balkans at the European Court of Human Rights.

The problems of the enforcement systems in the Western Balkan countries are also closely related to and linked with the current overall poor state of affairs of the judicial systems in these countries. The governments of the Western Balkan countries have all endorsed the policy of aligning their legal systems with the standards of the European Union, and thus of the Council of Europe in the area of Rule of Law. They have all outlined some roadmap to meeting those standards. The European Union is monitoring the progress of harmonizing the countries’ legal frameworks with the *acquis communautaire*, as well as the countries’ meeting the standards of the Copenhagen criteria and the Rule of Law.

1 Memorandum of Understanding between the Council of Europe and the European Union CM (2007)74, 10 May 2007; signed by the Council of Europe on 11 May 2007 and by the European Union on 23 May 2007.

2 Decision of the Council of the European Union relating to the conclusion of an Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe, signed on 16 June 2008.

3 *Hornsby v. Greece*, ECtHR 19 March 1997, no. 18357/91.

4 See: Chapter 4.



### 2.3 Legislation and organization of the enforcement process

The common basis for enforcement law in each of the countries (except Albania) is the former federative Law on Enforcement Procedure from 1978 (ZIP 1978).

ZIP 1978 was in force in all the countries succeeding SFRY. For example in Bosnia and Herzegovina, on the whole territory of Bosnia and Herzegovina, the former federative Law on Enforcement Procedure from 1978 was applicable until 2000 (Brčko District) and 2003 (Federation of Bosnia and Herzegovina and Republika Srpska). But even after the reform there are no major changes in comparison with ZIP 1978.

Prof. Dr. Meliha Povlakic summarized this law and the (intention to) reform as follows: "The main principle of enforcement law in the former SFRY, was the principle of sociality, which summarizes all measures of protection of the debtor in the enforcement procedure. It is that very principle that caused the well-known inefficiency of the enforcement procedure. On the territory of the former SFRY existed full consent on the necessity of abandoning the mentioned principle, as the primary goal of the reform of enforcement law. The goal of the reforms was the increase of efficiency of the enforcement procedure, which would consequently result in the improved protection of the creditors."<sup>5</sup>

There have been legal changes in the overprotection of the debtors. As is the case in other (Southern European) countries, under the ZIP 1978 the law could easily be abused by debtors to prolong the enforcement procedure. Not on legal grounds, but simply to frustrate enforcement. In this light reform improved enforcement procedures.

In all countries the influence of the court in enforcement procedures is substantial. Not always there is a clear distinction between the functions of litigation proceedings and of enforcement proceedings. The aim of trial proceedings is to examine whether or not the claim alleged by the plaintiff is justified. The enforcement process should pursue the goal of enforcing the justified claim as efficiently and swiftly as possible. Hence enforcement legislation should never make it possible for the defendant to re-open and to re-adjudicate the trial proceedings of a case.<sup>6</sup>

Two other issues we will discuss in this publication are the non-enforcement of small claims and the role of the notary public in enforcement.

One of the biggest problems in enforcement is the non-enforcement of small claims, i.e. unpaid utility bills. For instance, only at the Municipal Court in Sarajevo, at the end of 2007, there were 909.257 unresolved utility bill cases (87.66 per cent of the total number of unresolved cases in this court), out of which there were 809.128 or 88.87 per cent enforcement cases.<sup>7</sup> We will go into more detail on this issue in the various chapters.

The enormous backlog in cases at the courts and insufficient functioning of the enforcement system made some countries decide to "outsource" part of the enforcement procedures to non-government institutions. The best example of this is the role the notary public plays in enforcement (e.g. in Croatia). In the various country descriptions we will pay attention to this issue.

Regarding cross-border enforcement all countries have legislation that deals with the enforcement of a foreign court decision. One or more courts decide on the recognition and enforcement of foreign judicial decisions. In view of the (increasing) volume of trade between the countries in the region we consider it important that attention is paid to the conclusion of bilateral or multilateral agreements within the region under which a decision made in one state would be enforced in the other without the need for any special recognition. The Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>8</sup> and the experiences with e.g. OHADA<sup>9</sup> in Africa could be used as an example.

<sup>5</sup> Prof. dr. Meliha Povlakic, Law Faculty of the University in Sarajevo, Bosnia and Herzegovina, National report for Bosnia and Herzegovina – Enforcement Law, page 1.

<sup>6</sup> Of course there should be an exception in case of certain justified interests of the defendant and third parties that require protection and thereby the establishment of certain legal remedies in accordance with the concept of a "fair trial" pursuant to Article 6 ECHR. For example (and self evident) a defendant must be able to immediately stop the enforcement process if he has paid the debt in question, and that third persons may pursue their legal rights to their property which has been seized by mistake.

<sup>7</sup> Action plan for reduction of case backlogs, 1 February 2008, NACRT, Page 19.

<sup>8</sup> Council Regulation (EC) no. 44/2001 ("the Brussels I Regulation") on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It came into force on 1 March 2002 and applies to all Member States of the European Union with the exception of Denmark. The Regulation lays down uniform rules to settle conflicts of jurisdiction and facilitate the mutual recognition and enforcement of judgments, court settlements and authentic instruments within the EU in civil and commercial matters. It also includes rules to assist courts in settling jurisdictional matters.

<sup>9</sup> OHADA stands for "Organisation pour l'Harmonisation du Droit des Affaires en Afrique" translated in English as the "Organization for the Harmonisation of Business Law in Africa". It is an organization created on October 17, 1993 in Port Louis (Mauritius). The OHADA Treaty is



## 2.4. Training of professionals involved in enforcement

The already mentioned Recommendation of the Council of Europe on enforcement, Rec(2003)17, is dedicating - for good reasons - a chapter to "enforcement agents".<sup>10</sup> The Recommendation clearly states that "enforcement agents should undergo initial and ongoing training according to clearly defined and well-structured aims and objectives". With this recommendation the Council of Europe unmistakably recognizes that an effective enforcement system, based on the principles of Rule of Law, needs highly professional and specialized enforcement agents, who have the right and obligation to undergo an initial and an ongoing training. The principle enshrined in this Recommendation is an apparent refusal of putting the enforcement act into the hands of people, who did not receive a proper education.

In most of the countries the core of the enforcement system lies in the hands of judges. To this extent it is indisputable that judges have, after undergoing years of education at the university, a huge general knowledge about the law and its implementation. Still it has to be mentioned, that carrying out the function of an enforcement judge requires special knowledge in the field of enforcement, which is not automatically delivered during university education or general introduction courses for judges. This means that a special training strategy for enforcement judges is absolutely necessary.

Additionally it has to be stressed that also those, who are carrying out judge's instructions, and particularly the court clerks, should be familiar with the basic principles of the enforcement process. Taking into consideration that most citizens (especially on debtor's side) are getting in contact mainly with those court clerks, better educated and trained court clerks would contribute not only to a more efficient enforcement procedure but at the same time to a higher reputation of the enforcement machinery and ultimately of the judiciary as a whole. Citizens' trust in the professionalism and competence of the enforcement staff will finally foster debtors' cooperation during the enforcement procedure.

A comprehensive initial and ongoing training cannot replace a responsible self-preparation of professionals. The continuous update and improvement of practical and theoretical knowledge can only be achieved if several factors are being taken into account. First and foremost judges and court clerks who are entrusted with the enforcement process have to be sensitized for the need of continuous efforts regarding the improvement of their professional knowledge. On the other hand it is the obligation of the state authorities in charge, to guarantee the availability of high quality literature, training materials and practical guides in sufficient quantity and diversity so that those who are eager to widen their professional capacity will find reliable sources. Materials should be tailor-made for the different professions involved (judges and court clerks) and should highlight issues of practical importance. It should be drawn up in a way that the knowledge gained through working with the materials can easily be transferred to diverse situations of daily enforcement practice. Special attention should be paid to guides and manuals, which contain practical tips, templates and other materials and can be used during the enforcement procedure. Mistakes during the process of translating judges' decisions into action will delay the whole procedure and produce an even higher workload for judges involved.

## 2.5. Ethics, monitoring and control, disciplinary issues

During the last decades it has become a common accepted practice to develop professional ethical standards for many different groups of professionals in order to serve the dramatic increase in the ethical expectations of the society towards civil servants and entrepreneurs. It is undisputed that such a set of rules is of even bigger importance, wherever professionals have the state-given right to interfere with the rights (e.g. property rights) of others. The development and promotion of a Code of Ethics for enforcement agents is therefore an important tool on the way to lift the profession to higher standards and bigger acceptance within the population.

Also the CoE recommendation<sup>11</sup> makes obvious reference to the need to develop binding ethical guidelines.

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made up today of 16 African states. OHADA's purpose is to promote regional integration and economic growth and to ensure a secure legal environment through the harmonization of business law. A uniform debt recovery and enforcement law was adopted by the Council of Ministers on July 10, 1998. This Uniform Act sets out the legal proceedings that the creditor can rely upon to force his debtor to meet his commitments. The Act has a simplified debt recovery and seizure of property (distrain) proceedings and institutes quick, inexpensive and efficient methods of debt collection such as the injunction to pay (writ of execution issued by the judge against the debtor, in favor of the creditor) and the restitution procedure, which will be a strong protection for the unpaid creditor.

10 According to the definitions of the recommendation 17/2003 (I; b) "enforcement agent" means a person authorized by the state to carry out the enforcement process irrespective whether this person is employed by the state or not.

11 See annex 3 and 4: Council of Europe Recommendation (2003)17 of the Committee of Ministers to member states on enforcement (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies) and European Commission on the efficiency of justice (CEPEJ) Guidelines for a better implementation of the existing Council of Europe's Recommendation on enforcement CEPEJ (2009) 11 REV.

It clearly states that “enforcement agents should be honorable and competent in the performance of their duties and should act....according to recognized .....ethical standards”.

A profession's ethical standard must be compatible with civil society's common morality, but at the same time go beyond this common morality in the way that it has to interpret those general rules for the specific details of the work of a particular occupational group. The very exercise of developing a code is in itself worthwhile; it forces a large number of people to think through in a fresh way their mission and the important obligations they have as a group and as individuals with respect to society as a whole. At the same time it can be observed, that ethical regulations, tailor-made for a specific profession, are able to “...enhance the sense of community among members, of belonging to a group with common values and a common mission.”<sup>12</sup>

Wrapping up the different impacts, which a Code of Ethics can have on the profession, one can say that such a set of rules is the ideal instrument to define accepted and acceptable behaviors; to promote high standards of practice; to provide a benchmark for members to use for self-evaluation; to establish a framework for professional behavior and responsibilities; to be a vehicle for occupational identity and to be a mark of occupational maturity.

Having said this, it becomes clear that an ethical code can only be a success, when based on a common understanding regarding the principals in question. Such a common understanding usually does not exist from the very beginning but has to be achieved through a broad and thorough discussion between professionals and other members/representatives of the legal society.

Once a set of rules is in place it has to be guaranteed that there is a (control) mechanism in place, which is checking the compliance of the enforcement agents with those rules and which, if necessary, initiates proper measures in case the rules are not respected. Enforcement agents alleged to have abused their position should be subject to disciplinary, civil and/or criminal proceedings, providing appropriate sanctions where abuse has taken place.<sup>13</sup> Nothing else but a proper control mechanism guarantees proper law implementation and trust of the population in the system at the same time. In addition to this, a well-defined system of check and balance is the best way to prevent and to combat corruption.

## 2.6. Working circumstances, remuneration

Adequate salaries and social benefits are crucial for the well development of any profession as they are indispensable to attract and to retain qualified candidates. Low salaries will cause a lack of sufficient qualified career starters and will lead almost perforce to a high labour turnover at a later stage. The outflow of trained people will then cause additional costs for education/vocational training of continuous new people.

Besides problems caused through high rates of fluctuation and shortage of qualified candidates for the job, low salaries lead also to low reputation of the whole profession within the society. This is attributed on the one hand to the low qualified people, who will deliver at the end low quality services and on the other hand to the effect that civil society tends to have a bigger trust in high paid professionals, because the average salary of a profession is often being seen as a quality benchmark for the profession as such. Last but not least, the average salary is also an indicator for the appreciation for the profession by the society.

There is a third problem, which is directly related to insufficient salaries: corruption. It is undisputed among specialists in the field of the “fight against corruption” that a decent and sufficient salary is, besides efficient and sharp control mechanisms, the first step to prevent or to combat corruption within a profession. The main reasons for this correlation is that the reasonable pay raises the opportunity cost - the risk of losing a decent salary - of engaging in corruption. It also reduces the need to generate other forms of incomes. Together with a well-developed ethical system, including efficient disciplinary procedures, appropriate salaries are the key to lower corruption within the profession.

We are aware of the fact that influencing of salaries for judges, enforcement agents and court clerks is far out of the mandate and possibilities of outsiders like donor-funded projects. However, given the great importance of this matter for a successful enforcement system we want to raise the awareness of decision makers. Attention needs to be paid to both the salaries of the judges, who under most of the current systems (still) play the leading role in the enforcement process, and the salaries of the court clerks and/or the enforcement agents.

<sup>12</sup> Kultgen J, 1988. *Ethics and Professionalism*. Philadelphia; University of Pennsylvania Press. pp.212-213.

<sup>13</sup> Council of Europe Recommendation (2003)17; IV. 6.

## 2.7. Infrastructure and material resources

Except for FYROM all countries have a lack of infrastructure and material resources. The main reason for this is the lack of financial means and an annual budget to properly and effectively enforce court decisions. Obviously enforcement agents are considered the closing post within the court budget.

In our opinion this is a fundamental problem. The lack of a proper infrastructure creates unacceptable delays in enforcement. There is a risk of unnecessary dependency on claimants: claimants are offering their services/assistance (e.g. staff, transport) to enforcement agents. Such a dependency undermines the position of enforcement agents in the legal system. There is a risk that priority is given to certain creditors only. Enforcement agents should be independent within the legal system. It is inappropriate that enforcement agents should be dependent on claimants to fulfil their duties. There should be as few barriers to enforcement as possible and the system should be equal before all claimants. Moreover the lack of financial means might lead to corruption.

An example can be found in a USAID study on the enforcement system in Serbia: "While enforcement officers handle large numbers of cases, their productivity seems to be rather low in terms of their ability to effectuate contact with the debtor and to seize and sell property effectively. This is in part a consequence of the extended travel requirements of the job and the relatively small number of visits to debtors' premises the typical enforcement officer can perform in the course of a day.

In addition, there is a significant issue of motivation. Enforcement officers have safe but very poorly paid jobs in which they handle an unending stream of highly repetitive cases.

No enforcement officer has any interest in completing work on any specific case quickly, though there are quotas and expectations for a certain number of "actions" to be performed within a given time period. Similarly, when enforcement agents sell movable property, they have absolutely no interest in improving either the sale price or the probability of sale. While the creditor is allowed to advertise the sale, the typical judgment creditor has little experience in such matters."<sup>14</sup>

Adequate premises are another problem. In most Western Balkan countries there is an urgent need for improvement of the premises of the enforcement agents. A typical example can be found in a report from the Euralius mission in Albania: "As we have seen during visits, there are at least some enforcement agents' offices that have too few rooms for performing their work. The Enforcement agents' office in Kruja is situated in the court building. It consists of a single room and has no heating. During our visit in December 2005, the staff had no electricity and therefore could not work with the IT system. There is no room to store the seized items. According to the chairman, a request for a bigger office has been sent to the GD, but so far they received no answer. The local enforcement agents' office in Elbasan consists of two rooms which together have less than 25 m<sup>2</sup> for all 8 enforcement agents and the administrative staff, consisting of a secretary, a finance clerk and a driver. This is obviously much too little. There is no storage room for the seized items..... In Tirana, there are only two landline telephones for 26 employees including 17 enforcement agents."<sup>15</sup>

Material resources also refer to the means of transportation. In all countries those means of transportation are rather poor. It is not an exception that only one car is available for a complete office. In a number of cases the enforcement agent is dependent upon the availability of the "court car". In practice this means that to carry out enforcement activities the enforcement agents are completely dependent on public means of transport. Even when the agents are dependent on the public transport in a number of cases there is no adequate funding of expenses for traveling by these public means of transport.

Adequate IT and software is indispensable for an efficient enforcement process. All countries expressed their need for an adequate computer system to file the cases:

- for an efficient internal organization of the offices;
- for communication with the other offices and the Ministry of Justice (through Internet or Intranet);
- for efficiently obtaining information from the registers;
- for communication with other public authorities;
- for training and exchanging legal information.

<sup>14</sup> USAID-BES Project, Enforcement of civil and commercial judgments in Serbia, Baseline assessment, USAID/Booz, Allen & Hamilton (July 31, 2006), page 12.

<sup>15</sup> Euralius, the European Assistance Mission to the Albanian Justice System, "First analysis of needs and gaps of the Albanian Enforcement Service", February 2006.

As an example the already mentioned Euralius report says: "The bailiff's office in Elbasan which has 8 enforcement agents has 4 PCs etc. with software. The PCs are only used as a typewriter. Only one official vehicle and one landline telephone are available for the whole office. The enforcement agents' office in Kruja has only 1 PC without specific software. The PC is not working properly. According to the chairman, the request for a repair or another one has been turned down with the reason that all PCs in the courts are of the same quality."<sup>16</sup>

## 2.8. Service of documents

Several times we already referred to article 6 ECHR, the principle of fair trial. Such a fair trial is an illusion when a debtor is not properly informed about the ignition of proceedings or on the enforcement of a judgment. The proper service of documents can be considered a fundamental part of any well-functioning enforcement system, or, broader, any well-functioning legal system. An addressee needs to be properly informed and given the possibility to challenge the document.

In all Western Balkan countries the service of documents is considered to be one of the main problems, also in enforcement procedures. The problems are more or less familiar. Only the larger courts have a special post office within their court for the delivery of documents. In these offices post is prepared to be delivered by special officials. Medium and small sized courts do not have such offices and are dependent on the Mail Company. In practice it appears that documents are either not delivered at all or are not delivered in time. In addition, due to financial constraints (some courts frequently had a lack of money to pay for postage), service sometimes is not effected at all. The Mail Company requires payment in advance before delivering the court documents. Consequently some courts are unable to serve documents for extended periods. The court based service causes delays and is open to the possibility of abuse.

Another problem relates to the registration of the addresses. It seems that often people refuse to register themselves. For obvious reasons. However this means that documents are not delivered at the proper address.

Especially the service by post appears to be completely inefficient and a lot of problems arise because of the wrong service, or no service at all. A lot of problems could be solved by a decent and correct service of the documents introducing proceedings and introducing enforcement. Wrong service, or no service at all might cause months of delay in proceedings and might lead to a substantial increase in the number of enforcement cases in the courts. The system depends on the professionalism, qualification and training of the postal staff and precisely these qualities and qualifications can be questioned.

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<sup>16</sup> Euralius, the European Assistance Mission to the Albanian Justice System, "First analysis of needs and gaps of the Albanian Enforcement Service", February 2006.

## Chapter 3: Cases at the European Court of Human Rights

### 3.1. Introduction

"The aim of the Council of Europe is to achieve an ever-greater unity between its members, founded on the principles of parliamentary democracy, the rule of law and human rights, for the purpose of safeguarding and realising the ideals and values which are the common heritage and facilitating their social and economic progress. This aim shall be pursued through the organs of the Council by discussion of questions of common concern, by conventions and agreements and common action in the fields necessary to achieve this unity"<sup>1</sup>

One of the means to fulfil this statutory aim is by concluding treaties: by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realization of human rights and fundamental freedoms.<sup>2</sup> One of those treaties is the Convention for the Protection of Human Rights and Fundamental Freedoms, in short European Convention on Human Rights (ECHR).

This Convention was drawn up within the Council of Europe. It was opened for signature in Rome on November 4, 1950 and entered into force on September 3, 1953. Taking as their starting point the 1948 Universal Declaration of Human Rights,<sup>3</sup> the framers of the Convention sought to pursue the aims of the Council of Europe through the maintenance and further realisation of human rights and fundamental freedoms. The Convention was to represent the first steps for the collective enforcement of certain of the rights set out in the Universal Declaration.

In addition to laying down a catalogue of civil and political rights and freedoms, the Convention set up a mechanism for the enforcement of the obligations entered into by Contracting States. Three institutions were entrusted with this responsibility: the European Commission of Human Rights (set up in 1954), the European Court of Human Rights (set up in 1959) and the Committee of Ministers of the Council of Europe, the latter organ being composed of the Ministers of Foreign Affairs of the member States or their representatives.

The European Court of Human Rights (ECtHR), as presently constituted, was brought into being by Protocol No. 11 on November 1, 1998. This amendment made the Convention process wholly judicial, as the Commission's function of screening applications was entrusted to the ECtHR itself, whose jurisdiction became mandatory. The Committee of Ministers' adjudicative function was formally abolished.<sup>4</sup>

Only Council of Europe member states can ratify the ECHR. In the past the Parliamentary Assembly contented itself with a "firm intention"<sup>5</sup> or a "declared willingness"<sup>6</sup> to ratify the Convention. Nowadays ratification is seen as an "instrument of European public order"<sup>7</sup>, and a deadline is made compulsory for candidate countries to sign the ECHR on joining and then ratify the Convention within a year.<sup>8</sup>

### 3.2. The European Convention on Human Rights and enforcement

Article 6 of the ECHR states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

1 Recommendation 1212 (1993) on the adoption of a revised Statute of the Council of Europe, text as adopted by the Assembly on May 11th 1993 (32nd Sitting).

2 See art. 1 par. 2 Statute Council of Europe, London, 5.V.1949.

3 On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights.

4 The text of the Convention has been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed.

5 Application of Hungary; Opinion no. 153/1990.

6 Application of Poland; Opinion no. 154/1990.

7 See: *Loizidou v. Turkey*, ECtHR 23 March 1995, no. 15318/89, ECHR Series A no. 310, par. 75.

8 As stated in art. 58 par. 3 of the Convention: "Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions".

In 1997, in the landmark case of *Hornsby v. Greece*,<sup>9</sup> the ECtHR held by seven votes to two that there had been a violation of article 6 paragraph 1 of the ECHR on account of the Greek administrative authorities' failure to comply within a reasonable time with two judgments of the Supreme Administrative Court quashing the Minister of Education's refusal to grant the applicants authorisation to open a private school for the teaching of English. By refraining for more than five years from taking the necessary measures to comply with a final, enforceable judicial decision the Greek authorities had deprived the provisions of article 6 paragraph 1 of the Convention of all useful effect. There had accordingly been a breach of that Article.

The enforcement of a court judgment is an integral part of the fundamental human right to a fair trial within a reasonable time, in accordance with article 6 of the ECHR. Since *Hornsby v. Greece* the ECtHR has in all its jurisprudence always stressed that the rule of law principle can only be a reality if citizens can, in practice, assert their legal rights and challenge unlawful acts.<sup>10</sup> Therefore it is absolutely undisputed that all member states have a duty to ensure that all persons who receive a final and binding court judgment have the right and possibility to its enforcement. The non-enforcement of such a judgment, or a delay in it taking effect, could render this right inoperative and illusory to the detriment of one party.

The ECtHR interpreted the inclusion of enforcement in article 6 ECHR in several cases and, over the years also extended its scope and meaning.

In the case *Estima Jorge v. Portugal*<sup>11</sup> the Court has decided that "Article 6 paragraph 1 of the Convention required that all stages of legal proceedings for the 'determination of ... civil rights and obligations,' not excluding stages subsequent to judgment on the merits, be resolved within reasonable time" (paragraph 35). This case dealt with the enforcement of a notarial deed received as a security for mortgage. The Court stated: "conformity with the spirit of the Convention required that the word 'contestation' (dispute) should not be construed too technically and that it should be given a substantive rather than a formal meaning" (paragraph 37).

Another example relates to preliminary expenses: the ECtHR ruled that the access to enforcement proceedings cannot be limited depending on the payment of a court fee.<sup>12</sup> In the case *Scollo v. Italy*<sup>13</sup> the ECtHR ruled that the State can be held responsible for the inactive behaviour of administrative authorities.

The State is subject also in other ECtHR judgments. The State as a debtor for example. In the case *Burdov v. Russia*<sup>14</sup> the ECtHR concluded that lack of funds is not an excuse for not honouring a judgment debt. Omissions are no reason either not to pay, the ECtHR decided in *Timofeyev v. Russia*.<sup>15</sup>

In its case-law the ECtHR assesses the length of proceedings. Such a length of proceedings must be assessed in the light of the circumstances of the case and with reference to the certain criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute. An overall period of over seven years cannot, in itself, be deemed to satisfy the "reasonable time"

9 *Hornsby v. Greece*, ECtHR 19 March 1997, no. 18357/91.

10 See e.g. the following (basic) ECtHR decision: *Estima Jorge v. Portugal*, ECtHR 21 April 1998, no. 24550/94: In this judgment the European Court of Human Rights held unanimously that art. 6 par. 1 of the ECHR was applicable to the enforcement proceedings in issue and had been infringed on account of their length. Under art. 50 of the Convention, the Court awarded the applicant a specified sum for pecuniary damage, non-pecuniary damage and legal costs and expenses.

11 *Estima Jorge v. Portugal*, ECtHR 21 April 1998, no. 24550/94.

12 *Apostol v. Georgia*, ECtHR 28 November 2006, no. 40765/02: "The right to a court is not merely a theoretical right to secure recognition of an entitlement by means of a final decision but also includes the legitimate expectation that the decision will be executed. [...] the imposition of the obligation to pay expenses in order to have that judgment enforced constitutes a restriction of a purely financial nature and therefore calls for particularly rigorous scrutiny from the point of view of the interests of justice"

13 *Scollo v. Italy*, 28 September 1995, no. 19133/91, par. 40, 44: in this case, the eviction procedure lasted 11 years and ten months and was finally settled when the tenant vacated the premises of his own accord. The Court noted that: "...even if, in the instant case, it is not possible to speak of enforcement proceedings in the strict sense, the Court considers that Article 6 para. 1 ... is applicable, regard being had to the purpose of the proceedings, which was to settle the dispute between the applicant and his tenant ... While not overlooking the practical difficulties raised by the enforcement of a very large number of evictions, the Court considers that the inertia of the competent administrative authorities engages the responsibility of the Italian State under Article 6 para. 1 ..." See also *Matheus v. France*, ECtHR 31 March 2005, no. 62740/00.

14 See *Burdov v. Russia*, ECtHR 7 May 2002, no. 59498/00: "It is not open to a State authority to cite lack of funds as an excuse for not honouring a judgment debt. Admittedly, a delay in the execution of a judgment may be justified in particular circumstances. But the delay may not be such as to impair the essence of the right protected under Article 6 § 1 [...] In the instant case, the applicant should not have been prevented from benefiting from the success of the litigation, which concerned compensation for damage to his health caused by obligatory participation in an emergency operation, on the ground of alleged financial difficulties experienced by the State."

15 *Timofeyev v. Russia*, ECtHR 23 October 2003, no. 58263/00: "... It appears that the delays in the execution were caused by the bailiffs' unlawful actions, numerous adjournments due to interference of supervisory-review authorities, and the obscurity of the judgment. The Court considers that the applicant should not pay the price of these omissions of the State [...] The Court finds it unacceptable that a judgment debt against the State is not honoured for such a long period of time. [...] By failing to comply with the judgment of the Leninskiy District Court of Orsk the national authorities prevented the applicant from receiving the money he could reasonably have expected to receive. The Government have not advanced any justification for this interference."



requirement in article 6 paragraph 1 of the ECHR.<sup>16</sup>

Having said this, it does not come as a surprise that the development of the case-law of the court over the last years showed a constant increase of cases related to the enforcement of (final) judgements or other enforceable court decisions and documents. As the number of cases in front of the ECtHR is, especially in transition countries, still seen as an indicator for the state of affairs in the field of the development of rule of law and especially in the field of the judiciary, all cases are adding to the interest of the countries to improve the (efficiency) of their enforcement systems.

### 3.3. Recommendation 17/2003 and 2009 Guidelines

On 4 and 5 October 2001 in Moscow the 24<sup>th</sup> Conference of European Ministers of Justice was held. The conference adopted a resolution on "General approach and means of achieving effective enforcement of judicial decisions". The Conference agreed that "the proper, effective and efficient enforcement of court decisions is of capital importance for States in order to create, reinforce and develop a strong and respected judicial system." The Conference asked the European Committee on legal Co-operation (CDCJ) "to identify common standards and principles at a European level for the enforcement of court decisions."

The Resolution was followed up by a Recommendation on enforcement. This Recommendation was adopted by the Committee of Ministers of the Council of Europe on September 9, 2003.<sup>17</sup> CEPEJ, Council of Europe's Committee on the Efficiency of Justice, included enforcement of judicial decisions into the list of its priorities. On December 17, 2009 CEPEJ published a Guideline for a better implementation of the existing Council of Europe's Recommendation on Enforcement.<sup>18</sup>

The Recommendation (and the Guidelines) are based on efficiency, transparency and being understandable. Without prescribing the ideal system. There is not an ideal system on enforcement. But what is possible, is to prescribe the basics, the principles of enforcement. As such, those Recommendations and Guidelines can be used to assess enforcement procedures and practices.

Also the judgments of the ECtHR can be used to assess those enforcement procedures and practices. Since 1997, the *Hornsby v Greece* case, a number of judgments of the ECtHR have found violations of the ECHR. We already saw before: those cases are also interesting as an indicator for the state of affairs in the field of the development of rule of law and judiciary. Specifically on those subjects where the enforcement law does not meet European standards, the ECtHR points out where the states should modernize. Comparing different countries, it will become clear where the common defects, if any, are in the national enforcement law.

The right to have a judgment enforced is an integral part of the right to have access to court, as is the right to have proceedings within a reasonable time. Sometimes it is not clear which right is the object of a case. The cases listed below, are selected on the fact that they involve enforcement issues, sometimes caused by an excessive length of the enforcement procedure. This means that both the requirements concerning the reasonable time, and the right of having a judgment enforced, are violated.

A selection of ECtHR case-law based on formal, national law specifics would eventually result in the state deciding which cases will be studied. The ECtHR tries to protect the rights listed in the Convention; therefore it is not effective to only recognize enforcement problems by national classification.

16 Sokolov v. Russia, ECtHR 22 September 2005, no. 3734/02: "The Court observes, however, that substantial periods of inactivity, for which the Government have not submitted any satisfactory explanation, are attributable to the domestic authorities. For more than a year, from 26 November 1999 to 14 December 2000, the enforcement proceedings languished with no apparent progress. The domestic courts admitted that the bailiffs had been responsible for their failure to enforce the judgment. The aggregated length of the delays occasioned by the judge's absence and his participation in unrelated proceedings amounted to approximately seven months. The Court also finds it peculiar that in the case which was of no particular complexity so many hearings had to be adjourned to give time to the defendant to produce additional evidence [...]. The Court furthermore notes that the conduct of the defendant was one of the reasons for the prolongation of the proceedings. In the Court's opinion, the domestic authorities failed to take adequate steps in order to ensure the defendant's attendance. The defendant defaulted on at least eight occasions which resulted in a delay of approximately seven months. There is no indication that the court reacted in any way to that behaviour. Accordingly, the Court considers that, the domestic courts did not avail themselves of the measures available to it under national law to discipline the participants to the proceedings and to ensure that the case be heard within a reasonable time [...]. Finally, the Court recalls that employment disputes generally require particular diligence on the part of the domestic courts [...]." See also: *Balcan v. Romania*, ECtHR 29 July 2008, no. 37380/03. Although: it can be much worse. See for example: *Di Pede v. Italy*, ECtHR 26 September 1996, no. 15797/89 ("... the enforcement proceedings must be regarded as the second stage of the proceedings..., a period of more than eighteen years, for most of which the authorities dealing with the case bear responsibility, cannot be regarded as reasonable.") and *Zappia v. Italy*, ECtHR 26 September 1996, no. 24295/94 ("... a period of more than twenty-three years for proceedings which are still pending and are of no particular complexity cannot be regarded as reasonable...").

17 See annex 3: Council of Europe Recommendation (2003)17 of the Committee of Ministers to member states on enforcement (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies).

18 Guidelines for a better implementation of the existing Council of Europe's Recommendation on Enforcement, European Commission on the efficiency of Justice (CEPEJ), CEPEJ (2009) 11 REV, see annex 4.

An important cause of the number of cases in which the different states are involved with is the period of membership of the Council of Europe. As it takes years for cases to be admissible for the ECtHR, either by exhaustion of domestic remedies, or by a violation of the reasonable time requirement, it only seems that new members have not, or have less, violated the rights of their civilians, but in fact in time they also will be involved in a number of cases.<sup>19</sup>

Enforcement law is the final stage of a procedure. This means that difficulties that originated from an earlier stage in the procedure, sometimes will cause or come to the surface as an enforcement problem. The solution to these problems is therefore not necessarily found in enforcement law. A state body, not willing to pay damages of expropriation after a judgment, will violate article 6 of the Convention (access to court, including the right to have a judgment enforced), in case the property right was recognized in national law, resulting in a judgment, as is the situation with Croatia. Denying the right for damages for expropriation in an earlier stage, for instance when no legal basis is provided in the national property law, will result in a violation of article 1 of Protocol No. 1 to the Convention (right to peacefully enjoy property). The similarity of these problems (lack of respect for property of civilians, non-compliance with the rights of civilians by legislative or executive state institutions) illustrates that the problem is indifferent of the kind of regulation it belongs to.

### 3.4. Albania and the European Court of Human Rights

Albania joined the Council of Europe on 13<sup>th</sup> of July 1995 as the 35<sup>th</sup> member state. It ratified the European Convention on Human Rights on 2<sup>nd</sup> of October 1996.

Since then Albania has been party to numerous cases in front of the ECtHR. Until 2009 the ECtHR has issued 22 judgments in cases against Albania; in a number of these cases the ECtHR found violations against the convention and/or additional protocols. At least three of these cases were grounded on the failure of the state to comply with or to enforce a final judgment.

In the case *Driza v. Albania*<sup>20</sup> the ECtHR had to decide on a case in which a final judgment of the Supreme Court of Albania was left without enforcement for more than six years. The court stated that the Government had not provided any explanation as to why the judgment of 7 December 2000 has still not been enforced more than six years after it was delivered and that it did not appear that the bailiffs or the administrative authorities had taken any measures to execute the judgment.

Having said this, one has to remember that Albania is in a very special situation regarding cases in which the court has to decide on cases under the so-called "Property Restitution and Compensation Act".<sup>21</sup> Those cases are dealing de facto with a new redistribution of land and the compensation for the loss of land respectively. The fulfilment of judgements and decisions in these cases is one of the most urgent tasks of the Albanian Government. The Strasbourg court called already several times upon Albania, "... as a matter of urgency, to take all the necessary statutory, administrative and budgetary measures to ensure that claimants "speedily" received the compensation or land awarded to them.... Those matters are to include the creation of an adequate fund to pay those applicants entitled to financial compensation".

Similar is the case of *Marini v. Albania*,<sup>22</sup> where execution had not been performed for more than 5 years.

In this case an Albanian/American company established with the Albanian State a joint venture, a plastic production company called *Marini-Albplastik*. During the development activities of the joint venture, the Albanian State suggested to change the terms of cooperation. The applicant declined the proposal and applied to the State Arbitration Commission, which rewarded the applicant with loss of profit, interest, and ordered the State to finish the development activities. The appeal of the State to the Plenary State

19 Because Kosovo is not fully recognized by other States, this is not a member of the CoE. Kosovo is following the Court's decisions for internal legal development. Serbia is the successor of the State Serbia and Montenegro. FYROM's reformed enforcement is so far not related (yet) with a case at the ECtHR. Montenegro was already a member as a part of the State Union with Serbia.

20 *Driza v. Albania*, ECtHR 13 November 2007; Application No 33771/02.

21 The Property Restitution and Compensation Act (Ligji për kthimin dhe kompensimin e pronës) has undergone several amendments during the past fourteen years. The main changes to the first Property Act of 1993 came about as a result of two laws which entered into force respectively in 2004 and 2006. The original Act and these two amending Acts will hereinafter be referred to as the "Property Act 1993" the "Property Act 2004" and the "Property Act 2006" respectively.

In the above mentioned case *Driza v. Albania* the Property Restitution and Compensation Act 1993 was applicable since the Property Act of 2004 had no retroactive effect (see also Property Act of 2004, providing the establishment of a State Committee on Property Restitution and Compensation, and Property Act 2006, providing an Agency for the Restitution of Properties and Compensation, and a section concerning the enforcement).

22 *Marini v. Albania*, ECtHR 18 December 2007, no. 3738/02.



Arbitration Commission, resulted in a decision where (1) the compensation claim of the applicant was quashed, (2) the Commission was given guidelines for a recalculation of the lost profit, and (3) the State was given an obligation to continue the development activities.

At the time the outcome of the recalculation was presented by the Commission, the enforcement agents froze the assets of the State-owned company, the applicant's partner in the joint venture, but failed to enforce the judgment as the State authorities refused to cooperate. The National Privatization Agency sold the factory and the plot of land adjacent to it. This privatization act was declared void again and again, eventually by the Constitutional Court, as this privatization concerned assets of the joint venture. Ignoring the outcome of the abovementioned judgment, the State authorities concluded a 20 year lease contract with company D., without applicant's consent. Later on, this agreement was also declared void. In a new attempt the Ministry of Labor and the applicant agreed to establish a new Marini-Albplastik Company. The State insisted (contrary to the law) that the applicant should invest his share first. Again State Authorities concluded a lease contract for twenty years with D., followed by the registration of the factory as State property. The applicant did not succeed in restitution of his property. The State liquidated the assets of the factory.

Article 142 paragraph 3 of the Albanian Constitution reads as follows: "state bodies shall comply with judicial decisions". Nevertheless this article is ignored in a number of ECtHR cases: State authorities do not comply with the enforceable judgments, and ignore property rights of the applicants.

The number of un-executed cases show that Albania at the moment does not only have the "typical" enforcement problems, caused by a lack of efficiency, ignorance of property rights or under-funding of the existing service, but also lacks the financial means in order to honour obligations, which arise from decisions against the State.

Having said this, it is just logically consistent that many cases which come before the Strasbourg court are touching upon the State as a debtor, who is not paying despite a final judgement against him. To this respect the ECtHR made crystal clear in several decisions that a person who has obtained an enforceable judgment against the State as a result of successful litigation cannot be required to resort to enforcement proceedings in order to have it executed.<sup>23</sup> Therefore one can say that those cases, which are the clear majority of cases against Albania, are not directly cases, which have their roots in the weakness of the enforcement system, but in a lack of budgetary means of the State to pay its own debts.

An example of the lack of financial means can be found in the case of *Qufaj Co. sh.p.k v. Albania*.<sup>24</sup> In this case the Tirana Court of Appeal sentenced the Municipality of Tirana to pay compensation to the applicant company for losses resulting from the refusal to grant a building permit. However, this judgment was not executed on the grounds that the State allegedly lacked the necessary funds, despite various steps taken by the applicant company. Therefore the company brought proceedings before the Albanian Constitutional Court, which declared that enforcement proceedings in general did not fall within its jurisdiction.

The ECtHR recalled that enforcement of judicial decisions is an integral part of the "trial" for the purposes of article 6 and that a delay in enforcement may impair the essence of the right to a fair trial.

Another example is the case of *Beshiri and others v. Albania*.<sup>25</sup>

This case concerns the failure to enforce a final judicial decision of April 11, 2001 concerning the applicants' right to compensation in respect of plots of land which had been nationalized (violations of article 6 paragraph 1 ECHR and article 1 of Protocol 1 to the ECHR).

The ECtHR noted that the judgment in question remained unenforced for over five years, a situation for which the Albanian government had not provided any plausible justification. Citing a lack of state funds, as the government had done, did not justify the situation. Moreover, by failing to comply with the judgment of April 11, 2001 the national authorities left the applicants in a state of uncertainty with regard to the chances of reacquiring their property rights and, for a considerable period of time, prevented them from having their compensation paid and from enjoying the possession of their money.

Concerning the enforcement of the Commission's decisions, the ECtHR observed that, irrespective of whether the final decision to be executed took the form of a court judgment or a decision by an administrative authority, domestic law as well as the ECHR provided that it was to be enforced. However, no steps had

<sup>23</sup> see *Cocchiarella v. Italy*, ECtHR 29 March 2006, no. 64886/01, *Metaxas v. Greece*, ECtHR 27 May 2004, no. 8415/02, *Koltsov v. Russia*, ECtHR 24 February 2005, no. 41304/02, and *Petrushko v. Russia*, ECtHR 24 February 2005, no. 36494/02, par. 18.

<sup>24</sup> *Qufaj Co. sh.p.k. v. Albania*, ECtHR 18 November 2004, no. 54268/00.

<sup>25</sup> *Beshiri and others v. Albania*, ECtHR 22 August 2006, no. 7352/03.

been taken to enforce the Commission's decisions in the applicants' favor. None of the property acts or any related domestic provision governed the enforcement of the Commission's decisions. In particular, the various property acts in Albania did not provide either for any statutory time-limit for appealing against such decisions before the domestic courts or for any specific remedy for their enforcement. The ECtHR further noted that the property acts left the determination of the appropriate form and manner of compensation to the Albanian Council of Ministers, which was to define the detailed rules and methods for such compensation. To date no such measures had been adopted. The decisions in the applicants' favor had been unenforced for 12 and 11 years respectively and the Government had not submitted any evidence that relevant measures were imminent.

The ECtHR considered that the Albanian Government had not produced any convincing evidence to justify the failure of the domestic authorities over so many years to determine the final amount of the compensation due to the applicants or to return to the first three applicants a plot of land belonging to them which had since been allocated to third parties. There had therefore been a violation of article 1 of Protocol No. 1 to the ECHR, regarding compensation (all the applicants) and restitution (the first three applicants).

By ignoring judgments, state bodies will not check nor improve themselves through a system of 'checks and balances'; and fail to help the rule of law gaining respect. Instead of treating the judgments as disturbance of their policies, it is important that the executive bodies of the State ask themselves how to prevent violations of their civilian's right. State bodies can not only apply those rights which can be literally found in formal laws, but also have the obligation to protect those laws that are implied. In a system that lacks instruments to materialize rights that obviously deserve protection, like the right to have a judgment enforced, provided that the access to court is already a recognized right, the judicial bodies have to understand that rights deriving from the ECHR ask for solutions that are not provided (yet) by the national formal law. In some cases the way to the court does not provide an effective solution for civilians that claim their rights have been violated, resulting in frustration and the need for seeking help in unjust solutions.

A first example can be found in the enforcement of family law.

In the case of *Bajrami v. Albania*<sup>26</sup> the applicant's daughter was taken by her mother to Greece without his consent. On February 2, 2004 the Vlorë District Court decreed the applicant's divorce and gave him custody of the child. Although the applicant repeatedly took steps to secure the return of his daughter, the judgment was never enforced. According to the office of the enforcement agent, it was impossible to enforce it since the child was not in Albania. The ECtHR noted that Albania had not ratified the relevant international instruments on securing the reunion of parents with their children, including the Hague Convention of 1980 on the Civil Aspects of International Child Abduction. However, irrespective of that, the ECtHR found that the Albanian legal system, as it stood, provided no alternative framework affording the applicant the practical and effective protection required by the State's positive obligation enshrined in article 8 ECHR. (Albania acceded to the Hague Convention, which entered into force in respect of Albania on 1 August 2007).

A more recent example can be found in the case *Gjyli v. Albania*:<sup>27</sup> "A person who has obtained a judgment against the State may not be expected to bring separate enforcement proceedings [...]. In such cases, the defendant State authority must be duly notified of the judgment and is thus well placed to take all necessary initiatives to comply with it or to transmit it to another competent State authority responsible for execution.

The Court observed that the Government did not provide any plausible reasons for the failure of the responsible authorities to comply with the Durrës District Court's judgment of 27 September 2005. As to the Government's suggestion that the applicant's appointment was made unlawfully, the domestic courts found in his favour. The risk of any mistake must be borne by the State and errors must not be remedied at the expense of the individual concerned [...]. The national authorities appear to have made no efforts to offer the applicant an alternative solution, for example to accommodate him in another position of similar rank. There is no information to indicate that the enforcement entailed any complexity. The applicant did not prevent the enforcement. The Court finds no justification for this period of non-enforcement, which continues to date and has impaired the essence of the applicant's right to a court. For the foregoing reasons, the Court considers that there has been a violation of article 6 paragraph 1 of the Convention." Just recently the ECtHR judged a second time in this case, based on art 41 ECHR:<sup>28</sup> "The Court reiterates that a

<sup>26</sup> *Bajrami v. Albania*, ECtHR 18 December 2007, no. 35853/04.

<sup>27</sup> *Gjyli v. Albania*, ECtHR 29 September 2009, no. 32907/07. A more recent case is the case *Puto cs v. Albania*, 20 July 2010, no. 609/07.

<sup>28</sup> Art. 41 ECHR: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach [...] If national law does not allow – or allows only partial – reparation to be made, article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate [...]. That being so, the Court cannot but conclude that despite partial compensation paid to the applicant, the domestic authorities have not fully complied with the Supreme Court's decision [...] The Court considers that it has to afford the applicant just satisfaction, corresponding to the outstanding amount of salary arrears as calculated by the authorities, in the absence of a different detailed breakdown submitted by the applicant."<sup>29</sup>

Is the ECtHR losing her patience with Albania?

In a more recent case, *Nuri v. Albania*,<sup>30</sup> the property rights of the applicant were recognized by a Property Restitution Commission. As a plot of land could not be restated, the applicant was entitled to receive compensation. After other property was restituted to the applicant, the compensation was still not received. Although the applicant did not exhaust the national remedies, the Court holds that there has been a violation of article 6 of the Convention. In spite of her obligation, the State had failed to provide the instruments of bodies to organize of proper restitution.

Obviously the ECtHR did not feel like providing an extensive explanation in her judgment: the court did not feel like providing much explanation as it held that there had been a violation of article 6 of the Convention. The ECtHR simply referred to relevant cases from the past: *Driza v. Albania*, and *Ramadhi and others v. Albania*.

However progress is made.

Three months after the decision of the ECtHR in another more recent case *Vrioni and others v. Albania*,<sup>31</sup> from March 24, 2009, the Council of Ministers of Albania with its decision dated 23.06.2009<sup>32</sup> authorized the execution of this decision by paying the amount of 450.000 EUR + 10% of the income tax. In the same decision it was decided that the Ministry of Finance should pay the 10% income tax of the amount given as compensation in 9 other judgments of the ECtHR.<sup>33</sup> Another similar decision has been taken by the Albanian Government dated 18 June 2009,<sup>34</sup> on the judgment *Dauti and others v. Albania*.<sup>35</sup>

The height of the compensation should also be more clear. In the aforementioned case *Driza v. Albania* the ECtHR also referred to the method of calculation of the amount of compensation: it should correspond to the value of the plot of land at the time of the domestic authorities' decisions. Meanwhile Albania has adopted property valuation maps. In a recent case the ECtHR refers to this development: "the Court notes with interest that the authorities have adopted property valuation maps in respect of the entire territory of Albania. The reference price, as stated by the Government, reflects the real market value and was interest- and inflation-indexed at the time of adoption of the maps. The Court will therefore base its findings for the calculation of pecuniary damage on the property valuation maps adopted [...]"<sup>36</sup>

### 3.5. Bosnia and Herzegovina and the European Court of Human Rights

Bosnia and Herzegovina's accession to the Council of Europe was in April 2002 and the ECHR was signed in the same year. At that time Bosnia and Herzegovina was member state number 44.

It took several years before the first cases against Bosnia and Herzegovina appeared before the Strasbourg Court, but since 2004 a number of cases were and are still pending, which are dealing with non-enforcement of enforceable, binding judgments and decisions. As we will see in relation to other countries, the highlighted country specific problems, as brought before the ECtHR, can neither be attributed to the individual enforcement officer, nor to the enforcement authority. Rather these problems can be put down to the lack of budgetary provision on the part of the State. This is also the case with Bosnia and Herzegovina.

To understand the background of these cases it is indispensable to look into some country specifics.<sup>37</sup>

<sup>29</sup> *Gjyli v. Albania*, ECtHR 7 December 2010, no. 32907/07.

<sup>30</sup> *Nuri v. Albania*, ECtHR 3 February 2009, no. 12306/04.

<sup>31</sup> *Vrioni and others v. Albania*, ECtHR 24 March 2009, no. 2141/03.

<sup>32</sup> <http://www.keshilliministrave.al/?fq=brenda&m=news&lid=11370>.

<sup>33</sup> [www.panorama.com.al/index.php?id=29803](http://www.panorama.com.al/index.php?id=29803).

<sup>34</sup> <http://www.km.gov.al/?fq=brenda&m=news&lid=11319>.

<sup>35</sup> *Dauti and others v. Albania*, ECtHR 3 February 2009, no. 19206/05.

<sup>36</sup> *Vrioni v. Albania*; ECtHR 7 December 2010; nos. 35720/04 and 42832/06.

<sup>37</sup> For a more detailed description see the very instructive ECtHR judgment in the case *Jeličić v. Bosnia*, ECtHR 31 October 2006; no. 41183/02.

From 1965 citizens were allowed to open foreign-currency savings accounts in the former Socialist Federal Republic of Yugoslavia ("the SFRY"). Hard-pressed for hard currency as it was, the SFRY made it attractive for its expatriate workers and other citizens to deposit their foreign currency with SFRY commercial banks: such deposits earned high interest and were guaranteed by the State. From the entry into force of the Foreign-Currency Transactions Act 1977 until 15 October 1988, commercial banks could re-deposit foreign currencies with the National Bank of the SFRY in Belgrade and could obtain interest-free, national-currency loans in return. The commercial banks then used foreign currency for payments abroad (for financing imports and foreign services for their clients). On the other hand, foreign currency, which was actually deposited with the National Bank of the SFRY, was used for paying foreign debts of the SFRY.

Problems resulting from the foreign and domestic debt of the SFRY caused a monetary crisis in the 1980s and made the SFRY taking emergency measures including legislative restrictions on the repayment of foreign-currency deposits to individuals.

After their respective declarations of independence the successor States took over the SFRY's statutory guarantee for those deposits, which had not been ceased before the dissolution of the SFRY. The Republic of Bosnia and Herzegovina (the legal predecessor of present-day Bosnia and Herzegovina), which declared its independence in March 1992, took over the statutory guarantee of foreign-currency deposits from the SFRY on 11 April 1992.

In 1998 Bosnia and Herzegovina authorised the Federation of Bosnia and Herzegovina and the Republika Srpska (its constituent entities) to dispose of proceeds from the privatisation of State-owned companies and banks located in their respective territories, making them, at the same time, accountable for the accrued debts of those companies and banks.<sup>38</sup> On 8 April 1998 and 8 January 2002 the Federation of Bosnia and Herzegovina and the Republika Srpska passed legislation providing for the transfer of the banks' liabilities for "old" foreign-currency savings to their respective governments on the completion of the privatisation of their banking sectors.<sup>39</sup> In 2004 the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District of Bosnia and Herzegovina undertook to settle the claims arising from "old" foreign-currency savings by payment in cash and in State bonds.<sup>40</sup> On 15 April 2006 Bosnia and Herzegovina took over from its constituent units the debt arising from "old" foreign-currency savings.<sup>41</sup>

Till today the settlement of those, so called, "old" foreign-currency savings cases is a major challenge for Bosnia and Herzegovina and all its constituent entities. The magnitude of the "old" foreign currency savings makes it till today impossible to pay back all creditors. About 1.100 cases are currently pending before the ECtHR concerning "old savings". This number becomes much more impressive, when taking into account that these cases have been submitted on behalf of more than 11.000 applicants. It has to be stressed that not all of these cases are driven by the accusation of non-enforcement, as the vast majority of the applicants have not obtained a final and enforceable title.

However, the ECtHR stressed in its decisions so far, that the possession of a title makes a significant difference and that the debtor has primarily to fulfil its obligations arising from those titles. The ECtHR further has been reiterating that it is not open to a State authority to cite lack of funds as an excuse for not honouring a judgment debt. Admittedly, a delay in the execution of a judgment may be justified in particular circumstances, but the delay may not be such as to impair the essence of the right protected under article 6 paragraph 1 ECHR.<sup>42</sup> The first case at the ECtHR against Bosnia and Herzegovina was about these debts arising from "old foreign currency savings": the case of *Jeličić v. Bosnia and Herzegovina*.<sup>43</sup>

Between 7 January 1977 and 31 January 1983 the applicant deposited in total 70.140 German marks (DEM) in her savings account at the then State-owned Privredna banka Sarajevo Filijala Banja Luka. In Bosnia and Herzegovina, as well as in other successor States of the former Socialist Federal Republic of Yugoslavia ("SFRY"), such savings are commonly referred to as "old" foreign currency savings, having been deposited prior to the dissolution of the SFRY. The judgment was dated 26 November 1998. The applicant complained

<sup>38</sup> Section 4 of the Privatisation of Companies and Banks Framework Act 1998.

<sup>39</sup> Section 35(1) of the Opening Balance Sheets Act 1998 of the Federation of Bosnia and Herzegovina and section 20 of the Opening Balance Sheets Act 1998 of the Republika Srpska, as amended on 8 January 2002.

<sup>40</sup> the Settlement of Domestic Debt Acts of 2004 of the Federation of Bosnia and Herzegovina, of the Republika Srpska and of the Brčko District of Bosnia and Herzegovina.

<sup>41</sup> Section 1 of Old Foreign-Currency Savings Act 2006 (Zakon o izmirenju obaveza po osnovu stare devizne štednje; published in the Official Gazette of Bosnia and Herzegovina ("OG BH") no. 28/06 of 14 April 2006; "the 2006 Act").

<sup>42</sup> *Burdov v. Russia*, ECtHR 7 May 2002, no. 59498/00, par. 35, ECHR 2002-III, and *Teteriny v. Russia*, ECtHR 30 June 2005, no. 11931/03, par. 41.

<sup>43</sup> *Jeličić v. Bosnia and Herzegovina*, ECtHR 31 October 2006, no. 41183/02. This case is similar to other cases such as case of *Pejaković and others v. Bosnia and Herzegovina*, ECtHR 18 December 2007, nos. 337/04, 36022/04 and 45219/04; case of *Kudić v. Bosnia and Herzegovina*, ECtHR 9 December 2008, no. 28971/05; case of *Pralica v. Bosnia and Herzegovina*, ECtHR 27 January 2009, no. 38945/05.

about the statutory prevention of the enforcement of a final and enforceable judgment in her favor. The Government maintained that the obligation to enforce final and binding judicial decisions was not absolute. Since the judgment at issue concerned “old” foreign-currency savings, which represented a significant part of the large public debt, the Government asserted that the impugned statutory intervention was justified.

The ECtHR reiterated that article 6 paragraph 1 ECHR secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way it embodies the “right to a court”, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. However, that right would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. The ECtHR is of opinion that it would be inconceivable that article 6 paragraph 1 ECHR should describe in detail the procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions. To construe article 6 ECHR as being concerned exclusively with access to a court and the conduct of proceedings, would indeed be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. The ECtHR refers to the *Hornsby v. Greece* case: execution of a judgment given by any court must therefore be regarded as an integral part of the “trial” for the purposes of article 6 ECHR.

The Court further reiterated that it is not open to a State authority to cite lack of funds as an excuse for not honoring a judgment debt. Admittedly, a delay in the execution of a judgment may be justified in particular circumstances, but the delay may not be such as to impair the essence of the right protected under article 6 paragraph 1 ECHR.

In a more recent case, *Suljagić v. Bosnia and Herzegovina*,<sup>44</sup> the ECtHR was even more clear: “The present case is fundamentally about the compliance of the domestic legislation on “old” foreign-currency savings with the conditions laid down by Article 1 of Protocol No. 1 [...]. The concept of “possessions” has an autonomous meaning which is not limited to the ownership of material goods. In the same way as material goods, certain other rights and interests constituting assets can also be regarded as “possessions” for the purposes of Article 1 of Protocol No. 1 [...] Claims, provided that they have a sufficient basis in domestic law, qualify as an “asset” and can thus be regarded as “possessions” within the meaning of this provision [...]. The applicant in the present case, upon depositing foreign currency with a commercial bank, acquired an entitlement to collect at any time his deposit, together with accumulated interest, from the commercial bank or, in the event of its “manifest insolvency” or bankruptcy, from the State [...]. While it is true that towards the end of its existence, the SFRY and its commercial banking sector had difficulties in honouring their financial obligations [...], the entitlement subsisted. Despite varying approaches to this issue following the dissolution of the SFRY and the shifting of responsibilities from one level of government to another [...], there has never been any doubt that Bosnia and Herzegovina and/or its constituent units had a legal duty to repay “old” foreign-currency savings in locally based commercial banks. In such circumstances, the Court concludes that the applicant had, and still has, a claim amounting to a “possession” within the meaning of Article 1 of Protocol No. 1. The guarantees of that provision therefore apply to the present case. [...] As the Court has stated on a number of occasions, Article 1 of Protocol No. 1 comprises three distinct rules: the first rule [...] is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule [...] covers deprivation of possessions and subjects it to certain conditions; the third rule [...] recognises that the Contracting Parties are entitled, among other things, to control the use of property in accordance with the general interest. The three rules are not, however, distinct in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule [...]. For many years, the applicant in the present case has been unable to freely dispose of his “old” foreign-currency savings. At the time of the introduction of his application (2 July 2002) and, more importantly, the date of the ratification of Protocol No. 1 by Bosnia and Herzegovina (12 July 2002), he could use those funds only to purchase certain State-owned companies [...]. As he was the owner of the house in which he lived, the possibility of buying a State-owned flat was not open to the applicant. The 2004 legislation then followed [...] and finally the current legislation [...], each limiting the use of “old” foreign-currency savings. This has not been contested before the Court. In such circumstances, the present case falls to be examined under the third rule of Article 1 of Protocol No. 1”.

<sup>44</sup> *Suljagić v. Bosnia and Herzegovina*, ECtHR 3 November 2009, no. 27912/02, par. 33-38.



### 3.6. Croatia and the European Court of Human Rights

Croatia's accession to the Council of Europe was on November 6, 1996. Croatia ratified the ECHR on 5 November 1997.

Since then Croatia has been party to far more than 150 admissible cases before the ECtHR in Strasbourg. Most of the cases were grounded on a violation of article 6 paragraph 1 of the ECHR and were dealing with the problem of "proceedings within reasonable time". The high number of such cases had its reasons in a very specific situation of Croatia.

During the Homeland War, members of the Croatian Army had damaged or destroyed a huge number private property, movable and immovable. After the end of the Homeland War the injured parties/citizens were requesting compensation. Thousands of such cases had been brought before Croatian courts; most of them in the period between 1996 and 1998.

On 6 November 1999 the Croatian Parliament introduced amendments to the Civil Obligations Act ("the 1999 Amendments"). The amended legislation provided that all actions for damages against the State for the acts of members of the Croatian Army and the police in the performance of their official duties during the Homeland War in Croatia were to be stayed. Only on 31 July 2003 new legislation on the liability of the State for damage caused by members of the Croatian Army and police in the performance of their official duties during the Homeland War ("the 2003 Liability Act") entered into force. This Act on "Liability for Damage Resulting from Terrorist Acts and Public Demonstrations"<sup>45</sup> provides, *inter alia*, that the State has to compensate only damage resulting from bodily injuries, impairment of health or death. All compensation for damage to property is to be sought under the Reconstruction Act. Section 10 of this Act provides that all proceedings stayed pursuant to the 1996 Amendment are to be resumed.

Most cases before the Strasbourg court were and are dealing with cases, which have been resumed in 2003 and are still pending.

The ECtHR was also involved in the return of refugees and displaced persons after the Homeland war. On 27 September 1995 the Temporary Takeover and Managing of Certain Property Act ("the Takeover Act") entered into force. It provided that property situated in the previously occupied territories, and belonging to persons who had left Croatia, was to be taken into the care of, and controlled, by the State. It also authorised local authorities (takeover commissions) to entrust such property for temporary use by third persons. In June 1998 Parliament adopted the Programme for the Return of Refugees and Displaced Persons ("the Programme for Return"), regulating the principles for their return and repossession of their property. In August 1998 the Act on Termination of the Takeover Act ("the Termination Act") entered into force. It incorporated and gave legal force to the provisions of the Programme for Return providing that those persons, whose property had during their absence from Croatia been given for accommodation of others, had to apply for repossession of their property with the competent local authorities – the housing commissions. Meanwhile, on 1 October 2002 the Amendments to the Act on Areas of Special State Concern ("the 2002 Amendments") entered into force. They transferred the jurisdiction in the matter from the housing commissions (which were abolished) to the Ministry of Public Works, Reconstruction and Construction.<sup>46</sup> Accordingly, the State, represented by the State Attorney's Office, took over the proceedings from the Housing Commission.

Section 27(4) of the Act on Areas of Special State Concern<sup>47</sup> as amended by the 2002 Amendments, provides that the State shall pay compensation for the damage sustained by an owner who applied for repossession of his or her property prior to 30 October 2002 but to whom the property was not returned by that date.

The ECtHR acknowledged that the Croatian authorities were faced with an exceptionally difficult task in balancing the rights of owners against those of temporary occupants in the context of the return of refugees and displaced persons. The ECtHR considered that applicants had been subjected to an excessive restriction of their property rights for which, moreover, they had received no compensation for the damage sustained. In the Program for the Return and the Termination Act, not only the owner has the right to get his property returned, but also the occupier has the right for an alternative accommodation. It seems to be a fundamental mistake to make alternative accommodation a condition for the possession of the property, while not compensating the owner. Many of these cases are also incompatible with the reasonable time requirement, caused by judgments that are quashed because they were made by a court that lacked

<sup>45</sup> Zakon o odgovornosti za štetu nastalu uslijed terorističkih akata i javnih demonstracija, Official Gazette no. 117/2003 – "the 2003 Liability Act".

<sup>46</sup> Ministarstvo za javne radove, obnovu i graditeljstvo.

<sup>47</sup> Zakon o područjima od posebne državne skrbi, Official Gazette nos. 44/1996, 57/1996 (errata), 124/1997, 73/2000, 87/2000 (errata), 69/2001, 94/2001, 88/2002, 26/2003 (consolidated text), 42/2005).

jurisdiction. Sometimes those courts lost their jurisdiction due to retrospective legislation, as is the case with the jurisdiction of the Commission of Restitution of Property and Housing Commissions.

An example of such a case is *Kunić v. Croatia*.<sup>48</sup> This case concerned the violation of the applicant's right to the peaceful enjoyment of his possessions. The applicant was prevented from using his privately owned properties as a result of their allocation by state authorities, in 1996, to third persons on the basis of the Act on the Temporary Take-over and Management of Certain Property ("the Take-over Act"). In 2000, the Housing Commissions ordered the occupants of the applicants' properties to vacate them within 15 days. However, both decisions remained unenforced until December 2003. The *Kunić* case also concerned the excessive length of enforcement proceedings (from September 1997 to December 2003, namely 6 years and 1 month within the European Court's jurisdiction *rationae temporis*).

The ECtHR noted that its case-law is based on the fundamental principle that the reasonableness of the length of proceedings is to be determined in the light of the particular circumstances of the case. Since in the present case those circumstances call for a global assessment, the Court does not find it necessary to consider the above criteria in detail. According to the ECtHR it is sufficient to note that it took more than six years for the domestic authorities to give and enforce a final decision in a case of undeniable importance for the applicant, which was of no particular complexity. There has accordingly been a breach of article 6 paragraph 1 and of article 1 of Protocol No. 1 ECHR. The ECtHR acknowledges that the proper administration of justice takes time. However in the ECtHR's view, the inordinate length also has a direct impact on the applicant's right to peaceful enjoyment of his possessions for over six years. This delay imposed an excessive individual burden on the applicant and therefore upset the fair balance that has to be struck between the applicant's right to peaceful enjoyment of his possessions and the general interest involved.<sup>49</sup>

In the case *Majski v. Croatia*<sup>50</sup> it took almost three and a half years to initiate eviction. A period that, in the opinion of the Court, is too excessive and therefore fails to meet the "reasonable time" requirement.

Another example is the case of *Radanović v. Croatia*.<sup>51</sup> In 2000, the Housing Commissions ordered the occupants of the applicants' properties to vacate them within 15 days. However, as in the case *Kunić v. Croatia*, the decision remained unenforced until December 2003. With respect to the *Radanović* case, the relevant legislation and the case-law of the Supreme Court required the authorities to provide the temporary occupant with alternative accommodation. Although the ECtHR recognized that the Croatian authorities faced an exceptionally difficult task in having to balance the rights of owners against those of temporary occupants in the context of the return of refugees and displaced persons, it considered that the applicant had been subjected to an excessive restriction of her property rights for which, moreover, she had received no compensation for the damage sustained.

Besides these cases the Strasbourg Court also had to deal with cases, which were directly targeted at the length and effectiveness of the enforcement procedure. Thorough study of those cases made clear that they did not show any country specifics. The disputes focused mainly on two areas. First area of discussion was the question of the admissibility of the cases in the light of the subsidiary nature of the ECtHR and the necessity to exhaust domestic remedies first. As already concluded in the context of cases against other member states the Court reiterated that the obligation to exhaust domestic remedies requires that an applicant makes normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances. It is worth mentioning that the ECtHR in all cases came to the conclusion that the applicant could not have been expected to file additional domestic complaints or procedures, because those did not offer any reasonable prospect of success. For example in the case *Horvat v. Croatia*<sup>52</sup> the Court concluded "that there does not exist a true legal remedy enabling a person to complain of the excessive length of proceedings in Croatia and considers that the applicant was justified in considering that no other legal remedy on the national level would be effective in respect of her complaint. The Court finds, therefore, that there were no adequate and effective remedies for the purposes of article 35 of the Convention which the applicant was required to exhaust. Thus, the Court decides that the Government's objection on grounds of failure to exhaust domestic remedies cannot be upheld."

So the Strasbourg court clearly declared the complaint procedures in place ineffective and insufficient and

<sup>48</sup> *Kunić v. Croatia*, ECtHR 11 January 2007, no. 22344/02.

<sup>49</sup> See, *mutatis mutandis*, *Immobiliare Saffi v. Italy* [GC], ECtHR 28 July 1999, no. 22774/93, par. 59, ECHR 1999-V. Familiar ECtHR cases against Croatia: *Pibernik v. Croatia*, ECtHR 4 March 2004, no. 75139/01; *Kostić v. Croatia*, ECtHR 18 November 2004, no. 69265/01; *Kvartuč v. Croatia*, ECtHR 18 November 2004, no. 4899/02; *Brajić - Bratanović v. Croatia*, ECtHR 9 October 2008, no. 9224/06.

<sup>50</sup> *Majski v. Croatia*, ECtHR 1 June 2006, no. 33593/03.

<sup>51</sup> *case of Radanović v. Croatia*, ECtHR 21 December 2006, no. 9056/02.

<sup>52</sup> *Horvat v. Croatia*, ECtHR 26 July 2001, no. 51585/99.

therefore the respective applications admissible.

An example of such a case is *Samija v. Croatia*.<sup>53</sup> On 10 December 1992 the applicant applied for enforcement of the above judgment. Shortly afterwards the court issued a writ of execution by seizure of debtor's movable property. Until 1997 a number of unsuccessful attempts to seize the debtor's movables were made. The debtor failed to comply with a judgment stating that he should disclose his assets. The applicant complained that the length of the enforcement proceedings had been incompatible with the "reasonable time" requirement, laid down in article 6 paragraph 1 ECHR. The period to be taken into consideration began only on 6 November 1997, the day after the entry into force of the Convention in respect of Croatia. However, in assessing the reasonableness of the time that elapsed after that date, account must be taken of the state of proceedings at the time. In this connection the ECtHR noted that the proceedings commenced on 10 December 1992, when the applicant applied for the enforcement of the Municipal Court's judgment of 14 April 1992. Consequently, the case was already pending for four years, ten months and twenty-five days before the ratification. The period in question has not yet ended. It has thus lasted about nine years.

The ECtHR reiterated that under article 35 paragraph 1 of the ECHR it may only deal with a matter after all domestic remedies have been exhausted. The purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it.<sup>54</sup> The obligation to exhaust domestic remedies requires that an applicant makes normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances.

As of 22 March 2002 a constitutional complaint under section 63 of the Constitutional Court Act is considered an effective remedy in respect of the length of proceedings still pending in Croatia.<sup>55</sup> However, at that time it was not clear whether the new remedy would at all apply to the length of enforcement proceedings. The applicant lodged his application with the Court on 6 February 2004. At that time the constitutional complaint did not offer him any reasonable prospect of success.<sup>56</sup>

In the case *Horvat v. Croatia* the ECtHR held that there were no legal remedies enabling a person to complain of the excessive length of proceedings in Croatia. However, following the *Horvat* judgment the Croatian Parliament enacted the Act on Changes of the Constitutional Court's Act, which was published in the Official Gazette no. 29 of 22 March 2002. The act introduced new remedies against the length of the proceedings. The ECtHR subsequently held in the *Slaviček* case that this was a remedy which had to be exhausted by the applicant in order to comply with article 35 paragraph 1 of the ECHR.<sup>57</sup> The subsequent developments in the Constitutional Court's case-law showed that only as of 2 February 2005 a constitutional complaint did become an effective remedy for the length of enforcement proceedings.

Looking into the merits of the cases the ECtHR admitted that the length of enforcement alone is not enough to decide whether there is a violation of article 6 paragraph 1 ECHR or not, but that the reasonableness of the length of proceedings "must be assessed in the light of the circumstances of the case with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in dispute".<sup>58</sup>

The above mentioned case *Horvat v. Croatia* is also interesting from another point of view. In the case the Government argued that the case discloses a certain degree of complexity as neither the plaintiffs nor the Zagreb Municipal Court were able to ascertain the correct addresses of the defendants. The applicant argued that it was the duty of the police to ascertain the addresses of the defendants. The ECtHR acknowledges that it has been difficult to ascertain the defendants' addresses. However, under Croatian law, it is possible to ask the Social Welfare Centre to appoint a legal representative for a defendant whose address is unknown. Although the applicant instituted proceedings at the end of March 1995, it took one year before a legal representative was appointed in the proceedings against defendant M. and three years in the proceedings against defendant J.. Otherwise the ECtHR does not find that the case discloses any circumstances which would qualify them as complex. The applicant failed to provide the correct addresses of the defendants.

<sup>53</sup> *Samija v. Croatia*, ECtHR 7 December 2006, no. 14898/04.

<sup>54</sup> See also e.g. *Selmouni v. France*, ECtHR 28 July 1999, no. 25803/94.

<sup>55</sup> See for example *Horvat v. Croatia*, ECtHR 26 July 2001, no. 51585/99.

<sup>56</sup> Similar cases: *Mahmutović v. Croatia*, ECtHR 15 February 2007, no. 9505/03; *Omerović v. Croatia*, 1 June 2006, no. 36071/03; *Šoštarić v. Croatia*, ECtHR 12 April 2007, no. 39659/04.

<sup>57</sup> See decision *Slaviček v. Croatia*, ECtHR 4 July 2002, no. 20862/02. European Commission for Democracy Through Law (Venice Commission), "Implementation of the case-law of the European Court of the Human Rights in Council of European States: Impact on the Structural and Legal Reforms" Trieste 25-28 February 2008, [http://www.venice.coe.int/docs/2008/CDL-UDT\(2008\)004-e.pdf](http://www.venice.coe.int/docs/2008/CDL-UDT(2008)004-e.pdf) (26-03-2009).

<sup>58</sup> See for further references *Samija v. Croatia*, as cited above.



According to the ECtHR the applicant did not contribute to the length of the proceedings by not supplying the address. The Government claimed that the domestic courts showed diligence in the conduct of the proceedings. They submitted further that the Zagreb Municipal Court was constantly facing problems of excessive workloads, as each judge in the civil division of that court was dealing with more than 1.000 cases.

However the ECtHR is not persuaded by the Government's explanations for the delays. It recalls that it is for the Contracting States to organise their legal systems in such a way that their courts can guarantee to everyone the right to obtain a final decision on disputes relating to civil rights and obligations within a reasonable time.

In a more recent case the ECtHR is more precise on the explanation of these criteria. Complexity of the case, conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute cannot be used as an excuse in all cases. In the case *Praunsberger v. Croatia* the ECtHR<sup>59</sup> stated: "The Court considers that the length of the enforcement proceedings at issue, lasting twelve years after the ratification of the Convention, is a priori unreasonable and calls for a global assessment. The overall length could be justified only under exceptional circumstances. In this connection, the Court notes that, contrary to the Government's submissions, the County Court attributed all delays to the inefficiency of the Municipal Court. Therefore the Court cannot accept the explanations given by the Government for the length of proceedings. The Court reiterates that a State has an obligation to organise a system of enforcement of judgments that is effective both in law and in practice and that ensures their enforcement without any undue delay [...] The Court has frequently found violations of article 6 paragraph 1 of the Convention in cases raising similar issues to the present one. [...] It holds that in the period which was subject to the scrutiny of the national courts the length of the proceedings was already excessive and failed to meet the "reasonable time" requirement."<sup>60</sup>

Enforcement is not only a matter of the enforcement authorities. A number of issues are at stake, and also other authorities can be involved. A good example of this is the case *Buj v. Croatia*.<sup>61</sup>

In this case to implement the decision given in inheritance proceedings, this decision needed to be registered in the land register. The court gave an order for the registration of the change of ownership ex officio by the land registry division of the Municipal Court. Also in this case the ECtHR considered article 6 ECHR applicable: "The Municipal Court's decision of 8 June 1999 constituted an enforcement title, regardless of the nature of the inheritance proceedings. Even though the inscription of the applicant's right to ownership in the instant case would under the domestic law not be considered a constitutive one, the ensuing proceedings in the land registry were decisive for the effective exercise of his rights, i.e. the free enjoyment of his ownership. Prior to that inscription, the applicant continues to be severely limited in disposing freely of his property. Consequently, article 6 paragraph 1 applies to this part of the proceedings. [...] Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. The enforcement of the decision given in the inheritance proceedings, in form of registration of property in the applicant's name, has now been pending for more than four years, without a single decision to that end. [...] the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement. There has accordingly been a breach of article 6 paragraph 1."

### 3.7. Kosovo and the European Court of Human Rights

So far, Kosovo has only been recognized by 47 countries worldwide,<sup>62</sup> including a number of member countries of the Council of Europe. However, another number of Council of Europe members have not recognized Kosovo yet.

As a result, Kosovo is not a member of the Council of Europe and therefore, no remarks can be made about the cases at the European Court of Human Rights related to enforcement law.

However, it should be mentioned that the Kosovo legal community should and is closely following the developments in the framework of the Council of Europe as a reference for the internal Kosovo standards.

<sup>59</sup> *Praunsperger v. Croatia*, ECtHR 22 April 2010, no. 16553/08.

<sup>60</sup> See, for example: *Plazonić v. Croatia*, ECtHR 6 March 2008, no. 26455/04; and *Medić v. Croatia*, ECtHR 26 March 2009, no. 49916/07.

<sup>61</sup> *Buj v. Croatia*, ECtHR 1 June 2006, no. 24661/02.

<sup>62</sup> From the neighbouring countries only Albania and Croatia have officially recognized Kosovo on 18 February and 19 March 2008 respectively.

### 3.8. The Former Yugoslav Republic of Macedonia and the European Court of Human Rights

The Former Yugoslav Republic of Macedonia became a member of the Council of Europe on 9 November 1995. The ECHR was signed on 9 November 1995 and ratified 10 April 1997.

Given the fact that FYROM has just introduced a new, privatized system of enforcement and keeping in mind that the way to the Strasbourg court is only free after having used all national remedies, it is quite easy to understand that so far there are no cases at the ECtHR, which would deal with the new enforcement system. Still it is necessary to understand that the State will be responsible for a well functioning enforcement system, even if organised under a private scheme, and that therefore all arguments which have been used before the court will be still valid, if the new system will not bring a tactile relief for enforcement seekers. A look into the old system and related court cases can also be used as a lessons learned project in order to avoid repeating of old mistakes and introducing old weaknesses into the newly created system.

Also in FYROM most cases are grounded on a violation of article 6 paragraph 1 ECHR: proceedings within a reasonable time. An example is the case *Jankulovski v. FYROM*.<sup>63</sup> This case is dealing with the enforcement of a court decision that meanwhile is taking more than 11 years. The ECtHR confirms that a delay in the execution of a judgment may be justified in particular circumstances, but this delay may not be such as to impair the essence of the right protected under article 6 paragraph 1 ECHR. The facts of the case point out that the old system was lost in unclear and overlapping competences of the enforcement bodies (i.e. different courts) and an unmanageable number of remedies for the debtor. Against this background, the Court considered that the respondent State has failed to conduct the enforcement proceedings at issue effectively.<sup>64</sup>

Also in other decisions the ECtHR noted the importance of an efficient enforcement system. The Government's arguments about the complexity of the case and the applicant's alleged contribution to the partial non-enforcement of his claim could not alter that conclusion according to the ECtHR in the above mentioned case *Jankulovski v. FYROM*. Also in the case *Pecevi v. FYROM*<sup>65</sup> the ECtHR reiterated that article 6 paragraph 1 of the ECHR requires that all stages of legal proceedings for the "determination of ... civil rights and obligations", not excluding stages subsequent to judgment on the merits, be completed within a reasonable time.<sup>66</sup> According to the ECtHR the State has a positive obligation to organise a system for enforcement of judgments that is effective both in law and in practice and ensures their enforcement without any undue delay. A delay in the execution of a judgment may be justified in particular circumstances. However, the delay may not be such as to impair the essence of the right protected under article 6 paragraph 1 ECHR. The ECtHR refers to other cases where it was already noted that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute.<sup>67</sup>

In the case *Jovanoski v. FYROM*<sup>68</sup> the ECtHR reiterated that the State has a positive obligation to organise a system for enforcement of judgments that is effective both in law and in practice and ensures their enforcement without undue delay. In this case the enforcement proceedings started in 1991 when the applicant had sought enforcement of his claim against a Croatian debtor. His claim was partly enforced on 20 June 1991. On 4 February 1992 the applicant requested that the court enforce the remainder. The enforcement proceedings laid dormant since 11 July 1995 when the Bitola District Court remitted the case for a fresh consideration. The first-instance court remained inactive although it was called upon to render a decision. The next and last activity was taken on 31 August 2001 when the case-file was destroyed. There was no evidence that the destruction was ordered on the applicant's request. Also in this case the ECtHR considered that the applicant's failure to seek enforcement of the remainder before the Croatian courts could not absolve the responsibility of the respondent State for the proceedings pending before its courts. By refraining from taking adequate and effective measures to enforce the applicant's claims there was a violation of article 6 ECHR.

63 *Jankulovski v. FYROM*, ECtHR 3 July 2008, no. 6906/03. Another example is the case *Pakom Slobodan Dooel v. FYROM*, ECtHR 21 July 2010, no. 33262/03.

64 See also: *Fuklev v. Ukraine*, ECtHR 7 June 2005, no. 71186/01.

65 *Pecevi v. FYROM*, ECtHR 6 November 2008, rectified 16 December 2008, no. 21839/03.

66 See also: *Miltanovic v. FYROM*, ECtHR 19 June 2006, no. 26615/02.

67 See for example *Atanasovic and Others v. FYROM*, ECtHR 22 December 2005, no. 13886/02, and more recent the cases *Krsto Nikolov v. FYROM*, ECtHR 23 October 2008, no. 13904/02, *Savov and others v. FYROM*, ECtHR 25 September 2008, no. 12582/03, and *Kalanoski v. FYROM*, ECtHR 17 December 2009, no. 31391/03.

68 *Jovanoski v. FYROM*, ECtHR 7 January 2010, no. 31731/03.

Legal remedies are always a delicate point. Article 13 ECHR guarantees an effective remedy before a national authority for an alleged violation of the requirement under article 6 paragraph 1 ECHR to hear a case within a reasonable time. Effective remedies, according to the ECtHR, mean remedies that “[prevent] the alleged violation or its continuation, or [provide] adequate redress for any violation that [has] already occurred”. Such a remedy is considered to be effective if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred.<sup>69</sup>

The FYROM Government acknowledged the lack of an effective remedy in respect of the length of proceedings in the domestic legal system. The requests under FYROM law for speeding up the proceedings to supervisory organs cannot be considered as a remedy in respect of the complaints of delay: “The Court notes that the remedies cited by the Government, that is a request to the President of the Kumanovo Municipal Court, the Ministry of Justice and the Republican Judicial Council to speed up the proceedings, effectively consist of submitting a complaint to a supervisory organ with the suggestion that it make use of its powers if it sees fit to do so. If such an appeal is made, the supervisory organ might or might not take up the matter with the official against whom the complaint is directed if it considers that the complaint is not manifestly ill-founded. Otherwise, it will take no action whatsoever. If action is taken, they would exclusively involve the supervisory organ and the officials concerned. The applicants would not be a party to any proceedings and would only be informed of the way in which the supervisory organ has dealt with their complaint”<sup>70</sup>

Also in the recent case-law the domestic legal system was under the attention of the ECtHR. In the case *Bočvarska v. FYROM*<sup>71</sup> the ECtHR reiterates that “...the “right to a court” would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. Execution of a judgment given by any court must therefore be regarded as an integral part of the “trial” for the purposes of Article 6. The State has an obligation under Article 6 to organise a system for the enforcement of judgments that is effective both in law and in practice and ensures their enforcement without undue delay [...]” As we already saw, the reasonableness of the length of proceedings should be assessed in the light of the circumstances of the case and with reference to the certain criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute. In the case *Bočvarska v. FYROM*, the ECtHR observed some legal complexity. However this complexity alone cannot justify the length of the proceedings. There were no delays attributable to the applicant according to ECtHR: “The latter cannot be held responsible for the procedural conduct of the debtor and public prosecutor [...]. As regards the conduct of the authorities, the Court notes that, during the period under consideration, the applicant’s case was reconsidered on five occasions. The domestic courts cannot therefore be said to have been inactive. However, the Court notes that repetition of remittal orders within one set of proceedings discloses a serious deficiency in the judicial system [...]. The main reason for the numerous remittals was the different legal opinion of the domestic courts regarding legal matters indicated by the Government [...]. It was those issues that affected the length of the enforcement proceedings. Having examined all the material submitted to it, the Court considers that in the instant case the length of the enforcement proceedings was excessive and failed to meet the “reasonable time” requirement of Article 6 § 1 of the Convention. There has accordingly been a breach of that provision.”

In this publication we will also pay attention to the importance of a good system of service of documents. In this context the case *Grozdanoski v. FYROM*<sup>72</sup> is interesting. The FYROM Government submitted that the proceedings were fair as the parties were given an equal opportunity to present their case. The ECtHR had a different opinion. The applicant (defendant in the case at the Supreme court) disputed that he had been given a fair trial before the Supreme Court. According to the applicant the Government had failed to provide any evidence that a copy of the appeal on points of law had been communicated to him. The rules of proceedings before the Supreme Court had been infringed as the applicant had been prevented from commenting on the company’s appeal on points of law. The lack of the slip receipt in the case-file supported his arguments.

The ECtHR recalled that, in civil proceedings, the principle of equality of arms implies that each party must be afforded a reasonable opportunity to present his or her case - including evidence – under conditions that

69 See *Kudła v. Poland*, ECtHR 26 October 2000, no. 30210/96.

70 See the case of *Atanasovic and others v. FYROM*, ECtHR 22 December 2005, no. 13886/02.

71 *Bočvarska v. FYROM*, ECtHR 17 September 2009, no. 27865/02.

72 *Grozdanoski v. FYROM*, ECtHR 31 May 2007, no. 21510/03.

do not place him/her at a substantial disadvantage vis-à-vis his/her opponent.<sup>73</sup> Equality of arms is one of the aspects of the concept of a fair trial. Such an equality implies the right for the parties to have knowledge of and to comment on all evidence adduced or observations filed.

In the case *Grozdanoski v. FYROM* the Supreme Court had full jurisdiction to decide the applicant's case, as it examined the merits of the appeal on points of law and the public prosecutor's request for the protection of legality. According to section 376 of the Civil Proceedings Act both the appeal on points of law and the public prosecutor's request for the protection of legality they should have been communicated to the applicant. The ECtHR concludes: "In the absence of any evidence of service, the Court is unable to accept the Government's argument that the appeal and the request were ever served on the applicant. Moreover, the [...] appeal and the public prosecutor's request led to the Supreme Court's decision which was to the applicant's significant disadvantage. The Court considers that that procedural failure prevented the applicant from effectively participating in the proceedings before the Supreme Court. Article 6 § 1 of the Convention is intended, above all, to secure the interests of the parties and those of the proper administration of justice [...]. In the present case, respect for the right to a fair trial, guaranteed by Article 6 § 1 of the Convention, required that the applicant be given an opportunity to have knowledge of, and to comment upon the [...] appeal and the public prosecutor's request. Consequently, there has been a violation of Article 6 § 1 of the Convention."

As mentioned above it goes without saying that these principles are also valid for a privatized system. So far there have not been any cases dealing with the new, privatized, system. At this moment there is a challenge for both the FYROM Ministry of Justice and the Chamber of enforcement agents: the FYROM Minister of Justice intends to decrease the backlog of enforcement cases under the old system by re-distributing those cases to the newly created private (67) bailiff offices. It is very important that mechanisms will be developed and put in place. Otherwise the enforcement agents will not be able to absorb the additional work of several hundred thousands of cases and a new flood of complaints to the ECtHR is to be expected.

### 3.9. Montenegro and the European Court of Human Rights

As a separate independent country Montenegro became a member of the Council of Europe on 11 May 2007 only. It had already been a member in the state union with Serbia. On 3 March 2004 the Convention and Article 1 of Protocol No. 1 entered into force in respect of the State Union of Serbia and Montenegro.

The Declaration of Independence was adopted by the Montenegrin Parliament On 3 June 2006.

On 14 June 2006 the Committee of Ministers of the Council of Europe, *inter alia*, noted that:

"1. ... the Republic of Serbia will continue the membership of the Council of Europe hitherto exercised by the ... [State Union] ... of Serbia and Montenegro, and the obligations and commitments arising from it;

2. ... the Republic of Serbia is continuing the membership of [the State Union of] Serbia and Montenegro in the Council of Europe with effect from 3 June 2006; ...

4. ... the Republic of Serbia was either a signatory or a party to the Council of Europe conventions referred to in the appendix ... to which [the State Union of] Serbia and Montenegro had been a signatory or party [including the European Convention on Human Rights]; ..."

On 7 and 9 May 2007 the Committee of Ministers decided, *inter alia*, that:

"2. ... a. ... the Republic of Montenegro is to be regarded as a Party to the European Convention on Human Rights and its Protocols No. 1, 4, 6, 7, 12, 13 and 14 thereto with effect from 6 June 2006; ..."<sup>74</sup>

The case-law concerning Montenegro as a separate country is very limited. Regarding enforcement so far

<sup>73</sup> See *Dombo Beheer B.V. v. the Netherlands*, ECtHR 27 October 1993, no. 14448/88, and *Stran Greek Refineries and Stratis Andreadis v. Greece*, ECtHR 9 December 1994, no. 13427/87.

<sup>74</sup> The relevant provisions of the Statute of the Council of Europe read as follows:  
Article 4:

"Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers. Any State so invited shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute."

Article 16:

"The Committee of Ministers shall, subject to the provisions of Articles 24, 28, 30, 32, 33 and 35, relating to the powers of the Consultative Assembly, decide with binding effect all matters relating to the internal organisation and arrangements of the Council of Europe. For this purpose the Committee of Ministers shall adopt such financial and administrative arrangements as may be necessary."

the case of *Bijelić v. Montenegro and Serbia*<sup>75</sup> is one of the few judgments of the ECtHR. In this case the applicants stated that they wished to proceed against both Montenegro and Serbia, as two independent States.

The case regards three applicants: the first applicant and her husband who divorced. The first applicant was granted custody of the other two applicants (applicant two and three). The first applicant obtained a decision from the Court of First Instance (*Osnovni sud u Podgorici*) (26 January 1994) declaring her the sole holder of the specially protected tenancy on the family's flat. In addition, her former husband ("the respondent") was ordered to vacate the flat within fifteen days from the date when the decision became final. In a later stage (15 July 1994) the first applicant bought the flat and became its owner. On 23 October 1995 the first applicant gifted the flat to the second and third applicants.

From 8 July 1994 a number of attempts were done to evict the flat. For example on 26 October 1994 the bailiffs and the police (once again) failed to evict the respondent who kept threatening the first applicant in their presence and bore arms on his person. There also appear to have been additional weapons, ammunition and even a bomb in the flat at the time. The police took the respondent to their station but released him shortly afterwards without pressing charges. In March of 2004 another eviction was attempted but failed. In the presence of police officers, fire fighters, paramedics, bailiffs and the enforcement judge herself, as well as his wife and their children, the respondent threatened to blow up the entire flat. His neighbours also seem to have opposed the eviction, some of them apparently going so far as to physically confront the police. Also after this date several attempts failed, e.g. on 9 February 2006 another scheduled enforcement failed because the respondent had threatened to "spill blood" rather than be evicted.

Throughout the years the first applicant complained to numerous State bodies about the non-enforcement of the judgment rendered in her favour, but to no avail. On 5 May 2006 and 31 January 2007, respectively, the enforcement judge sent letters to the Ministry of Internal Affairs, seeking assistance. On 15 February 2007 the enforcement judge was told, at a meeting with the police, that the eviction in question was too dangerous to be carried out, that the respondent could blow up the entire building by means of a remote control device, and that the officers themselves were not equipped to deal with a situation of this sort. The police therefore proposed that the applicants be provided with another flat instead of the one in question. On 19 November 2007 the enforcement judge urged the Ministry of Justice to secure the kind of police assistance needed for the respondent's ultimate eviction.

In its decision the ECtHR needed to answer a number of questions. First question to be answered: which State, Montenegro or Serbia, could be held responsible for the impugned inaction of the authorities between 3 March 2004 (the date on which the Convention and article 1 of Protocol No. 1 entered into force in respect of the State Union of Serbia and Montenegro) and 5 June 2006?" (date on which the Montenegrin Parliament adopted its Declaration of Independence).

The ECtHR noted at the outset that the Committee of Ministers has the power under Articles 4 and 16 of the Statute of the Council of Europe to invite a State to join the organisation as well as to decide "all matters relating to ... [the Council's] ... internal organisation and arrangements". The ECtHR, however, notwithstanding Article 54 of the Convention, has the sole competence under Article 32 thereof to determine all issues concerning "the interpretation and application of the Convention", including those involving its temporal jurisdiction and/or the compatibility of the applicants' complaints *ratione personae*.

As regards the present case the ECtHR concluded that based on the Constitutional Act on the Implementation of the Constitution of the Republic of Montenegro and the Montenegrin Right to a Trial within a Reasonable Time Act and the Montenegrin Government's own observations Montenegro can be considered to be bound by the Convention, as well as the Protocols thereto, as of 3 March 2004, that being the date when these instruments had entered into force in respect of the State Union of Serbia and Montenegro.<sup>76</sup>

Consequently the ECtHR considered that both the Convention and Protocol No. 1 should be deemed as

<sup>75</sup> *Bijelić v. Montenegro and Serbia*, ECtHR 28 April 2009, no. 11890/05.

<sup>76</sup> The ECtHR noted that the Committee of Ministers had itself accepted, apparently because of the earlier ratification of the Convention by the State Union of Serbia and Montenegro, that it was not necessary for Montenegro to deposit its own formal ratification of the Convention. The ECtHR refers to the creation of the Czech and Slovak Republics as separate States: notwithstanding the fact that the Czech and Slovak Federal Republic had been a party to the Convention since 18 March 1992 and that on 30 June 1993 the Committee of Ministers had admitted the two new States to the Council of Europe and had decided that they would be regarded as having succeeded to the Convention retroactively with effect from their independence on 1 January 1993, the Court's practice has been to regard the operative date in cases of continuing violations which arose before the creation of the two separate States as being 18 March 1992 rather than 1 January 1993.

This opinion of the ECtHR was confirmed in the case *Garžič v. Montenegro*, ECtHR 21 September 2010, no. 17931/07.



having continuously been in force in respect of Montenegro as of 3 March 2004, between 3 March 2004 and 5 June 2006 as well as thereafter. Given the fact that the impugned proceedings have been solely within the competence of the Montenegrin authorities, the ECtHR, without prejudging the merits of the case, found the applicants' complaints in respect of Montenegro compatible *ratione personae* with the provisions of the Convention and Protocol No. 1 thereto. For the same reason, however, their complaints in respect of Serbia are incompatible *ratione personae*, within the meaning of Article 35 paragraph 3, and must be rejected pursuant to article 35 paragraph 4 of the Convention.

On 23 October 1995 the first applicant had transferred ownership of the flat in question to the second and third applicants. This meant that the first applicant's complaint in respect of Montenegro is incompatible *ratione personae* with the provisions of Article 1 of Protocol No. 1. Applicants 2 and 3 have been the owners of the flat at issue since 23 October 1995, which is why, without prejudging the merits of the case, their complaints in respect of Montenegro are compatible *ratione personae* with article 1 of Protocol No. 1.

The second and third applicants had not exhausted all effective domestic remedies. In particular, they had failed to lodge an appeal with the Constitutional Court and make use of the newly adopted Right to a Trial within a Reasonable Time Act. Both remedies were introduced long after their application had been lodged. The ECtHR concludes: "The Court reiterates that, according to Article 35 § 1 of the Convention, it may only deal with a complaint after all domestic remedies have been exhausted and recalls that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time [...]. In the present case, the impugned enforcement proceedings had already been pending domestically for more than thirteen years before the legislation [...] had entered into force. Furthermore, these proceedings are currently still ongoing and the Montenegrin Government have failed to provide any case-law to the effect that the remedies in question can be deemed effective in a case such as the one here at issue. The Court considers, therefore, that it would be disproportionate to now require the second and third applicants to try those avenues of redress [...] It follows that the Montenegrin Government's objection must be dismissed."

In the context of Article 1 of Protocol No. 1, the State may be required to take the measures necessary to protect the right of property.<sup>77</sup> "It is thus the State's responsibility to make use of all available legal means at its disposal in order to enforce a final court decision, notwithstanding the fact that it has been issued against a private party, as well as to make sure that all relevant domestic procedures are duly complied with", the ECtHR concludes. The ECtHR found that the Montenegrin authorities failed to fulfil their positive obligation, within the meaning of article 1 of Protocol No. 1, to enforce the judgment of 31 May 1994. There has, accordingly, been a violation of the said provision. Three reasons were given: the inability of the second and third applicants to have the respondent evicted from the flat in question amounts to an interference with their property rights. Secondly the judgment at issue had become final by 27 April 1994, its enforcement had been sanctioned on 31 May 1994, and Protocol No. 1 had entered into force in respect of Montenegro on 3 March 2004, meaning that the impugned non-enforcement has been within the ECtHR's competence *ratione temporis* for a period of almost five years, another ten years having already elapsed before that date. Finally, but most importantly, the police themselves conceded that they were unable to fulfil their duties under the law, which is what ultimately caused the delay in question. Regarding article 6 paragraph 1 ECHR the ECtHR concludes: "Having regard to its findings in relation to Article 1 Protocol No. 1 and the fact that it was the non-enforcement which was at the heart of the applicants complaints, the Court considers that, whilst this complaint is admissible, it is not necessary to examine separately the merits of whether, in this case, there has also been a violation of Article 6 par. 1 ECHR."

The "reasonable time" was also subject of the child custody case *Mijušković v. Montenegro*.<sup>78</sup> "The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 ECHR. [...] Even though the primary object of Article 8 is to protect the individual against arbitrary action by the public authorities, there are, in addition, positive obligations inherent in effective "respect" for family life. In this context, the Court has repeatedly held that Article 8 includes a right for parents to have measures taken that will permit them to be reunited with their children and an obligation on the national authorities to take such action."

"However, the national authorities' obligation to take measures to facilitate reunion is not absolute, since the reunion of a parent with children who have lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. [...] The nature and extent of such

<sup>77</sup> See also *Broniowski v. Poland*, ECtHR 22 June 2004, no. 31443/96 and *Öneryıldız v. Turkey*, ECtHR (GC) 30 November 2004, no. 48939/99.

<sup>78</sup> *Mijušković v. Montenegro*, ECtHR 21 September 2010, no. 49337/07.

preparation will depend on the circumstances of each case, but the understanding and co-operation of all concerned are always an important element. [...] The Court, therefore, has to ascertain whether the national authorities took all such necessary steps to facilitate reunion as could reasonably be demanded in the special circumstances of the case. [...] In this connection, the Court states that, in a case such as the present one, the adequacy of a measure is to be judged by the swiftness of its implementation as the passage of time can have irremediable consequences for relations between the children and the parent who does not live with them.”

A time period of three years and seven months after the court judgment to the same effect becomes final cannot be considered “reasonable”, especially when only limited enforcement attempts are undertaken within this period. The ECtHR concludes: “the reunion of a parent with a child who has lived for some time with the other parent may not be able to take place immediately and without the necessary preparation, particularly in the circumstances of A and B’s case. However, there is no evidence that any such preparatory work explained the above-mentioned delays by the authorities. [...] Having regard to the facts of the case, including the passage of time, the best interests of A and B, the criteria laid down in its own case-law and the Government’s submissions, notwithstanding the State’s margin of appreciation as well as the fact that A and B were eventually surrendered to the applicant, the Court concludes that the Montenegrin authorities have failed to make adequate and effective efforts to execute the NSCC [Social Care Center in Nikšić] decision and the final court judgment in a timely manner.”

### 3.10. Serbia and the European Court of Human Rights

Serbia and Montenegro became a member state to the Council of Europe on 3 April 2003 and ratified the Convention on Human Rights on March 3 2004. With effect from 3 June 2006, the Republic of Serbia is continuing the membership of the Council of Europe previously exercised by the Union of States of Serbia and Montenegro.<sup>79</sup>

The relatively short time of membership and especially the time of signing the convention leads to quite a small number of judgments against Serbia. Following a referendum, on 3 June 2006, Montenegro declared its independence from the State Union of Serbia and Montenegro, whereupon that entity ceased to exist together with all of its public bodies including the Court of Serbia and Montenegro. On 5 June 2006 the President of Serbia informed the Secretary General of the Council of Europe that Serbia was the sole successor to the former State Union of Serbia and Montenegro. In its decision of 14 June 2006 the Committee of Ministers of the Council of Europe noted inter alia: (i) that “Serbia ... [had continued] ... membership of [the State Union of] Serbia and Montenegro in the Council of Europe with effect from 3 June 2006”, and (ii) that it had remained a party to a number of Council of Europe conventions signed and ratified by the former State Union of Serbia and Montenegro, including the Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore Serbia became the successor of Serbia and Montenegro also as a party in cases before the ECtHR, which had been lodged originally against Serbia and Montenegro.

The cases, which have been brought to a final decision by the ECtHR in the field of non-enforcement of court decisions, were mostly based on the “Enforcement Procedure Act 2000.”<sup>80</sup> Meanwhile this regulation has been replaced by the “Enforcement Procedure Act 2004”<sup>81</sup> but in accordance with article 304 of the latter regulation all enforcement proceedings instituted prior to 23 February 2005 are to be concluded pursuant to the earlier legislation.

Thorough study of cases has shown that the court again and again had to deal with principles, which will be of interest also for future solutions in the field of enforcement of court decisions.

In most cases the Government tried to deny that applicants had exhausted all available, effective domestic remedies, which would lead to the inadmissibility of the case. In most cases applicants did not complain about the delay in the enforcement procedure to the Supreme Court’s Supervisory Board. The ECtHR used the chance to reiterate that according to its established case-law, the purpose of the domestic remedies rule in article 35 paragraph 1 of the Convention is to afford the Contracting states the opportunity of preventing or putting right the violations alleged before they are submitted to the ECtHR. However, the only remedies to be exhausted are those which are effective. For concrete cases concerning Serbia the ECtHR repeatedly stated that most of the remedies provided for within national legislation and especially a complaint to the Supreme Courts Supervisory Board, criminal complaints or a complaint to the Court of Serbia and Montenegro were not efficient, due to structural or factual deficiencies.

<sup>79</sup> See also par. 4.8

<sup>80</sup> Zakon o izvršnom postupku; published in official Gazette of the Federal Republic of Yugoslavia-OG FRY-no. 28/00, 73/00 and 71/01.

<sup>81</sup> Zakon o izvršnom postupku; published in official Gazette of the Republic of Serbia- OG RS- no. 125/04.

An example of such a decision is the case of *EVT Company v. Serbia*.<sup>82</sup> In this case the applicant was a company which was entitled in 1996 to have a judgment enforced. As the original debtor was transformed in four different companies, the commercial court ruled that these companies together should pay the debt to the applicant. In January 2005 the applicant was informed by the President of the Commercial Court that the enforcement proceedings had been hindered by the debtors' employees as well as the police. The police refused to assist the bailiffs in their subsequent attempts to seize those very assets. The President stated that the proceedings would recommence as soon as the judge handling the case clarified the situation with the head of the local police, and concluded that the refusal of the police to assist the bailiffs in their duties was common in cases involving "discontented workers" engaged in the obstruction of judicial enforcement proceedings.

The Government submitted that the applicant had not exhausted all available, effective domestic remedies consisting of either a complaint under article 47 of the Enforcement Procedure Act 2000 or a complaint about the delay in question to the Supreme Court's Supervisory Board or a complaint procedure before the Court of Serbia and Montenegro, pursuant to the Constitutional Charter and the Charter on Human and Minority Rights and Civic Freedoms. Furthermore, the applicant had failed to lodge a criminal complaint under either the Criminal Code 1977 or a complaint under article 340 of the Criminal Code 2005.

The ECtHR recalled that the purpose of the domestic remedies rule in article 35 paragraph 1 ECHR is to afford the Contracting States the opportunity of preventing or putting right the violations alleged before they are submitted to the ECtHR. However, the only remedies to be exhausted are those which are effective.

It is incumbent on the Government claiming non-exhaustion to satisfy the ECtHR that the remedy was an effective one, available in theory and in practice at the relevant time. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement.

The ECtHR emphasised that the application of this rule must make due allowance for the context and must be applied with some degree of flexibility and without excessive formalism. It must examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected in order to exhaust domestic remedies. The Court reiterated that the decisive question in assessing the effectiveness of a remedy concerning a complaint about procedural delay is whether or not there is a possibility for the applicant to be provided with direct and speedy redress, rather than an indirect protection of the rights guaranteed under article 6 ECHR. In particular, a remedy of this sort is considered to be "effective" by the ECtHR if it can be used either to expedite the proceedings at issue or to provide the litigant with adequate redress for delays which have already occurred.

The ECtHR considered that a complaint with the Supreme Court's Supervisory Board to speed up the enforcement at issue (even if relevant and directly available to the applicant), would have amounted to no more than mere information submitted to a higher instance with full discretion to make use of its powers as it saw fit. In addition, even if this board had instituted proceedings in response to the applicant's complaint, they would have taken place exclusively between the board itself and the judge/court concerned. A complaint to the Supreme Court's Supervisory Board cannot therefore be considered effective within the meaning of article 35 paragraph 1 of the Convention. Regarding article 47 of the Enforcement Procedure Act 2000, the ECtHR considered, although the applicant had repeatedly complained about the lack of police assistance to various State bodies, that it is up to the respondent State's authorities, and not the applicant personally, to seek police assistance and inform the Ministry of Internal Affairs about the difficulties encountered.

A criminal complaint, according to ECtHR, would have been just as ineffective as it would have been no faster than any other "ordinary" criminal matter which could have lasted for years and gone through several instances. The Government certainly offered no evidence to the contrary. Regarding the filing of a complaint with the Court of Serbia and Montenegro, the Court recalls that it has already held that this particular remedy was unavailable until 15 July 2005 and, further, that it remained ineffective until the breakup of the State Union of Serbia and Montenegro.

The ECtHR concluded that the applicant's complaints cannot be declared inadmissible for non-exhaustion of domestic remedies under article 35 par 1 of the ECHR. Irrespective of whether a debtor is a private or a State actor, it is up to the State to take all necessary steps to enforce a final court judgment as well as to, in so doing, ensure effective participation of its entire apparatus, including the police, failing which it will fall short of the requirements contained in Article 6 par 1 ECHR.

<sup>82</sup> *EVT company v. Serbia*, ECtHR 21 June 2007, no. 3102/05.



Also in another recent case, *Felbab v. Serbia*,<sup>83</sup> the domestic remedies were discussed. The complaint regarded the non-enforcement of a final access order in a pressing child-related matter. Under article 13 ECHR,<sup>84</sup> the applicant complained that he had no effective domestic remedy in order to expedite the enforcement proceedings at issue. Thus the complaint raised issues of fact and law under the ECHR, the determination of which required an examination of the merits. The complaint was declared admissible. The Court considered that, at the relevant time, there was indeed no effective remedy under domestic law for the applicant's complaint about the non-enforcement in question. There has, accordingly, been a violation of article 13 taken together with articles 6 paragraph 1 and 8 of the ECHR.<sup>85</sup>

In a more recent case the responsibility of the State for the enforcement was the subject: *Krivošej v. Serbia*.<sup>86</sup>

Here the delay in enforcement was, according to the Serbian Government, partly attributable to the court's bailiff who was ultimately sanctioned for his malfeasance. However the ECtHR was clear: "irrespective of whether enforcement is to be carried out against a private or State actor, it is up to the State to take all necessary steps to execute a final court judgment as well as to, in so doing, ensure the effective participation of its entire apparatus, failing which it will fall short of the requirements contained in Article 6 § 1. [...] Lastly, it is noted that throughout the proceedings the applicant has done everything in her power to have the final access order enforced, whilst the domestic authorities have failed to make use of any coercive measures in spite of the clearly uncooperative attitude expressed by the other party, including N.C.'s apparent attempt to conceal his new place of residence between September 2007 and October 2009. Notwithstanding the sensitivity of the impugned proceedings, as well as the fact that the applicant was able to see her child occasionally prior to September 2007, the Court concludes that the Serbian authorities did not act diligently or take sufficient steps to execute the final access order of 7 October 2002, as modified on 21 May 2003. There has, consequently, been a violation of Article 6 § 1 of the Convention."<sup>87</sup>

The excessive number of legal remedies has also been a point of discussion. In the case *Bulović v. Serbia*,<sup>88</sup> the applicant complained about the non-enforcement of a judgment from 9 March 1994 from the Municipal Court in Sombor (Opštinski sud u Somboru). Due to numerous appeals against the enforcement procedure, ill-scheduled hearings, often suspended hearings pending on the outcome of other cases, enforcement was not carried out. On 17 May 2007 the applicant withdrew her claim as the debtor had fully compensated her. On 23 May 2007 the President of the Municipal Court sent a letter to the applicant's lawyer which read as follows:

"As regards ... [your client's] ... enforcement case[,] ... we would like to apologise for ... [its] ... long duration, ... for which there are several reasons such as ... [her] ... failure to appear at scheduled hearings, the lawful stay of these proceedings which had lasted for five years, the ... [time needed to appoint] ... a guardian ... and the unjustifiably long time which the court took to decide in respect of the complaint ... [filed by S.B.] ... against the ... [court's] ... decision of 6 April 2004."<sup>89</sup>

The Serbian Government noted that the applicant had been "fully compensated" by the debtor and that the Municipal Court had sent her an official apology for the excessive length of the impugned proceedings. She was therefore no longer a "victim", within the meaning of article 34 of the Convention.

The ECtHR recalled that a decision or a measure favourable to the applicant is not in principle sufficient to deprive him or her of the status of "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention complained of. Even assuming that the applicant has obtained a sufficiently unequivocal acknowledgement of the violation allegedly suffered, the Government have failed to provide her with any compensation for the delay in question. The ECtHR therefore was of the opinion that the applicant had retained her victim status and dismissed the Government's objection in this regard. Finally, the ECtHR considered that in the absence of the said compensation "the effects of a possible violation of the Convention" remained yet to be "redressed" by the respondent State. Thus the matter cannot be struck out of the Court's list in accordance with article 37 paragraph 1 (b) of the ECtHR. In these circumstances, the ECtHR considered that the Serbian authorities had failed to conduct the impugned enforcement proceedings effectively, thereby impairing the essence of the applicant's "right to a court". There had accordingly been a violation of article 6 paragraph 1 of the ECHR.

<sup>83</sup> *Felbab v. Serbia*, ECtHR 14 April 2009, no. 14011/07.

<sup>84</sup> Article 13 ECHR reads as follows: "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

<sup>85</sup> See also: *V.A.M. v. Serbia*, ECtHR 13 March 2007, no. 39177/05, and *Ilić v. Serbia*, ECtHR 9 October 2007, no. 30132/04.

<sup>86</sup> *Krivošej v. Serbia*, ECtHR 13 April 2010, no. 42559/08.

<sup>87</sup> A similar case is *Damnjanović v. Serbia*, ECtHR 18 November 2008, no. 5222/07.

<sup>88</sup> *Bulović v. Serbia*, ECtHR 1 April 2008, no. 14145/04.

<sup>89</sup> On 6 April 2004 the Municipal Court rejected the request for the stay of the enforcement proceedings filed on 25 February 2003.

One of the other arguments that were used in the ECtHR procedures was the backlog of cases. The ECtHR was very clear on this: “[...] a chronic backlog of cases is not a valid explanation for excessive delay [...]”. Moreover, Article 6 § 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time [...].”<sup>90</sup>

A similar case is *Ilić v. Serbia*:<sup>91</sup> “The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, as well as the importance of what is at stake for the applicant [...] A chronic backlog of cases is not a valid explanation for excessive delay, and the repeated re-examination of a single case following remittal may in itself disclose a serious deficiency in the respondent State’s judicial system [...] In any event, it is for the Contracting States to organise their courts in such a way as to guarantee everyone’s right to a determination of their civil rights and obligations “within a reasonable time”.”<sup>92</sup>

Other ECtHR decisions are dealing with decisions against state controlled debtors and the efficient set up of working mechanisms between Government bodies. Especially in the case *Kacapor and others v. Serbia*<sup>93</sup> the ECtHR made clear that “irrespective of whether the debtor is a private or a state controlled actor, it is up to the state to take all necessary steps to enforce a final court judgement, as well as to, in doing so, ensure the effective participation of its entire apparatus.”<sup>94</sup>

Reiterating this principle the court underlined that the State is responsible for an enforcement procedure (i.e. law, by-law and regulations), which also takes into account the necessity of enforcement officials to have the support of other governmental bodies as for example the land registry or a national bank.

The case concerned the applicants’ complaints about the Serbian authorities’ failure to enforce final judgments given in their favor. All the applicants were former employees of a socially-owned company (SOC; *preduzeća koja posluju većinskim društvenim kapitalom*). These companies are comprised of social capital and are a relic of the former Yugoslavian communism. A SOC is an independent legal entity which is owned and run by his own employees, and can be subjected to insolvency proceedings. From 2002 these companies that are not formally being privatized, cannot, without prior approval by the Privatisation Agency (Agencija za privatizaciju), itself a State body, adopt their own decisions concerning inter alia, privatization, but also the settlements of claims (payment of debts). Any decisions adopted in the absence of such approval would be declared null and void by the Privatisation Agency. This regime was in force until March 2007, the competent ministries having announced that its extension was imminent.

The ECtHR noted that the debtor is currently owned by a holding company predominantly comprised of social capital. As such, it is closely controlled by the Privatisation Agency, itself a State body, as well as the Government, irrespective of whether any formal privatisation had been attempted in the past. The ECtHR therefore considered that the debtor, despite the fact that it is a separate legal entity, does not enjoy “sufficient institutional and operational independence from the State” to absolve the latter from its responsibility under the Convention. Accordingly, the Court was of the opinion that the applicants’ complaints were compatible *ratione personae* with the provisions of the ECHR.

The ECtHR concluded: “[...] notwithstanding the Governments submissions to the contrary, the enforcement court was obliged to proceed *ex officio* with other means of enforcement, had any one of those proposed by the applicants already proved impossible [...]. The relationship between the enforcement court and the Central Bank was an internal one, between two Government bodies, and, as such, beyond the scope of the applicants’ influence who, in any event, did everything in their power to expedite the impugned proceedings [...]. There was no reason why the applicants should have requested updates from the Central Bank in respect of the said bank transfer merely in order to fill the communication void between two branches of Government. [...] Given the finding of State liability for the debts owed to the applicants in the present case, it is noted that the State cannot cite either the lack of its own funds or the indigence of the debtor as an excuse for the non-enforcement in question. [...] In view of the above, the Court finds that the Serbian authorities have failed to take necessary measures in order to enforce the judgments in question. There has, accordingly, been a violation of Article 6 § 1 of the Convention.”<sup>95</sup>

90 Case of *Samardžić and AD Plastika v. Serbia*, ECtHR 17 July 2007, no. 28443/05.

91 *Ilić v. Serbia*, ECtHR 9 October 2007, no. 30132/04.

92 See also, more recent: *Dimitrijević and Jakovljević v. Serbia*, ECtHR 19 January 2010, no. 34922/07.

93 *Kacapor and others v. Serbia*, ECtHR 15 January 2008, nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06.

94 See also: *Crnišanić and Others v. Serbia*, ECtHR 13 January 2009, nos. 35835/05, 43548/05, 43569/05 and 36986/06, par. 100-104, and *EVT Company v. Serbia*, ECtHR 21 June 2007, no. 3102/05.

95 See also: case *Vlahović v. Serbia*, ECtHR 16 December 2008, no. 42619/04.

In the case of *Grišević and others v. Serbia* the ECtHR recently confirmed once again her opinion:<sup>96</sup> “the Court has already held that the State is responsible for the debts of companies predominantly comprised of social capital [...] It finds no reason to depart from this ruling in the present case since the first and second applicants’ debtors are themselves such companies [...] and the period of debt recovery has so far lasted between three years and nine months and five years and three months in all. The Serbian authorities have thus not taken the necessary measures to enforce the judgments in question and have not provided any convincing reasons for that failure [...]. Accordingly, there has been a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.”

### 3.11. Future

There is an increasing number of cases at the ECtHR. The non-enforcement seems to be one of the most frequently identified problems in the judgments of the ECtHR. Reference has already been made to the increasing number of cases related to the enforcement of (final) judgments or other enforceable court decisions and documents. This number of cases is seen as an indicator for the state of affairs in the field of the development of rule of law and especially in the field of the judiciary all cases are adding to the interest of the countries to improve the (efficiency) of their enforcement systems.

The lack of proper enforcement has different reasons. First the present legislation in most countries seems to be outdated and not able to handle the number of enforcement requests. In most countries there is no balance between the interests of the debtor and the creditor. It is easy for defendants to frustrate enforcement by abusing the substantial number of legal remedies.

Secondly there is a lack of efficiency and effectiveness in the organisation of the enforcement system. In most countries there is hardly any budget to set up an adequate enforcement system. As a result there is a lack of professionalism, trained staff and a lack of infrastructure. The budgetary legislation also has its influence on the approach of enforcement towards the State and State institutions. In most countries the State as a debtor has an exceptional position. This frustrates the confidence and expectations towards the functioning of the enforcement system.

The high number of cases made the Council of Europe to introduce the “pilot judgments”. In Recommendation Rec(2004)6<sup>97</sup> the Committee of Ministers stated inter alia “When a judgment which points to structural or general deficiencies in national law or practice (“pilot case”) has been delivered and a large number of applications to the Court concerning the same problem (“repetitive cases”) are pending or likely to be lodged, the respondent state should ensure that potential applicants have, where appropriate, an effective remedy allowing them to apply to a competent national authority, which may also apply to current applicants. Such a rapid and effective remedy would enable them to obtain redress at national level, in line with the principle of subsidiarity of the Convention system. [...] The introduction of such a domestic remedy could also significantly reduce the Court’s workload.”

The intention is that once the structural problem is identified, the State could adopt an ad hoc approach, whereby the state concerned would assess the appropriateness of introducing a specific remedy or widening an existing remedy by legislation or by judicial interpretation.

It is clear that the steady flow of enforcement cases does not only have the attention of the ECtHR. In 2006 the Parliamentary Assembly noted<sup>98</sup> “with grave concern, the continuing existence in several states of major structural deficiencies which cause large numbers of repetitive findings of violations of the Convention and represent a serious danger to the rule of law in the states concerned.” The Assembly listed among those deficiencies some major shortcomings in the judicial organisation and procedures.

To avoid becoming overburdened with cases the ECtHR needs to look for different approaches. The ECtHR is setting the tone. In a recent case *Yuriy Nikolayevich Ivanov v. Ukraine*<sup>99</sup> the Court noted repetitive violations of the Convention on account of the non-enforcement or the lengthy enforcement of final domestic awards in Ukraine and on account of the absence of effective domestic remedies in respect of such shortcomings: “... the Court concludes that the violations found in the present judgment were neither prompted by an isolated incident, nor were they attributable to a particular turn of events in this case, but were the

<sup>96</sup> Case of *Grišević and others v. Serbia*, ECtHR 21 July 2009, nos. 16909/06, 38989/06 and 39235/06.

<sup>97</sup> Recommendation Rec(2004)6 of the Council of Europe to member states on the improvement of domestic remedies, adopted on 12 May 2004 by the Committee of Ministers.

<sup>98</sup> Resolution 1516 (2006) on implementation of the European Court’s judgments, adopted on 2 October 2006

<sup>99</sup> Case *Yuriy Nikolayevich Ivanov v. Ukraine*, ECtHR 15 October 2009, no. 40450/04.

consequence of regulatory shortcomings and administrative conduct of the State authorities with regard to the enforcement of domestic decisions for which they were responsible. Accordingly, the situation in the present case must be qualified as resulting from a practice incompatible with the Convention [...] The Court stresses that specific reforms in Ukraine's legislation and administrative practice should be implemented without delay in order to bring it into line with the Court's conclusions in the present judgment and to comply with the requirements of article 46 of the Convention. The Court leaves it to the Committee of Ministers to determine what would be the most appropriate way to tackle the problems and to indicate any general measure to be taken by the respondent State. [...] In any event, the respondent State must introduce without delay, and at the latest within one year from the date on which the judgment becomes final a remedy or a combination of remedies in the national legal system and ensure that the remedy or remedies comply, both in theory and in practice, with the key criteria set by the Court and reiterated in the present judgment [...] The Court reiterates that delays in the enforcement of domestic decisions should be calculated and assessed by reference to the Convention requirements and, notably, in accordance with the criteria defined in the present judgment [...]"

Preventive measures are taken by the Council of Europe too. In January 2009 the ECtHR Department for Execution started a regional project "Removing the obstacles to the non-enforcement of domestic court judgments / Ensuring an effective implementation of domestic court judgments". The project focuses on Albania, Azerbaijan, Bosnia and Herzegovina, Moldova, Serbia and Ukraine.

One can only hope that all those efforts will have the desired result.

## Chapter 4: Albania

### 4.1. Political context

#### *The European Commission progress reports*

The Feira European Council in June 2000, confirmed by the Thessaloniki European Council in June 2003, the European Council of December 2006 and, again, the Sarajevo EU-Western Balkans ministerial meeting on 2 June 2010, acknowledged that Western Balkan countries participating in the Stabilisation and Association Process were 'potential candidates' for EU membership. And "that the future of the Western Balkans lies in the European Union".

Also Albania has aspirations to join the European Union. The application for membership was presented on 28 April 2009. A Stabilisation and Association Agreement (SAA) between the EU and Albania was signed in June 2006 and entered into force in April 2009, superseding the Interim Agreement on trade and trade-related aspects, which entered into force in December 2006.

The progress reports of the European Commission are written against the background of the conditions of eligibility as laid down by the European Council. In Copenhagen in June 1993, the European Council concluded that: "Accession will take place as soon as a country is able to assume the obligations of membership by satisfying the economic and political conditions required. Such a membership requires:

- that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union;
- the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union."

The assessment reports provide a good overview of the developments in the light of the abovementioned conditions.

In 2006 the European Commission reported in its Progress Report with some optimism on the improvements in the Albanian enforcement system: "There has been some progress in the field of enforcement of final judicial decisions through the reorganisation of the Bailiff Service and the upgrading of the level of its employees." However, judicial proceedings, according to the European Commission, remained lengthy, poorly organised and lacked transparency.<sup>1</sup> It is only logical that this situation also had its impact on the performance of the Albanian enforcement agents: "The Bailiff Service remains hindered in executing judgements by lack of funds, unclear court decisions, and the refusal of many state organisations to meet their judgment obligations."<sup>2</sup> "Delays in the courts have continued to have considerable negative effects on the business climate. This is due to the difficulty of obtaining court rulings and enforcing contracts on issues such as commercial litigation or enterprise liquidation. [...] Enforcement of property rights has continued to be weak and only marginal progress has been achieved in improving the efficiency of the judicial system."<sup>3</sup>

When looking at the developments in 2007 it is important to mention first the positive developments in the civil registry, the national address system and land registry, all cornerstones for a sound and efficient enforcement process.

Regarding the developments in the judicial system the European Commission was less positive: "Judicial procedures generally remain slow and lack transparency. Government measures to combat corruption in the judiciary led to continued conflict between the executive and the judiciary, in particular the General Prosecutor. [...] The civil case management system was extended to all Albania's district and appeal courts. Some improvement has been made to the capacity of the bailiff service. The backlog of court rulings awaiting enforcement involving state institutions was reduced. [...] However, a draft law overhauling the judiciary remains under discussion in parliamentary committee. It provides for administrative courts, transparent assignment of cases and improvement in judges' career structure and disciplinary procedures. [...] Judicial infrastructure remains poor, especially in the Tirana district court and court of appeal, the country's largest. Courts continue to lack adequate space for courtrooms, archives and equipment. This

1 Albania 2006 Progress Report, European Commission, 8 November 2006, SEC(2006) 1383, hereafter the 2006 Progress Report, page 7.

2 2006 Progress Report, page 8.

3 2006 Progress Report, page 19.

hinders transparency, with the public unable to attend trials held in judges' offices. Lack of office space and equipment for bailiffs and insufficient assistance from other authorities, such as the police and the Immovable Property Registration Office, impedes the enforcement of judgments, which remains slow. Enforcement of court rulings in cases involving state institutions often takes longer than the six months allowed by law. Plans to reform the bailiff system have not yet led to new laws."<sup>4</sup>

"The judicial system suffers from non-transparent and inefficient court proceedings. Political and other undue interference in the system occurred. While some progress has been made with enforcement of court rulings and establishment of property rights, the overall efficiency of the judicial system and the resulting implementation of law remain low."<sup>5</sup>

Developments in 2008 still did not satisfy the European Commission. Although in March 2008, a cross-party National Pact on Justice was endorsed by the main political parties, the European Commission states that a clear reform strategy and vision for the judiciary, going beyond adoption of individual pieces of legislation, is still missing. The European Commission advocates for a "comprehensive strategy on judicial reform, to complete the legal framework and to provide sufficient human and financial resources for implementation."<sup>6</sup>

"Overall, there has been limited progress in judicial reform, mainly on the legal framework. However, the justice system continues to function poorly due to shortcomings in independence, accountability and transparency."<sup>7</sup> "The court system continues to be problematic, with procedures remaining slow and non-transparent. [...] Courts lack adequate space for archives and equipment for court transcripts, which remain mostly handwritten. Due to overcrowding, many courts cannot allow public access to hearings. This hinders the transparency and efficiency of the courts. The State budget allocated to the judiciary remains insufficient for the normal operation of most courts. Overall, judicial infrastructure requires considerable strengthening."<sup>8</sup>

The European Commission concludes: "The government took a number of steps to strengthen the judicial system and the fight against corruption. A number of electronic public services (including the electronic public procurement system) were introduced in order to increase transparency. The general judiciary reform continued, with the adoption of a law on the organisation and functioning of the judiciary. Inspections of courts and public agencies were stepped up and legal procedures were initiated against officials responsible for violations. Legal certainty was increased by establishing a legal basis for a new type of administrative courts to rule on commercial cases and disputes between companies and public institutions. Preparations for defining property rights made progress. Offices in several cadastral areas were prepared for the initial registration of land, and preparatory work on the digitization of maps of the territory was completed. However, further efforts are required to effectively fight against corruption that affects the business climate and has an adverse impact on the quality of public services. Overall, the legal framework for contract enforcement was strengthened, but the judiciary remained weak and uncertainty about real estate property rights persists."<sup>9</sup>

Critique was also expressed on the developments in enforcement: "A law has been prepared on privatisation of the bailiff system for the enforcement of civil court rulings. However, enforcement of judgments by bailiffs remains slow."<sup>10</sup>

The European Commission in its 2009 Progress Report criticized the fact that a comprehensive long-term strategy to reform the judiciary is pending. "Overall, judicial reform in Albania remains at an early stage. Key pieces of legislation needed to complete the legal framework have not been adopted. The justice system continues to function poorly due to shortcomings in independence, transparency and efficiency, which are key European Partnership priorities to be addressed. A comprehensive strategy to improve the judicial system will be key to progress in this area."<sup>11</sup>

4 Albania 2007 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2007-2008, European Commission, 6 November 2007, SEC(2007) 1429, hereafter 2007 Progress Report, page 8-9.

5 2007 Progress Report, page 23.

6 Albania 2008 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2008-2009, European Commission, 5 November 2008, SEC(2008) 2692, hereafter 2008 Progress Report, page 8-9.

7 2008 Progress Report, page 10.

8 2008 Progress Report, page 9.

9 2008 Progress Report, page 22.

10 2008 Progress Report, page 9.

11 Albania 2009 Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2009-2010, European Commission, 19 October 2009, SEC(2009) 1337, hereafter 2009 Progress Report, page 11.



In 2009 only little progress in completing the legal framework for judicial reform was made, according to the European Commission. "Attempts by the government to curtail the independence of the judiciary have politicised the debate about judicial reform and hampered progress."<sup>12</sup>

Court infrastructure remained poor. "Sessions in judges' offices continue to be common, and public access to court hearings remains a concern. The random electronic allocation of court cases to judges is working fairly well. The judges affected by the abolition of eight small district courts in 2007 have been reinstalled. A computerised case management system for both civil and criminal cases is installed in all courts. The Ministry of Justice started publishing case management statistics on its website. However, court procedures remain problematic in terms of efficiency and transparency. The budget for the judiciary has been increased in 2009. The management of the Office for the judicial budget has improved. However, the funding for the judiciary remains insufficient to ensure proper functioning of court administration."<sup>13</sup>

Regarding the developments in enforcement the European Commission was slightly positive. "In November 2008, the Law on the private bailiff service was adopted, allowing for private enforcement agents to carry out bailiff duties. The establishment of the twin-track (private and public) bailiff system will help in enforcing civil court rulings. However, implementation regulations for the service to start operating are pending."<sup>14</sup> "The role of courts in the enforcement of contracts remains limited and the legal system at large lacks authority and public acceptance, partly due to perceived levels of corruption and weak administrative capacity. Informal methods of contract enforcement, by-passing the legal system, continued to be widespread. [...] Overall, the legal system did not contribute as required to the enforceability of contracts and to the strengthening of the rule of law."<sup>15</sup>

In 2010 a considerable number of laws passed by the Albanian parliament in view of necessary social and economic reforms and to align Albanian legislation with the EU *acquis*. However, the European Commission has her doubts as "the quality of legislation passed has not always been of an adequate standard. Parliamentary committees often work under severe time pressure. There are substantial differences in workload between the committees, with the legal committee being particularly overburdened. Involvement of relevant interest groups in parliamentary hearings and consultations is limited. The assembly's legislative agenda is decided upon by the Conference of Chairmen, which includes the parliamentary group chairmen but not the individual committee chairs. As a consequence, there have been conflicts between the committees' work plan and the assembly's legislative agenda. The position of parliamentary speaker has been misused, in particular by exerting disproportionate influence on the process of establishing the legislative agenda by frequently imposing short-term decisions as opposed to joint decisions of the conference of chairmen. Despite constitutional provisions, there is a lack of effective parliamentary oversight over the executive and parliament does not function as an independent institution. Interpellations and question times are rarely used and written questions are hardly ever submitted."<sup>16</sup>

The European Commission notes that the judiciary is one of the sectors where there still is corruption: "Despite an improved legal and institutional framework, corruption across many sectors and institutions remains at high levels, with certain sectors and areas particularly affected, notably the judiciary, the health sector and property rights, but also public procurement and party funding."<sup>17</sup> "Overall, Albania lacks a tradition of judicial independence. It needs to continue the process of reforming the judiciary, including the adoption of a comprehensive judicial reform strategy and key pending laws and the establishment of a sustained track record of implementation demonstrating the independence and efficiency of the judiciary. It will need to address the lack of independence, transparency and accountability in the appointment, transfer and evaluation of judges as well as necessary improvements to the system for inspecting the judiciary. The fact that the parliament votes on the appointment of judges to the High Court and Constitutional Court entails strong risks of politicisation and hence of a weakening in the independence of the institutions. Adequate human and financial resources as well as infrastructure conditions are needed to ensure the efficient functioning of courts. Albania also needs to address corruption in the judiciary, taking into consideration all the relevant aspects, including salaries, immunity, security, and the politicisation of key appointments."<sup>18</sup>

<sup>12</sup> 2009 Progress Report, page 10.

<sup>13</sup> 2009 Progress Report, page 11.

<sup>14</sup> 2009 Progress Report, page 10.

<sup>15</sup> 2009 Progress Report, page 22.

<sup>16</sup> Analytical Report accompanying the Communication from the Commission to the European Parliament and the Council, Commission Opinion on Albania's application for membership of the European Union, 9 November 2010, SEC(2010) 1335, hereafter 2010 Analytical Report, page 11.

<sup>17</sup> 2010 Analytical Report, page 22.

<sup>18</sup> 2010 Analytical Report, page 21.

Another issue that hampers the access to justice is the substantial increase in judicial administration fees introduced in March 2010. The increase “risks limiting access to justice for the economically underprivileged, particularly since individuals benefiting from the free legal aid scheme are not exempt from the payment of court fees.”<sup>19</sup>

Also on the developments in the enforcement system the European Commission does not come with good reports: “Enforcement of decisions is weak, in particular in cases where state institutions are the defendants. The European Court of Human Rights in Strasbourg has ruled on several occasions against Albania for non-enforcement of its judgments. The law on the new bailiff services, approved in 2008, has still not fully entered into effect. The private bailiff system has not yet started to function and no sound case management for bailiffs is in place. Provisions of relevant and financial resources from the state budget for the execution of decisions against state bodies could also improve the enforcement of decisions.”<sup>20</sup>

One of the main issues in the Albanian legal system is the reform process concerning property rights. In paragraph 3.4. we already indicated that a number of cases are pending at the ECtHR.

These cases refer to the re-establishment of private immovable property, the reintroduction of civil law principles and transactions and the acknowledgement of ownership rights of those that had been unjustly expropriated during Communism. During recent years Albania has taken legislative and institutional measures in three main interrelated areas: property registration, restitution and compensation, and legalisation. As a result a number of laws passed the Albanian Parliament, such as the Law on registration of immovable properties in 1994 (last amended in 2007), the Law on the verification of the legal validity of property titles on arable land in 2008, the Law on restitution and compensation of property in 2004 (initial law of 1993), and the Law on legalisation, urban planning and integration of informal buildings in 2006 (initial law of 2004).

The Immovable Property Registration Office was established to undertake initial property registration across the country. In addition, the Property Restitution and Compensation Agency was set up to prepare the restitution of expropriated land and property and to provide compensation in case restitution is not possible. To issue legalisation permits the Agency for legalisation of informal zones was established as the coordinating body.

Nevertheless the European Commission is not very positive in her opinion: “this legislation was often developed in a piecemeal and uncoordinated manner, leading to a very complex legal framework often challenged for its legitimacy and fairness by people concerned. The property issue remains unresolved. Difficulties include an artificially high number of agencies operating in an uncoordinated, often inefficient and sometimes overlapping way, an improperly functioning land registry system in addition to widespread corruption. Albania’s courts suffer from a backlog of property disputes that often go through all instances, sometimes several times. The ensuing systemic problem of the non-enforcement of final domestic judgments and administrative decisions ordering restitution of properties or compensation of former owners is of serious concern. Cases relating to a breach of the principle of due process in property disputes constitute the largest amount of petitions to the European Court of Human Rights against Albania. The lack of enforcement, especially of claims against the state, is particularly worrying. These are, among other things, caused by the inefficiency of the bailiffs in enforcing court decisions, the lack of necessary funds and the lack of an effective remedy system.”<sup>21</sup>

The question is whether, as the European Commission concludes, the lack of enforcement in these cases is caused by the “inefficiency of the bailiffs in enforcing court decisions”. In our opinion this issue goes beyond the powers of the enforcement agent. As such the remark that is made by the European Commission on page 43/44 seems more obvious: “The land registration process is tainted by lack of legal documents, delays and poor enforcement of court decisions, competing land ownership claims, corruption and weak coordination among government agencies. This leads to an informal exchange of property giving rise to disputes which further burdens the courts and causes an additional loss of tax revenue. Overall, although progress has been achieved in the past two decades, ownership transfer and recognition of property rights remain incomplete and hamper the functioning of the land market.”

### ***Government Strategy***

As we already mentioned, one of the points of critique of the European Commission was the fact that Albania did not develop a legal reform strategy.

<sup>19</sup> 2010 Analytical Report, page 25.

<sup>20</sup> 2010 Analytical Report, page 21.

<sup>21</sup> 2010 Analytical Report, page 31.



The main guiding document of the Albanian Government for developments in the field of enforcement is the Government Program, as presented to the Parliament on 9 September 2005. As outlined in the document, the government has concluded that the existing system of enforcement does not meet the expectations and that the rate of enforcement is unsatisfactory. Therefore, the present Albanian Government under prime-minister Berisha made it a priority “to restructure and strengthen the capacities of the bailiff office and creating opportunities for the private sector in this field”.

Based on this Government Program the Law on Private Judicial Enforcement Service<sup>22</sup> was adopted on 11 December 2008. With this law Albania now has created a mixed system consisting on the one side of privatized enforcement through privatized bailiffs, whereas on the other side the State-run enforcement service will also remain.

## 4.2 Legislation and organization of the enforcement process

### 4.2.1. Legislation

The enforcement proceedings are based on the provisions of the Code of Civil Procedure of the Republic of Albania, mainly Chapter IV (Notices) and Part IV, called Enforced Execution.<sup>23</sup>

For the organization of enforcement two main laws are important: the “Law on the Organization and Functioning of Judicial Bailiff’s Service”<sup>24</sup> (ALOBS; see paragraph 4.2.3) that is dealing with the State enforcement service, and the “Law on Private Judicial Enforcement Service”<sup>25</sup> (ALPES; see paragraph 4.2.4) dealing with the private enforcement agents.

In addition a number of by-laws and regulations have been developed. Regarding the State enforcement the most important by-law is the “Internal Regulation on the Bailiff Service” (2004),<sup>26</sup> coordinating the relations and organic structure established through the central and local level of organisation.

### 4.2.2. The enforcement process

#### *Enforceable documents*

Enforcement is carried out based on an executive title:<sup>27</sup>

- civil final decisions of the court containing an obligation;
- security decisions issued by the court;
- court decisions on temporary enforcement;
- irrevocable penal decisions in the section dealing with property rights;
- decisions of the arbitration courts of foreign countries that are empowered in accordance with the provisions of the ALCPC;
- decisions of an Albanian arbitration court;
- notary documents containing monetary obligations as well as documents for the award of bank loans;
- bills of exchange, cheques, and order papers equivalent to them;
- other documents when regulated in specific laws.

#### *Decision on execution*

At the request of the creditor an executive title is carried out. Within 5 days from the date of submission of the request of the creditor the court will issue an execution order. In general prior to the enforcement and the issuance of the execution order the creditor needs to have paid the fee for enforcement.<sup>28</sup> The competent

<sup>22</sup> Law on Private Judicial Enforcement Service (no. 10031), 11 December 2008, hereafter ALPES.

<sup>23</sup> Code of Civil Procedure of the Republic of Albania, based on art. 16 of Law No. 7491, dated 29 April 1991 “For the Main Constitutional Provisions”, lastly amended by Law no. 10052, 29 December 2008, hereafter called ALCPC.

<sup>24</sup> Law on the Organization and Functioning of Judicial Bailiff’s Service, Nr. 8730, dated 18 January 2001, hereafter ALOBS.

<sup>25</sup> Law on Private Judicial Enforcement Service, Nr. 10031, dated 11 December 2008, hereafter ALPES.

<sup>26</sup> Internal Regulation of the Court Bailiff Service, Order nr. 6508, 17 October 2004, hereafter ALINREG.

<sup>27</sup> Art. 510 ALCPC.

<sup>28</sup> Art. 515 ALCPC.

court is dependent on the type of executive title. In general the court that issued the civil final decision, the decision on temporary enforcement, the penal decision or the security decision is also competent to issue the execution order. For notary documents, bills of exchange, cheques, and order papers equivalent to them or other documents when regulated in specific laws the court where the decision shall be carried out is competent. For foreign (arbitral) court decisions the court of appeal is competent.<sup>29</sup>

The creditor can file an appeal against the decision by which the issuance of the execution order is refused.<sup>30</sup>

Based on the execution order the State or private bailiff can start enforcement. The commencement of enforcement of the execution order starts within 15 days from the date of submission of the request of the creditor.<sup>31</sup>

For enforcement against a foreign person, the ALCPC (article 526) requires permission of the Minister of Justice.

### ***Costs of enforcement proceedings***

The enforcement fees are paid initially by the creditor and after the termination of the execution procedure they are imposed to the debtor. Other expenses during execution procedure are paid by the party that incurred them.<sup>32</sup>

The enforcement fees are determined by the Minister of Justice (for State bailiffs: see article 12 ALOBS) and private bailiffs by the Minister of Justice in cooperation with the Minister of Finance (article 10 ALPES) and after consultation of the Chamber.<sup>33</sup>

ALPES explicitly mentions the right of the private bailiff to return a case when the pre-paid fee is not paid by the creditor.<sup>34</sup> The fees consist of several components: the pre-paid fee, a basic fee based on the value of the case and an additional fee for technically or legally specific or complex, or time-consuming enforcement acts.<sup>35</sup> In the event of unsuccessful enforcement, where the private judicial bailiff has performed appropriately and legitimately all the procedural acts, the pre-paid fees are non-refundable. Where the creditor has paid only the fee for the institution of the enforcement procedure and the obligation is met voluntarily by the debtor within the legal time periods, the fee for the institution of the procedure is non-refundable.<sup>36</sup>

### ***Fines and court penalties***

Albania law has numerous provisions in which a party can be fined by the bailiff. In those cases it is not necessary to obtain a special execution order, e.g.: article 509 ALCPC (sanction against objection declared unacceptable), article 583 ALCPC (a third person who fails to reply on a notice for seizure), article 588 ALCPC (refusal to retain amounts from debtor's salary), article 606 ALCPC (sanction for non-performance by a debtor).

Article 511 ALCPC stipulates: "No execution order is issued for the decision of attachment of claim and for the fines imposed by the court, which are executed directly by the bailiff's office, after the announcement of the decision".

### ***Territorial competence of the bailiff***

Here we need to make a distinction between the State bailiff and the private bailiff. The private bailiffs, based on article 17 ALPES, exercise their procedural enforcement tasks in the territory of the Republic of Albania. So the request for the implementation of the execution order can be addressed to any private bailiff. In case the creditor uses the services of a State bailiff the place of enforcement is decisive.<sup>37</sup>

### ***Commencement of the enforcement procedure***

The Ministry of Justice has a special register for all enforcement cases received by the bailiffs. Each bailiff is obligated, upon receipt of the request for enforcement from the creditor, to check this register. In case there

<sup>29</sup> Art. 511 ALCPC.

<sup>30</sup> Art. 512 ALCPC.

<sup>31</sup> Art. 515 ALCPC.

<sup>32</sup> Art. 525 ALCPC.

<sup>33</sup> Art. 47 ALPES.

<sup>34</sup> Art. 43 ALPES.

<sup>35</sup> Art. 48 ALPES.

<sup>36</sup> Art. 49 ALPES.

<sup>37</sup> Art. 516 ALCPC.

are already other creditors under enforcement procedure against the same debtor (unless the State is the debtor) with the same object, the bailiff receiving the new case will suspend the commenced procedure and addresses his creditor to the bailiff who has previously registered the request for execution. The bailiff who has been the first to register the request proceeds with the enforcement procedure in accordance with the relevant provisions of the ALCPC.<sup>38</sup>

According to these provisions other creditors of the same debtor may participate at any stage of execution as long as the bailiff has not prepared the plan for the division of the proceeds. The participation is made through a written request to which is attached the execution order or a decision of the bailiff that the execution order is attached to another case which is under execution.

A participating creditor will have the same rights with the creditor, who was the first to place seizure on the things or credits of the debtor, except when legal causes of preference exist. The execution actions, performed before the creditor participates together with the other creditors, create rights also for them.

When amounts from the execution are not sufficient to pay all creditors, the Bailiff shall prepare a division plan, firstly by setting aside amounts required for the credits paid according to preference and, from the amount remaining the Bailiff shall pay the other credits in proportion to their amount. The debtor and the creditors are informed by the bailiff on the preparation of the plan for the division of the proceeds. Any appeal against the division should be done within 5 days.<sup>39</sup>

### ***Legal challenges: objection and appeal***

ALCPC enables the debtor to challenge the validity of an executive title. According to article 609 the debtor may file such a request to the competent court of the place of execution. When the executive title is a court decision or an arbitral award, the debtor may contest the execution of the title only for facts occurred after the issuing of those decisions. The court considers the case within 5 days.

Within five days from the performance or refusal to perform the action, or in other cases since the day of notification or the day of becoming aware of the action or of the refusal, parties may file an appeal to the court. Against the private bailiff parties may lodge a complaint with the court where executive title is enforced, within 5 days from the performance of the action.<sup>40</sup> The appeal does not suspend execution, unless the court decides otherwise.

Third persons who claim to be owner of the attached goods, may initiate proceedings to exercise their rights and to exempt the attached goods from seizure and sale. The proceedings are initiated against the creditor and the debtor in the court of the place of the execution of the decision. In these cases the court may decide as a temporary measure the suspension of the execution with or without guarantee.<sup>41</sup>

### ***Suspension and cessation of enforcement***

Except in cases where the court is competent, the suspension or cessation of a case is decided by the bailiff.

Enforcement is suspended by decision of the court, on the request of the creditor, if one of the parties dies; if one of the parties is terminated as a legal person; if one of the parties loses the legal capacity to act as a party; when the bailiff, alone or under the auspices of the creditor does not find property of the debtor within 6 months from the institution of enforcement; or when the creditor does not present himself without reasonable grounds, within 3 months from the second notice by letter, made by the bailiff.<sup>42</sup> When the decision of suspension of execution becomes final, the bailiff removes the seizure over the movable or immovable properties. In the case the creditor has renounced from the execution, the bailiff returns the execution order to the creditor, who has the right to file a new request for execution within the lapse of time period.<sup>43</sup>

Enforcement is ceased when the debtor presents to the bailiff the statement signed by the creditor, duly certified, that he has paid the amount indicated in the execution order, or a payment note from the post office or a bank letter in which it is certified that the amount indicated in the execution order has been

38 Art. 516A ALCPC.

39 Artt. 534-539 ALCPC.

40 Artt. 611-612 ALCPC.

41 Artt. 612-614 ALCPC.

42 Art. 615 ALCPC.

43 Art. 617 ALCPC.

paid to the benefit of the creditor; when the creditor renounces in writing from the execution; when the execution order is invalidated or by a decision of the court.<sup>44</sup>

### ***Service of the decision on execution***

The enforcement procedure starts with a notice of voluntary fulfilment issued by the bailiff. The debtor is given a time period of five days (in case of enforcement regards salary or an order for maintenance) or a period of ten days for all other cases.<sup>45</sup> Enforcement can only start once this time limit has passed, unless the danger exists that with the expiry of the time-period the execution shall be made impossible.<sup>46</sup> In such a case the bailiff may start immediately with the enforced execution.<sup>47</sup> In case the domicile of the debtor is unknown, the First Instance Court upon the request of the bailiff and after attaining the necessary evidence on the situation, within 10 days from the date of submission of the request by the judicial bailiff, assigns the debtor a representative. The expenses of the representative are initially paid by the creditor.<sup>48</sup>

### ***Determination of debtor's property***

Upon receipt of the notice of voluntary fulfilment and upon request of the bailiff the debtor is obliged to declare in written form his property status and the objects or credit that third persons owe to him. Upon the debtor's request, the First Instance Court may take into consideration the financial status of the debtor or other circumstances of the case and may, after hearing the creditor postpone the timeframe for the execution of the monetary order or divide such an order into instalments. Such a court decision is to be taken within 20 days from the date of submission of request.

### ***Exemption from enforcement***

Certain goods or things are exempted from attachment:<sup>49</sup>

- things of personal use of the debtor and his family such as: clothing, sheets and covers, furniture to the degree they are necessary for their living;
- food and fuel which are necessary to the debtor and his family for up to three months;
- decorations and souvenirs, letters, documents of the family and professional books;
- books, musical instruments, means of art which are necessary for the scientific and artistic activity of the debtor and his family;
- for farmers: up to 3 thousand square meters of land, two animals for tilling land, one cow, 6 sheep or 6 goats, seeds for the future planting as well as the food for those animals for three months;
- assistance given to mothers with many children or lone mothers, on the retirement, invalidity or family pensions or on the study fellowship unless the obligation is for sustenance. In this case cannot be seized more than 1/2 of the amount of pension or fellowship;
- natural fruits one month before they are ripe;
- necessary objects of work for ensuring a living.

In addition the debtor confronted with a seizure may propose alternative property than the property that was indicated by the creditor. It is up to the bailiff to decide if these alternatives (apart from the properties under pledge and mortgage) fulfil the request of the creditor.<sup>50</sup>

Also regarding a seizure on salary Albanian law has certain restrictions (article 533 ALCPC): "After reducing the contribution for social insurance and income tax the judicial bailiff seizes the salary of the debtor, without falling below the minimum living wage determined according to the legal and subordinate legal acts in force."

44 Art. 616 ALCPC.

45 Artt. 517- 518 ALCPC.

46 Art. 519 ALCPC.

47 Art. 519 ALCPC.

48 Art. 522 ALCPC.

49 Art. 529 ALCPC.

50 Art. 528 ALCPC.

### ***The State as a debtor***<sup>51</sup>

The budgetary institutions have an exceptional position in Albanian law. The execution of financial obligations to budgetary institutions can be carried out only into their relevant bank account, into the credits they have with third parties and in their absence, into the account of the treasury. Enforced execution on the movable or immovable property of a budgetary institution is not permitted.

In case the budgetary institution's bank account is devoid of money and lacking credit with third parties or with the treasury, the bailiff requests from the relevant superior financial body to designate the necessary fund and the budget chapter of the subject that shall fulfil the obligation, or to allocate special financing from the State Budget. The Council of Ministers issues the necessary instruction for the execution of the pecuniary obligations of the budgetary institutions in the account of the treasury.

### ***Seizure on movables***

Seizure on movables is effected through an inventory by the bailiff. The bailiff sequesters the movables by placing a label of the enforcement service.<sup>52</sup> The inventory is done in the presence of the debtor or, in case of absence of the debtor, in the presence of another adult person of the family and, when no such person is present, in the presence of a representative of the local authority. An inventory always needs to be prepared in the presence of two witnesses.<sup>53</sup>

The movables are either handed over to a guardian or are left in custody to the debtor. The debtor or the guardian, to whom the movables are left in custody, must render account on the income and expenditure made for the movables. They are responsible in conformity with the provisions of the Penal Code for their possession, damage or destruction.<sup>54</sup> Precious things such as gold, silver, platinum and the metals of platinum group in bars, pieces, coins and articles made of them, precious stones, pearls, and articles made of them as well as foreign currency, documents of payment in foreign currency such as bills of exchange, cheques, bills and other papers of such nature as well as foreign titles with value as shares, bonds and the relevant coupons are given in custody to a bank.<sup>55</sup>

When execution is carried out on items that are joint property of the debtor and other persons, the bailiff, preparing the inventory, will request the court, to determine and divide the part belonging to the debtor. The execution of this part is then carried out by the bailiff.<sup>56</sup>

The inventoried things are appraised by the bailiff on the basis of appraisals by experts, on the basis of market prices, deducting the appropriate percentage for wear and tear or oldness.<sup>57</sup>

After the seizure the bailiff notifies the debtor that the seized things shall be sold if he does not execute the obligation within five days.<sup>58</sup> The sale is made by auction or in shops of free sale. Precious items that are deposited in the bank are sold to it and their counter value is received by the bailiff on basis of the official rate at the time of payment.<sup>59</sup> The price of the seized movables is determined by the bailiff in cooperation with the creditor and debtor. When there are contradictions between them an expert is called.<sup>60</sup>

In case the sale is made in shops of free sale the bailiff sends the movables to the shop. The sale shall be effected based on an agreement between the bailiff and the salesperson. The amount of compensation depends on the cost of the sale of the seized goods. Albanian Law has a time limit for the sale: two months. With the consent of the parties this period can be prolonged for 30 more days.<sup>61</sup>

The sale through public auction is effected according to the price determined by the bailiff. The bailiff announces the date, time of the public sale and the determined price of the goods in the place where the thing is and in the place designated for the auction. The price during the first public sale is 80% of this determined

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51 Art. 589 ALPCP.

52 Art. 540 ALPCP.

53 Art. 543 ALPCP.

54 Art. 545 ALPCP.

55 Art. 548 ALPCP.

56 Art. 546 ALPCP.

57 Art. 544 ALPCP.

58 Art. 549 ALPCP.

59 Art. 550 ALPCP.

60 Art. 552 ALPCP.

61 Art. 553 ALPCP.

price. There should be at least 5 days between the day of announcement and the day of public sale. Ten days after the first public sale the bailiff can announce a new date for the second public sale. In that case the new price shall not be less than 30% of the price of the first auction. In case no bidder is present in the second auction, the bailiff proposes first to the creditor to take the object against the credit at the price of the second auction. If creditor refuses to take the object, the bailiff removes the seizure over this object by returning that to the debtor and proceeds with the enforcement procedures over other properties.<sup>62</sup>

### ***Enforcement against immovable property***

Prior to the attachment the bailiff assures himself about the ownership of the immovables, either by the ownership documents presented to him, or by requesting the office of registration of immovable property and, in their absence, the financial organs of local power.<sup>63</sup>

The attachment on immovables is done by registration of the act of attachment in the office of the register of immovable property. The ALCPC<sup>64</sup> describes the contents of such an act: the kind, nature and at least three borders of the immovable thing, its location as well as the mortgages and real rights which may have been held on it. The Register office registers the attachment within 10 days from the date of its submission. The debtor receives a copy of the act. Remarkable is that the method of communication nor the time limit is prescribed.

When execution of an immovable of joint ownership is carried out, the bailiff files a request to the court to divide the part belonging to the debtor who is also co-owner. In that case the execution is performed on this part. The item can be sold in its entirety in case of prior consent of the other co-owners. Such a consent must be provided by the provision of a notary act.<sup>65</sup>

The immovables are left in custody to the debtor until it is sold, unless the debtor does not take due care for immovables. In that case the bailiff appoints another person for the custody. The guardian has a right on a fee that shall be drawn out of the value of the thing after its sale. The provisions of the Penal Code for both the debtor and the guardian for actions which constitute an obstacle for the execution of the court decision are applicable.<sup>66</sup>

Ships and planes<sup>67</sup> are mentioned in the same chapter as the attachment on immovables. The attachment is also effected by its registration in the (maritime) register and notification of the director of the port where seizure is placed or the commander of the airport where seizure is made. Again no time limit is mentioned. Remarkable here is that it is not the bailiff but the director of the port who notifies the owner of the ship. In case of a plane there is no provision at all on notification of the owner, but here the law also prescribes, in case of a foreign plane, notification of the office where the plane is registered by the command of the airport.

The value of the immovable can be agreed upon between the debtor and the creditor. If the creditor and the debtor do not reach an agreement, the bailiff within 15 days determines through a decision the value, based on the act of expertise submitted by the certified expert and based on the real market value of the property in the moment that it has been seized. Within 10 days from the date of determining the value both the debtor and creditor are informed.<sup>68</sup>

Once the attachment is done, the debtor is given a period of 10 days from the date of notification of the attachment to fulfil the obligations.<sup>69</sup> After expiry of this time period the bailiff will announce the sale of the immovables.

The announcement for sale by auction is placed at the office of the bailiff, at the place where the immovable object is located, the court, the commune, the municipality, the municipality unit and in other public places which the bailiff considers appropriate. The announcement contains the name of the owner, mortgage on the immovable and for what amount of money, the price of the immovable at which the auction shall start and the place, day when the sale by auction shall end. The bailiff will inform the mortgage creditors on the announcement for sale by auction.

<sup>62</sup> Artt. 554-558 ALCPC.

<sup>63</sup> Art. 563 ALCPC.

<sup>64</sup> Art. 560 ALCPC.

<sup>65</sup> Art. 578 ALCPC.

<sup>66</sup> Art. 566 ALCPC.

<sup>67</sup> Artt. 561 and 562 ALCPC.

<sup>68</sup> Art. 564 ALCPC.

<sup>69</sup> Art. 567 ALCPC.

The law prescribes a minimum time period of 15 days between the announcement and the sale.<sup>70</sup> The initial auction price is 80% of the price appraised by the bailiff. Each bidder who participates in the public sale must deposit as guarantee with the office of the bailiff an amount of money equal to 10% of the appraised price before the start of the auction.

The public sale is made in the office of the bailiff or in any other appropriate public place. The sale continues for 15 days and ends at the end of the official working hours of the last day which is indicated in the announcement for the sale by auction.<sup>71</sup>

In case of an unsuccessful first auction, within 10 days from the end of this first auction the bailiff sets a new price of the object (not less than 20% of the price of the first auction). The second auction is held no later than 15 days from the date of the setting of the new price.

In case no bidder is present in the second auction, the bailiff proposes first to the creditor to take the object against the credit at the price of the second auction. If creditor refuses to take the object, the bailiff removes the seizure over this object by returning that to the debtor and proceeds with the enforcement procedures over his other properties. In case of several creditors, the bailiff declares buyer the creditor who within 3 days from the suggestion gives a higher price than the one designated for the new auction.<sup>72</sup>

At the end of the auction, the bailiff announces the winner. Buyer is the bidder who has given the highest price. Within 15 days from the end of the auction the buyer has to pay the full price.<sup>73</sup> The guarantees paid by the other bidders are returned to them immediately after the end of the auction. Once the buyer has paid the full amount, the ownership will be passed.<sup>74</sup> The buyer is given possession of the object by the bailiff within 10 days from the date of the payment.<sup>75</sup> In case of non-payment the buyer loses the right of being returned the amount left as guarantee, which goes to the benefit of the state, and a new auction is held.<sup>76</sup>

### ***Enforcement on a claim***

Prior to an attachment on the debtors' debtor the bailiff needs to ensure the existence of credits of the debtor and objects that third persons owe to the debtor. To this end, the bailiff notifies in writing the third person (debtors' debtor) and the debtor.

On receiving the notice, the debtor should declare to the bailiff that information submitted over his/her properties or property under possession of third persons is accurate and complete. A false declaration by a debtor can be prosecuted under the provisions of the Criminal Code.

On receiving the seizure notice, the third person is prohibited from delivering to the debtor the credit and his things.<sup>77</sup> The third person is obligated to respond to the bailiff within five days of receiving the notice of seizure if the seized credit is justified or that the objects belong to the debtor and that he is willing to pay off the credit or to deliver the items. In case other people have claims over the credit or items or there already is another attachment on the credit or objects, the third person has to inform the bailiff on this. In case of refusal the third person can be fined. The third person can file an appeal against the decision of the bailiff within 5 days from the date of notification.<sup>78</sup>

When the third person agrees he has to transfer the credit or objects to the bailiff. In case of objection execution on them cannot continue and the creditor must file a lawsuit to prove that the credit or the things, that the third person has, belong to his debtor.<sup>79</sup>

### ***Enforcement against savings deposit and current account***

Contrary to other legal systems in the region Albania does not have a coordinating body for the communication between the bailiff and the banks. Regarding the attachment on bank accounts article

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70 Art. 568 ALCPC.

71 Art. 570 ALCPC.

72 Art. 577 ALCPC.

73 Art. 574 ALCPC.

74 Art. 573 ALCPC.

75 Art. 575 ALCPC.

76 Art. 576 ALCPC.

77 Art. 581 ALCPC.

78 Art. 583 ALCPC.

79 Artt. 584-585 ALCPC.



593 ALCPC simply states: “The Bailiff notifies all public and private banks, which are obliged to inform the relevant Bailiff of accounts, deposits or credits in the name of the debtor; otherwise they shall be accountable in accordance with the provisions detailed in the Penal Code.”

On receiving the execution order the bank seizes the account, deposits and credits of the debtor to the measure necessary for the execution of the obligation. In doing so the bank has to bear in mind that the payment of credits, which in conformity with article 605 of the Civil Code are paid by preference towards the credit on which seizure is placed, are not suspended.<sup>80</sup>

The amounts taken from the account, deposits and credits of the debtor are paid by the bank directly into the account of the creditor in the same bank or in another bank or, when there are no such, into the Bank account of the bailiff.<sup>81</sup> The time limits for supplying information and for payment are not mentioned in the law; it is the Bank of Albania who issues the necessary instructions on the manner of applying the legal provisions. Those instructions are, based on article 600 ALCPC, mandatory for the entire banking system.

When the bailiff has ground to doubt that the bank inappropriately does not execute the obligation entirely or partially, violates the time-periods of executions or does not respect the order of preference, he has the right to verify in place the bank documentation in the presence of the person assigned by the management organ of the bank and keeps the relevant minutes. For breaches and incorrectness the bailiff has the right to fine the bank employee or the management organ, that has ordered incorrect actions.<sup>82</sup>

### ***Enforcement against wages and other permanent monetary income***

Regarding the attachment on salary we have to bear in mind that the Albanian law has certain restrictions (article 533 ALCPC): “After reducing the contribution for social insurance and income tax the judicial bailiff seizes the salary of the debtor, without falling below the minimum living wage determined according to the legal and subordinate legal acts in force.”

The attachment on the salary extends not only on the salary indicated in the seizure notice but also on any other remuneration that the debtor receives from the same work or from another work, at the same natural or juridical person, state or private.

Regarding the attachment on salary the employer has certain legal obligations.<sup>83</sup> First: when the debtor changes place of work, the old employer is obligated to send the notice of seizure to the new employer. In this case, as well as in the case the debtor is dismissed from work, the bailiff needs to be notified within five days. When the employer does not retain the ordered amounts from the debtor’s salary in accordance with the notice of the bailiff, or does not notify the bailiff of the transfer of the debtor to another workplace or of his/her dismissal, the person in charge shall be charged a fine by the bailiff.

### ***Execution of an obligation to relinquish a movable***

When a movable on which the decision is issued, is not delivered voluntarily by the debtor within the time-period designated in the notice of the bailiff, it is taken from him by enforcement and delivered to the creditor. In case the object is (partly) destroyed, the value of the thing or of the missing part is taken from the debtor. When the order of execution does not indicate the value of the object, it is designated by the court after hearing the parties and if necessary after questioning witnesses or experts.<sup>84</sup>

### ***Eviction***

In case of an immovable the bailiff, at least three days in advance, notifies to the debtor the day and time on which he shall place the creditor in possession of the thing.<sup>85</sup> When movable objects are located within the immovable the bailiff will make sure that those movables are removed immediately by delivery of those items to the debtor or his family members.

In case the debtor or his family members are not present during release, the bailiff may store the movable

<sup>80</sup> Art. 594 ALCPC.

<sup>81</sup> Art. 595 ALCPC.

<sup>82</sup> Art. 598 ALCPC.

<sup>83</sup> Artt. 587-588 ALCPC.

<sup>84</sup> Art. 601 ALCPC.

<sup>85</sup> Art. 602 ALCPC.



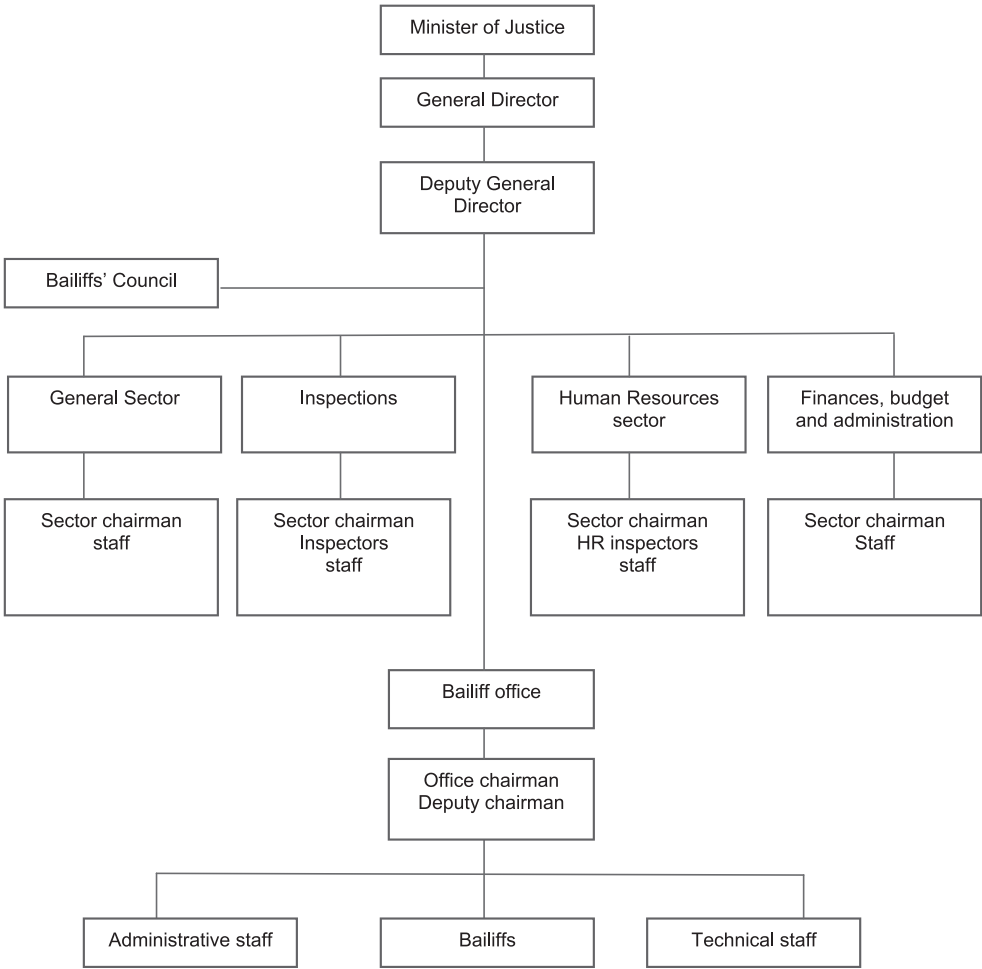
properties for a time period of two months in the free premise, upon agreement with the creditor; the premises, disposed by the enforcement service for the storage of objects; a neutral location where movables may be stored safely or a state reserved premise according to the rules in force for the storage of objects.

If within two months from release, the debtor does not claim for his movables, or does not pay all the expenses of release and storage, any seizeable movables will be sold by the bailiff. The unseizable objects are returned to the debtor despite the place where they are stored without the requirement for him to pay for expenses. Movables located within the immovables which may not be sold and claimed by the debtor are eliminated or transferred to state institutions or state public entities, capital transfer.<sup>86</sup>

4.2.3. The State Judicial Bailiff Service

The ALOBS was adopted in 2001. According to this law the enforcement is under the authority of the Ministry of Justice.

The State Judicial Bailiff Service is organised on both a central and a local level.<sup>87</sup> On a central level there is a special department within the Ministry of Justice, the General Directorate of Enforcement. It consists of the General Director, a deputy General Director, a finance or budget unit, Inspection sector, and supporting staff such as secretaries and drivers. There is a separate budget for the Bailiff Service within the budget of the Ministry of Justice.<sup>88</sup>



86 Art. 601A ALCPC.

87 Art. 6 ALOBS.

88 Art. 11 ALOBS.

The General Director is appointed and discharged by the Prime Minister on the proposal of the Minister of Justice. The General Director is responsible for the management, coordination and inspection of the overall bailiff service; proposes to the Minister of Justice the appointment and removal of the chairmen of the bailiffs' offices; prepares and issues orders, internal instructions and methodology dealing in general with execution matters; organizes and follows up the professional education and training of bailiffs and ensures ethical and professional conduct in the execution activity.<sup>89</sup> In addition the General Director, representing the Ministry of Justice, has certain tasks based on the Law on Private Judicial Enforcement Service (ALPES). The General Directorate enjoys only administrative competence, separated from the executive title executing procedural competence of the Bailiff Offices in the districts. This competence enjoy only the bailiffs.<sup>90</sup>

At present on a local level there are 21 bailiffs' offices.<sup>91</sup> The offices are located in the towns where district courts are established. Although the offices are, according to the law, not considered to be part of the courts, in many regards they are totally detached from the courts. On a local level the State Judicial Bailiff Service is organised within the jurisdiction of each judicial district of the first level. All offices are under the administrative subordination of the General Directorate.

In total the local offices have 92 bailiffs<sup>92</sup> plus administrative staff. The local office is managed by the bailiffs' office chairman. In smaller offices the chairman also has some extra duties. In the bigger offices (e.g. Tirana) the tasks of the director are mainly administrative. The tasks of the chairman are: leading, controlling and monitoring the activities of the bailiffs' office. The chairman reports to the General Directorate of Enforcement about the progress of the work and other issues.

The Bailiffs' Council consists of the general secretary of the Ministry of Justice, the general director of the bailiff service, the director of the Directorate of Personnel, Organisation and Services at the Ministry, the chairman of the Tirana bailiffs' office and a counselor of the Minister of Justice. This Council acts like an advisory body and is responsible for the organization of the competition for the appointment of bailiffs, evaluation of the work of the bailiffs and the examination of disciplinary violations.<sup>93</sup>

#### 4.2.4. The Private Judicial Enforcement Service

On 11 December 2008 the Albanian Assembly adopted the Law on Private Judicial Enforcement Service (ALPES), thus introducing the system of private enforcement in Albania.

The Private Judicial Enforcement Service is exercised by natural persons licensed according to the provisions of ALPES. The private bailiffs are allowed to organize themselves in a commercial company<sup>94</sup> providing such a commercial company limits itself only to the execution of enforceable titles.<sup>95</sup> At present there are 62 private bailiffs certified.

The public function of the private enforcement service in Albania is reducible to both the private bailiff (as a natural person) and the commercial company in which these private bailiffs participate. E.g. in article 4 ALPES it is stated that "Enforcement services may also be provided by companies [...]". Article 5 ALPES has similar provisions: "For purposes of this law, the private judicial enforcement service is an independent position of public nature exercised by private judicial bailiffs and private enforcement agencies." And: "The private judicial bailiff or private enforcement agencies in exercising their tasks [...]" And article 10 ALPES "Minister of Justice [...] issues, suspends or revokes the license of a private bailiff, or suspends or revokes the license of a company providing private enforcement services". These provisions seem to be contrary to the provision from article 4 paragraph 1 ALPES: "Private Judicial Enforcement Service is exercised by natural persons licensed according to the provisions of this law." The result of this inconsistency might be a discussion on the liability of the private bailiff and/or the private bailiffs' commercial company.

The Minister of Justice continues to have powers over the profession: issuance, suspension or revocation of the license of a private bailiff, or suspension or revocation of the license of an enforcement agency,

<sup>89</sup> Artt. 7 and 8 ALOBS.

<sup>90</sup> Art. 6 Internal Regulation of the Bailiff Service (ALINREG).

<sup>91</sup> The number of first instance courts was reduced from 29 under a reorganization carried out in September 2007, and fixed to 22 according to Decree nr 6201 June 9th, 2009. Nevertheless we were informed that there are not 22, but 21 offices.

<sup>92</sup> Source: Albania's answers to the EC questionnaire "Information requested by the European Commission to the Government of Albania for the preparation of the Opinion on the application of Albania for membership of the European Union", Council of Ministers of Albania, April 2010 (hereafter EC Questionnaire), page 104. Here there is also a discrepancy with the information we received from the General Directorate who informed us that at present there are 114 State bailiffs.

<sup>93</sup> Artt. 13 and 14 ALOBS.

<sup>94</sup> Art. 4 ALPES.

<sup>95</sup> Art. 8 par 2 ALPES.

control on the implementation of the law, approval of the Code of Ethics of Judicial Bailiffs, initiating disciplinary proceedings, taking disciplinary measures, organization of the qualification exam, approval of the Committee for the qualification exam, approval of the model contract, determination, in cooperation with the Minister of Finance, of the fee schedule. Remarkable is also that the Minister of Justice assigns a delegate in the meetings of the General Council (without a right to vote).<sup>96</sup>

The conditions for appointment seem to be easier than for the State bailiffs: Albanian citizenship, full capacity to act, a higher legal education, a 3 years' experience as a jurist, passed successfully the qualification examination as private bailiff, not convicted for commission of criminal act upon final decision. Besides the difference in education (a higher legal education versus a university degree in law) for the private bailiff there seems to be no check on disciplinary violations.

In theory there is no limit to the number of private bailiffs that can be appointed: once the candidate has passed the exam and meets the other requirements he/she will be appointed: "After the announcement of the list of winning candidates, the winning candidates shall be registered, at their request, with the register of private judicial bailiffs and they shall be provided with the respective license."<sup>97</sup>

### ***The National Chamber of private bailiffs***

All private bailiffs are a compulsory member of the National Chamber of private bailiffs, a legal entity exercising its activity independent from the State.<sup>98</sup> The Chamber has two steering bodies: the General Assembly and the Steering Council.<sup>99</sup>

The General Assembly is the supreme body of representation and decision-making of the National Chamber, consisting of all licensed private bailiffs. The General Assembly elects the General Council, the chairperson and its deputy chairperson and the secretary general; approves the annual budget of the Chamber; approves the Statute of the National Chamber and performs any other act necessary for the running of the activity of the Private Enforcement Service.<sup>100</sup>

The Steering Council has 7 members who are elected by the General Assembly. The Steering Council has its own Chairperson and deputy chairperson. The Steering Council drafts the Statute of the National Chamber; approves the ongoing training programme; attends the normal functioning of private bailiffs as legal persons or partnership or commercial company; gives opinions about draft laws and regulations related with the profession of the private judicial bailiff; approves the regulation for the handling of complaints and for any issue in its competence; coordinates and supports the initiatives which aim at professional upgrading and promotion; convenes the meeting of the General Assembly and is responsible for the cooperation with counterpart leading structures of the Chamber of Advocacy and Notary about problems dealing with enforcement.<sup>101</sup>

### ***The model contract***

Another novelty in the Albanian law is the introduction of a "model contract". This is a document that private bailiffs are obligated to use as the contract to be concluded between the private bailiff and an interested party, prior to the commencement of execution procedures. The model contract is drafted by the Chamber and approved by the Minister of Justice.<sup>102</sup>

This contractual relationship is explicitly mentioned in the law: "The relationship between the private judicial bailiff and the creditor party shall be regulated on the basis of the contract concluded among them. Details related with mutual obligations are determined in the contract concluded between the private judicial bailiff and the creditor." The private bailiff has the right to terminate unilaterally the contract entered into with the creditor party where the latter does not meet its own obligations.<sup>103</sup> The moment of withdrawal of the contract is decisive for the validity of the acts: "The procedural files and acts performed by the private judicial bailiff prior to the moment of terminating the contract shall be legally valid and

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<sup>96</sup> Art. 10 ALPES.

<sup>97</sup> Art. 15 par 2 ALPES.

<sup>98</sup> Artt. 23 and 24 ALPES.

<sup>99</sup> Art. 26 ALPES.

<sup>100</sup> Artt. 27-28 ALPES.

<sup>101</sup> Artt. 29-30 ALPES.

<sup>102</sup> Artt. 25 and 10 ALPES.

<sup>103</sup> Art. 31 ALPES.

the further enforcement proceedings by another private judicial bailiff shall start from the procedural act pending at the moment of the termination of the enforcement process.”<sup>104</sup>

### ***Market working***

The obvious intention of the legislator to introduce a system of free market working can be found in several of the provisions of the law. Contrary to his colleagues from neighbouring legal systems, the Albanian private bailiff is allowed to perform his tasks in the whole territory of Albania.<sup>105</sup> Also contrary to most of his foreign colleagues the Albanian private bailiff is not obligated to accept all enforcement cases. Another example is article 31 ALPES, according to which article the private bailiff has the right to “accept freely the requests of the natural or legal entities for the enforcement of the executive titles, with the exception of the case where he finds out that he is in a situation of conflict of interest.” Also article 35 ALPES can be seen as an example of a market orientated legislator: “Judicial Bailiff may advertise publicly his activity without violating the fair competition and legal commercial practices.”

### **4.2.5. Problems and challenges**

In the World Bank’s Doing Business 2011 Report,<sup>106</sup> Albania is ranked 89<sup>th</sup> on the Enforcing Contracts section. The 2011 Doing Business report noted that an Albanian enforcement process has to go through 39 procedures (Best practice is 20) and lasts 390 days (best practice is 120 days). We have to mention here that this report has not (yet) taken into consideration the introduction of the private bailiff in the Albanian legal system.

Looking at the enforcement process a number of problems/ challenges can be identified.

### ***Enforcement through immovables***

The enforcement on immovables is criticised by creditors, banks and the enforcement agents.

According to articles 560-580 ALCPC “The enforcement on immovable property, ships and airplanes”, the bailiff is involved in the enforcement of immovables. Especially the method of selling (Article 527 ALCPC) causes problems. According to the ALCPC two auctions (public sales) can be organized. For these public auctions the value of the immovable has to be determined. Here we already encounter a problem: there is no set of standards for such a valuation.

When there is no buyer the creditor can take possession of the immovable, at the given price in exchange of its receivables. The creditor is able to refuse. However in such a case the enforcement on immovables is considered ended. This means that the creditor then has to look for other, alternative methods of enforcement. So consequently creditors are indirectly forced to take possession of the immovable. When the value of the immovables is higher than the debt, the creditor has to pay to the debtor the difference between the appraised value and the amount of the claim.

What are the consequences? First the problems will lead to increased cost for the creditor. A project team of banks<sup>107</sup> identified also some influences on domestic economics: it will influence the consumer’s access to loans and it will be reflected in the prices of the creditors, such as the banks.

Except for the banks another important creditor is the Agency for the Treatment of Credits (ATK). In the 1990s, state banks had given out loans to enable investments in agricultural and other projects. When the state banks were dissolved, the ATK was established in order to claim back these loans. Loans that are formally secured by immovables.

### ***Enforcement against state institutions***

We were informed that more than 1/3 of all requests for enforcement are directed against state institutions.<sup>108</sup> A good example of those cases are the claims as a result of the legislation on restitution and compensation.

<sup>104</sup> Art. 42 ALPES.

<sup>105</sup> Art. 7 ALPES.

<sup>106</sup> World Bank Doing Business Report; see: [www.doingbusiness.org](http://www.doingbusiness.org).

<sup>107</sup> Project: Improving auction procedures under foreclosures for immovable collateral. The team was composed of: banks, Legal Department Bank of Albania, Ministry of Justice, Bailiff Service, Association/Federation of appraisals Business Associations.

<sup>108</sup> Report Sokol Sheti, Regional Harmonization of legal framework for Justice Affairs.

The State is unwilling/unable to pay. Especially the amount that has to be paid under this legislation is enormous.

The State has a special position in enforcement proceedings: article 589 of the ALCPC states that “execution of obligations in money against budgetary institutions is made only into their relevant bank account or into the credit they have with third parties. Enforced execution on the movable or immovable property of a budgetary institution is not permitted.”

In practice this means that those requests for enforcement never lead to a successful execution. When the budgetary institution does not have money in its bank account and does not have credit with third parties, the relevant superior financial organ is required to designate the necessary funds from which the obligation shall be paid. However an order of the Ministry of Finance (Prot. No. 4670 Prot. to the Ministry of Justice, the Bailiffs’ Office and the Treasure Department) makes the execution almost impossible as it binds the employees of the respective institutions to ask for special funds to pay the obligations asked for by the bailiff.

#### ***Privileged position of the State - Article 536 ALCPC***

On the other hand the State has a privileged position in comparison with other creditors.

The state is always called a creditor who participates together with other creditors for the obligation that the same debtor has towards the state and which results from taxes and other credits, whose amount has been notified to the bailiff before the division of the other amounts is made. For this purpose the bailiff notifies the relevant finance section on any execution initiated by him and on any division made by him.

#### ***Service of documents***

In paragraph 4.6. we will describe the legal provisions regarding the service of documents. In Albania the deadline for voluntary fulfilment normally is 10 days. Such a period normally starts after giving notice of the judgment to the debtor. However, this procedure might work in theory, not in practice. Even when there is a return receipt procedure.

Especially in the north of Albania, people often do not have addresses or the decision to be executed does not contain any. Consequently even to notice the debtor of the voluntary fulfilment of his obligation, the bailiff must make big efforts. The lack of address information makes it easy for a debtor to escape from enforcement.

Wrong notification or no notification at all frustrates enforcement. For that reason all countries looked for alternative methods to solve this problem. For example in Albania (article 522 ALCPC) a special procedure of appointing a representative for a disappeared or emigrated debtor was introduced. A procedure that appears to be unpractical and causes delay.

### **4.3 Training of professionals involved in enforcement**

The State bailiffs are required to have a university degree in law.<sup>109</sup> The private bailiff is required to have a higher legal education and at least 3 years’ experience as a jurist.<sup>110</sup> In practice all private bailiffs also have a university law degree. It is clear that the basic knowledge in law is provided by law faculties. In practice the time dedicated to study “procedure laws” (core of enforcement agents’ activities) is limited to a few hours only. So far there is no specific training for both State and private bailiffs, although the legal framework indicates the necessity of training.<sup>111</sup>

Another issue is the difference in vocational training between the State and private bailiffs. State bailiffs follow a “probationary period” of 3 months and will either be appointed or requested to leave the profession

<sup>109</sup> Art. 15 ALOBS.

<sup>110</sup> Art. 12 ALPES.

<sup>111</sup> See for example art. 24 ALINREG (“The Human Resources Sector [...] organizes workshops for the professional training of the court bailiffs”); art. 59 ALINREG (the bailiff office chairman...“Organizes and follows up on the professional training in the bailiff activity based on the state training tasks and objectives...[...])” and Code of ethics for State and private bailiffs (order 3851; 8 May 2009); art. 2 (“Provisions of the Code of Ethics are bound to be applied by the bailiffs in all cases and they shall be handled in all the forms of professional training”) and art. 7. (“Bailiffs shall undergo initial and ongoing training related with the object of their activity.”)

after this 3 month period.<sup>112</sup> During this probationary period the candidate State bailiff is “tutored” by colleagues on enforcement specialization and practice. Although this period in our opinion is too short, the private bailiffs do not have any probationary period at all. Regarding their practical skills, the ALPES (article 12) requires a 3 years’ experience as a jurist. Such experience is not compulsory in the field of enforcement. Some of the newly appointed private bailiffs didn’t have any experience in enforcement.

Regarding recent developments in the field of training we need to make a remark. While preparing this publication a TNA (Training Needs Assessment) has been made (at the request of both the General Directorate and the Chamber of private bailiffs).

#### 4.4 Status, ethics, monitoring and control, disciplinary issues

##### 4.4.1 The State Judicial Bailiff Service

In paragraph 4.2.3. we already indicated the role of the Bailiffs’ Council in the appointment process. In order to be appointed as a State bailiff one has to meet certain requirements: Albanian citizenship; full capacity to act; a university degree in law; enjoy a good reputation; not being convicted of a criminal act by a final court decision; not being dismissed from the public administration for disciplinary violations within a time period of 3 years from the date of submission of his application or, when the disciplinary violation was committed while exercising the function of a judge, prosecutor, judicial police officer, notary or lawyer, within a time period of 5 years.<sup>113</sup> Appointment is based on a competition organized by the Bailiffs’ Council, who does a proposal to the Minister of Justice.

A newly appointed State bailiff will be appointed temporarily for a probationary period of 3 months. During this probationary period, the bailiff is under the supervision of a senior bailiff and will be evaluated by his superior. Training activities are obligatory for the bailiff during the probationary period. At the end of the probationary period, the Minister of Justice, on the proposal of the General Director, decides either to a permanent appointment as a bailiff or removal from the bailiff service.<sup>114</sup>

Regarding the incompatibilities there seems to be a difference with the private bailiff: the State bailiff is not allowed to perform any other duty or activity, except educational ones and

teaching or to have working relationships or conduct other activities that raise conflicts of interest with the position he holds or prevent him from fulfilling its duties. (private bailiff: no public functions, or practice as a public notary, lawyer or any other profession which is inconsistent with the impartial exercise of the profession of private bailiff). ALOBS explicitly states that a State bailiff shall not be member of the central or executive bodies of political parties. For the private bailiffs the Law does not have such a provision.<sup>115</sup>

##### *Civil servants?*

“The Bailiff Service is under the Minister of Justice” as it is stated in article 6 ALOBS. One would expect that the State bailiffs and staff are considered civil servants and that the legislation for civil servants is applicable.<sup>116</sup> However at this moment it is not clear what the institutional status of the enforcement agents and both the staff in the local offices and within the General Directorate is. Although the enforcement agents are appointed by the Minister of Justice, they are not considered to be civil servants. Thus the Law 8549 “On the Status of the Civil Servant” is not applicable. The ALOBS does not give any clarity.

Under article 2 of the civil service law in force, the institutions covered are the Administration of the Assembly, the administration of the President, the apparatus of the Council of Ministers, the ministries, the independent central institutions, the municipalities and the regions. Dependent central institutions were not covered.

Although the General Directorate is included in the organogram of the Ministry of Justice with special treatment and defined as an “institution under the Ministry of Justice”<sup>117</sup> it is a dependent institution of the Ministry of Justice. Thus the General Directorate is not covered by the civil servant law. There is no

<sup>112</sup> Art 16 ALOBS.

<sup>113</sup> Art. 15 ALOBS.

<sup>114</sup> Art. 15-16 ALOBS.

<sup>115</sup> Art. 17 ALOBS and art 8 ALPES.

<sup>116</sup> Basis for civil servants is the Law No 8549, dated 11.11.1999 of the Assembly, “On the status of civil servants”, published in Official Gazette 2000/36, page 1381, date of publication 12.01.2000.

<sup>117</sup> Art. 17 of law no. 8678 on the Ministry of Justice.

regulation concerning the status of the staff of the General Directorate. The same remark can be made with regard to the (deputy) chairmen of the local offices and the staff in the local offices.

The State bailiffs are in the same position: they are not covered by the civil servants law either: the law does not extend civil service status to employees of dependent institutions. However being State bailiff, they exercise public authority and as such they should be considered equal to other specialists of the Ministry. The ALOBS tries to create a special status for the State bailiffs, although they do not fall under the basic civil servants law. Consequently the State bailiffs are less protected and less paid than the equivalent civil servants (e.g. disciplinary measures, dismissal).

### ***Disciplinary proceedings<sup>118</sup>***

The disciplinary measures are given by the Minister of Justice. They are imposed in a graduated or depending on the severity of the violation and the consequences:

- a) A reprimand in writing
- b) A reprimand with a warning of dismissal in writing
- c) Discharge from duty.

A disciplinary proceeding starts no later than 30 days from the observance of the violation and not later than 1 year of the moment it was committed. The initiative is taken by the General Director of the bailiff service. The disciplinary violations are investigated by the Bailiffs' Council.<sup>119</sup> The Bailiffs' Council gives its opinion within 15 days of the starting of the proceedings.

The disciplinary proceedings are settled in an administrative procedure. The interested person is informed in writing of the decision regarding the administrative measure. The appeal against the giving of the disciplinary measures is based on the appeal provisions against an administrative act (article 328 Civil Procedure Code). This means that an appeal needs to be initiated within 30 days.

A State bailiff will be dismissed by the Minister of Justice in case:<sup>120</sup>

- he is sentenced for the commission of a criminal act;
- he commits serious disciplinary violations;
- he repeatedly violates the disciplinary rules and the measures given previously have not been removed;
- it is proved that he has used his position for the benefit of personal interests or for the benefits of persons to whom he is related;
- it is proved that his actions or failures to act have created unjust privileges for other persons;
- he does not fulfil the bailiff's functions provided by law;
- he has been rated "incompetent" by the Bailiffs' Council yearly evaluation of professional skills.

### ***Monitoring and control of the State bailiffs***

Regarding the monitoring and control of the State bailiffs two legal provisions are relevant. According to article 7 ALOBS the General Director is responsible for the management, coordination and inspection of the bailiff service. Article 14 paragraph 2 describes the role of the Bailiffs' Council: the Council evaluates the professional skills of the bailiffs every year, based on certain criteria. These criteria are determined by the Minister of Justice on the proposal of the General Director and are based on the quality criteria (the way of executing the executive title, the legal and sub-legal basis rightly used), on the quantitative criteria of work (the total number of executed executive titles, terminated and suspended), on the deadline (pace) criteria (meaning execution within the procedural deadlines defined in CPC), and the ethical criteria (the effective application of the Bailiff Code of Ethics).<sup>121</sup>

The powers of the General Director are regulated in more detail in the Internal Regulation of the Bailiff Service (ALINREG). The General Director assesses annually the performance of the Sector chairmen of the

<sup>118</sup> Artt. 31-33 ALOBS.

<sup>119</sup> Art. 13 par 2 ALOBS.

<sup>120</sup> Art. 35 ALOBS.

<sup>121</sup> Art. 14 ALINREG.



General Directorate.<sup>122</sup> He is able to order and perform special controls in the bailiff offices.<sup>123</sup> Based on the acts of control performed by the inspectors and their proposals, and his evaluation of the degree of violation by the State bailiff the General Director proposes to the Bailiff Council measures of a disciplinary character or can denounce the bailiffs committing such acts to the competent bodies for criminal prosecution.

#### 4.4.2 The Private Judicial Enforcement Service

##### *Monitoring and control of the activities of the private bailiff*

In paragraph 4.2.4. we already referred to the obvious intention of the legislator to introduce a market orientated enforcement system.

There are more legal systems with a market orientated enforcement system. All these systems have in common that the monitoring and control mechanisms function as a balance. The provisions in the ALPES unfortunately are too limited in this respect.

For example article 37 ALPES enables the private bailiff to open “a declared current bank account and to carry out financial transactions dealing with enforcement procedures.” In most legal systems the use of such a bank account solely for the receipt of money paid by debtors is an obligation. Such an obligation is not regulated in ALPES (“Private Judicial bailiff has the right”) and also the provisions in ALCPC are rather vague (article 532): “The amounts ensuing on the occasion of the execution against the debtor, against the third person who owes to the debtor, against the buyer of the sold thing in the shops of free sale or at auction are sent to the bank at the Bank account of bailiff’s office or judicial bailiff.”

Also the powers of the Minister of Justice and the Chamber are only described in a very general way: “Minister of Justice exercises the following responsibilities: [...] controls through the structures of the Ministry of Justice the implementation of this law and other legal and bylaw acts connected to the activity of the private judicial bailiffs;”<sup>124</sup> and “National Chamber of Private Judicial Bailiffs has the following competences: a) ensure implementation of professional and ethical criteria to be followed by the private judicial bailiff during the exercise of their function; b) issue normative acts regarding the running of the activity of private judicial bailiffs; c) oversee the exercise of the profession of private judicial bailiff.”

##### *Disciplinary proceedings*<sup>125</sup>

The disciplinary body for private bailiffs is the Disciplinary Commission of Private Judicial Bailiffs. The organisation, functioning and the remuneration measure for the members of the disciplinary commission is determined upon order of the Minister of Justice.

The disciplinary Commission is established by the Minister of Justice and consists of:

- The Chairman of the National Chamber of Private Judicial Bailiffs, or a representative authorised by him in the capacity of the chairman;
- The Chairman of Steering Council of National Chamber of Private Judicial Bailiffs, in the capacity of the member;
- One lawyer assigned by the National Chamber of Lawyers (National Bar Association) in the capacity of member.

Disciplinary proceedings are initiated by the Minister of Justice at his initiative or according to the complaint submitted by parties in the execution process. Within ten working days from the day of the violation, the Disciplinary Commission will start disciplinary proceedings and will notify the private bailiff who has committed the violation to appear in the hearing session against him. After the administrative investigation and verification of the committed violation, the Disciplinary Commission submits to the Minister of Justice the final report along with the proposal on the disciplinary measure. Within 15 days from the day of submission of the final report and the proposal for the disciplinary measure the Minister of Justice will take one of the disciplinary measures.

The disciplinary measure depends on the disciplinary violation and can be:

- removal of license and writing off from the register;

<sup>122</sup> Art. 15 ALINREG.

<sup>123</sup> Artt. 16-19 ALINREG.

<sup>124</sup> Artt. 10 and 25 ALPES.

<sup>125</sup> Art 50-56 ALPES.



- a fine from 30.000 up to 50.000 ALL;
- suspension of license from three months to two years;

The order for giving the disciplinary measure is reasoned and is notified to the interested person in writing not later than 15 days from the date of issuance of the order of the Minister of Justice. The order will be registered with the register of private bailiffs. The disciplinary measure is imposed within 6 months from the date of finding out about the violation, but not later than 3 years since the moment of the commission.

The private bailiff has the right to appeal with the court of appeal against the decision of the Minister of Justice within 45 days from the date of notification.

## 4.5 Working circumstances, remuneration

### *Working circumstances*

Working circumstances are bad. The 2007 Progress Report indicates the poor working circumstances as one of the reasons for the bad results in enforcement: "Lack of office space and equipment for bailiffs and insufficient assistance from other authorities, such as the police and the Immovable Property Registration Office, impedes the enforcement of judgments, which remains slow."<sup>126</sup> Also just recently in the 2010 Progress Report, the European Commission is referring to the lack of funds: "The lack of enforcement, especially of claims against the state, is particularly worrying. These are, among other things, caused by the inefficiency of the bailiffs in enforcing court decisions, the lack of necessary funds and the lack of an effective remedy system."<sup>127</sup>

### *Remuneration*

According to article 20 ALOBS the State bailiffs enjoy health care and social security for themselves and the members of the family under their responsibility. They are paid the expenses of working trips according to the criteria and amount provided by decision of the Council of Ministers.

The remuneration of the State bailiff consists of different components:<sup>128</sup> the basic salary, increments above the salary and special compensation based on the results from the enforcement activities. The salaries are determined by decision of the Council of Ministers. The special compensation is determined by order of the Minister of Justice.

The State bailiff works in accordance with the same weekly working time and timetable as the public administration. By order of the immediate supervisor, a bailiff is also obliged to work outside the working time, during weekends, holidays or even when on annual leave. Each State bailiff enjoys the right to an annual paid leave of four calendar weeks during the period July – August. For special personal or family circumstances, a bailiff has the right to enjoy up to 20 days of unpaid leave per month, but not more than 30 days per year.<sup>129</sup>

The State bailiff is normally appointed at a certain office. However, when necessary, the bailiff can be assigned to work in another bailiff's office in order to execute a number of executive titles but not more than two times per year, up to 3 months each. At the end of this period, the bailiff returns to his previous position.

### *Cooperation of other authorities*

According to article 523 ALCPC the bailiff might request the Order Police to support him during execution procedures. In case for the enforced execution it is necessary to collapse the object, release the land or suspend works, the Construction Inspectorate near Local Government and National Inspectorate, at the request of the bailiff, is obliged to support the bailiff during execution procedures. In case of "visitation and child custody" the bailiff may ask the assistance of a psychologist.<sup>130</sup>

Both the legislation on private and State bailiffs have separate provisions. According to article 31 ALPES the private bailiff has the right to request, where he deems necessary for his procedural activity, from state

<sup>126</sup> 2007 Progress Report, page 9.

<sup>127</sup> 2010 Progress Report, page 36.

<sup>128</sup> Art. 22 ALOBS.

<sup>129</sup> Artt. 23 and 24 ALOBS.

<sup>130</sup> Art. 523 ALCPC.

institutions, legal or natural entities in accordance with the law, any information pertaining to the property situation of the debtor or his location necessary for execution procedures and to have the support of the law and order forces in the event of the specific enforcement cases.

Both laws also have special provisions on the protection of the bailiff. According to articles 34 ALPES and 27 ALOBS the bailiff, while during the exercise of his duties, or due to that risks his life, or his family or property are in danger, is guaranteed special protection by the State.

#### 4.6 Service of documents

The ALCPC has general rules on the notification of documents. Based on article 144A ALCPC these rules also apply to the bailiffs.

The notification is addressed to the person defined as the receiver. In case the person refuses receipt of notification, this will be noted and, when possible, validated by the signature of a witness.<sup>131</sup>

When it is not possible to make the notification this way, it is made in the domicile or residence of the receiver or in the office or the place where he exercises handicraft, industrial or commercial activity. If the receiver is not found in any of these places, the notification is delivered to a person of the family who has attained sixteen years of age. In case no one of them is present, the notification is handed over to neighbours who accept to deliver it by hand to the person summoned or to his office or place of work. When it is not possible to make the notification like this, a copy of the notification is delivered to the doorman of the dwelling, the office or the place of work.

In all cases the person who receives the notification should sign the original or its copy undertaking the commitment to deliver it to the person summoned.<sup>132</sup>

When the person summoned to the court or the members of his family refuse to receive the notification, or when those members, family or neighbours do not know the receiver or cannot sign, another note is made on the copy of the announcement which should be signed by at least one witness. In this case the notification should be considered completed.<sup>133</sup>

When the receiver lives abroad and does not have a domicile or residence in Albania or has not chosen a dwelling or has not appointed his representative, the announcement of the act is made through posting a copy at the court of the place where the dispute shall be tried, as well as at the posting place where he had his residence.<sup>134</sup> The announcement of acts of a foreign state is done through the Ministry of Justice, which passes them on to the district court of the place where the announcement should be made.<sup>135</sup>

Notification can also be made through the mail service, except when it is prohibited by law.<sup>136</sup>

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131 Art. 130 ALCPC.

132 Art. 131 ALCPC.

133 Art. 132 ALCPC.

134 Art. 133 ALCPC.

135 Artt. 134-135 ALCPC.

136 Art. 143 ALCPC.

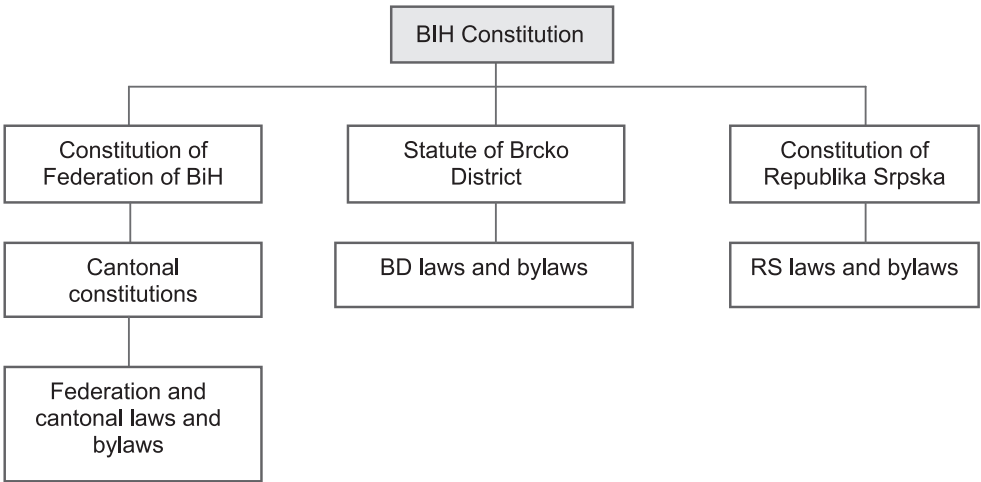
## Chapter 5: Bosnia and Herzegovina

### 5.1 Political context

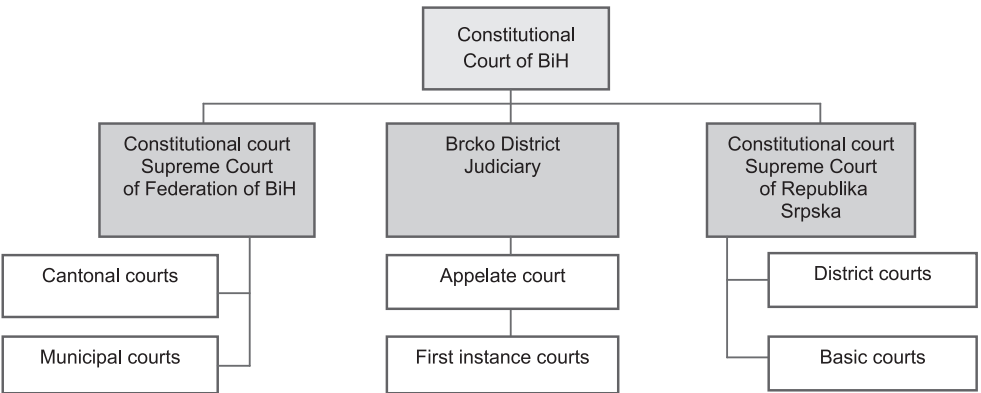
While addressing the issue of a government strategy, it is good to take note of the complicated constitutional arrangements of post-Dayton Bosnia and Herzegovina. Under the provisions of the Dayton Agreement, signed on 14 December 1995, the constitutional system of Bosnia and Herzegovina consists of fourteen separate constitutions: the Constitution of Bosnia and Herzegovina itself (Annex 4 of the Dayton Agreement), followed by the constitutions of the two constitutional entities (the Bosnian Federation and Republika Srpska) and the ten cantonal constitutions of the Bosnian Muslim-Croat Federation of Bosnia and Herzegovina). The fourth constitutional entity, Brčko District was added 5 March 1999.

The Constitution of Bosnia and Herzegovina establishes a complex political structure. As a result of the specific situation, the government structure and also the judicial system of Bosnia and Herzegovina is organized at the State level and the level of the three Entities: Federation (with 10 cantons), the Republika Srpska and the Brčko District. The State-level is comprised of a tripartite rotating Presidency, a Council of Ministers (executive branch) and a bicameral Parliamentary Assembly consisting of a House of Representatives (lower chamber) and a House of Peoples (upper chamber). The judicial branch established by Dayton consists of a Constitutional Court, with a High Judicial and Prosecutorial Council. This complex constitutional framework, as well as a lack of qualified staff, seriously hampered the effective implementation of a comprehensive reform agenda for some years:

*Normative hierarchy:*



*Judicial system:*



The complicated structure causes inefficiency and misuse. The European Commission in its latest progress report was very clear in her opinion: “Dayton/Paris Peace Agreement (DPA) put an end to the 1992-1995 war and brought peace and stability to Bosnia and Herzegovina. However, Bosnia and Herzegovina’s Constitution, which is contained in Annex IV to the DPA, established a complex institutional architecture, which remains inefficient and is misused. No steps have been taken to address the problem of legislation relevant for EU integration being blocked. The repeated misuse of rules on quorums complicate the decision-making process, delay reforms and reduce the country’s capacity to make progress towards the EU. There are particular problems in the Federation, where competences of the Entity, the Cantons and the municipalities overlap. Failure to harmonise legislation at the different levels, particularly in the smaller Cantons, adds to the arrangement’s complexity.”<sup>1</sup>

The European Commission in the 2010 Progress Report referred to the “entity voting”, based on article IV, 4d of the Constitution.<sup>2</sup> “On occasion, “entity voting” prevented the adoption of laws addressing European Partnership priorities. These included proposed laws on the promotion of SMEs, contractual obligations, witness protection and public procurement.”<sup>3</sup> Although the ECtHR, in December 2009, issued a legally-binding decision that found ethnicity-based ineligibility to stand for election “...incompatible with the general principles...”<sup>4</sup> of the ECHR, it seems most unlikely that in the near future this will lead to changes in the existing structures. So far any attempts for changes have failed.

Bosnia and Herzegovina intends to become a member of the European Union. The Stabilisation and Association Agreement (SAA) between Bosnia and Herzegovina and the EU was signed in June 2008. The Interim Agreement, which focuses on the trade-related areas of the SAA entered into force in July 2008. Nevertheless the progress on EU related reforms is limited: “There is little domestic consensus on the main EU related reform priorities, such as the harmonisation of the Constitution with the European Convention on human rights and on establishing a single economic space.”<sup>5</sup>

Let us have a closer look at those developments.

### *European Commission Progress Reports*

Looking at the developments within the judicial system the European Commission acknowledges the difficult environment to consolidate the judicial system. In the 2007 Progress Report the European Commission remarked: “The structure of the judicial system in Bosnia and Herzegovina reflects the internal structure of the country. Courts exist at State and Entity levels and also within the Entities. At State level, the system consists of a Ministry of Justice with limited powers and staff, the State Court with an international registry, and the High Judicial and Prosecutorial Council (HJPC) which substantially guides the justice reform but has only limited resources. The HJPC, as an independent and autonomous body, continues to play an important role in improving the situation of the judiciary. It has contributed to increase professionalism, resources and efficiency. Nevertheless, the HJPC position is not sufficiently secure within the constitutional framework and its role is frequently challenged.”<sup>6</sup>

In the introduction of this paragraph we already referred to the complicated legal structure of Bosnia and Herzegovina. Also the European Commission is of the opinion that such a structure hinders the establishment of an effective and efficient system: “... serious obstacles to the efficient operation of the judiciary persist. These include: four parallel and separate jurisdictions at State, Republika Srpska, Federation and Brčko District levels; incoherent systems of laws; directives issued by fourteen Ministers of Justice; four different bar examinations for lawyers; and a high rate of reversal of judgements in major criminal cases at the Court of Bosnia and

1 Bosnia and Herzegovina 2010 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2010-2011, European Commission, 9 November 2010, SEC(2010) 1331, hereafter called 2010 Progress Report, page 8.

2 Art IV, 4D reads: “(d) All decisions in both chambers shall be by majority of those present and voting. The Delegates and Members shall make their best efforts to see that the majority includes at least one-third of the votes of Delegates or Members from the territory of each Entity. If a majority vote does not include one-third of the votes of Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the Delegates or Members elected from either Entity.”

3 2010 Progress Report, page 10.

4 Sejdić and Finci v. Bosnia and Herzegovina, nos. 27996/06 and 34836/06, par. 21.

5 2010 Progress Report, page 5.

6 Bosnia and Herzegovina 2007 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2007-2008, European Commission, 6 November 2007, SEC(2007) 1430, hereafter called the 2007 Progress Report, page 12-13.

Herzegovina. The judicial system is not exempted from political interference. In the parliamentary and executive branches of the governments, there are attempts to reverse reforms already implemented to allow greater political influence in the work of prosecutors and judges. A comprehensive justice sector development strategy is urgent. The slow processing of cases due to backlog, poor management skills and the scarcity of modern equipment and premises creates obstacles to establishing an effective judiciary. The deployment of computer applications to improve case management was completed in six courts. However, there is not yet a systematic action plan to reduce the growing backlog of pending cases at courts. At the end of 2006 there were almost two million pending cases (although half of these concerned utility issues). Further efforts are needed to introduce alternative out-of-court resolution measures such as mediation and arbitration.”<sup>7</sup>

It is clear that such a backlog also has its influence on the economic environment: “The judicial system continues to suffer from slow court proceedings, poor case management and a large and growing backlog of unresolved cases. Political interference in the system has occasionally occurred. Overall, these circumstances impair the business environment by undermining effective enforcement of creditor and property rights.”<sup>8</sup>

In 2008 some progress was made. However the environment remained difficult: “One ongoing major problem was the lack of a Supreme Court that could harmonise application of legislation across the four internal jurisdictions: the State level, the Federation of Bosnia and Herzegovina, Republika Srpska and the Brčko District. Another continuing structural problem was the absence of a single budget for the judiciary. Having 14 Ministries of Justice each preparing judicial budgets has been detrimental to judicial independence and overall implementation of the judicial reform. [...] At State-level, the system consists of a Ministry of Justice with limited powers and staff, the State Court and the State Prosecutor’s Office with a common international registry and the High Judicial and Prosecutorial Council (HJPC), which substantially guides the judicial reform, but has only limited resources. The HJPC, as an independent and autonomous body, has continued to play an important role in improving the situation of the judiciary. It has contributed to increased professionalism, resources and efficiency. Cooperation between the HJPC and the ministries has been upgraded, in that it is now more common for budget drafts and budget proposals to be submitted to the HJPC for comments. [...] The National Strategy for Development of the Justice Sector for 2008-2012 was adopted in June 2008. The Strategy includes provisions aiming at further strengthening the independence, accountability, efficiency, professionalism and harmonisation of the judicial system and at advancing the system of international legal assistance and the processes to guarantee equal access to justice. Owing to the lack of consensus, however, the Strategy makes no provision for establishing a Supreme Court of Bosnia and Herzegovina, a single judicial budget and a single criminal law.”<sup>9</sup>

In the backlog of cases in 2008 some progress was made: “Bosnia and Herzegovina has made some efforts to reduce the backlog of court cases. The Backlog Reduction Project, formalised by the signing of a memorandum of understanding in January 2008, is one positive step. However, the total number of pending court cases exceeded 2 million, of which approximately 1.2 million were cases of unpaid utility bills.”<sup>10</sup> A Case Management System has been gradually introduced into courts, leading to an improvement in the management of cases. The authorities have not yet established commercial courts. Closing a business and enforcing contracts has become somewhat easier as a result of improvements in bankruptcy legislation. Widespread corruption, and also criminal activities, affect the business climate and have a negative impact on the quality of public services. Overall, the judicial system has slowly improved; however, the existing backlog of unsolved cases and the slow processing times are hampering the enforcement of creditor and property rights.”<sup>11</sup>

The European Commission was not very satisfied with the developments in 2009. Positive in the area of judicial reform was the establishment of an IT network and a Case Management System: “Almost all courts and a few prosecutors’ offices in Bosnia and Herzegovina are connected to a nationwide area network. Training courses have been provided to facilitate the usage of the new Case Management System supported by this network. Local area networks have been installed in all courts and prosecutor’s offices. This should contribute to further improving the efficiency and transparency of the work of the courts and prosecutor’s offices in Bosnia and Herzegovina.”<sup>12</sup>

7 2007 Progress Report, page 13.

8 2007 Progress Report, page 26.

9 Bosnia and Herzegovina 2008 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2008-2009, European Commission, 5 November 2008, SEC(2008) 2693, hereafter called 2008 Progress Report, page 13.

10 2008 Progress Report, page 13.

11 2008 Progress Report, page 29.

12 Bosnia and Herzegovina 2009 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2009-2010, European Commission, 14 October 2009, SEC(2009) 1338,

The Backlog Reduction Plan, as it was initiated in 2008, is not yet fully operational. In the opinion of the European Commission the complex structure of the judiciary remains a major obstacle: "Regarding the backlog of court cases, various projects are underway with the aim of introducing systemic solutions. There has been some improvement in this regard, even though a high number of cases are still to be resolved and further efforts are necessary. However, the complex structure of the judiciary and the absence of a single budget continue

to be a major obstacle to reform. [...] Implementation of the Justice Sector Reform Strategy has not progressed in accordance with the agreed timelines. This was due mainly to the complicated structure of the judicial system and the limited contribution by the Entity Ministries of Justice to the work of the implementation working groups. Material conditions for the improvement of judicial capacities remained very limited."<sup>13</sup>

Also from a business point of view developments are progressing slowly in 2009: "The poor quality of public services and prevalent corruption negatively affect the business climate and the attractiveness of Bosnia and Herzegovina for investors. The large informal sector is fuelled by weaknesses in tax and expenditure policies, as well as in law enforcement, including the fight against corruption and organised crime. The backlog of cases remains a major problem for judiciary. Various activities aimed at introducing systemic solutions for reducing delays in courts are underway, and a database has been created at the Sarajevo municipal court, where the vast majority of the backlog exists. Almost all courts in the country have now been connected to a nation-wide area network and the new Case Management System has been introduced. Overall, the operation of the judicial system has slightly improved; however, the existing backlog of unsolved cases, unreliable contract enforcement and slow processing times are hampering the business environment. The informal sector remains an important challenge, as it reduces the tax base and the efficiency of economic policies."<sup>14</sup>

Was there any reason for optimism in 2010?

No, at least not from the European Commission point of view. Their opinion is rather negative. Limited progress has been made in the area of judicial reform: "The reconstruction of the Sarajevo municipal court, the largest in the country, was completed in December 2009, thus increasing its efficiency and effectiveness. Republika Srpska also renovated several courts. In the Federation, a review of the court system and of the number of court branches is ongoing. [...] However, the complexities arising from the four separate judicial systems (State-level, Republika Srpska, Federation and Brčko District) pose serious challenges to the functioning of the judicial system. There is no single body comparable to a supreme court that can guarantee uniform application of the law. The presence of 14 budgetary authorities affects the independence of the judiciary. In addition, budgetary measures have led to posts in State-level judicial institutions being frozen for two years. Political pressure on the judiciary continued. The authority of the HJPC, the State Court and the Prosecutor's Office have often been questioned by political leaders."<sup>15</sup>

Regarding the backlog of cases the European Commission noted some progress however it still remains at an early stage: "The backlog of cases remained one of the most acute problems facing the judiciary and court proceedings are generally lengthy. The HJPC took several measures to reduce the backlog, including quarterly reporting by all courts, a new quota system for judges, more judges in critical courts, new specialised software and training for bailiffs. Despite these reforms, the backlog still stands at over 2.1 million cases country-wide. Many of these are claims for unpaid utility bills. A general lack of political will meant that few steps were taken to implement the Justice Sector Reform Strategy for 2009-13. In particular, authorities at Entity and Cantonal levels failed to integrate the strategy into their work plans. Limited human resources and poor coordination hampered implementation. The work of the five working groups for implementation of the strategy has been undermined by the lack of a quorum. Specialisation within courts and prosecution services has started on administrative and commercial cases, but without strategic planning or harmonised measures. To speed up case adjudication in commercial disputes and to facilitate business registration, Republika Srpska established six new commercial courts, including a second instance commercial court. In the Federation, a system of commercial courts has not yet been established."<sup>16</sup>

To summarize: the opinion of the European Commission on the most recent developments are not very positive: "No material improvements can be recorded as regards the complex and challenging legal environment in Bosnia and Herzegovina. While in some areas the standard of legislation is relatively high, the practical implementation and application of laws is often poor due to the weak enforcement capacity

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hereafter the 2009 Progress Report, page 12.

13 2009 Progress Report, page 12-13.

14 2009 Progress Report, page 28.

15 2010 Progress report, page 12-13.

16 2010 Progress Report, page 13.



of key institutions. A law on commercial arbitration does not exist. The rule of law is weak, notably the judicial system often does not function efficiently, is subject to obstruction by the parties and does not cover commercial activities adequately. Property registers are largely unreliable. Overall, weak rule of law, prevalent corruption and unreliable contract enforcement continue to hamper the business environment.”<sup>17</sup>

### **Government Strategy**

Between December 2006 and December 2007, the relevant Bosnian authorities - ministries of justice of the state, the entities, cantons and Brčko District Judicial Commission and the HJPC, coordinated by the State Ministry of Justice - developed the ‘Bosnia and Herzegovina Justice Sector Reform Strategy 2008 – 2012’. In their effort the authorities were supported by the international community (USAID, Council of Europe, Office of the High Representative, Swedish International Development Agency). The Strategy was developed with the objective to create a joint framework of reform for justice sector institutions in BiH that sets out agreed priorities for the future development of the sector as a whole, as well as realistic actions for reform. The vision statement of the justice sector in BiH is: “an efficient, effective and coordinated justice system in BiH that is accountable to all BiH citizens and is fully aligned with EU standards and best practices, guaranteeing the rule of law.”<sup>18</sup>

Under the heading of the ‘efficiency and effectiveness’, the Strategy also touches upon the issue of enforcement:<sup>19</sup> “One of the key impediments to efficiency and effectiveness in the courts is the backlog of cases, which at the end of 2006 stood at 1.9 million cases. Around 56% of this total related to execution cases for small value claims, and around 20% for violation cases. Removing small claims enforcement cases from the system will clearly be an important first step in addressing this issue, but this will require legislative changes.”<sup>20</sup> [...] “Although the existence of backlogs for other types of cases is still alarming (with, for instance, 29.000 backlog in criminal and 145.721 backlog in civil cases as of December 31st 2006), removing small claims enforcement cases from the system will clearly be an important first step. However, many other steps are also needed, and these should be included in an overall strategy, supported by all parts of the justice sector, to address the backlog, without which the massive backlog of cases will continue to hamper the effective functioning of the judiciary. If the high portion of backlog in execution cases for claims of small value is to be reduced, changes to legislation need to be made in order to lower the number of these cases reaching the courts, as has already been done in relation to violation cases. Any new legislative solutions should be based on analyses that have already been made by HJPC, as well as individual donors, of the concrete measures that need to be implemented to reduce the number of executive procedures for small value claims.”<sup>21</sup>

With regard to a policy strategy related to the issue of enforcement we also want to point at the important role of the HJPC, the High Judicial and Prosecutorial Council<sup>22</sup> in this.

This High Judicial and Prosecutorial Council is a body of self-governance with the task of “ensuring the maintenance of an independent, impartial and professional judiciary, and to ensure the provision of a professional and efficient court system and prosecutorial service on the level of the State of Bosnia and Herzegovina and in Brčko District as well as to co-ordinate the application of these standards in the Entities to the extent provided by the Law on the High Judicial and Prosecutorial Council.”<sup>23</sup>

The HJPC has been established as an independent and autonomous body, founded in accordance with the law at the state level after the transfer of authorities from the entities in accordance with their constitutional authorities. The HJPC’s responsibilities as a state institution refer to all the levels of the state authority including the Brčko District of BiH and to all courts and prosecutors’ offices (with the exception of the constitutional courts that are subject to certain restrictions). In the belief that the problem of the huge number of case backlogs in courts in Bosnia and Herzegovina can only be solved in a coordinated and comprehensive way, all relevant institutions have joined their forces in defining an action plan to address the issue. Under the coordination and authority of the HJPC several attempts have been made to reduce to backlog of cases in the courts. In February 2008 an action plan for the reduction of case backlogs was announced.

17 2010 Progress Report, page 29.

18 Bosnia and Herzegovina Justice Sector Reform Strategy, page 5.

19 Bosnia and Herzegovina Justice Sector Reform Strategy, page 19-20 and 61-63.

20 Bosnia and Herzegovina Justice Sector Reform Strategy, page 19.

21 Bosnia and Herzegovina Justice Sector Reform Strategy, page 62.

22 Hereafter called the HJPC.

23 Art. 4 Law on High Judicial and Prosecutorial Council 2002.



As a result of the Justice Sector Reform Strategy and the Action Plan Reduction of Case Backlogs, the HJPC has initiated two working groups, entrusted with (1) the development of recommendations related to backlog in utility cases and (2) the development of proposals with regard to the total reorientation of the enforcement system.

Progress has been made: the legislative framework has been assessed and during the past year attention has been given to the training of the court enforcement agents. Yet it seems too early for conclusions. Reducing the backlog seems a laborious process.

HJPC in her Strategic Plan 2010-2013 also pays attention to a necessary substantial reduction of the backlog: "The HJPC will also continue to implement this program, which relates to unresolved utility cases and cases in the enforcement procedure, by undertaking measures aimed at ensuring a more efficient collection of the required information on debtors and their assets, introducing separate automated processing of utilities cases, enhancing the system for the service of subpoenas and improving capacities of court enforcement services and officers in accordance with Council of Europe recommendations."<sup>24</sup>

## 5.2 Legislation and organization of the enforcement process

### 5.2.1. Legislation

In Bosnia and Herzegovina as was the case in other countries succeeding SFRY, until new laws on enforcement procedure were passed, the Law on Enforcement Procedure from 1978 was applied. Until that moment Bosnia and Herzegovina had a uniform enforcement law even though the regulation of enforcement procedure did not lie within the competency of Bosnia and Herzegovina as a state.

In the Federation of Bosnia and Herzegovina, the Law on Enforcement Procedures was published in the "Official Gazette of the Federation of Bosnia and Herzegovina" No. 32/03, dated July 18, 2003, and it entered into force on the day after its publication. The amendments were published in the "Official Gazette" no 32/03, 52/03, 33/06, 39/06 and 39/09. The implementation started 60 days after its entry into force. The Law on Enforcement Procedures in the Republika Srpska was published in the "Official Gazette of the Republika Srpska" No. 59/03, and it entered into force on August 1, 2003; the Law on Changes and Amendments to the Law on Executive Procedure was published in the "Official Gazette of the Republika Srpska" No. 85/03, 64/05 and 118/07. For Brčko District the new enforcement law, the Law on Enforcement Procedure of the Brčko District BiH was published in nos. 8/00, 1/01, 5/02 and 8/03.

Except for the provisions on enforced return of a child to the parent or other person and the regulation on claims from the period of war operations from May 1992 till June 19, 1996, the entities' Laws on Enforcement Procedure are almost identical. These laws were based on the Law on Enforcement Procedure of Brčko District, the Enforcement Law of the Republic of Croatia and the contemporary Law on Enforcement Procedure of SR Yugoslavia from 2000. The Law on Enforcement Procedure of Brčko District was not included in this process of harmonization. However: the reliance on the solutions from the Brčko District had the effect of a relative unification of enforcement law in Bosnia and Herzegovina, even though three separate laws exist.

The enforcement procedures do not differ much between the entities. The basis for enforcement proceedings are enforceable and credible documents. The enforcement proceedings are instituted by a motion for enforcement by the creditor to the competent court (Federation of Bosnia and Herzegovina: Municipal Court; Republika Srpska: basic court). Such a motion is based on enforceable documents or credible documents: court judgments and court settlements in civil cases or administrative proceedings, enforceable notary public's documents; other documents declared enforceable documents by law. A complaint can be filed against the execution decision at the same court (first instance). It is also possible to start a civil procedure on disputed facts in the enforcement procedure.

Subjects of enforcement are immovables, movables, monetary claims of the enforcement debtor, money kept in an account owned by the enforcement debtor. Some assets may not be subject to enforcement (such as things and rights, which are necessary for the fulfillment of the basic needs of the life of the enforcement debtor; agricultural land or farm buildings belonging to a farm worker; clothing, shoes, underwear and other items of personal use, etc.).

To summarize: regarding the legislative framework of enforcement in Bosnia and Herzegovina we will focus on the following laws:

<sup>24</sup> Strategic Plan 2010-2013, High Judicial and Prosecutorial Council BiH, page 9.

- The Law on Enforcement Procedure of the Federation of BiH (Official Gazette of the FBiH Nos. 32/03, 52/03, 33/06, 39/06 and 39/09), (FBIHLEP).
- The Law on Enforcement Procedure of the Brcko District BiH (Official Gazette of the Brcko District BiH, Nos. 8/00, 1/01, 5/02 and 8/03) (BDLEP).
- The Law on Enforcement Procedure of the Republika Srpska, Official Gazette of RS Nos. 59/03, 85/03, 64/05 and 118/07) (RSLEP).

### 5.2.2. The enforcement process

#### *Object and means of enforcement*

Legislation<sup>25</sup> defines the objects of enforcement as: any property, real or personal, or any right, unless otherwise exempted by law, which can be subject to lawful enforcement in order to satisfy a judgement creditor's claim. This means that certain objects either cannot be object of enforcement or are exempted:<sup>26</sup>

- Goods that may not be traded or turned over, as well as resources in ore and other natural resources are exempted from enforcement;
- Facilities, armament and equipment for the armed forces and police use as well as appropriations for those purposes cannot be object of enforcement.

The means of enforcement are (a system of) enforcement actions by which a claim is forcibly collected.<sup>27</sup> The means of enforcement are determined by the court in the enforcement decision. This means that the enforcement agent cannot undertake any further action than those prescribed in the enforcement decision. Should the enforcement agent become aware of any other seizeable assets, he first needs a court decision to seize those assets.<sup>28</sup>

#### *Enforceable documents*

The basis for enforcement is any enforceable or authentic document issued in Bosnia and Herzegovina.<sup>29</sup> The law describes enforceable documents as:<sup>30</sup>

- an enforceable ruling of a court or arbitration body and an enforceable court or arbitration body settlement;
- an enforceable ruling passed in an administrative procedure and a settlement in an administrative procedure if it orders the payment of a monetary obligation, unless otherwise prescribed by law;
- an enforceable notary document;
- other document prescribed by law as an enforceable document;
- an authentic document as described in article 29 FBIHLEP and article 29 RSLEP: a bill of exchange or cheque with protest and reverse account, if necessary, for the establishment of claim, as well as utility bills or records from the accounts of such utilities, with respect to the furnishing of water, heat and garbage removal.

The documents only become enforceable once they are final and after the period for voluntary satisfaction has expired.<sup>31</sup>

#### *Initiation of enforcement procedure*

Enforcement is initiated by a motion of the creditor or ex officio on a motion by any person or body permitted by law.<sup>32</sup> The competent court depends on the object of enforcement and the method of enforcement. In general, the court must decide on a motion for enforcement within eight days.<sup>33</sup>

25 Art. 6 FBIHLEP; art. 6 RSLEP; art. 7 BDLEP.

26 Art. 7 FBIHLEP; art. 7 RSLEP.

27 Art. 6 FBIHLEP; art. 6 RSLEP.

28 Art. 8 FBIHLEP; art. 8 RSLEP.

29 Artt. 22 and 23 FBIHLEP; artt. 22 and 23 RSLEP.

30 Artt. 23 and 24 FBIHLEP; artt. 23 and 24 RSLEP.

31 Artt. 25 and 26 FBIHLEP; artt. 25 and 26 RSLEP.

32 Art. 3 FBIHLEP; art. 3 RSLEP.

33 Art. 15 FBIHLEP; art. 15 RSLEP.

If a motion for enforcement is filed with a court that did not decide the claim in the first instance, the original or a certified copy of the enforceable document containing a certificate of enforceability shall be submitted together with the motion. This so-called certificate of enforceability is issued by the court or body that decided the claim in first instance. For enforcement on the basis of an enforceable notary document no certificate on enforceability shall be required.<sup>34</sup>

The motion for enforcement should also contain the means of the enforcement and the object of enforcement, if known. In addition, for a motion for enforcement on the basis of an authentic document, this should contain a request that the court imposes an obligation on the judgement debtor to satisfy the claim, together with the estimated costs within eight days, and in case of disputes related to bills of exchange and cheques, within three days of service of the decision.

Enforcement can be carried out on working days between 07:00 and 19:00, unless the court has allowed enforcement on a non-working day or during the night.<sup>35</sup>

### ***Decision on execution***

The court issues an enforcement decision based on the objects as listed in the motion for enforcement.<sup>36</sup> If more than one method or more than one object were requested the court may limit the enforcement to the extent necessary to satisfy the claim. If an enforcement decision cannot be enforced on a certain object or by a particular method, the creditor may propose a new method or object for enforcement to the court.

An enforceable document or authentic document is suitable for enforcement if it contains name and address of the creditor and debtor and the subject, type, scope of and time for satisfaction of the obligation. If an enforceable document does not specify a period for voluntary satisfaction of the obligation, that period shall be stipulated in the decision on enforcement.<sup>37</sup>

The decision on enforcement need not contain an explanation, unless the motion is completely or partially rejected. It may be issued by affixing a seal to the motion for enforcement. The decision on enforcement contains an instruction on legal remedies available to the parties.<sup>38</sup>

### ***Temporary representative***

We want to point at two possibilities where a temporary representative can be appointed:<sup>39</sup>

#### ***1. In case of death of the creditor***

In case the creditor was not represented by an agent or legal representative, any of the heirs or interested persons may request the court, at their own expense, to appoint a temporary representative for the potential heirs for the period of time before it is determined who the true heirs are, in order that the enforcement proceedings may continue. If such a motion by the heirs or interested persons has not been filed within 30 days of the death of the judgement creditor, the court shall dismiss the enforcement proceedings.

#### ***2. In case of death of the debtor***

In case of the death of a debtor not represented by an agent or legal representative, the court shall, on the motion of the creditor and at the creditor's expense, within a period of 15 days of the date of receipt of the notification from the court of the death of the debtor, appoint a temporary representative from among the persons who possess the property subject to enforcement and proceed with the enforcement procedure. The court shall appoint a temporary representative within a period of 8 days of the filing of the motion. If the authorized person fails to file said motion within the prescribed period, the court shall dismiss the enforcement procedure.

### ***Costs of enforcement proceedings***

The estimated costs of the enforcement proceedings are paid in advance by the creditor within a period determined by the court. In case those costs are not paid timely, the court shall dismiss the enforcement procedure. If carrying out an enforcement act the necessary costs are not paid in advance before a deadline, such enforcement shall not be carried out.

<sup>34</sup> Art. 35 FBiHLEP; art. 35 RSLEP.

<sup>35</sup> Art. 42 FBiHLEP; art. 42 RSLEP.

<sup>36</sup> Art. 8 FBiHLEP; art. 8 RSLEP.

<sup>37</sup> Artt. 27 and 29 FBiHLEP; artt. 27 and 29 RSLEP.

<sup>38</sup> Art. 39 FBiHLEP; art. 39 RSLEP.

<sup>39</sup> Art 34 FBiHLEP; art 34 RSLEP.

A debtor shall compensate the creditor for the costs incurred that are necessary to carry out the enforcement. A request for compensation of costs is submitted not later than fifteen days after the conclusion of the enforcement proceedings. The court decides on the costs in the enforcement procedure and upon a motion by a party, the court shall order enforcement for their collection in the same manner.<sup>40</sup>

### ***Interest***

If the law governing the rate of default interest changes after an enforceable document is issued or after a settlement is reached, the court shall, on a motion by a party, issue a decision on enforcement determining the collection of such interest at the new rate for the period to which such change refers.<sup>41</sup>

### ***Fines and court penalties***

The Bosnian enforcement law provides for certain fines. There is a difference in the amount of the fine depending on whether the fine is imposed on a natural person or a legal person.

Fines may repeatedly be imposed in case of repeated failure to comply with a court order. Before imposing a fine the debtor is given the possibility to make a statement, when necessary in a hearing. The fine is imposed by a court decision. The fine is ex officio collected and deposited in the budget from which the enforcement court is funded. The estimated costs of enforcement are paid in advance from the court funds.<sup>42</sup>

The provisions of fines may not be applied if the judgement debtor is Bosnia and Herzegovina and its entities, BIH Brčko District, cantons, cities, municipalities and administrative organizations as well as the bodies of such legal persons.

### ***Service of the decision on execution***<sup>43</sup>

A decision on enforcement is served on the creditor and the debtor. Known lien holders will be notified of the decision on enforcement. In addition the decision on enforcement is served to the relevant participants in the enforcement procedure such as the debtor's debtor, the debtor's bank.

A decision denying a motion for enforcement not necessarily needs to be served on the debtor.

If a creditor proposes to satisfy the claim from common or jointly held property all of the joint or common owners are given notice of the decision on enforcement.

### ***Legal challenges: objection and appeal***

Bosnia and Herzegovina has two different ordinary legal remedies: objection and appeal.

An objection may be filed against a decision issued by the first instance court, whereas an appeal may be filed when stipulated by the respective Laws on Enforcement Procedure. An objection against the decision on enforcement may be filed for reasons which impede the enforcement. The Law lists ten different reasons for an objection, e.g. the enforceable document is without effect or is not enforceable. The use of the words "in particular" mean that this list is not exhaustive.<sup>44</sup>

Normally an objection needs to be filed with the court that issued the decision within eight days from the date of service. The objection filed against the decision on enforcement is served on the adverse party. A response to an objection needs to be filed within three days from the date of the delivery of the objection. Depending on the nature of the case, the court renders either a decision without scheduling a hearing or sets a hearing for argument on the objection. The objection shall be decided by the court that issued the decision within 15 days.<sup>45</sup>

<sup>40</sup> Art 16 FBiHLEP; art 16 RSLEP.

<sup>41</sup> Art. 28 FBiHLEP; art. 28 RSLEP.

<sup>42</sup> Art. 17 FBiHLEP; art. 17 RSLEP.

<sup>43</sup> Art. 40 FBiHLEP; art. 40 RSLEP.

<sup>44</sup> Art. 47 FBiHLEP; art. 47 RSLEP.

<sup>45</sup> Artt. 15 and 48-49 FBiHLEP; artt. 15 and 48-49 RSLEP.

An objection opposing the decision on enforcement on the basis of the authentic document needs to specify what part of the decision is contested and the grounds and argument in support thereof. In case the decision on enforcement is contested in its entirety or in that part which determines that a claim exists, the motion for enforcement is deemed as a complaint, and the case is proceeded in accordance with the rules of Civil Procedure. In that case the court shall postpone the enforcement and shall resume it on the motion of the creditor after the judgement from the civil proceedings becomes final and the creditor prevails.<sup>46</sup>

A third person claiming to have a right in an object of enforcement may file an objection against the enforcement.<sup>47</sup> The objection needs to be filed prior to the completion of the enforcement proceedings. The objection is served on the creditor and the debtor, whom is given a time period of eight days to respond. The court can either rule on the objection or request the third party to initiate proceedings. In those proceedings the third party may request postponement of the enforcement.

The second instance court decides on an appeal, that may be filed against a decision on objection within eight days from the date of service of the decision. A judgement creditor may only file an appeal contesting a decision in which a motion for enforcement has been denied or refused.<sup>48</sup>

Neither an objection nor an appeal stays the enforcement procedure, but the payment of the judgement creditor's claim shall be postponed until the first instance court issues a decision on enforcement.

The enforcement decision becomes final in case no objection has been filed within 8 days or in case the decision denying the objection is not appealed within the set time limit or in case the appeal has been denied.<sup>49</sup>

### ***Counter-enforcement***<sup>50</sup>

Once an enforcement is finished the debtor may, in the same enforcement procedure, request the court to order the creditor to return to him/her what was obtained through the enforcement in case the enforceable document has been finally rescinded, altered, annulled, repealed or otherwise been established as without effect or the decision on enforcement has been finally revoked or altered, or if, during the enforcement procedure the debtor satisfied the creditor's claim out of court so that the judgement creditor would receive double compensation.

The motion for counter-enforcement needs to be filed within thirty days of the date when the debtor became aware of the grounds for counter-enforcement, and at the latest within one year of the conclusion of the enforcement procedure. The court serves the motion for counter-enforcement on the creditor and asks him to respond to it within three days. If the creditor opposes the motion, the court shall rule on it following a hearing. If the creditor fails to respond to the motion before the expiration of the deadline, the court shall decide whether to rule on the motion without holding a hearing. If the court decides to grant the motion, it shall order the creditor to return within eight days what s/he has obtained through enforcement to the debtor.

Counter-Enforcement can also be effected upon a motion of a third party if the creditor has satisfied his claim against a person who has not been designated a debtor in the decision on enforcement.

### ***Postponement, termination and dismissal of enforcement***

In general, enforcement may be fully or partially postponed only on a motion of the creditor and only as long as the enforcement process has not yet started. If several creditors participate in the enforcement proceedings, and only some of them request the postponement, the court shall postpone the enforcement only with respect to those creditors who request it. The debtor might oppose the postponement. In that case the court shall decide whether a postponement is justified.<sup>51</sup>

As a rule the court shall postpone enforcement for the period requested by the creditor or for a period of time appropriate for the circumstances. The enforcement may resume before the period of postponement

46 Art. 50 FBiHLEP; art. 50 RSLEP.

47 Artt. 51-53 FBiHLEP; artt. 51-53 RSLEP.

48 Artt. 12 and 46 FBiHLEP; artt. 12 and 46 RSLEP.

49 Art. 13 FBiHLEP; art. 13 RSLEP.

50 Artt. 54-59 FBiHLEP; artt. 54-59 RSLEP.

51 Art. 60 FBiHLEP; art. 60 RSLEP.

expires upon the motion of the creditor. If the creditor fails to request the court to resume the enforcement procedure within 30 days following the expiration of the period of postponement, the court shall dismiss the proceedings.<sup>52</sup>

Enforcement shall be dismissed automatically if the enforceable document has been finally rescinded, altered, annulled, repealed or otherwise declared without effect, if the certificate of enforceability is revoked, if the third person has satisfied the creditor's claim in lieu of judgement debtor, or if it has become impossible or cannot be enforced for other reasons. Prior to passing a decision on dismissal the court shall instruct the creditor to file a motion for a new method or object for enforcement within fifteen days after the date of service of the order. The court shall issue a decision dismissing the enforcement if the motion is not filed in a timely manner, or if there are no grounds for the motion. The decision dismissing the enforcement revokes all enforcement actions previously performed unless it infringes upon rights acquired by third persons.<sup>53</sup>

On the motion of the debtor enforcement can be dismissed in case enforcement has extended to objects not specified in the decision on enforcement, objects which are exempt from enforcement, or objects on which the scope of the enforcement is limited.

The enforcement procedure is considered completed when the decision on rejecting or denying the motion for enforcement has become final, when the last enforcement action is completed, or when the enforcement is dismissed.

### ***Determination of debtor's property***

In addition to the motion the creditor can file a request to locate the assets of the debtor. In that case the court shall notify the judgement creditor of the results of the investigation and allow him/her time to amend and supplement the submitted motion.<sup>54</sup>

In the motion for enforcement based on an enforceable document the creditor may request the court to require the judgement debtor and/or other natural and legal persons, administrative and other bodies and organizations listed in the request to disclose information about the judgement debtor's assets ("Disclosure Order"). The application for the Disclosure Order may be made before a decision on enforcement has been granted or after a decision on enforcement if the proposed means of enforcement failed.

The court orders the judgement debtor or other persons to list all available information about the judgement debtor's personal and real property and the source and amount of the judgement debtor's income and monetary assets and its whereabouts, on a form prescribed by the Entity's Minister of Justice.

The court shall impose fines upon persons who fail to comply with the court's order. In case false or misleading information about the judgement debtor's assets is provided, such person shall be held criminally liable for giving a false statement to the court. When necessary the court holds a hearing in lieu of the statement given on the prescribed form.<sup>55</sup>

### ***Exemption from enforcement***

The legislation has several provisions regulating the exemption from enforcement.

Regarding immovables articles 79 FBiHLEP and 79 RSLEP stipulate that a parcel smaller than a 5.000 square meter piece of farming land belonging to a farmer is exempted from enforcement, unless it regards the enforcement based on a mortgage.

In addition articles 79A and 79B FBiHLEP state that property belonging to the Federation of Bosnia and Herzegovina, canton, city, municipality or a public fund cannot be the object of enforcement. Also property belonging to an institution financed partially or entirely from the budget which was founded to conduct affairs in public interest and to ensure exercising of the rights to education, health care, child protection, welfare, science, culture or physical culture, and if such property is used for activities of that institution which are not profit oriented, shall not be the object of enforcement.

<sup>52</sup> Artt. 61-62 FBiHLEP; artt. 61-62 RSLEP.

<sup>53</sup> Art. 63 FBiHLEP; art. 63 RSLEP.

<sup>54</sup> Art. 36 FBiHLEP; art. 36 RSLEP.

<sup>55</sup> Art. 37 FBiHLEP; art. 37 RSLEP.

Regarding movables, according to article 117 FBiHLEP and article 117 RSLEP are exempted from enforcement:

- items necessary for the debtor and the members of his/her household to satisfy their daily needs;
- food and fuel needed by the debtor and members of his/her household for three months;
- the debtor's cash originating from claims that are limited or exempt from enforcement, as well as the cash of a debtor who has regular monthly income up to the monthly amount exempt from enforcement according to law, prorated for the time remaining until the next monthly payment;
- medals, certificates of war service and other decorations and awards, wedding rings, personal correspondence, manuscripts and other personal documents of the debtor, family photographs, personal and family documents and family portraits;
- A postal delivery or postal money order directed to the debtor (unless it is delivered to the debtor).

Regarding movables in the Federation of Bosnia and Herzegovina articles 117A and 117B FBiHLEP additionally exempt:

- fixed assets required for the performance of the Federation, canton, city, municipality and a public fund;
- movable assets used for activities in public interest of institutions financed partially or entirely from the budget which were founded to conduct affairs in public interest and to ensure exercising of the rights to education, health care, child protection, welfare, science, culture or physical culture, and if such property is used for activities of that institution which are not profit oriented.

Regarding claims of a debtor, are exempted:<sup>56</sup>

- the income, which is derived from lawful support, unless it is claimed by a person entitled to such support;
- Tax claims and other related fee claims prescribed by law;
- (for the Federation of Bosnia and Herzegovina only) Monetary funds used for activities in public interest of institutions financed partially or entirely from the budget which were founded to conduct affairs in public interest and to ensure exercising of the rights to education, health care, child protection, welfare, science, culture or physical culture, and if such property is used for activities of that institution which are not profit oriented.<sup>57</sup>

Not exempted, but limited on enforcement regarding claims of a debtor are garnishment on salary, reimbursements instead of salary, reimbursement for shorter working hours and reimbursement for the reduction in salary or pension, income from compensation for bodily injuries in accordance with provisions of disability insurance, income from social welfare, income from temporary unemployment benefits, income from child benefits, income from scholarship and subsidies to any school or university students and reimbursement for convicts' labor. These may be subject to enforcement in the amount of up to one half of such income.<sup>58</sup>

Regarding the Federation of Bosnia and Herzegovina<sup>59</sup> there are also limitations in enforcement against funds of State authorities:

- Enforcement against funds of the Bosnia and Herzegovina budget and cantonal budgets shall be made in an amount projected in a designated budgetary item and in accordance with the Law on Budget Execution.
- Execution against budgetary funds of a city and municipality shall be made in an amount projected in a designated budgetary item and in accordance with the Decision on budget execution.

### ***Seizure on movables***

The territorial jurisdiction in case of seizure of movables is either the court, in whose territory the movables are located (in case the movables are known when filling the motion on enforcement) or the court where the debtor has his residence (in case at the moment of filling the motion on enforcement the movables are unknown). In the last case the creditor may submit a decision on enforcement to any competent court in whose territory the movables of the debtor are located with a request that the court carries out the enforcement.<sup>60</sup>

<sup>56</sup> Art. 137 FBiHLEP; art. 137 RSLEP.

<sup>57</sup> Art. 137A BiHLEP.

<sup>58</sup> Art. 138 FBiHLEP; art. 138 RSLEP.

<sup>59</sup> Art. 138 par. 3 and 4 FBiHLEP.

<sup>60</sup> Artt. 114-115 FBiHLEP; artt. 114-115 RSLEP.



The enforcement against movables is executed by seizure, appraisal, sale and payment to a creditor from the proceeds of the sale.

As a rule, before a seizure is commenced, a court enforcement agent serves the decision on enforcement on the debtor and instructs the debtor to pay the amount for which the enforcement has been ordered. If the decision on enforcement cannot be served on the debtor at the time of seizure, it shall be served on him/her at a later time in accordance with the general rules of service of process.<sup>61</sup>

The seizure shall be carried out by making an inventory for seizure. The inventoried objects will be properly marked indicating their seizure.<sup>62</sup> In enforcement proceedings against movables in the possession of the debtor, there is a presumption that the movables are owned by the debtor and that there are no other encumbrances against the property, unless third parties have filed notice with the court, establishing their interest in the property. Property of the debtor that is in the possession of a third person may be inventoried only upon such third person's consent. If the third person does not consent to the inventory, the creditor requests the court, by a conclusion, to transfer the debtor's right to possession of the property to the creditor, in order to execute the enforcement under the rules governing the transfer for the purpose of payment.<sup>63</sup>

In case the debtor, his/her legal representative, agent or adult member of his/her household is not present, enforcement can only be carried out in the presence of an adult witness. In case of opening a locked room in addition to the adult witness also the police needs to be present. A copy of the record will be tacked on the apartment or room door.<sup>64</sup>

The court enforcement agent shall leave the inventoried items with the debtor for safekeeping, unless, on the creditor's motion, the court has ordered that the objects be submitted for safekeeping to the creditor or a third person. Cash, securities, valuables and items of significant value shall be delivered to the court for deposit.

If, during seizure, no movables were found that may be subject to enforcement, the court shall so inform all creditors who were not present at the seizure. In that case the creditor may file a motion that the seizure be conducted again within three months of the date of service of the notice or of the date of the seizure attempted when s/he was present. If the creditor does not file a motion for a repeated seizure within this deadline or if items that are subject to enforcement are not found in the course of the repeated seizure, the court shall dismiss the enforcement.<sup>65</sup>

An appraisal of movables is performed at the same time the inventory of the seizure is carried out. A party may file a motion for an expert appraisal even when the court has not ordered it. If the court accepts the motion, the person filing the motion must advance the costs of the expert appraisal within a deadline set by the court. If the costs are not paid within such deadline, it shall be deemed that the person filing the motion has withdrawn it.<sup>66</sup>

From the inventory and the appraisal a court record is made. The creditor may publish, at his expense, the court record on inventory of seized objects in the public media. If, after the seizure inventory, another enforcement order is given from the same or from another creditor, on the same debtor, no new inventory and appraisal of the movables is performed. The information from the later decision on enforcement shall be added to the record.<sup>67</sup>

At least fifteen days after the date of making the seizure inventory the movables can be sold. This sale is carried out by a public auction or private agreement. The court determines the manner of sale in a conclusion based on the method that will obtain the most favorable sales price. The sale is conducted by a court enforcement agent or other person appointed by the court.

In case of a sale by private agreement the purchaser and the court enforcement agent or a commission agent make an agreement. The court enforcement agent shall sell the movables for and on behalf of the debtor or a broker performing the commission sale in his/her own name on behalf of the debtor. The property may not be sold by private agreement for less than one third of the appraised value.

61 Artt. 118-119 FBiHLEP; artt. 118-119 RSLEP.

62 Art. 127 FBiHLEP; art. 127 RSLEP.

63 Art. 120 FBiHLEP; art. 120 RSLEP.

64 Art. 43 FBiHLEP; art. 43 RSLEP.

65 Art. 125 FBiHLEP; art. 125 RSLEP.

66 Art. 126 FBiHLEP; art. 126 RSLEP.

67 Artt. 127-128 FBiHLEP; artt. 127-128 RSLEP.

A sale through public auction is ordered if the objects in question are of considerable value and it is expected that they will be sold at a price exceeding their appraised value. The sale of the objects is announced on the court notice board in a timely fashion and may also be advertised in the manner stipulated for advertisements for sales of immovables. The movables cannot be sold for less than half of the appraised value. Initial bids offering less than half of the appraised value at the first foreclosure sale are disregarded.<sup>68</sup>

The highest bidder shall pay the price for the property immediately after the results are announced, unless the court decides otherwise by a conclusion. In the event such bidder does not pay immediately, the next bidder shall be declared the buyer and shall pay the price s/he offered, and so on down the list of bidders. In the event none of the bidders who made an appropriate bid pays the sale price immediately the court shall, at the motion of any party, declare the first public auction void. A party may move the court to schedule a new auction within a period of 8 days after the failed auction. At the second public auction, there is no minimum sales price required.

Regarding the payment to creditors with a different order of priority the provisions of the enforcement on immovables are applicable:<sup>69</sup>

1. the costs of the enforcement procedure;
2. claims of lien holders with a superior right to the creditor;
3. the claim of the creditor on whose motion the enforcement was ordered;
4. inferior lien holders;
5. the claims of holders of personal easements that cease to exist with the sale.

#### ***Enforcement on a claim***

The court in whose territory the debtor's permanent residence is located has territorial jurisdiction over deciding on the motion for enforcement against a monetary claim and over the execution of that enforcement. In case the debtor has no permanent residence within the respective entity, the court in whose territory the debtor's temporary residence is located is competent. In the event the debtor has no residence within the respective entity, the court in whose territory the permanent residence of debtor's debtor is located is competent; whereas if the debtor's debtor has no permanent residence within the entity, the court in whose territory the temporary residence of the debtor's debtor is located shall be competent.<sup>70</sup>

Enforcement on a monetary claim is enforced through seizure and transfer. The seizure is carried out by serving the decision on enforcement on the debtor's debtor prohibiting it from paying out money it owes to the debtor. The seizure is effective as of the date of serving the decision on enforcement on the debtor's debtor.<sup>71</sup>

The seizure of a monetary claim based on securities is conducted by a court enforcement agent by seizing the securities from the debtor and delivering them to the court. The seizure is deemed completed by seizing the securities from the debtor.<sup>72</sup>

The order of priority of liens of several creditors is determined according to the date of filing the motion for enforcement. If the motion for enforcement was sent by registered mail, the date of delivering it to the post office shall be deemed the date of its delivery to the court. If motions for enforcement of several creditors were received in the court on the same date, their liens have the same order of priority.<sup>73</sup>

Seizure of claims secured by a lien entered in the Public Registry is carried out by entering the seizure in the Registry. The registration shall be done automatically with a notice that the seizure by which the lien was acquired on the claims was ordered to satisfy the creditor's claim. If there are several creditors, the order of priority of their claims shall be determined as of the dates of registration.<sup>74</sup>

The seized assets shall be transferred to a creditor pursuant to his/her motion to have his/her claim satisfied either by transfer for the purpose of payment or transfer in lieu of payment. The transfer of claim is effectuated by serving the debtor's debtor with the decision ordering the transfer. The debtor is obligated, upon the request of the creditor to whom the claim has been transferred and within the deadline set by the

68 Artt. 129-131 and 89 par. 1 and 2 FBiHLEP; artt. 129-131 and 89 par. 1 and 2 RSLEP.

69 Artt. 134-135 FBiHLEP; artt. 134-135 RSLEP.

70 Art. 136 FBiHLEP; art. 136 RSLEP.

71 Artt. 139-141 FBiHLEP; artt. 139-141 RSLEP.

72 Art. 142 FBiHLEP; art. 142 RSLEP.

73 Art. 144 FBiHLEP; art. 144 RSLEP.

74 Art. 145 FBiHLEP; art. 145 RSLEP.

court, explain to the creditor what is required in order to liquidate the claim and to deliver to him/her any necessary documents relevant to the claim. The transfer of a claim authorizes the creditor to demand from the debtor's debtor payment of the amount and if such amount is due, to undertake all steps necessary to preserve and liquidate the transferred claim and to exercise the rights related to the security posted for said claim. A transfer of claim does not authorize the creditor to settle with the debtor's debtor at the expense of the debtor, to release the debtor's debtor from the debt, to otherwise dispose of the transferred claim, or to enter into an agreement with the debtor's debtor to arbitrate a disputed decision on the claim.<sup>75</sup>

### ***Enforcement against wages and other permanent monetary income***

A decision on garnishment of a salary orders the seizure of a certain portion of a salary and orders the employer who pays the debtor's salary to pay out or to continue paying the sum for which the garnishment was ordered to the creditor. The decision on enforcement covers also any salary increase occurring after delivery of the decision on enforcement as well as any other income earned by the debtor.<sup>76</sup> As an alternative the debtor may, by certified document, consent to the seizure of a part of his/her salary for the purpose of paying a creditor's claim, and to payment directly to the creditor in the manner set out in the document. Such document has the legal effect of a decision on enforcement.<sup>77</sup>

Article 138 FBiHLEP and article 138 RSLEP put certain limitations to the enforcement on: salary, reimbursements instead of salary, reimbursement for shorter working hours and reimbursement for the reduction in salary or pension, income from compensation for bodily injuries in accordance with provisions of disability insurance, income from social welfare, income from temporary unemployment benefits, income from child benefits, income from scholarship and subsidies to any school or university students and reimbursement for convicts' labor. In general these incomes may be subject to enforcement in the amount of up to one half of such income.

Another limitation refers to the situation where several persons have the right of support by virtue of law, or, the right to an annuity due to loss of support because of the supporter's death, against the same debtor, and the total of their claims exceeds the part of salary that may be garnished. In that case the enforcement shall be ordered and executed in favor of each such creditors in a proportionate amount to their claims. This proportionate amount is automatically modified in case another motion for enforcement is filed by another claimant.<sup>78</sup>

Claims for cash payments may be collected by the creditor directly at the cashier where the debtor's salary is paid out. The creditor is entitled to demand payment of the garnished amount by postal order at an address s/he designates or to a particular account held with a bank, after deduction of administrative costs.<sup>79</sup>

When the debtor's employment is terminated, the decision on enforcement applies to a subsequent employer, beginning on the date of service of the decision on enforcement upon the new employer. The former employer of the debtor is obligated to promptly send the decision on enforcement to the new employer via registered mail with return receipt, and to inform the court. In case the former employer is unknown with the identity of the new employer he will inform the court. The court then will instruct the creditor to obtain the information on the new employer within a given deadline. The enforcement is dismissed if the creditor does not inform the court within the specified deadline about the identity of the new employer.<sup>80</sup>

### ***Enforcement against registered immovable property***

The court where the property is located is the competent court to decide on the motion for enforcement against real property.<sup>81</sup> With the motion for enforcement the creditor submits the ownership excerpt from the Land Book on real property as proof that the real property is registered as the debtor's property. If the right to real property is registered in the Land Book in the name of another person than the debtor, the motion may be granted only if, based on the disclosure of the debtor's assets, conditions for correction of registration entry in the land register are given.<sup>82</sup>

75 Artt. 146-157 FBiHLEP; artt. 146-157 RSLEP.

76 Art. 159 FBiHLEP; art. 159 RSLEP.

77 Art. 164 FBiHLEP; art. 164 RSLEP.

78 Art. 160 FBiHLEP; art. 160 RSLEP.

79 Art. 161 FBiHLEP; art. 161 RSLEP.

80 Art. 162 FBiHLEP; art. 162 RSLEP.

81 Art. 67 FBiHLEP; art. 67 RSLEP.

82 Art. 70 FBiHLEP; art. 70 RSLEP.

The enforcement is effected through a notice on enforcement entered in the Land Book, an appraisal of the value of the real property, the sale of the real property and the payment to the creditor out of the proceeds of the sale.<sup>83</sup> Once a notice on enforcement is entered into the Land Book, a separate enforcement procedure may not be carried out for the purpose of satisfying another claim of the same or other judgement creditor on the same real property. In that case a creditor, for whose claim enforcement was subsequently ordered on the same real property, will be joined in the enforcement procedure already initiated.<sup>84</sup>

A change of ownership of real property during the enforcement procedure does not prevent the continuation of the enforcement procedure against a new owner as a debtor, up to an amount equal to the value of the real property.

Enforcement might also be carried out over the joint ownership share on real property. Upon the request of the creditor, debtor or other joint owner, the court orders in its decision on enforcement that the property be offered for sale both in its entirety and as a joint ownership share. If the sale price for the joint ownership share is considerably higher if the entire real property is sold, the court shall sell the entire real property and proceed as if the joint owners requested partition of a physically indivisible object as defined by regulations governing joint ownership relations. In that case the joint owners who are not debtors have the right to be paid for their representative share of the property from the proceeds of the sale before the creditor or other persons are paid, and before the costs of the enforcement procedure are reimbursed. In case that there is no agreement on existing rights between the debtor and other common owners, the court will issue a conclusion instructing the party who contests the debtor's right over commonly owned property to establish his/her right in proceedings. Until there is a decision, the other common owners can ask for a postponement of enforcement.<sup>85</sup>

Within three days after service of the decision on enforcement, the debtor may, under certain circumstances, file a motion requesting that enforcement be ordered against another parcel of real property. The debtor shall file proof of his/her ownership of the proposed object, together with the motion so that the court may order enforcement on the proposed object. The court serves this motion on the creditor who may file a response to it within three days after the date of service. The court decides on the motion by a decision within eight days from the day of receipt of the creditor's response or after the expiration of the deadline for its submission. If the debtor has proposed garnishment on salary, pension, disability allowance or other constant source of income as the other means of enforcement, the court may accept the motion on the condition that the debtor establishes the likelihood that the claim shall be paid within one year from the date of issuing the decision on his/her motion.<sup>86</sup>

A mortgage holder who did not propose the enforcement shall also be paid in the enforcement in accordance with the rules on priority for satisfaction of such claims. Generally a mortgage on real property shall cease with the enforcement of the decision even if the mortgage holders were not satisfied in full. However, the buyer of real property and a mortgage holder may agree (through a court settlement or a notarial deed), up to the date of the foreclosure sale, that the mortgage remains on the property even after the sale, and that the buyer assumes the judgement debtor's debt towards the mortgage holder in the amount that would have been awarded to him in the enforcement procedure. In such case, the sales price shall be reduced by the amount of the debt assumed.<sup>87</sup>

Contracts for rent or lease of real estate that are concluded and entered into the Land Register prior to acquiring the mortgage or right of settlement for which the enforcement is being sought, do not cease with the sale of the real estate. The buyer becomes the renter or the lessor upon attaining ownership of the real property.<sup>88</sup>

The manner of appraisal is determined by the court in a conclusion. If necessary, the court shall hold a hearing with the parties before issuing the conclusion. The immovables are appraised based on an expert's evaluation and other factors to determine its market value on the date of the appraisal.<sup>89</sup>

After conducting a proceeding for determining the value of real property, the court issues a conclusion on sale of the real property, setting forth the value of the property and stipulating the manner and conditions as well as the time and place of the sale if the sale is being carried out at a public auction. The conclusion on

83 Art. 72 FBiHLEP; art. 72 RSLEP.

84 Art. 73 FBiHLEP; art. 73 RSLEP.

85 Art. 69 FBiHLEP; art. 69 RSLEP.

86 Artt. 70-71 FBiHLEP; artt. 70-71 RSLEP.

87 Art. 74 FBiHLEP; art. 74 RSLEP.

88 Art. 76 FBiHLEP; art. 76 RSLEP.

89 Art. 80 FBiHLEP; art. 80 RSLEP.

sale is delivered to the parties, to the persons who have priority right or the same right to have their claims satisfied as a judgement creditor, to the persons who have a registered right or a preemption right by law to purchase it and to the applicable tax administration body. In addition the conclusion on sale is posted on the court notice board and as determined by the court. A party may publish the conclusion on sale in the media at its own cost or may inform persons dealing with the sale of real property of the conclusion.<sup>90</sup>

Any person who has a right to be paid from the sale price of the real property, and whose right takes precedence over a judgement creditor in the order of priority, may request the court (within eight days from the date of service of the conclusion on sale) that the enforcement be dismissed if the appraised value of the property does not cover a portion of the amount of judgement creditor's claim.<sup>91</sup>

There should be a time period of at least thirty days between the date the conclusion on sale is posted on the court notice board and the date of the sale.

The sale is carried out at a public auction which is normally held in the courthouse, unless the court stipulates otherwise. Parties and mortgage holders who have priority rights or the same rights to have their claims satisfied as the judgement creditor, may agree in writing until the time of the sale, that the sale be consummated by private agreement within a specified deadline, through an authorized real estate agent, court enforcement agent or in some other way.<sup>92</sup>

Only persons who have posted guarantee in advance may participate in a public auction as buyers. The amount of guarantee depends on the assessed value of the immovable (normally 10%).<sup>93</sup>

Even if only one bidder is present the foreclosure sale can be held, unless a person with a priority right to payment requests the court to postpone the sale.<sup>94</sup>

At the auction the immovables may not be sold for less than an amount that will at least partially satisfy the judgement creditor's claim, unless all parties with superior rights to settle their claims before the creditor agree.

At the foreclosure sale, the real property may not be sold for less than half of the appraised value. Initial bids offering less than half of the appraised value at the first foreclosure sale are disregarded.

If the immovables are not sold at the first foreclosure sale, the court shall schedule a second foreclosure sale within thirty days. The second foreclosure sale shall also be held, within the same deadline, if all three of the highest bidders at the first foreclosure sale fail to pay the sale price. At the second foreclosure sale the property may not be sold for less than one third of the appraised value determined by the conclusion on sale. The initial bid at the second foreclosure sale may not be less than one third of the appraised value.

If the real property is not sold at the second foreclosure sale, the court schedules a third foreclosure sale within 15 days and no later than 30 days, at which the property may be sold at a price without regard to the appraised value. The court shall dismiss the enforcement if the real property cannot be sold at this third foreclosure sale.<sup>95</sup>

A person who has a legal or contractual right of preemption entered in the Land Book has precedence over the highest bidder if he acknowledges, immediately following the termination of the auction, that he will buy the real property at the same price and on the same conditions.<sup>96</sup>

Parties may agree prior to initiating the enforcement procedure, in an agreement certified before the court, that the real property could be sold for the purpose of paying the judgement creditor's claim as set forth in that agreement, for a price lower than the aforementioned amounts. In that case the real property may be sold at such price at the first foreclosure sale providing there are no other persons participating in the enforcement procedure whose claims are being satisfied, and who have entered their right in the Land Book before the creditor's right was entered. The lowest price at which the real property may be sold in such case may not be less than 1/3 of the appraised value.<sup>97</sup>

90 Art. 82 FBiHLEP; art. 82 RSLEP.

91 Art. 81 FBiHLEP; art. 81 RSLEP.

92 Art. 84 FBiHLEP; art. 84 RSLEP.

93 Art. 86 FBiHLEP; art. 86 RSLEP.

94 Art. 87 FBiHLEP; art. 87 RSLEP.

95 Art. 95 FBiHLEP; art. 95 RSLEP.

96 Art. 83 FBiHLEP; art. 83 RSLEP.

97 Art. 89 FBiHLEP; art. 89 RSLEP.

The court issues a written conclusion of sale, confirming the sale of the real property to the highest bidder. This conclusion is posted on the court notice board and shall be deemed served on all persons on whom the conclusion of sale must be served and on all the participants in the foreclosure, upon the expiration of three days following the date of its posting on the notice board.<sup>98</sup>

The bidder who offered the highest bid at the foreclosure sale shall pay the total sales price reduced by the amount of the security deposit, by delivering it to the court within a period ordered by the court, but not exceeding thirty days after the date the court posted the conclusion of sale on the court notice board. If the highest bidder fails to deliver the sale price within the specified period, the court shall declare by a conclusion, that the sale to such bidder is void and issues a new conclusion that the property has been sold to the next highest bidder who shall deliver the sale price to the court within a period ordered by the court but not exceeding thirty days of the date of receipt of the conclusion. If the second highest bidder fails to deliver the sale price within the specified period, the court shall apply these rules to the third highest bidder. In the event all three bidders fail to pay the sale price within the specified periods, the court may declare the first foreclosure sale void and schedule a new foreclosure sale.<sup>99</sup>

After payment the court shall, in its decision on award, grant the real property to the buyer and orders the immovables to be transferred to the buyer and the Land Registry Court to enter the change of ownership and delete the rights of any third persons. Also this decision is posted on the court notice board and shall be deemed served on all persons on whom the conclusion of sale must be served and on all the participants in the foreclosure, upon the expiration of three days following the date of its posting on the notice board.

Based on the priority of the creditor the proceeds of the sale are paid in the following order:

1. the costs of the enforcement procedure;
2. claims of mortgage holders with a superior right to the creditor;
3. the claim of the creditor on whose motion the enforcement was ordered;
4. inferior mortgage holders;
5. the claims of holders of personal easements that cease to exist with the sale;

If there are multiple creditors referred to in the same categories they shall be paid in the order they acquired their mortgage or right to settlement or personal easements.<sup>100</sup> Several claims with the same order of priority shall be paid on a pro rata basis if the amount obtained through sale is insufficient to pay them all in full.<sup>101</sup>

Upon the sale of the immovables, the judgement debtor loses his/her right to occupancy and must deliver the property to the buyer immediately after service of the decision on award, unless otherwise provided by the law or by an agreement with the buyer.<sup>102</sup> At the request of buyer the court shall order by way of a conclusion in the decision on award that the property be vacated and transferred to the buyer.<sup>103</sup>

#### ***Enforcement against non-registered immovables***<sup>104</sup>

- Enforcement against real property which is not registered in the Land Register is conducted as much as possible in accordance with provisions of enforcement against registered immovables. Certain steps in the enforcement procedure however are different:
- In the motion for enforcement the creditor needs to provide proof that the property is owned by the debtor or petitions the court to request the proof in accordance with the provisions on Disclosure Order. The creditor needs to specify the real property with the description from the cadastral survey. In case there is no description of the real estate in the cadastral survey, the creditor needs to specify the location of the real estate, its name, boundaries and size;
- After the decision on enforcement has been issued, enforcement against real property in a region where there are no Land Registers or they have been destroyed or disappeared, may only be continued after a

<sup>98</sup> Art. 90 FBiHLEP; art. 90 RSLEP.

<sup>99</sup> Art. 92 FBiHLEP; art. 92 RSLEP.

<sup>100</sup> Art. 98 FBiHLEP; art. 98 RSLEP.

<sup>101</sup> Art. 101 FBiHLEP; art. 101 RSLEP.

<sup>102</sup> Art. 110 FBiHLEP; art. 110 RSLEP.

<sup>103</sup> Artt. 111-112 FBiHLEP; artt. 111-112 RSLEP.

<sup>104</sup> Art. 113 FBiHLEP; art. 113 RSLEP.

Land Register for such property is established in accordance with the Law on Land Registers, provided that establishing a land register is not contrary to applicable laws;

- The creditor must request the establishment of the Land Register within 15 days from the date the decision on enforcement was rendered and must prove that the request was filed within a deadline ordered by the court. The court dismisses the enforcement procedure if the creditor fails to request establishment of the Land Register within the prescribed deadline or fails to prove that the request was filed within the deadline ordered by the court;
- If real property cannot be entered into the Land Register due to other applicable laws, the court shall make an inventory of the real estate subject to seizure against which a motion for enforcement has been filed, and shall summon the creditor, the debtor and abutters to the real property to a hearing on the inventory;
- The record of the hearing on the inventory of the real estate subject to seizure shall be posted on the court notice board;
- The court shall place a notice in the Official Gazette and at least two daily newspapers which can be obtained within the territory of the entity which will include: the court placing the notice, the case number, name and address of parties and real estate on which the enforcement is being carried out, the place and time that the hearing on the inventory was held, and when the record of the inventory was posted on the court notice board. In that same notice, the court shall summon all interested parties to notify the court, orally or in writing, of any reasons why the enforcement cannot be carried out against the real estate.

### ***Eviction***

The court in whose territory real property is located has jurisdiction over issuing a decision on a motion for enforcement for the purpose of vacating and delivering real property.<sup>105</sup>

Vacating and delivery of real property may commence after the expiration of eight days of the date of serving the decision on enforcement if an objection has not been filed, or of the date of serving the decision denying the debtor's objection.

At the request of the court, the police and welfare agency are obliged to provide all necessary assistance in carrying out the eviction. If necessary, the court may impose fines on persons impeding the execution of enforcement.

The manpower and equipment required shall be provided by the creditor at the request of the court enforcement agent, no later than eight days prior to executing the enforcement.<sup>106</sup>

The movables that are removed from the real property are delivered to the debtor, and if the debtor is not present to an adult member of his household or his/her authorized agent. If none of these persons are available, or if such persons refuse to accept them, the items shall be delivered to another party for safekeeping at the expense of the debtor. The creditor shall designate a person to whom the removed items may be delivered or the creditor may keep the items of the debtor for safekeeping himself. If possible, the court informs the debtor of the delivery to another party and on the costs of safekeeping, leaving the debtor a reasonable time to request the return of the items upon paying the costs of safekeeping. After the expiration of the given period of time, the items shall be sold in accordance with the provisions on sale of movables, and the costs of safekeeping and the sale shall be paid out of the sales price.<sup>107</sup>

### ***Enforcement against savings deposit and current account***

Enforcement of a monetary claim against a bank account belonging to the debtor, is effectuated by ordering the bank to pay the amount under enforcement to the creditor after the decision on enforcement has become enforceable. The decision on enforcement states the number of the account of the debtor from which payment will be made, and the account number of the creditor to be credited with the payment or some other form of payment.

<sup>105</sup> Art. 202 FBiHLEP; art. 202 RSLEP.

<sup>106</sup> Art. 203 FBiHLEP; art. 203 RSLEP.

<sup>107</sup> Artt. 204-205 FBiHLEP; artt. 204-205 RSLEP.



When funds on the account are not available or are insufficient for settlement of the claim, the bank, based on the decision on enforcement, shall disclose the transaction history of the account of the debtor. The transaction history to be disclosed is limited to 30 calendar days preceding the enforcement decision and needs to comprise any operation on the account including cash withdrawal, credit and debit transfers, intra-bank and inter-bank transfers. The data with regard to inter-bank transfers to be disclosed must indicate among others the name of the receiver and the number of the account in the destination bank.

Any contract on a savings deposit account and any other deposit account shall be terminated by virtue of law on the date a decision on enforcement becomes enforceable, regardless of whether the deposits are fixed-term deposits or not.<sup>108</sup>

The bank maintains a separate record of the order of the decisions on enforcement, by date and time of delivery. At the creditor's request the bank issues the creditor a receipt confirming his/her place in the order of claims. The payments by the bank are made in accordance with the order of priority established by the date of delivery of the decision on enforcement.<sup>109</sup>

If there are no funds on the account designated in the decision on enforcement, the bank shall effectuate the transfer of an appropriate amount of the debtor's funds for the benefit of such account from other accounts in that bank pursuant to the order determined by the judgment creditor. In case the bank is not able to collect the enforceable claim due to lack of funds in the account, the bank shall keep a separate record of the decision on enforcement and shall effectuate the transfer when funds become available in the account, unless stated otherwise in the decision on enforcement. The court will be informed by the bank that no funds are available in the account and shall provide the court with the transaction history.<sup>110</sup>

A bank that does not proceed in accordance with the decision on enforcement or other court orders is held liable for the damages inflicted on the creditor pursuant to the general regulations governing compensation of damages.<sup>111</sup>

#### ***Enforcement of a claim to deliver movables or movables***

The court in whose territory the movables or immovables are located has jurisdiction over ruling on the motion for enforcement to deliver (certain quantity of) movables or to deliver immovables.<sup>112</sup>

The enforcement is effected by seizure of the claim for property, its transfer to the creditor and the sale of the property. In case the creditor does not have an enforceable document on the obligation of the debtor's debtor to surrender the assets, he may initiate civil proceedings for delivery against a debtor's debtor who is unwilling to deliver assets.<sup>113</sup>

The sale shall be effected in accordance with the provisions on public sale of movables or immovables.

In case of immovables within thirty days of the date the real property is delivered to him/her, the creditor needs to file a motion with the court for the sale of the property. If the creditor fails to file the motion for sale in time, the court shall dismiss the enforcement and revoke all enforcement actions carried out.<sup>114</sup>

#### ***Enforcement against shares***

The court in whose territory the permanent residence or head office of the debtor that owns the shares of stock or holds ownership rights in a legal person is located, has territorial jurisdiction over deciding the motion for enforcement and the effectuation of the enforcement against the shares of stock and other registered securities (hereinafter: shares of stock), and on any other ownership rights in a legal person.<sup>115</sup>

The enforcement on shares of stock or shares in a legal person is effected by seizing the shares of stock, appraising their value, selling them and paying the creditor, even if the transfer of shares of stock or ownership rights are restricted or prohibited by contract or the by-laws of the legal person. On the motion

<sup>108</sup> Art. 166 FBiHLEP; art. 166 RSLEP.

<sup>109</sup> Art. 167 FBiHLEP; art. 167 RSLEP.

<sup>110</sup> Art. 169 FBiHLEP; art. 169 RSLEP.

<sup>111</sup> Art. 175 FBiHLEP; art. 175 RSLEP.

<sup>112</sup> Art. 177 FBiHLEP; art. 177 RSLEP.

<sup>113</sup> Artt. 179-181 FBiHLEP; artt. 179-181 RSLEP.

<sup>114</sup> Artt. 182-186 FBiHLEP; artt. 182-186 RSLEP.

<sup>115</sup> Art. 187 FBiHLEP; art. 187 RSLEP.

of the creditor, and with the consent of the debtor, shares of stock may also be transferred instead to the creditor at the value stated on the certificate, in lieu of payment.<sup>116</sup>

The seizure of shares of stock is completed by serving the decision on enforcement on the Register of the Securities and to the Depository and Issuer of the Shares of Stock. Upon the entry of the seizure in the Register of the Securities, the Register cannot make any entry with regard to the seized shares of stock, based on the transfer from the debtor in the Register.<sup>117</sup>

Regarding the appraisal and sale we need to make a distinction between shares of stock that are listed on the Stock Exchange or other public capital exchanges under the law and regulations of the Securities Commission and shares which are not listed.

Shares of stock that are listed on the stock exchange or other organized public capital exchanges are sold in accordance with the Law on Securities through a broker designated by the court after the decision on enforcement has become enforceable.

Shares of stock which are not listed on the stock exchange or other organized public capital exchange are sold at public auction or by private agreement. If the shares of stock are to be sold at public auction or by private agreement, their appraisal, determination of the sales price and their subsequent sale, as well as the settlement of the creditor, shall be carried out by applying the provisions of enforcement on movables.

By private agreement the shares of stock are sold by the court enforcement agent or other person authorized by the court to sell shares of stock. The court enforcement agent or the person authorized to sell shares of stock shall enter into a contract for sale of the shares of stock on behalf of the debtor based on a court conclusion authorizing him/her to do so.

In the event the shares of stock have not been sold within a period of two months from the date they were initially offered for sale on the stock exchange or in the event of a failed public auction or private agreement the creditor may request that enforcement be enforced by transferring the ownership of the shares of stock to him/her in lieu of payment. A decision on the transfer of shares of stock shall be served on the Registrar of securities. In case the creditor fails to file such a request the enforcement proceedings shall be dismissed.<sup>118</sup>

The seizure of ownership rights in a legal person is carried out by serving the decision on enforcement on the Registry court or other responsible Registry office. Appraisal and sale shall be effected in accordance with the provisions concerning the enforcement against movables. If other shareholders or co-shareholders have a preemption right deriving from law, contract or the by-laws of a legal person, they will have precedence over the highest bidder if s/he acknowledges, immediately following the termination of the auction, that s/he will buy the ownership rights at the same price and on the same conditions.<sup>119</sup>

### ***Court penalty for non-performance***

On the motion of the creditor the court can set a court penalty for every day (or other period) the debtor does not perform a particular non-monetary obligation. Against this decision an appeal may be filed within a period of eight days. The appeal does not stay the enforcement.

In case the debtor fulfills his/her obligation within fifteen days after the decision on court penalty becomes final, the court may, in the same enforcement procedure and at a request of the debtor filed within eight days after fulfilling the obligation, reduce the amount of the penalties imposed, taking into account the reasons they were imposed.<sup>120</sup>

### **5.2.3. Challenges within the enforcement system**

#### ***Backlog***

This seem to be one of the main problems in Bosnia and Herzegovina. In the "Bosnia and Herzegovina Justice Sector Reform Strategy 2008 – 2012" attention was paid to enforcement and enforcement related

116 Art. 188 FBiHLEP; art. 188 RSLEP.

117 Art. 189 FBiHLEP; art. 189 RSLEP.

118 Art. 190 FBiHLEP; art. 190 RSLEP.

119 Artt. 191-192 FBiHLEP; artt. 191-192 RSLEP.

120 Artt. 194-195 FBiHLEP; artt. 194-195 RSLEP.

problems: “One of the key impediments to efficiency and effectiveness in the courts is the backlog of cases, which at the end of 2006 stood at 1.9 million cases. Around 56% of this total related to execution cases for small value claims, and around 20% for violation cases. Removing small claims enforcement cases from the system will clearly be an important first step in addressing this issue, but this will require legislative changes.”<sup>121</sup>

In Bosnia and Herzegovina small claims mainly consist of the claims of the utility companies (companies supplying electricity, gas, water, heating and dealing with garbage removal). In the past already a lot of attention has been paid to this issue. For example in 2005 a project was initiated, supported by ALPS and FILE Projects and the HJPC representatives.<sup>122</sup>

One of the conclusions was that the Public utility companies are receiving thousands of enforcement proposals on a monthly basis against customers using their services without paying the bills.<sup>123</sup>

“To collect their claims, there are currently using two possibilities: discontinuation of providing services (telephone, electric energy and gas supply) or initiation of court proceedings (civil or enforcement). However, not all the companies are able to discontinue providing their services because of unpaid bills for technical reasons (many customers in Sarajevo are using services of public companies through joint systems, without separate, individual meters necessary for the service they are using). These are the companies supplying water, heating and dealing with garbage removal. This is why these companies simply decided to submit all unpaid bills for enforcement to the courts instead of discontinuation of their services. These companies are not even obliged to prepare enforcement proposals but can instead simply submit a copy of the bills as an authentic document to the court. Nor are they obliged to show that the bill has been delivered or that they have sent any reminders to the customer in respect of the bill.”<sup>124</sup>

It was necessary to find solutions.

In 2007 the Municipal Court Sarajevo established two new departments in this court – the Enforcement Department for Authentic Documents Novi Grad and the Civil Department for Small Value Claims. The new departments employ legal associates who work only on the aforementioned cases. According to the Report of the Novi Grad Department for enforcement based on authentic documents for the period between May and December 2007, this Department took over 685.282 cases from the Enforcement Department as of 31 May 2007. During 2007, another 120.003 cases were received and 1.476 cases were resolved. At the end of 2007, there remained another 809.128 utility bill cases in the Enforcement Department.<sup>125</sup>

Cases of unpaid debts for utility services provided					
	<i>Number of unresolved cases as of 1 January 2006</i>	<i>Number of received cases during 2006</i>	<i>Total number of pending cases during 2006</i>	<i>Number of resolved cases during 2006</i>	<i>Number of unresolved cases as of 31 December 2006</i>
	<i>I</i>	<i>II</i>	<i>III = I + II</i>	<i>IV</i>	<i>V = III - IV</i>
<i>Civil cases</i>	96,604	56,952	153,556	45,219	108,337
<i>Commercial cases</i>	23,278	10,051	33,329	9,721	23,608
<i>Enforcement cases</i>	707,478	306,010	1,013,488	91,563	921,925
<b><i>Utility services</i></b>	<b>827,360</b>	<b>373,013</b>	<b>1,200,373</b>	<b>146,503</b>	<b>1,053,870</b>
<b><i>Minor offence departments</i></b>	<b>257,711</b>	<b>27,433</b>	<b>285,144</b>	<b>15,114</b>	<b>270,030</b>
<b>TOTAL</b>	<b>1,409,343</b>	<b>708,117</b>	<b>2,117,460</b>	<b>492,806</b>	<b>1,624,654</b>

Table 1: Processing of cases in 28 municipal courts in the Bosnia and Herzegovina Federation during 2006.

121 Bosnia and Herzegovina Justice Sector Reform Strategy 2008 – 2012, page 19. Figures based on statistical information compiled by the HJPC for 2006.

122 The Court Administration Project in the Municipal Court Sarajevo, Final Report, 1 November 2004 – 28 February 2005, p. 19-21.

123 HJPC. Project proposal «Reduction of case backlogs in courts», October 2006.

124 HJPC. Project proposal «Reduction of case backlogs in courts», October 2006, page 13.

125 Action Plan for the reduction of case backlogs, 2008, page 19.

Cases of unpaid debts for utility services provided					
	Number of unresolved cases as of 1 January 2006	Number of received cases during 2006	Total number of pending cases during 2006	Number of resolved cases during 2006	Number of unresolved cases as of 31 December 2006
	I	II	III= I + II	IV	V= III - IV
Civil cases	5,063	5,239	10,302	4,959	5,343
Commercial cases	791	861	1,652	784	868
Enforcement cases	8,598	15,783	24,381	5,327	19,054
Utility services total	14,452	21,883	36,335	11,070	25,265
Minor offence departments	129,723	26,733	156,456	42,581	113,875
TOTAL	254,776	179,660	434,436	185,759	248,677

Table 2: Processing of cases in 19 basic courts in Republika Srpska during 2006

A Working Group was established to analyze the problem and to come with suggestions. In October 2009 the Working Group published a report<sup>126</sup> on how, taking into consideration the legal background of Bosnia and Herzegovina, to improve the enforcement system in Bosnia and Herzegovina.

The Working Group collected some interesting statistical data on the enforcement system in Bosnia and Herzegovina:

	Total beginning 2008	Enforceable documents	Authentic documents	Enforceable documents	Authentic documents	Total cases end 2008
		New cases	New cases	Solved 2008	Solved 2008	
Brčko District	22,837	13,309	410	7,737	1,122	27,697
Federation Bosnia-Herzegovina	1,054,594	46,512	285,290	40,675	114,074	1,231,647
Republika Srpska	121,539	18,340	137,195	8,372	32,602	236,100
Total	1,198,970	78,161	422,895	56,784	147,798	1,495,444

Table 3: number of enforcement cases in 2008<sup>127</sup>

Taking into consideration the huge number of enforcement cases one would expect also a huge number of court enforcement agents and court officials (judges and associates) involved in enforcement. However this number is rather limited:

	Full time judges for enforcement cases	Associates for enforcement cases	Court enforcement agents	Cars at disposal (not exclusively for enforcement)
Brčko District	1	3	3	1
Federation Bosnia-Herzegovina	59	41	82	28
Republika Srpska	39	7	35	14
Total	99	51	120	43

Table 4: number of professionals (in FTE) involved in enforcement in 2008<sup>128</sup>

Comparing these two tables it already becomes clear that the workload per judge and court enforcement agent is far too high.

126 Analiza i preporuke radne skupine za unapređenje ovršnog postupka (not available in English), hereafter called 2009 WG Report.

127 Source: 2009 WG Report, page 6.

128 Source: 2009 WG Report, page 6.

	Number of solved cases per judge/professional associate during the 2008	Number of new cases per judge/professional associate during 2008	Number of backlog cases per judge/ professional associate at the end of 2008
Brčko District	2.215	3.340	6.924
Federation Bosnia-Herzegovina	1.561	3.348	12.427
Republika Srpska	885	3.361	5.102
<b>Total</b>	<b>1.369</b>	<b>3.354</b>	<b>10.010</b>

Table 5: average number of solved cases, new cases and backlog cases per judge/professional associate<sup>129</sup>

	Number of solved cases per court bailiff during the 2008	Number of cars per court bailiff	Number of new cases per court bailiff during 2008	Number of backlog cases at the end of 2008 per court bailiff
Brčko District	2.685	0.3	4.157	8.393
Federation Bosnia-Herzegovina	1.896	0.3	4.066	15.094
Republika Srpska	1.181	0.4	4.482	6.804
<b>Total</b>	<b>1.711</b>	<b>0.4</b>	<b>4.189</b>	<b>12.504</b>

Table 6: average number of solved cases, new cases and backlog cases per judge/professional associate<sup>130</sup>

From table 5 and 6 it is clear that, without any additional inflow of new cases it will take at least seven years before the backlog is resolved. Of course no inflow of new cases is just hypothetical. It is clear that the backlog will only grow, unless some fundamental reforms are carried out. The working group calculated that the average length of an enforcement case is 376,3 days (in case the debtor is a legal person) and 514 days in case the debtor is a legal entity.

Enforcement still needs improvement. The Working Group identified a number of shortcomings in both the organization and the legal provisions. A number of these issues we also identified from our perspective. Without going into detail we want to note some of the main issues.

### Court involvement

The enforcement procedure is completely conducted by the court. For each enforcement action or step in the enforcement procedure the court needs to be consulted and a formal decision or conclusion by the judge is needed.

Already a number of years ago a discussion started on the role of the judiciary in enforcement. After all, the enforcement procedure by itself does not represent settling of any kind of dispute. So why is it necessary to include the court in the enforcement procedure?

We want to give two examples of the, in our opinion, unnecessary involvement of the courts.

The first example refers to the rate of default interest. If the law governing the rate of default interest changes after an enforceable document is issued or after a settlement is reached, the court shall, on a motion by a party, issue a decision on enforcement determining the collection of such interest at the new rate for the period to which such change refers.<sup>131</sup>

The question is: why not delegate more of those tasks to the court enforcement agent. The second example is a good illustration of the inefficiency of court involvement.

The court enforcement agent has to enforce the decision on enforcement in accordance with the content of that decision. The court enforcement agent is not authorized to review the enforceable document during enforcement. The reason is that the decision on enforcement is limited by means of a conclusion. In case the

<sup>129</sup> Source: 2009 WG Report, page 7.

<sup>130</sup> Source: 2009 WG Report, page 7.

<sup>131</sup> Art. 28 FBiHLEP; art. 28 RSLEP.

debtor now pays part of the claim prior to the conclusion on inventory and seizure of movables and files a proof of the partly payment in his letter, the court has to limit the given claim by a conclusion.

### **Legal remedies**

In both the Federation of Bosnia and Herzegovina and Republika Srpska there are two kinds of legal remedies (as in the ZIP 1978): objection and appeal. In Brčko District only the objection is provided as an ordinary legal remedy. There are no extraordinary legal remedies anymore (as was the case in ZIP 1978). With some exceptions, the objection or the appeal do not stop the course of the execution procedure, but the replenishment is postponed until the decision on the objection is made. It is still possible that debtors misuse the legal remedies. In the neighbouring legal systems we noticed that the number of remedies is further reduced.

### **Seizure on immovables**

Despite the amendments on the Law on enforcement there still are a number of problems with the attachment of immovables. One of the judges in the county court in Banja Luka summarizes:<sup>132</sup>

- “as a result of problems of setting up the land books, the problem is that the executive court has no possibility to notify the creditors of mortgage on execution because there is no option that the execution is recorded in the land books;
- the sales price of the immovable property, in the way as described by the Law on Executive Procedures, allows (in practice) for sale of the property at unrealistic price, so to say “for 1 KM”. This deprives the person under execution of their property, but does not compensate the execution seeker.
- taking mortgage and surrendering the immovable property when the property is not entered in the land books. In case of this legal solution, the burden of the execution seeker’s obligation to request entry into the land books of the immovable property is too heavy.”

Not all immovables are registered in the land books. For those immovables that are not registered the creditor has to file evidence, together with the execution proposal, that the debtor is owner of these immovables. Another possibility is that the debtor is invited to appear in court to make a statement called “determining property of the debtor”. The creditor has to obtain the information for evidence from the Cadastre, and in case that such data are missing from the Cadastre, the location of the immovable property, its name, borders and surface have to be marked. After the adoption of the resolution on execution, the court shall suspend the execution until finalization of the process of entry into the land books (within 15 days from the day of adopting the decision on execution) of the immovable property that is the object of execution.

In case the entry in the land books is not in accordance with the law, the court shall make the list of seized immovables on which the execution has been proposed, and invite the creditor, the debtor and the person with whose property the subject property borders. The Court shall publish an ad on the process of repossession in the “Official Gazette” and at least two daily newspapers, in which they will state the name of the court advertising, case number, name and address of the parties, information on the property under execution, and put a general notice on when and where the hearing was held in which the property was registered for repossession and when the minutes on the registration of repossession were posted on the court bulletin board.

“... one may not talk about advantages of this new legislative solution. One may point at some advantages with respect of the legislator’s intention to have all the factors in the society “involved” and contributing to establishment of the land books, and one of the good opportunities is the one the execution court and the execution seeker have when selling the property that is out-of-book owned (not registered in the books)...[...] It is important to point here at the problem of discrepancy between the data – the records on the field and in the land books, what, among other things, leads to conclusion that there is a really big problem with land books. Therefore, it would be necessary to complete the process of setting up the land books in the nearest future...”<sup>133</sup>

132 Rosa Obradovic, judge county court Banja Luka, Report on key issues discussed at the round table that was held in Neum, on June 21-24, 2007, on the topic “Advantages and disadvantages of the executive procedures in comparison with the previous legislative solutions”.

133 Rosa Obradovic, judge county court Banja Luka, Report on key issues discussed at the round table that was held in Neum, on June 21-24, 2007, on the topic “Advantages and disadvantages of the executive procedures in comparison with the previous legislative solutions”.

### 5.3 Training of professionals involved in enforcement

#### *Enforcement judges*

From paragraph 5.2. it is clear that the enforcement process is being steered by the enforcement judge, the competent authority for issuing all enforcement related decisions as for example the decision on seizure or eviction. The enforcement judge stays involved at every stage of the enforcement process.

The enforcement judges share the same professional education and training as all other judges in BiH and all have a university degree in law. They are therefore full-fledged judges, whose specialisation on enforcement cases has been done on the job. Enforcement judges are enjoying the same benefits as their colleagues and are sharing also the same career perspectives. Not all judges are dedicating their whole working time to enforcement cases, but are dealing additionally with cases in different fields of law. The law obliges judges to attend yearly four days of training at the respective Judicial Training Centre (JTC). The JTC publishes a training program yearly with different training activities and judges may chose for which concrete training they want to apply. Training activities, which are targeted especially at enforcement judges were mainly offered after the last changes of the enforcement code and are meanwhile rare.

#### *The enforcement agent*

The role of the enforcement agent is to carry out judges' decisions related to enforcement. Bosnian enforcement agents are so-called court employees. Their salary is similar to those of receptionist, court drivers and court police. Enforcement agents have practically no career perspectives within the system. Based on the decision issued it is the enforcement agent who visits the debtor in order to carry out an eviction or seizure etc. Where possible, enforcement agents try, when going to the field, to work in pairs, what makes them feel more secure and enables them to discuss legal and factual problems, which they might face during the enforcement process on the spot.

In comparison to what has been said about the enforcement judges, the situation for enforcement agents is much less structured and unclear. Even if the main attributions of enforcement agents and therefore their basic job description is given by the enforcement law and the general book of court rules, the concrete understanding of the enforcement agent's job and its diversity and versatility differs from court to court.

To understand the big diversity within the system one has to know that based on the enforcement code and the general court book of rules, which is valid for the whole territory of Bosnia and Herzegovina, each canton is free to develop additional rules and regulations through its own court book of rules as long as they do not contradict the general ones. In some cantons even each court is developing its own set of rules. As the generalities are very vague in their description of enforcement agents' work and also with regard to the admission criteria to the job, many courts took the liberty to develop their own set of rules and criteria.

In summary, one can say that most courts are expecting future enforcement agents to have a high school degree. Nationwide enforcement agents, who have the status of court employees, have to pass an admission test for court employees, which also includes a knowledge test in the field of law.

The conditions for the professional exam in the Federation of Bosnia and Herzegovina are regulated by the "Book of Rules on contents and methods for taking the professional exam by employees in civil service organs in FBiH".<sup>134</sup> Article 5 of this Rulebook encompasses the various issues:

- 1) Basics of the constitutional system;
- 2) Organisation of the administrative organs in FBiH;
- 3) Administrative procedure;
- 4) Employment within state service organs;
- 5) Office and archive administration within state service organs.

Court enforcement agents only need to pass this general part to be appointed. There is no specialised admission test, a testing of the knowledge and qualifications in the specific tasks within the enforcement process.

The professional exam in the Republika Srpska is regulated by the "Regulation on professional exam for the work within administration of RS".<sup>135</sup> Contrary to the Federation of Bosnia and Herzegovina in the Republika

<sup>134</sup> "Book of Rules on contents and methods for taking the professional exam by employees in civil service organs in FBiH" (Official Gazette FBiH 69/06).

<sup>135</sup> "Regulation on professional exam for the work within administration of RS" (Official Gazette RS1/03).



Srpska a distinction is made in the entering qualifications. Civil servants and employees with higher and high education qualifications have a larger scope program, while those with high school qualifications have just the basics within the program, relating to the constitutional organization, the state administration system, the administrative procedure, employment and office administration.

After being selected, the newly recruited enforcement agents do not receive any structured or organised training for their future job. Training is mostly delivered through senior enforcement agents who try to pass their knowledge to their younger colleagues. At the court in Banja Luka for example newly recruited enforcement agents receive a 1-2 day introduction into the theory of the job (given by a senior enforcement agent) after which they have to accompany the senior enforcement agent to his daily missions into the field for approximately one month. Additional knowledge, which might be necessary for carrying out enforcement work and especially knowledge of the enforcement code, the young enforcement agents have to try to gain through self-studies. Doing this they can only rely on the enforcement code as special training material is not available. Also during their further assignment enforcement agents are not offered any kind of training.

### ***Recent developments***

To summarize: until recently and under the given form of organization of the enforcement procedure in both entities and Brčko district, as described above, there is neither a special initial training nor a structured ongoing education for those who are carrying out the enforcement process. Enforcement judges receive the standardized legal education like all other judges without being thoroughly familiarized with the specifics of enforcement related issues. The court enforcement agents, who are eventually transferring judge's instructions into real enforcement-action, do not receive the necessary knowledge and tool kit in order to execute their duties with the required professionalism. It is obvious that this kind of lack of specialization and skill is not only hampering an efficient, transparent, timely and fair enforcement process, but also leads to insufficient trust of the population and potential (foreign) investors in the system.

As the overwhelming part of the enforcement codes is verbatim identical, all training efforts can be done jointly for both entities and the Brčko district. In 2009 the two Centers for Judicial and Prosecutorial training in the Federation of Bosnia and Herzegovina and Republika Srpska, with international assistance, took the initiative to develop and implement a training plan for enforcement judges and involved court staff. In addition necessary training materials have been developed. In the first year of implementation (2010) 11 seminars were organised, attended by 490 participants (233 judges from mostly municipal and basic courts; 214 court enforcement agents and 43 other participants).<sup>136</sup>

On the enforcement legislation a practical manual for the court enforcement agents has been developed. In addition, a publication with the most important jurisprudence on enforcement-related matters has been published.

## **5.4. Ethics, monitoring and control, disciplinary issues**

The various laws in the entities of Bosnia and Herzegovina provide for an enforcement procedure, steered and implemented mainly through judges. When we have a closer look at the legislation in the various entities these stipulate that "enforcement shall be ordered and executed by the court as determined by law"<sup>137</sup> and "the enforcement procedure shall be conducted in the first instance court and a single judge shall issue rulings."<sup>138</sup>

The second person in charge with the enforcement of judgments is the so-called "court referee", who is defined within the very same provision as a "court official who on the court's order directly undertakes certain acts set forth in the enforcement procedure", so, as we will further refer to, the court enforcement agent.<sup>139</sup>

Taking this distribution of duties into account, one has to state that under the given legal framework there doesn't exist a specialized profession dealing with the enforcement of judgments, but the enforcement is in the hands of "normal" judges and court clerks.

<sup>136</sup> Handbook for court bailiffs published by the BERP Project, Center for Judicial and Prosecutorial Training in the Federation of Bosnia and Herzegovina, Center for Judicial and Prosecutorial Training in Republika Srpska, Center for International Legal Cooperation, December 2010, page 5.

<sup>137</sup> Art. 4 par 1 FBiHLEP; art. 4 par 1 RSLEP.

<sup>138</sup> Art. 11 par 1 FBiHLEP; art. 11 par 1 RSLEP.

<sup>139</sup> Art. 2 under 8 FBiHLEP; art. 2 under 8 RSLEP.

As a consequence there is no special Code of Ethics. Potential problems are solved by making use of the general Codes of Ethics for judges and civil servants/court clerks or of the Civil and Criminal Code.

The question is whether, especially for the court enforcement agents, this is the most optimal tool. In our opinion the answer is: no. These laws are not the optimal tools of regulating profession-specific questions. Additionally those laws are in their main characteristics less preventive than a Code of Ethics would be. Therefore the use of the Civil Code and Criminal Code can clearly not replace a profession specific Code of Ethics. The special position of enforcement judges and agents and especially the important and delicate role that they play when interacting with the parties lets the use of very general regulations seem not to be the most suitable solution or requires at least specialized training on ethical issues, which enables involved professionals to interpret existing regulations in the light of the special role of enforcement judges and clerks.

To this end it should be noted that enforcement agents need to be particularly sensitive to the interests of defendants. Finally it are the respective Council of Europe Recommendations<sup>140</sup> which call upon member states to "bear in mind their responsibilities to properly regulate the practices of enforcement agents subject to appropriate levels of monitoring and scrutiny (e.g. Ombudsperson)..."

## 5.5 Status, working circumstances, remuneration

### *The Federation of Bosnia and Herzegovina*

Looking at the status and remuneration of the court enforcement agents, we first need to have a look at the Law on Courts (hereafter FBiHLOC).<sup>141</sup> According to article 61 FBiHLOC: "The Federation Ministry of Justice, with respect to the Supreme Court of the Federation, and the Cantonal Ministries of Justice with respect to cantonal and municipal courts, shall have the following responsibilities:

1. monitor the performance of matters of court administration;
2. co-operate with the Court President in resolving complaints received by the Ministry relating to court administration;
3. make recommendations to and cooperate with the Court President for improving the organization and operation of the court;
4. collect statistical information related to the work of courts;
5. provide for material conditions for the work of courts, unless provided otherwise by law; and
6. perform duties related to the court budgets in accordance with Articles 69, 71 and 72 of this Law."

Based on this provision it becomes clear that the system is fragmented: main responsibilities are with the Ministries of the various entities. Although article 61 FBiHLOC<sup>142</sup> enables the Federation of Bosnia and Herzegovina and the different entities to cooperate, so far there is no harmonized approach.

The number of staff is determined by the criteria in the Law on Courts. According to article 42 FBiHLOC the Federation Minister of Justice sets the criteria for the number of staff (civil servants and staff employed) in the courts. This "Rulebook on determining criteria for the necessary number of staff in municipal and cantonal courts and Supreme Court FBiH"<sup>143</sup> was published in 2003. The Minister determined a ratio of court staff to judges of 3:1. As this ratio also includes the court enforcement agents it is already clear that, due to the large backlog in courts, this ratio is completely inadequate.

Regarding the status of the enforcement agents in the Federation of Bosnia and Herzegovina this is regulated mainly by the Law on Employees in the Civil Service Organs in the Federation BiH<sup>144</sup> and the Labour Law.<sup>145</sup> Based on article 15 FBiHLECSO the enforcement department is managed by the Head of the enforcement department, the Court Bailiffs' Service. Employment requirements, job descriptions and number of positions are regulated in the "Rulebook on internal organisation of the Service"<sup>146</sup> and the "Book of Rules on Internal

<sup>140</sup> CoE Rec(2003) 17.

<sup>141</sup> Law on Court FBiH (Official Gazette FBiH 38/05, 22/06), hereafter FBiHLOC.

<sup>142</sup> Art. 61 FBiHLOC reads: "In carrying out their responsibilities, the Federation and Cantonal Ministries of Justice shall cooperate and exchange information. In order to harmonize the practices of the Cantonal Ministries of Justice, the Federation Ministry of Justice shall coordinate performance of these responsibilities and may issue instructions to that effect."

<sup>143</sup> Rulebook on determining criteria for the necessary number of staff in municipal and cantonal courts and Supreme Court FBiH (Official Gazette FBiH 41/03).

<sup>144</sup> Law on Employees in the Civil Service Organs in the Federation BiH (Official Gazette FBiH No. 49/05, hereafter FBiHLECSO).

<sup>145</sup> Labour Law in the Federation BiH (Official Gazette FBiH No. 43/99, 32/00 and 29/03)

<sup>146</sup> Artt. 20 and 24 FBiHLECSO.

Organisation and Systematization of Posts". In practice these Rulebooks are not standardized, but per Court a Rulebook has been developed. As we already indicated in paragraph 5.3. in general the legal condition for the performance of the tasks of the enforcement agent is a high school degree. The court enforcement agents need to pass an exam and have an obligation of continuous training.<sup>147</sup>

The salary is based on the Law on State Service,<sup>148</sup> a classification system and the number of years of experience. In addition the agent has the right to compensation for transportation (to and from work), compensation for illness, education, retirement bonus et cetera. The payment of bonuses varies per entity and is based on the economic situation and budget of that entity.

### ***The Republika Srpska***

Contrary to the Federation of Bosnia and Herzegovina, the Republika Srpska does not have a special Law on Employees in the Civil Service Organs. The status of the court enforcement agents is regulated in the Law on Courts of the Republika Srpska (hereafter the RSLOC).

According to article 37 RSLOC the Ministry has the competencies to:

1. monitor the application of this law and other regulations related to the organisation and method of operation of the courts;
2. make recommendations to and cooperate with the Court President for improving the organization and work of the court;
3. provide for material conditions for the work of courts, and
4. perform competencies related to the court budgets in accordance with Articles 69, 70, 72 and 73 of this Law.

According to article 49 RSLOC "The Minister of Justice shall set the criteria for determining the total number of staff in the courts." In the "Book of Rules on setting criteria for determining the necessary number of administrative and technical staff in courts in RS",<sup>149</sup> the Minister determined the ratio of court staff to judges in municipal courts on 3:1. A ratio similar to the ratio in the Federation of Bosnia and Herzegovina, which also includes court bailiffs.

This article 49 RSLOC also regulates the powers of the courts: "The number and qualifications of employees and other requirements for employment of staff members in each court shall be separately regulated in the Book of Rules on Internal Organisation and Systematization of Posts." So, as we have seen in the Federation of Bosnia and Herzegovina, also in the Republika Srpska this is determined on a court level, meaning there might be differences between the various courts. The courts' competence is regulated in article 36 RSLOC: "The Court President, with the consent of the Minister of Justice, shall issue a Book of Rules on the Internal Organisation and Systematization of Posts in accordance, in accordance with the criteria set forth in Article 49 of this Law."

Which legal provisions apply to the court enforcement agents?

Article 55 RSLOC stipulates: "Unless otherwise provided by law, the provisions of the laws regulating the employment rights and duties of staff of administrative bodies shall also apply to court staff."

From these laws the most important are the Law on Civil Servants,<sup>150</sup> the Labour Law<sup>151</sup> and the Law on Salaries of Employees in Administrative Organs of the Republika Srpska.<sup>152</sup> These laws regulate the right on salary, vacation and leave, education, membership of professional bodies et cetera.

In order to be appointed, the court enforcement agent needs to meet the general conditions based on the Law on Civil Servants and the special conditions of the court specific "Book of Rules on Internal Organisation and Systematization of Posts". These conditions are similar to the conditions in the Federation of Bosnia and Herzegovina.

<sup>147</sup> Art 33 FBiHLECSO.

<sup>148</sup> Art. 40 FBiHLECSO; in addition several regulations are applicable such as the Regulation on compensations and other material rights that are not salaries by character (Official Gazette FBiH 34/04, 56/04, 68/05, 33/06, 75/07).

<sup>149</sup> "Book of Rules on setting criteria for determining the necessary number of administrative and technical staff in courts in RS" (Official Gazette RS 84/06).

<sup>150</sup> Law on Civil Servants, adopted in November 2008.

<sup>151</sup> Labour Law (Official Gazette RS 38/00, 40/00, 47/02, 38/03, 66/03).

<sup>152</sup> Law on Salaries of Employees in Administrative Organs of the RS (Official Gazette RS118/07).

***The present situation***

On February 11, 2009 in Sarajevo a Round Table was held at which 18 court enforcement agents from 15 courts participated. Overall, the Round Table concluded that the status and working conditions of the court enforcement agents were at a low level. Main obstacles in the work were: insufficient remuneration, lack of a qualification structure, lack of infrastructure such as vehicles and computers, lack of unified working practices and insufficient training.

As we have already indicated the courts are given wide powers to regulate status, number and working conditions of the court enforcement agents. An indication of the present situation can be given based on information that the HJPC provided (2009). The number of enforcement agents seems to be inadequate to resolve the backlog: in the Municipal Court in Sarajevo there are 15 enforcement agents, whereas in the Banja Luka basic court there are only 5. In some courts the enforcement agents, in addition to their enforcement job, also act as e.g. court courier. Compensation of costs differs: some courts use a fixed amount, whereas other courts make a distinction between city zone, suburban areas and other zones and the number of outings per case. In some courts the enforcement agents have cars at their disposal, whereas in other courts there are no cars available (even though the territory to be covered can be 60-70 km). In courts where cars are available the number normally is limited. Examples were mentioned of 3 cars to a court for a territory covering 300.000 population.

***Obstruction of the work of the enforcement agent***

The enforcement agent is authorized to remove a person obstructing an enforcement action. The police is obliged to render assistance to the enforcement agent as may be necessary to carry out the enforcement action of the court. If necessary, the enforcement agent may order the use of force against a person obstructing the enforcement. In case the police fail to act in accordance with the enforcement agent's order or fail to render assistance in carrying out the enforcement, the court shall report it to the Ministry of the Interior of the entity through the Ministry of Justice of the entity.<sup>153</sup>

**5.6. Service of documents<sup>154</sup>**

In Bosnia and Herzegovina the service of documents is considered to be a procedural court action as the court undertakes such an action ex officio. The service is performed by either post, an authorised legal entity registered for service, a court officer or at the court directly. Depending on the required reliability of service a certain method is chosen. This means that e.g. for the service of enforcement decisions a process server will be used.

In case of requested service in person, the process server is obliged to make one more attempt at serving a document on the addressee in case the addressee does not happen to be on the location of service the first time. The process server will leave a written notification with a request to be present at the location at a certain time. In case the second time the addressee is not present, the process server can leave the document to one of the grown-up members of the household (who are obliged to receive the document), or to a tenant, neighbour, house keeper or a person who works together with the addressee.

In case the requested service was not in person, the notification is not necessary and the process server can immediately leave the documents with one of the grown-up members of the household (who are obliged to receive the document), or to a tenant, neighbour, house keeper or a person who works together with the addressee.

Documents cannot be left in post boxes. The process server shall leave the given document at the premises where it is supposed to be delivered or shall leave it pinned down to the door of the premises.

From the service a proof of service (return of service) needs to be signed by the recipient. In case service is done to a legal entity the recipient also needs to put the stamp on the document. In case of refusal the process server shall write this down on the proof of service.

When in case of personal service the addressee refuses to receive the documents, the server will leave the document at the premises or pin the document down on the door of the premises. The process server

<sup>153</sup> Art. 44 FBiHLEP; art. 44 RSLEP.

<sup>154</sup> See: art. 10 FBiHLEP, art. 10 RSLEP and art 11 BDLEP.

states on the proof of service that the party concerned refused the documents, the date and time, the reasons for refusal (when he was informed on those reasons) and the place where the given document is pinned to the door or left at the premises.

Service can also be done at the work place of the addressee. In case the addressee is not at his/her work place, the process server will notify his/her colleagues at work and inquire when and where to find the recipient, then the server will leave the given document with working colleagues. Should these colleagues refuse to receive the given document, the process server will pin down a written notice requesting the addressee to be present at the designated day and time at his/her work place to be served the document. If even after delivery of this notice the process server does not find the person on whom the given document should be served, the document may be delivered to his/her working colleague, provided he/she agrees to it. In this case the process server is obliged to send a written notice by regular mail to the addressee informing him/her about the person who had received the given document.

In case of enforcement on the basis of an enforceable document, and the writ cannot be served to the address of the debtor, nor to the address registered with the responsible agency, the service can be effected through the bulletin board of the Court.

"This would make the party's avoidance to receive the writ legally irrelevant for execution, what is a big advantage when it comes to service, which is anyway a big problem that prolongs the whole procedure ....One should indicate here that the term "service" is defined in the Law on Civil Proceedings in a way that makes difficult and slows down the procedure, and the first next changes of the Law on Civil Proceedings should be used to "simplify" the legally prescribed method of serving the writs....",<sup>155</sup> was a remark we noticed.

Another problem regarding the service of documents is the Register of Residency. It seems that people often refuse to register themselves. This makes the enforcement more difficult. In the Netherlands, for instance, if the whereabouts of a defendant are unknown the documents are served to the prosecutor of the district court. At the same time, an advertisement is placed in the local newspaper indicating that the defendant may obtain a copy of the notification at the office of the enforcement agent.

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<sup>155</sup> Rosa Obradovic, Judge County Court Banja Luka, Report on key issues discussed at the round table that was held in Neum, on June 21-24, 2007, on the topic "Advantages and disadvantages of the executive procedures in comparison with the previous legislative solutions".



## Chapter 6: Croatia

### 6.1. Political context

#### *The European Commission progress reports*

In October 2001 the Stabilisation and Association Agreement (SAA) between Croatia and the EU was signed. This SAA entered into force in February 2005. Meanwhile, in June 2004 the European Council granted Croatia the status of candidate country to the European Union. In October 2005 Croatia started with the accession negotiations. In December 2009, based on the Commission's recommendation, a working group was set up to draft the Treaty of Accession with Croatia.

The accession negotiations are now (December 2010) entering their final phase. On most chapters the negotiations have been provisionally closed. One of the last chapters that remains to be closed is chapter 23, on judiciary and fundamental rights. The accession negotiations with Croatia on this chapter judiciary and fundamental rights were opened in June 2010. The opening EU Common Position, stated that the provisional closure of negotiations on this chapter could be envisaged once a number of closing benchmarks (CBMs) were met, covering the following four areas: (1) judiciary; (2) fight against corruption and organised crime; (3) fundamental rights and (4) ICTY co-operation. The European Commission has established an on-going monitoring of Croatia's progress in the area of judiciary and fundamental rights, including enforcement.

The progress reports of the European Commission give us a good overview of which shortcomings have been identified over the years in the area of judiciary, or more specific, enforcement.

In 2006 the European Commission was rather sceptical about the Croatian judicial system: "The judicial system has continued to suffer from slow and inefficient court proceedings, poor

case management and low administrative and professional capacity. These circumstances may discourage economic actors from taking cases to court and undermine an effective enforcement of creditor and property rights."<sup>1</sup> 2006 was the year that Croatia started with the implementation of the judicial reform strategy. "However, reform is at an early stage and the judicial system continues to suffer from severe shortcomings. Successful implementation of the reform strategy requires serious sustained efforts. More needs to be done to reduce the still significant case backlog, to reduce the length of court proceedings, improve case management, rationalize the court network, including the closure of courts, to ensure proper enforcement of judgements and to reform legal aid. To ensure impartiality the procedures for the appointment, training and disciplining of judicial officials need to improve. Croatia is still some way from enjoying an independent, impartial, transparent and efficient judicial system, the establishment of which will be an important indicator of Croatia's readiness for eventual membership and a prerequisite for the successful implementation of the acquis"<sup>2</sup>; concluded the European Commission.

The backlog in cases was considerable. End of June 2006 Croatia had 1.23 million pending cases, compared to 1.64 million cases in 2005. "In this context various short-term steps were taken such as continued redistribution of cases from over-burdened to less burdened courts, extra overtime for judges and the use of notaries for the execution of non-disputed decisions. However, the backlog remains significant. The impact of some of these measures has been mitigated by resistance from the parties to the cases. Also, the State continues to contribute to the backlog by continuing to engage in litigation where there is little chance of success.

Particular progress was made in reducing the backlog of enforcement cases, including through the use of notaries for the execution of non-disputed decisions. However, enforcement cases still make up around one quarter of all pending court cases and procedures for the enforcement of court decisions need to be further reformed. Execution and enforcement cases are the main problem in 93% of the courts. Croatia needs to consider taking the enforcement process out of the hands of the courts, for instance through the use of special enforcement officers vested with public powers. Courts and parts of the state administration themselves do not always respect or execute in a timely manner the decisions of higher courts. This practice is contributing to cases against Croatia before the ECtHR."<sup>3</sup>

1 Croatia 2006 Progress Report Commission Staff Working Report, European Commission, 8 November 2006, SEC(2006) 1385, hereafter 2006 Progress Report, page 22.

2 2006 Progress Report, page 8.

3 2006 Progress Report, page 50.



2007 Noted some progress in the implementation of the Judicial Reform Strategy and the reduction of the case backlog. However the European Commission considered the improvements insufficient. "Overall, judicial reform is moving forward but considerable efforts are needed to overcome the weaknesses in the judicial system."<sup>4</sup> "Legislative and organizational steps have been taken to improve the functioning of the judiciary. Further progress has been made in reducing the case backlog. However, these improvements are as yet insufficient. Limited progress has been made on improving the accountability, impartiality professionalism and competence of the judiciary. The case backlog remains large."<sup>5</sup>

The 2007 Progress Report was rather sceptical on the efficiency of the judiciary, but also about the role of the State in this: "In relation to the efficiency of the judiciary, serious efforts have been made to reduce the backlog of pending cases of which there are now around 1 million compared to 1.23 million last year. The biggest reductions were achieved in reducing the backlog of enforcement cases. The Supreme Court has taken the lead for monitoring the backlog in view of reducing the length of proceedings. The Supreme Court has continued to order the transfer of cases to less burdened courts (around 10,000 cases per year). Amendments to the Law on Courts from January 2007 allowing the temporary transfer of judges to overburdened courts are not yet implemented as they are subject to challenge at the Constitutional Court. The excessive length of proceedings remains a serious problem in Croatia, however. The backlog remains high and considerable efforts will be required especially taking into account the very high annual in-flow of cases. The ECtHR continues to issue judgements against Croatia for violations of the European Convention of Human Rights regarding the length of proceedings. The State continues to contribute to the backlog by engaging in litigation even when there is little chance of success. Parties continue to abuse procedural rules in order to delay a final decision and its enforcement. Little use is made of existing possibilities for judges to control the number of hearings and the length of the procedure and they often fail to sanction abuse by the parties and their lawyers. It is too early to assess the effect of the shift in jurisdiction from the Constitutional Court to second instance courts for individual complaints regarding the length of proceedings. There remains no effective remedy for the length of proceedings in administrative cases. Streamlining of the court document delivery system and tackling divergences in case law across the country is also required."<sup>6</sup>

It is clear that the slow and inefficient court proceedings also have their influence on the economic climate of Croatia: "Some progress was made in reducing the backlog of cases before Croatian courts. However, the backlog is still a large one and the judicial system has continued to suffer from slow and inefficient court proceedings, poor case management and low professional capacity. These circumstances may discourage economic actors from taking cases to court and undermine effective enforcement of creditor and property rights."<sup>7</sup>

One would expect progress, taking into consideration the ambitions of Croatia to become an EU member. Indeed 2008 showed some progress: "Overall, reforms in the judiciary continue but only at a relatively slow pace. Significant challenges remain. Currently, effective dispensation of justice for citizens is not always assured."<sup>8</sup> "The weaknesses of the judicial system may discourage economic actors from taking cases to court and undermine effective enforcement of creditor and property rights."<sup>9</sup> "Implementation of the judicial reform strategy has continued even if adequate monitoring of its measures has not been possible due to weak administrative capacity. A revised Action Plan addressing all major reform issues was adopted in June 2008. However, in certain areas it lacks measurable objectives that will allow effective monitoring of its implementation."<sup>10</sup>

Over 2008 the European Commission noted some progress in the area of judiciary, with a main role - also in enforcement - for the Supreme Court: "In relation to the efficiency of the judiciary, the Supreme Court continues to monitor closely the backlog and supports the transfer of non-disputed enforcement cases to public notaries as well as mainly civil cases to less burdened courts. Changes to the Misdemeanour Act entered into force in January 2008 aimed at relieving misdemeanour courts of minor cases by transferring work to administrative bodies. The backlog of pending cases before all courts has been reduced by around 7% to 937,000 cases. Efforts have been made to accelerate the solving of old cases and establish more reliable statistics on the backlog.

4 Croatia 2007 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2007-2008, European Commission, 6 November 2007, SEC(2007) 1431, hereafter 2007 progress Report, page 10.

5 2007 Progress Report, page 9.

6 2007 Progress Report, page 49.

7 2007 Progress Report, page 20-21.

8 Croatia 2008 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2008-2009, European Commission, 5 November 2008, SEC (2008) 2694, hereafter 2008 Progress Report, page 9.

9 2008 Progress Report, page 22.

10 2008 Progress Report, page 53.

However, statistical tools have principally been improved in relation only to municipal court cases. Previous reductions in the backlog have not been sustained and the number of old cases remains high. The roots of the backlog and lengthy proceedings have not been tackled adequately. The reform of civil procedure started in 2003 has not shown clear results. While further amendments to the civil procedure code were adopted in July, there has been no proper assessment of the previous measures' impact on case duration. Misdemeanour cases account for 37% of the backlog. More than half of these cases are dismissed because of the statute of limitation. Changes to the Misdemeanour Act extended the statute of limitation for misdemeanour cases from two to four years. While this will lead to the expiry of the statute of limitation in fewer cases, it could have a negative impact on the case backlog. The handling of administrative cases also continues to face particular challenges. The Administrative Court still needs to be made a court of full jurisdiction. One of the main problematic areas remains enforcement cases, out of which approximately 50% fail because of the lack of a proper notification system to the parties. Reform of the system of enforcement of court decisions has begun. However, this continues to constitute a major obstacle to the efficient functioning of the courts."<sup>11</sup>

Also in 2009 the implementation of the judicial reform strategy continued. A large volume of new legislation was adopted: new law on misdemeanors, new civil procedure code, and an amended law on courts. The new Law and implementing regulations on legal aid entered into force in February 2009. The number of municipal courts was formally reduced from 108 to 67.

The European Commission seemed content with the developments. Although the remarks remained rather critical: "Further improvements in the accountability, independence, professionalism and competence of the judiciary are also required. The potential for undue political influence over the judiciary remains. The independence of the judiciary needs to be increased, and the role of the executive and parliament in issues such as judicial appointments reviewed. [...] Overall, reforms in the judiciary continue but the impact of various newly introduced measures remains to be tested in practice. Significant challenges remain, particularly as regards judicial independence and the lack of transparent selection procedures for judges and prosecutors and as regards judicial efficiency, not least the length of proceedings and enforcement of decisions."<sup>12</sup>

2009 The case backlog further decreased. "Progress has been made in relation to the efficiency of the judiciary. The backlog of cases was further reduced by 8.4% to 887,000 in December 2008. Good progress was made on reducing the number of old civil and criminal cases by 31% and 52% to 102,430 and 4,408 respectively. In addition, the new Law on Misdemeanors, the new Civil Procedure Code, and the amended Law on Courts seem to have contributed to reducing the inflow of new cases into courts. Thanks also to the use of accelerated procedures the number of pending misdemeanour cases was reduced by about

one third. However the overall backlog as well as the number of unresolved cases older than 3 years remains high. Without more far-reaching reform, continued reduction of the backlog may not be sustainable, especially if judges have focused on 'easier' cases to meet output targets. Moreover, problems with the enforcement of court rulings constitute a major obstacle to the efficiency of the judicial system. The number of enforcement cases in the backlog remains high. Reform of the enforcement procedure remains long overdue, although a strategic study on enforcement was adopted in July 2009 which foresees the introduction of a new system of enforcement officers. There is still no unified statistical system of case management in the judiciary."<sup>13</sup> "The weaknesses of the judicial system continue to undermine effective enforcement of creditor and property rights. Land registration has improved, but remains incomplete in parts of the country. Investors still suffer from lengthy procedures to register a property. Overall, improvements to the judicial system have been made, but major inefficiencies in the judiciary remain."<sup>14</sup>

Good progress was reported over 2010. A new action plan for the implementation of the Judicial Reform Strategy and a large volume of new legislation was adopted. The MoJ underwent a major reorganisation with the aim of improving efficiency. "Overall, the reform of the judiciary has continued, but significant challenges remain, in particular application of objective and transparent criteria for the appointment of judges and prosecutors, reduction of the case backlog, the excessive length of proceedings and enforcement of court decisions."<sup>15</sup>

11 2008 Progress Report, page 52.

12 Croatia 2009 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2009-2010, European Commission, 14 October 2009, SEC (2009) 1333, hereafter 2009 Progress Report, page 9-10.

13 2009 Progress Report, page 52.

14 2009 Progress Report, page 23.

15 Croatia 2010 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2010-2011, European Commission, 9 November 2010, SEC (2010) 1326, hereafter 2010 Progress Report, page 9.

The European Commission in relation to the business environment noticed: "Further progress was made in speeding up court procedures. However, the length of proceedings before the courts remains generally excessive and problems persist with enforcement of court decisions. The weaknesses of the judicial system continue to undermine effective enforcement of creditor and property rights. Land registration has improved, but remains incomplete in parts of the country. Investors still suffer from lengthy procedures to register property. Corruption is being tackled more vigorously but still affects the business environment. Overall, the judicial system has been improved although the enforcement of property rights is still weak. The business environment is also affected negatively by other remaining inefficiencies."<sup>16</sup>

There was a certain degree of positivism regarding the efficiency of the judiciary and the case backlog: "Progress has been made in relation to the efficiency of the judiciary. The backlog of cases was further reduced by 10% (796,000 in December 2009 compared to 887,000 in 2008). Good progress was made in reducing the number of cases older than 3 years. Old civil cases were reduced by 17% to 84,251 and old criminal cases by 16% to 3,667. In general, courts have increased their productivity. However, the backlog of cases has been reduced unevenly among the various courts. Some courts continue to suffer from disproportionately large numbers of old civil cases, for example the municipal courts in Zagreb, Split and Zadar. Certain categories of cases also remain problematic. The number of enforcement cases has been increasing and constitute 40% of all civil cases. Problems with the enforcement of court rulings continue to hamper the efficient working of the judicial system. The Law on Private Bailiffs and the amendments to the Law on Enforcement remain to be adopted. The economic crisis has triggered many bankruptcy proceedings (increased by 22%) which have overburdened the commercial courts. The handling of administrative cases continues to be slow, to lack transparency and is not in line with European standards. The backlog of cases has remained constant for the last two years (36,460 in 2009 compared to 36,802 in 2008) and the average duration of cases is longer than 3 years."<sup>17</sup>

From December 2009 until December 2010 the case backlog was further reduced from 795,722 to 785,561 cases (- 1.3%).

### **Government Strategy**

A first attempt to outline a government strategy to deal with the huge number of backlogs in enforcement cases was done through the 2005 'Action Plan to reduce the number of unresolved enforcement cases'. An analysis of the situation shows first of all an increasingly growing number of unresolved enforcement cases in Croatia's courts in the period 1998 – 2004. Then the Action Plan unfolds a number of measures aiming to address the problem. The measures consist of amendments to several laws and regulations, a training plan for judges and court officers dealing with enforcement cases, and a plan to attract more staff and to introduce overtime work. It must be said that the 2005 Action Plan did not bring the desired results. The BERP team is of the opinion that - as a fundamental discussion on the current Croatian enforcement system did not take place then - the proposed measures are all short-term measures which only address the symptoms and not the disease itself.

At a higher level, the Croatian Parliament adopted the 'Strategy of the Reform of the Judicial System and its Action Plan' in January 2006. The Strategy and the Action Plan were prepared by the Government in September 2005. The Strategy explicitly identifies ensuring a proper and full enforcement of court decisions as one of the priorities. In the identified priority areas for actions, specific measures needed implementation at the short-term, mid-term and long-term. It was agreed from the beginning that the Action Plan should be a "living document" and that from time to time there would be a need to have it revised.

Regarding enforcement this Strategy did not propose a fundamental reform of the enforcement system. The Enforcement Code needed amendments in order to reduce the backlog and the workload of the courts: "The judicial system is expensive, so it must be used rationally. For this reason, the courts should only hear the cases, which, due to the relevance of the right to be protected, may not be solved in any other place. Namely, regardless of their type, judicial proceedings are by their nature slow. There are opposing interests of the parties and mutually conflicting arguments, it is necessary to establish and assess all the facts and evidence presented, and this necessarily takes time. So, for the courts to be able to proceed more quickly in these proceedings, they must be relieved of cases, which by their nature do not belong to the category of "genuine court cases". So, under this part of the strategy it will be necessary to make relevant assessments

<sup>16</sup> 2010 Progress Report, page 22-23.

<sup>17</sup> 2010 Progress Report, page 48.

and decide of which (additional) cases the courts should be relieved, and transfer the jurisdiction over these cases to other institutions. Namely, probate proceedings have been transferred to notaries public, some parts of enforcement proceedings are also being transferred to notaries public, under the amendments to the Enforcement Act, so in this context it should be considered which other proceedings should also be excluded from the court jurisdiction, and within what time limits.

[...] During the adoption of the Notary Public Service Act, special account was taken of the contribution of the notaries public to the relieving of courts of certain procedures. Accordingly, one of the important innovations was the provision according to which a notary public's official act is an enforcement title if it determines a certain obligation in relation to which parties may settle even if it contains a statement of the person under obligation so that forceful execution may be directly carried out on the basis of it. The private document of the same content on which the notary public has certified the signature of the person under obligation has the same effect."<sup>18</sup>

In March 2008 the Croatian Ministry of Justice prepared a revised 'Action Plan of the Judicial Reform Strategy' (2008 revision). According to the 2008 Action Plan impressive results in reducing backlogs in enforcement cases were achieved.

As the Action Plan itself concluded additional measures needed to be undertaken. A working group was established to elaborate further proposals. Also the Croatian Supreme Court started the monitoring of civil and enforcement cases in which the Croatian State is the party being sued in civil cases or is the debtor in enforcement cases. Also amicable resolution of such cases was further stimulated.

Croatia became open for a more fundamental discussion on a possible system reform.

In June 2009 the Working Group issued a report "Strategic Study for More Efficient Execution and Introducing Public Bailiffs in Execution Proceedings" proposing the introduction of a system of private enforcement agents.

In January 2010 the Croatian Government published a report for adoption and implementation of the *acquis communautaire*. The report made clear the vision of the Croatian Government: "With the aim of reforming the system of execution and thus reducing the backlog of execution cases, the drawing up of a Draft Proposal of the Execution Act and a Draft Proposal of the Public Bailiffs Act is planned for 2010. The Strategic Study for More Efficient Execution and Introducing Public Bailiffs in Execution Proceedings identifies the main goal of the strategy and the special objectives which are the guidelines for drawing up the Draft Proposal of the Execution Act and the Draft Proposal of the Public Bailiffs Act. Implementing regulations (Ordinances) will also be drawn up based on the provisions of the Execution Act and the Public Bailiffs Act."<sup>19</sup>

Croatia has chosen a two-track system, introducing the private (or as they are called in Croatia) public enforcement agent. This public enforcement agent operates in an enforcement system in which also the court enforcement agent is still active. A Public Enforcement Agents Act<sup>20</sup> and a new Enforcement Act<sup>21</sup> have just recently been adopted.

## 6.2. Legislation and organization of the enforcement process

### 6.2.1. Legislation

In the previous paragraph (6.1.) we already indicated that a Public Enforcement Agents Act (CPEAA) and a new Enforcement Act (CEA) have just recently been adopted. The number of amendments of the previous Enforcement Act (COEA)<sup>22</sup> reflected the need for a good legislation in this field. On the one hand as a reflection of the economic and social circumstances, however, on the other hand also as a reflection of the attempts of the Croatian government to change the lack of financial discipline and to change the behavior of the parties and other participants to the proceedings. In addition, the following legislation is

<sup>18</sup> Strategy for the reform of the Judicial System, January 2006, page 21 and 69.

<sup>19</sup> Program of the Government of the Republic of Croatia for assumption and implementation of the *acquis communautaire*, Zagreb, January 2010, page 2.

<sup>20</sup> Adopted on 23 November 2010.

<sup>21</sup> Official Gazette 139/10; 23 November 2010.

<sup>22</sup> Enforcement Act (Narodne Novine No. 57/96, into force 11 August 1996; OG 29/99 of 26 March 1999, OG 173/03 of 31 October 2003, OG 151/04 of 29 October 2004, OG 88/05 of 20 July 2005 and OG 67/08 of 9 June 2008); hereafter: COEA.

most relevant: Law on Public Notaries,<sup>23</sup> Civil Procedure Code,<sup>24</sup> Arbitration Law,<sup>25</sup> Law on Contracts and Torts<sup>26</sup> and the Bankruptcy Code.<sup>27</sup>

At first sight the CEA seems complicated: a number of provisions from the “old” Enforcement Act are still applicable. A number of provisions of the new laws only come into force on 1 January 2011 or 1 January 2012 (the date the public enforcement agents will start to work). To make it even more complicated, in the new CEA also provisions are adopted that will come into force on the date of admission of Croatia to the full membership of the European Union.<sup>28</sup>

To summarize:

- CEA: this law has become effective, with the exception of a number of provisions that will become effective on 1 January 2011 or 1 January 2012 or on the date of admission of Croatia to the full membership of the European Union;
- COEA: this law has ceased to be valid with the exception of a number of provisions that cease to be effective on 31 December 2010 or 31 December 2011.

In this publication we make a difference between:

- the present situation, meaning the legislation in force as per 1 January 2011, regulated by the CEA2011;
- the future situation, meaning the legislation in force as per 1 January 2012, regulated by the CEA; and
- the past situation, meaning the legislation in force until 1 January 2011, regulated by the COEA.

It will be a challenge for the mathematicians amongst the lawyers to figure out which provision is applicable in which situation. Unfortunately the new CEA does not have a transition table and this might cause unclearness.

To give some examples:

Based on article 340 CEA, as of 1 January 2011 the following articles come into force:

- article 124 CEA Attachment upon Debtor's Consent
- article 125 CEA Attachment of Accounts under Debenture Bond
- article 126 CEA Attachment of Accounts under Blank Debenture Bond

From the CEA one would expect that in that case articles 124, 125 and 126 from the COEA would be replaced. However under COEA these provisions refer to completely different issues:

- article 124 COEA Vacation by other persons
- article 125 COEA Applying the provisions of this title in areas where there are no land registers
- article 126 COEA Territorial jurisdiction if the location of the chattels is known

So obviously these articles should not be replaced by the new articles 124, 125 and 126, the more so as article 339 CEA states that these articles cease to be valid on 31 December 2011.

The question is which provisions are deleted from COEA?

Going through the law and comparing the titles of the various articles it seems that:

- article 124 CEA Attachment upon Debtor's Consent corresponds with article 178 COEA
- article 125 CEA Attachment of Accounts under Debenture Bond corresponds with article 183 COEA
- article 126 CEA Attachment of Accounts under Blank Debenture Bond corresponds with article 183A COEA

Based on article 339 CEA these articles 178, 183 and 183A COEA will cease to be effective on 31 December 2010. However the provision of article 339 CEA does not state that these provisions will be replaced by articles 124, 125 and 126 COE. Consequently from January 1, 2011 the CEA will have two articles 124, two articles 125 and two articles 126.

<sup>23</sup> OG 78/93 of 25 August 1993, amended afterwards.

<sup>24</sup> OG 53/91 of 8 October 1991; amended afterwards.

<sup>25</sup> OG 88/01.

<sup>26</sup> OG 35/2005 of 17 March 2005.

<sup>27</sup> OG 44/96 of 5 June 1996; amended afterwards.

<sup>28</sup> Artt. 339 and 340 CEA.

This is just an example of the difficult reading and interpretation of the various laws.

Another example can be found in article 197 CEA:

- based on article 339 CEA this provision is no longer effective as this provision is not stated as an exception in article 339 CEA;
- Consequently this provision has been in force from the moment the CEA became effective;
- However article 340 CEA states that from article 197 CEA paragraphs 1, 2, 4, 5, 6, 7 and 8 become effective on January 1, 2012;
- Conclusion: only article 197 par 3 is applicable at this moment.

So careful reading of the various provisions in the various laws is absolutely necessary.

### 6.2.2. The role of the notary public

Under article 2 CEA the enforcement authorities are defined: the public enforcement agent, the notary public and the court. Although article 2 CEA only becomes effective as of 1 January 2012, also under the present circumstances the role of the notary in the Croatian enforcement process is substantial.

#### *The role of the notary public until 1 January 2012*

The role of the notaries in enforcement, until 1 January 2012, is mainly regulated in the COEA and the Civil Procedure Code.

According to article 54 Law on Public Notaries<sup>29</sup> any public notary act can be considered an enforceable document providing the act contains an enforceability clause. This means that parties who conclude their legal transaction in the form of a notarial act, obtain an enforceable title, without previous civil procedure, providing the act has such an enforceability clause.

Article 252A CEA2011 enables notaries to decide on a motion for execution on the basis of a trustworthy document. The creditor can submit a motion for execution on the basis of a trustworthy document to the notary public of his choice and seek that he passes a writ of execution. In case such a motion for execution on the basis of a trustworthy document is filed to the court instead of to the notary public, the court shall dismiss such motion.<sup>30</sup> Trustworthy documents are defined as invoices, bills of exchange and cheques with the protest clause and return invoices whenever that is required to establish a claim, official documents, excerpts from business books, legalized private documents and documents regarded as official documents under special regulations.<sup>31</sup>

It is not necessary that the creditor states in the motion for execution the means and the object of execution. The creditor can either mention the objects of execution, or propose that execution for the collection of a certain claim is ordered generally.<sup>32</sup> In case the notary public assesses that the motion for execution is permitted and founded, he passes the writ of execution on the basis of a trustworthy document and serves it on the parties. In case the notary public assesses that the motion for execution is not permitted, incorrect or unfounded, he forwards the case to the competent court to pass a decision. In that case the court might order execution on the basis of a trustworthy document if it assesses that the motion for execution is permitted, in order and founded.<sup>33</sup>

An objection may be lodged by the debtor to the notary public. In case of an untimely or unpermitted objection the notary public forwards the file for the passing of a decision on the objection to the competent court. In that case the court passes the ruling on dismissal of such objection. In case of a timely and permitted objection the notary public forwards the file to the competent court to carry out the procedure upon the objection and to pass a decision.<sup>34</sup>

In case the notary public does not receive an objection within eight days from the expiry of the time limit for lodging an objection, the notary public shall, at the execution creditor's request, affix the certificate of legal

<sup>29</sup> Hereafter called CLPN (Croatia Law on Public Notaries).

<sup>30</sup> Art. 252B CEA2011.

<sup>31</sup> Art. 28 CEA2011.

<sup>32</sup> Art. 252C CEA2011.

<sup>33</sup> Art. 252D CEA2011.

<sup>34</sup> Art. 252E CEA2011.



effectiveness and enforceability on the writ of execution passed by him. The notary public hands over the writ of execution with the certificate of legal effectiveness and enforceability to the execution debtor.<sup>35</sup> An objection may also be filed by the debtor before the court within eight days from receiving notification of the commencement of execution implementation. If the court determines that the objection has been lodged within due time, it shall act in accordance with the provisions of objection against a writ of execution based on a trustworthy document. In case no objection is filed, or not within due time, the court rejects the complaint and dismisses the objection.<sup>36</sup> In general the municipality court on whose territory the seat of the notary public to whom the motion for execution on the basis of a trustworthy document has been submitted, or who has issued a writ of execution on the basis of such document, is located, has jurisdiction.<sup>37</sup>

Based on the writ of execution the creditor has the choice to either directly deliver the decision (without interference of the court or notary public), the so-called out-of-court enforcement, or to forward the decision to the court for enforcement.

With the legally effective and enforceable writ of execution, the creditor can directly ask the bank that keeps the main account of a debtor who is a legal person or the account of a debtor who is a natural person, to pay from the account the amount necessary to settle his claim, for the realisation of which the execution was ordered. Also in case of execution against the debtor's permanent monetary income the creditor can directly ask the employer or other payer of the permanent monetary income to pay to him the amount necessary to settle his claim. During the, so-called, out-of-court execution, the debtor may lodge to the competent court an appeal against the writ of execution after the expiry of the time limit for objection.<sup>38</sup> In case of enforcement against another object the execution creditor can ask the court with jurisdiction to implement execution on this other object.<sup>39</sup>

The remuneration and recovery of expenses paid to a notary public by the creditor are part of the execution costs. The notary public informs the creditor on those expenses.<sup>40</sup>

Another task of the notary public regards the security or fiduciary transfer of ownership.<sup>41</sup> The CEA2011 enables the security creditor to ask the security debtor through a notary public, after the secured claim matures, to inform him, within thirty days, through this notary public, if he requires that the transferred object of security be liquidated through the notary public. In that case the security debtor is obliged to determine, in the notification, a minimum sales price at which the object of security may be sold, to appoint the notary public who shall conduct the sale and to attach his statement of willingness to conduct the sale and to first settle the security creditor's claim with interest and expenses and the sales tax from the proceeds acquired by the sale. Within 15 days after receipt of the statement the security creditor authorizes the notary public to sell the object of security under the conditions provided for in the security debtor's notification. In case the security debtor fails to act or the notary public fails to sell the object of security within three months, the security creditor is considered to become the rightful owner of the object, i.e. the holder of the rights, transferred to him as security – for the price corresponding to the amount of the secured claim with interest, expenses and taxes. These provisions not only relate to movables, but also to immovables. In case the security creditor becomes the rightful owner of a real estate he is authorised to seek the deletion of mortgage on such real estate on the basis of the notary public's certificate that he has become the rightful owner of the real estate.

Finally the CEA2011 has several provisions in which the notary public has a function in the enforcement process as a witness (see e.g. article 43 CEA2011: "Two adult witnesses or a notary public have to be present at enforcement actions in the execution debtor's residence when the execution debtor, his legal representative, proxy or an adult member of his household are not present."); to serve documents and to carry out the public sale (see e.g. article 92 CEA2011 on immovables: "Hearings for the sale of real estate are held before a single judge, but the court may entrust the holding of the hearing to a notary public in the conclusion on sale." And article 141 CEA2011 on movables: "The public auction is led by the execution administrator. In a conclusion, the court may entrust the conducting of the auction to a notary public.")

35 Art. 252F CEA2011.

36 Art. 252I CEA2011.

37 Art. 252J CEA2011.

38 Art. 252G CEA2011.

39 Art. 252H CEA2011.

40 Art. 252L CEA2011.

41 Art. 277 CEA2011.



### ***The role of the notary public after 1 January 2012***

Under the CEA the notary public forms, together with the public enforcement agent and the court, the Enforcement authority.<sup>42</sup> The enforcement procedure is carried out and decisions are brought by a public enforcement agent or notary public. Only in exceptional cases the enforcement shall be ordered and carried out by the court.

If it regards a security procedure, such a procedure can only be carried out and decisions can only be rendered by the court or notary public. The public enforcement agent does not have a function in such a procedure.<sup>43</sup>

Service of documents is carried out either by the public enforcement agent, or the notary public. The notary public has the possibility to delegate this power to his deputy or to a notary public clerk.<sup>44</sup>

As is the case before 1 January 2012 also under the provisions of the CEA the enforcement creditor may file the motion for enforcement on the basis of an authentic document to the notary public and request the notary public to render the enforcement decision on the basis of such document. The procedure upon the motion is familiar with the procedure under CEA2011.<sup>45</sup> Service of the enforcement decision is done by the notary public. Upon two unsuccessful deliveries of the enforcement decision on the basis of an authentic document the notary public shall post the decision on the bulletin board in the waiting room of the notary public's premises, and not in the court. The delivery is deemed completed after the expiration of the eighth day from the date of posting of the decision on the bulletin board.<sup>46</sup>

The enforcement debtor may file an appeal against the enforcement decision within eight days, and in the case of disputes involving bills of exchange and checks, within three days. The appeal is filed to the notary public who has rendered the enforcement decision on the basis of an authentic document. The appeal should include a statement of reasons. The appeal stays the carrying out of enforcement.

In case of an untimely or impermissible appeal against the enforcement decision the notary public, for the purpose of rendering of decision on the appeal, forwards the file to the court of jurisdiction, which court shall render a decision on dismissal of such appeal. In case of a timely and permissible appeal the notary public forwards the file to the court of jurisdiction to carry out the procedure upon appeal. If the appeal does not include the statement of reasons, and, especially, if it is unclear from such appeal, which part of the enforcement decision is contested, the court issues a conclusion instructing the debtor to supplement such appeal within eight days. If the debtor fails to proceed within the specified time limit or in accordance with the instruction provided, the court dismisses such appeal.

The decisions rendered by the court is also delivered to the notary public issuing the enforcement decision. If the enforcement decision becomes partially legally effective, the court shall forward a copy of the file and original copy of the enforcement decision, together with the conclusion of the court on the uncontested part of the enforcement decision to the notary public.<sup>47</sup>

In case only the enforcement decision is contested this can be done for the following reasons:

- Substantial violation of the enforcement procedure;
- Misapplication of substantive law;
- Contesting of legitimacy of enforcement.<sup>48</sup>

The court procedure depends on the contest: in case the enforcement decision is contested in its entirety, or only in the part instructing the enforcement debtor to settle the claim, the court invalidates the enforcement decision in the part ordering enforcement, revokes the actions carried out, and continues the procedure as further to the appeal against the payment order. If the enforcement decision is contested only in the part ordering enforcement, the subsequent procedure shall be continued as further to the appeal against the writ of execution.<sup>49</sup>

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<sup>42</sup> Art. 2 under 8 CEA.

<sup>43</sup> Art. 9 CEA.

<sup>44</sup> Art. 13 CEA.

<sup>45</sup> Artt. 57 and 58 CEA.

<sup>46</sup> Art. 59 CEA.

<sup>47</sup> Artt. 60 and 61 CEA.

<sup>48</sup> Art. 49 CEA.

<sup>49</sup> Art. 63 CEA.

After expiration of the time limit for filing an appeal, the notary public shall, at the enforcement creditor's request, affix the certificate of legal effectiveness and enforceability to the official copy of the enforcement decision rendered by him. These provisions are similar to the provisions before 1 January 2012.

The notary public has a right to remuneration and recovery of expenses for carrying out work in enforcement proceedings pursuant to The Tariff on Remuneration and Recovery of Notaries Public's Expenses in Enforcement Procedures. This Tariff still needs to be adopted by the Minister, while writing this publication. The remuneration and recovery of expenses are considered part of the enforcement costs.<sup>50</sup>

### 6.2.3. The role of the public enforcement agent in enforcement

#### *Motion for carrying out enforcement*

A motion for carrying out enforcement on the basis of the enforcement title can be made to the public enforcement agent having jurisdiction.<sup>51</sup>

If the public enforcement agent assesses that the motion is allowed and founded, he issues a writ of execution, and delivers such writ to the parties. Otherwise he forwards the case not later than eight days from the date of receipt of the motion to the court of jurisdiction to render a decision. The court renders a decision within thirty days from the date of receipt of the file. In case the court determines that the motion is allowed and founded, the court issues a conclusion ordering the public enforcement agent to issue a writ of execution. If the court determines that the motion is not allowed or founded, the court renders a decision dismissing and rejecting, respectively, such motion. If the motion for carrying out enforcement fails to include the necessary data, the public enforcement agent takes no further action.<sup>52</sup>

#### *Writ of execution*

The public enforcement agent decides in the writ of execution that the enforcement for the purpose of settling the enforcement creditor's claim is carried out by more means and on multiple objects of enforcement necessary in order to settle the enforcement creditor's claim in whole. The enforcement is carried out in such a way that the public enforcement agent delivers the writ of execution to persons and authorities carrying out or participating in the carrying out of enforcement. For the purpose of settling the same claim, upon motion of the enforcement debtor or ex officio, the public enforcement agent may issue a new writ of execution and resume the enforcement on the basis of such new writ by means and on objects of enforcement not specified in the previous writ of execution.

By way of derogation upon motion of the enforcement creditor or ex officio, the public enforcement agent may order through a writ of execution that the enforcement is carried out on the enforcement debtor's property that may be subject to enforcement, without stating the means and objects of enforcement.

After issuing the writ of execution but prior to issuing the conclusion on carrying out enforcement, the public enforcement agent may invite the debtor to discuss the method of fulfilling the obligation.<sup>53</sup>

#### *Appeal*

The debtor may file an appeal against the writ of execution for the following reasons:

- Substantial violation of the enforcement procedure;
- Misapplication of substantive law;
- Contesting of the existence or fulfillment of the creditor's claim on the basis of any fact occurred at the time when the debtor could no longer voice such fact in the procedure in which the decision was rendered, or after the conclusion of a court or administrative settlement, or drawing up, confirmation or certification of the notarial document; and
- Contesting of legitimacy of enforcement.

<sup>50</sup> Art. 65 CEA.

<sup>51</sup> Art. 45 CEA.

<sup>52</sup> Art. 46 CEA.

<sup>53</sup> Art. 47 CEA.

The creditor may contest the enforcement decision in an appeal if such enforcement decision has exceeded his request, and on account of the decision on the costs of the procedure.<sup>54</sup>

#### *Appeal after Expiration of Time Limit*

The debtor may file an appeal against the writ of execution for the following reasons:

- Contest of the existence or fulfillment of the creditor's claim on the basis of any fact occurred at the time when the debtor could no longer voice such fact in the procedure in which the decision was rendered, or after the conclusion of a court or administrative settlement, or drawing up, confirmation or certification of the notarial document; and
- Contesting of legitimacy of enforcement,

even after such writ becomes legally effective, if the debtor could not have already voiced such reason for justified reasons within the time limit for an appeal against such writ. Such an appeal may be filed until the conclusion of the enforcement procedure.<sup>55</sup>

Depending on the reason for appeal, the appeal is forwarded to the creditor to respond. The public enforcement agent shall, without delay, forward a copy of the file to the court of jurisdiction, and notifies the parties that the procedure further to such appeal is continued before such court. The court "may, exceptionally and as appropriate," hear the parties and other participants, and perform other investigations or render a decision without holding a hearing.<sup>56</sup>

Any party or participant may also file a pleading requesting the court to remedy any irregularity made by the public enforcement agent when carrying out enforcement. The court may issue a conclusion revoking any irregular action made by the public enforcement agent. The court renders a decision on the request seeking that the irregularities in the carrying out of enforcement be remedied within three working days from the date of receipt of any such pleading. The pleading does not stay the carrying out of enforcement.<sup>57</sup>

### **6.2.4. The enforcement process**

#### *Introduction*

In this paragraph we will pay attention to the developments in the Croatian enforcement process. As we already indicated in paragraph 6.2.1. for this we need to take into consideration:

- the present situation, meaning the legislation in force as per 1 January 2011 (and ceasing to be effective as from 31 December 2011) regulated by the CEA2011;
- the future situation, meaning the legislation in force as per 1 January 2012, regulated by the CEA and
- the past situation, meaning the legislation in force until 1 January 2011, regulated by the COEA.

The CEA2011 uses the term court administrator to define the court clerk who actually carries out the enforcement. We will use the term court enforcement officer (as it is also used in the CEA).

As a starting point in this paragraph we used the legislation that is in force at this moment, the CEA2011. We compare these provisions with the future legislation, the CEA. Any changes are mentioned. In case the provisions are similar we note this in the footnotes with a reference to the respective provisions. One remark has to be made: under the CEA2011 the court is the competent body; under the CEA the enforcement authority might be the court, the public enforcement agent and/or the notary public. As such, unless otherwise stated, we have not remarked this as a change every time.

#### *The role of the Croatian Chamber of the Economy*

The Croatian Chamber of the Economy keeps the register of real estate and chattels sold in the execution procedure. The register is maintained on all real estate sold in the execution procedure, and on chattels if

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<sup>54</sup> Art. 49 CEA.

<sup>55</sup> Art. 50 CEA.

<sup>56</sup> Art. 52 CEA.

<sup>57</sup> Art. 56 CEA.

their appraised value exceeds HRK 50,000.00. The register is public. Data entered in the register are made available on the internet. The court conducting the execution procedure is obliged to deliver the data to the Croatian Chamber of the Economy. If the sale is performed through a certified commission agent, the certified commission agent is obliged to deliver the data on the decision on execution against the chattels, the parties, the subsequently appraised value of the chattels, the conditions of sale, the time of the auction and the way in which the chattels may be examined to the Croatian Chamber of the Economy without any delay.<sup>58</sup>

### ***Enforceable documents***

Enforceable documents are:<sup>59</sup>

- an enforceable court decision (judgments, rulings, payment orders and other decisions rendered in court and arbitration procedures);
- an enforceable judicial settlement in court;
- an enforceable arbitration award;
- an enforceable decision rendered in the administrative procedure and an enforceable settlement reached in the administrative procedure if they are related to the satisfaction of a monetary obligation, unless provided otherwise by law;
- an enforceable notarial decision and an enforceable notarial deed;
- a settlement reached in procedures before courts of honour with various chambers in the Republic of Croatia;
- a foreign judgment provided it is recognized by law or international treaty;<sup>60</sup>
- Trustworthy documents: invoices, bills of exchange and cheques with the protest clause and return invoices whenever that is required to establish a claim, official documents, excerpts from business books, legalized private documents and documents regarded as official documents under special regulations, calculation of interest;<sup>61</sup>
- any other deed regulated as an enforcement title document by law.

*Under the CEA some changes are made in the list of enforceable titles:*

*Foreign judgments: this description is now broader: "The enforcement based on a decision of a foreign court and foreign arbitration award may only be ordered if such decision satisfies the prerequisites for recognition of a foreign court decision, or foreign arbitration award, or foreign notarial decision, or document, or when required by an international treaty or Act."<sup>62</sup>*

An enforceable document is a decision instructing the fulfilment of a claim on payment or performance. It has to specify the term for voluntary fulfilment. In case the decision does not specify a term for voluntary fulfilment, the term is set by the court in the decision on execution.<sup>63</sup>

Under the CEA it is the enforcement authority whom is given to power to set the term for voluntary fulfillment.<sup>64</sup>

A court decision instructing the fulfilment of a claim on payment or performance or a claim on sufferance or non-performance (failure to act) is enforceable if it has become legally effective and if the term for voluntary fulfilment has expired. The term for voluntary fulfilment runs from the date of delivery of the decision to the execution debtor, unless provided otherwise by law.<sup>65</sup> A first-instance court decision instructing a natural person not performing a registered activity to settle a claim whose principal does not exceed HRK 1,000, or a legal person to settle a claim whose principal does not exceed HRK 5,000, becomes enforceable within eight days from the date of delivery to the person ordered to execute payment. An appeal against such decisions does not postpone execution.<sup>66</sup>

<sup>58</sup> Artt. 146A and 146B CEA2011; similar artt. 212-213 CEA.

<sup>59</sup> Artt. 21 and 22 CEA2011.

<sup>60</sup> Art. 17 CEA2011.

<sup>61</sup> Art. 28 CEA2011; similar: art. 27 CEA.

<sup>62</sup> Art. 20 CEA.

<sup>63</sup> Art. 26 CEA2011.

<sup>64</sup> Art. 25 CEA.

<sup>65</sup> Art. 23 CEA2011.

<sup>66</sup> Art. 23A CEA2011.

Under the CEA provisions are similar. The provisions on a court decision apply accordingly to the enforceability of the public enforcement agent's and notarial decisions.

Court or administrative settlements are enforceable if the claim which has to be fulfilled has become mature. The maturity of a claim is demonstrated by the minutes on settlement or by an official document or by a legalised document.<sup>67</sup>

### ***Initiation of enforcement procedure***

The execution or security procedure is initiated through a motion filed by the execution creditor or security creditor.<sup>68</sup>

If the motion for execution is submitted to a court that did not decide on the claim in the first instance, it is necessary to enclose the enforcement title document to the motion, either the original or a legalised transcript, which has to contain the certificate of enforceability. This certificate is issued by the court or the body that decided on the claim in the first instance (unless this body is an arbitration court: they normally do not issue certificates of enforceability of their decisions: the court conducting the execution procedure shall review whether the arbitration award is enforceable or not). Notaries public issue certificates of enforceability of their documents by themselves.<sup>69</sup>

Some changes in the CEA. The public enforcement agents also issue certificates of enforceability of their decisions by themselves. Also arbitration courts and courts of honor of chambers in Croatia now issue certificates of enforceability of their awards. With respect to the legal remedy available to the debtor, the court conducting the enforcement procedure reviews whether the arbitration award and the award of the court honor of the Chamber of the Republic of Croatia, respectively, is enforceable or not, and decides, dependent on the outcome of such review, on the legal remedy by itself.<sup>70</sup>

The motion for enforcement is no longer addressed to the court, but to the public enforcement agent of the notary public.<sup>71</sup>

The motion for execution includes a request for execution specifying the enforcement or trustworthy document serving as basis for demanding execution, the execution creditor and the execution debtor, the claim whose fulfilment is demanded, and the means by which execution is to be enforced and, if necessary, the object with respect to which it is to be enforced. The motion also has to include other prescribed data required to enforce execution.<sup>72</sup> Throughout the procedure, the execution creditor may withdraw a motion for execution either fully or partially, without any approval being required from the execution debtor.<sup>73</sup>

Execution is enforced on business days, during daytime. The court may order execution to be enforced on a non-business day or during the night if there is a well-founded reason for doing that.<sup>74</sup>

The provisions in the CEA are similar. The consent of the court to carry out enforcement in the enforcement debtor's home on non-working days and during nighttime hours is given by the court in the form of a conclusion.<sup>75</sup>

### ***Decision on execution***

The decision on execution specifies the execution or trustworthy document based on which execution is ordered, the execution creditor and the execution debtor, the claim, the means and object of execution, the instructions about the legal remedy and any other data necessary to enforce execution. E.g.:

- If an obligation of the execution debtor established in the enforceable document is conditioned upon prior or simultaneous fulfilment of an obligation by the execution creditor or upon the occurrence of a condition, the court orders execution upon the motion of the execution creditor if he states that he has

67 Art. 24 CEA2011; similar art. 23 CEA.

68 Art. 3 CEA2011.

69 Art. 33 CEA2011.

70 Art. 32 CEA.

71 Art. 33 CEA.

72 Art. 35 CEA2011.

73 Art. 36 CEA2011.

74 Art. 42 CEA2011.

75 Art. 4 CEA.

fulfilled his obligation.<sup>76</sup>

- If the execution debtor has the right to choose between several objects of his obligation based on an enforceable document and fails to make the choice within the term for voluntary fulfilment, and does not fulfil his obligation, the execution creditor determines the object that is to be used to fulfil the obligation in the motion for execution.<sup>77</sup>

Only a ruling either fully or partially dismissing or rejecting a motion for execution has to include an opinion (explanation).

Enforcement is carried out only within the limitations imposed in the decision on execution.<sup>78</sup> The court orders execution or security with the means and on the objects that are stated in the motion for execution or the motion for security. In case a number of means or objects of execution or security are proposed, the court (upon motion of the debtor) limits the execution or security only to some means or objects, that are sufficient to collect on or secure the claim. If the writ of execution cannot be enforced the execution creditor may propose new means or a new object. The court then will issue a new writ of execution. The execution is suspended if the creditor fails to submit a new motion within two months after being informed by the court on the inability to enforce the writ of execution.<sup>79</sup>

### **Costs of enforcement proceedings**

Costs of the procedure are determined by the court. Upon the motion of the party, the court orders execution so that these costs can be recovered. The creditor may request the court to do so already in the motion for enforcement or security. The costs of the enforcement or security procedure are borne in advance by the execution creditor or the security creditor, within a period determined by the court. In case of non-payment the court suspends the execution. The debtor is obliged to indemnify the creditor from the costs required to enforce execution or security. The application for the recovery of costs has to be submitted at the latest within thirty days from the completion of the procedure.<sup>80</sup>

*Under the CEA the provisions are rather similar. Costs of the procedure in connection with ordering and carrying out of the enforcement and security are borne in advance by the enforcement creditor or the security creditor. The enforcement creditor or the security creditor advances the costs within a period determined by the enforcement authority. Upon motion of the party, the costs of the procedure incurred in the enforcement procedure before the public enforcement agent are determined in a decision rendered by the public enforcement agent. Upon motion of the party, the costs of the procedure not incurred in the enforcement procedure before the public enforcement agent are determined in a decision rendered by the court of jurisdiction.<sup>81</sup>*

*The CPEAA also contains certain provisions regarding the fees of the public enforcement agent. A public enforcement agent is entitled to a fee and reimbursement of costs incurred in carrying out his official duties in accordance with the Rules on Fees and Cost Reimbursements adopted by the Chamber and approved by the Ministry. A party who objects to enforcement agent's calculation of fees and costs, may address the competent municipal court in whose district the enforcement agent has his principal place of office to make an assessment of fees and costs. Against the decision of such court a complaint may be filed with the county court within eight days of receipt. No other legal remedies are permissible.<sup>82</sup>*

*The public enforcement agent may request payment of the fee immediately on concluding an action. When necessary the public enforcement agent may request advance payment of estimable costs and fees and may refuse his services if such advance is not paid.<sup>83</sup>*

*Each writ and copy issued by the public enforcement agent contains a notice stating the amount of charged fees and cost reimbursements. Upon party's request, the public enforcement agent issues a detailed invoice and receipt of paid fees and costs.<sup>84</sup>*

<sup>76</sup> Art. 30 CEA2011.

<sup>77</sup> Art. 31 CEA2011.

<sup>78</sup> Art. 41 CEA2011.

<sup>79</sup> Artt. 5 and 37 CEA2011; similar art. 37 CEA.

<sup>80</sup> Art. 14 CEA2011.

<sup>81</sup> Art. 14 CEA.

<sup>82</sup> Art. 109 CPEAA; at this moment (December 2010) these rules have not been developed yet. Based on art. 121 CPEAA until the establishment of the Chamber, the Rules on the Fees and Cost Reimbursements are stipulated by the Minister.

<sup>83</sup> Art. 112 CPEAA.

<sup>84</sup> Art. 113 CPEAA.

*The public enforcement agent shall make sure that parties pay any enforcement charges payable for official actions taken by him. The public enforcement agent shall not undertake any official actions unless the parties provide proof of payment of such charges.<sup>85</sup>*

### **Interest**

In case after a decision is adopted, a settlement reached or a notarial deed drawn, the rate of default interest changes, the court issues a new ruling ordering the payment of default interest at the changed rate upon the motion of any party.

If the payment of default interest on procedural costs is not specified in the enforcement title document, the court orders the payment of such interest in the decision on execution, upon the motion of the execution creditor, at the rate prescribed from the date of adopting the decision or concluding the settlement to payment.<sup>86</sup>

*Obviously under the CEA it is no longer necessary to issue a ruling: interest shall be computed and charged at the decreased or increased rate for the time to which such increase refers.<sup>87</sup>*

### **Fines, imprisonment and court penalties**

Fines may be laid down as a means of enforcement or security against both natural persons and legal entities. The CEA2011 also recognizes imprisonment, varying from fifteen days to three months per term and a maximum of 6 months per procedure.

If a legal person is fined, the court also fines the responsible persons within the legal person in case these persons have by their action or omission brought about the punishable deed committed by the legal person. In case a natural person who has been fined does not pay the fine in the period set by the court, this fine is replaced by a prison term in line with the rules of criminal law on the replacement of a fine by a prison term.

Fines or imprisonment is possible:

- if certain actions are undertaken contrary to the order or prohibition of the court with the intention of concealing, damaging or destroying the property of the execution debtor or the security debtor;
- if acts of violence are committed, or acts by which the rights, security and dignity of the execution creditor and the security creditor or other persons participating in the execution procedure or the security procedure can be seriously damaged or threatened;
- if any actions are undertaken against the order or prohibition of the court that can lead to irreparable or nearly irreparable damages to the execution creditor or the security creditor;
- if any actions are undertaken hindering the court, the court enforcement officer or other authorised persons in the enforcement of enforcement actions or security actions;
- other cases laid down by law.<sup>88</sup>

When a debtor fails to fulfil, within a set time limit, some of his non-monetary obligations to do, to tolerate and to omit, ordered by a legally effective judgment, judicial settlement or notarial document, the court shall, in execution proceedings, at the proposal of the creditor, order a suitable additional time limit to the debtor as execution debtor and adjudge that the debtor shall, if he fails to fulfil his obligation within the additional time limit, be obliged to pay to the execution creditor a certain amount of money for every day of delay or any other unit of time (judicial penalty), starting from the expiry of this time limit. On the basis of the ruling on the payment of judicial penalties the court passes, in the same execution proceedings in which it has made this ruling, at the proposal of the creditor, a decision on execution for the compulsory collection of the penalties awarded. If the execution debtor fulfills his obligation within a period of fifteen days after the legal effectiveness of the ruling, the court may, in the same execution proceedings, at the debtor's request filed within eight days from the day of fulfilment, reduce the amount of penalties awarded, taking account of the purpose for ordering their payment.<sup>89</sup>

<sup>85</sup> Art. 114 CPEAA.

<sup>86</sup> Art. 27 CEA2011.

<sup>87</sup> Art. 26 CEA.

<sup>88</sup> Art. 16 CEA2011.

<sup>89</sup> Art. 16 CEA2011.



***Service of the decision on execution***

The writs of execution are delivered to both the execution creditor and the execution debtor. A writ dismissing or rejecting motions for execution rendered before the execution debtor was provided an opportunity to give a statement about it are delivered only to the execution creditor.

Depending on the means of enforcement the decision on execution is also delivered to the bank or central depository agency with which the execution debtor's accounts are kept and to other persons and bodies whenever necessary for execution purposes before they become legally effective.

In case of enforcement on movables the decision on execution is delivered to the execution debtor when taking the first enforcement action.<sup>90</sup>

***Legal challenges: objection and appeal***

In a submission, any party or a participant may request the court to remedy any irregularities made by the execution administrator in enforcing execution. The court, in a conclusion, may revoke any unlawful and irregular actions by the court enforcement officer.<sup>91</sup>

Both in first instance and second instance, the execution procedure and the security procedure are conducted and decisions made by a single judge. The decisions in the execution and security procedure are rendered by the court in the form of a ruling or a conclusion. A conclusion is an order to the court enforcement officer to carry out certain actions and to decide on the best way to administer the procedure or on certain other issues as expressly provided in the CEA2011.<sup>92</sup>

In the CEA as enforcement authority the public enforcement agent and the notary public are introduced. In the first instance, the enforcement procedure is carried out and decisions are brought by a public enforcement agent or a notary public, and exceptionally, if provided in the CEA or any other Act that the enforcement be ordered and carried out by the court, by a single judge (first instance authority). The security procedure in first instance is carried out and decisions are rendered by the court or notary public. In the second instance, decisions are rendered by a single judge. Decisions in the enforcement procedure and in the security procedure are rendered by the enforcement authority in the form of a writ of execution, enforcement decision, decision on security, or conclusion. The conclusion of the enforcement authority is a decision on the administration of the procedure and on any other matter if so expressly provided in the CEA.<sup>93</sup>

The CEA2011 has two different legal remedies: appeal, used for a ruling in first instance, and objection, that may be filed against a writ of execution on the basis of a trustworthy document. Against a conclusion no legal remedy is possible.

An appeal under the CEA may be filed against a writ of execution, enforcement decision, or any other decision issued in the first instance. An appeal against a writ of execution, enforcement decision, or any other decision issued in the procedure before a public enforcement agent or notary public shall be decided by the first instance court.<sup>94</sup>

***Appeal***

An appeal must be made within a period of eight days of the day of delivery of the first instance ruling. In general the appeal does not postpone the enforceability of a ruling, unless provided otherwise in this Act. If an appeal is allowed, the court forwards the file with the appeal to the court of second instance, unless the court is authorised to act.<sup>95</sup>

In general an appeal by the execution debtor against the decision on execution does not postpone the enforcement of execution. The reasons for appeal from the debtor are described in detail in the CEA2011:

- the document used as the basis for adopting the decision on execution is not an enforceable document;
- if the document has not become enforceable;

<sup>90</sup> Art. 38 CEA2011; similar art. 44 CEA.

<sup>91</sup> Art. 45 CEA2011.

<sup>92</sup> Art. 10 CEA2011.

<sup>93</sup> Art. 9 CEA.

<sup>94</sup> Art. 10 CEA.

<sup>95</sup> Art. 11 CEA2011.

- the enforceable document was repealed, nullified, altered or in some other way placed out of force;
- parties have agreed in an official document or a document legalised by a notary public drawn up after the enforceable document that the execution creditor shall not seek execution on the basis of the enforceable document, either permanently or for some given period of time;
- the period during which execution can be demanded according to law has expired;
- execution is ordered on an object that is exempted from execution, or on which the possibility of execution is limited;
- the execution creditor is not authorized to seek execution on the basis of an enforceable document;
- some condition determined in the enforceable document is not fulfilled;
- the claim has ceased on the basis of a fact that came about at a time when the execution debtor could no longer make it known in the procedure in which the decision was rendered;
- the realisation of the claim is postponed, prohibited, altered or in some other way prevented, even for a definite period of time, on the basis of a fact that came about at a time when the execution debtor could no longer make it known in the procedure in which the decision was rendered;
- the claim from the enforceable document is barred by the statute of limitations.

The execution creditor may contest the decision on execution in an appeal if the decision on execution went beyond his request or on the decision on procedural costs.<sup>96</sup>

The court of first instance, within 30 days, may accept the appeal if it evaluates that it is founded, and alter the decision on execution either fully or partially and reject the motion for execution, or repeal the decision on execution and dismiss the motion for execution, or declare that it does not have subject-matter or territorial jurisdiction and assign the case to the competent court. In case of acceptance the court revokes the executed actions, except where it has declared that it does not have jurisdiction, assigning the case to the competent court. If the court considers an appeal is not founded, it forwards the case to the court of second instance. The court of second instance is obliged to render and dispatch the ruling on an appeal within sixty days from the date of receiving it.<sup>97</sup> The appeal is forwarded to the execution creditor without any delay. The creditor may reply within eight days. The court may decide to hold a hearing. In the ruling on the appeal, the court either dismisses or accepts the appeal. In case of acceptance the court of first instance shall recall the performed actions and suspend the execution.<sup>98</sup>

If the ruling on the appeal depends on the establishment of a disputable fact, the court instructs the debtor to initiate litigation proceedings within fifteen days from the date the ruling becomes legally effective and demand that that execution be declared impermissible.<sup>99</sup>

### *Objection*

The debtor may file an objection against the decision on execution based on a trustworthy document within the term of eight days, or in case of disputes involving bills of exchange and cheques within three days. The decision on execution based on a trustworthy document may be contested by an appeal in the part ordering execution after the expiration of this term in case:<sup>100</sup>

- the execution creditor is not authorized to seek execution on the basis of the enforceable document;
- the claim has ceased on the basis of a fact that came about at a time when the execution debtor could no longer make it known in the procedure in which the decision was rendered;
- the realisation of the claim is postponed, prohibited, altered or in some other way prevented, even for a definite period of time, on the basis of a fact that came about at a time when the execution debtor could no longer make it known in the procedure in which the decision was rendered;
- the claim from the enforceable document is barred by the statute of limitations.

If an objection against the decision on execution adopted on the basis of a trustworthy document filed by the execution debtor does not specify which part of the decision on execution is being contested, it shall

<sup>96</sup> Art. 46 CEA2011.

<sup>97</sup> Art. 47 CEA2011.

<sup>98</sup> Art. 50 CEA2011.

<sup>99</sup> Art. 51 CEA2011.

<sup>100</sup> Art. 53 CEA2011.

be deemed that the execution debtor is disputing the decision on execution in its entirety. Any objection against the decision on execution has to include an opinion (explanation). If the execution debtor does not file an objection against the part of the decision on execution by which he is ordered to settle the claim, he may demand retrial with respect to that part of the decision on execution according to the rules of civil action procedure. If the court that received the motion does not have jurisdiction to render a decision according to the rules of civil action procedure, it shall assign the case to the court having jurisdiction, so that it could render a decision about the motion.<sup>101</sup>

Any person claiming to have a right on the object of execution that prevents execution may submit an objection against execution, demanding execution on the object to be declared impermissible, until the execution procedure is concluded. The court forwards the objection to the execution creditor and the execution debtor and instructs them to reply on the objection within eight days.<sup>102</sup>

In case the execution creditor does not issue a statement about the objection within the prescribed term or if one of the parties opposes the objection, the court instructs the filer of the objection in a ruling to initiate litigation proceedings against the parties within a term of fifteen days, unless the filer proves the foundedness of his objection by a legally effective judgment or some other official document or document legalised by a notary public. In that case the court shall decide on the objection in the execution procedure.<sup>103</sup>

### ***Counter-enforcement***

After the execution is enforced, in the same execution procedure the execution debtor may request the court to instruct the execution creditor to return to him what he received as the result of execution:

- if the enforcement title document is repealed, altered, nullified, placed out of force by a legally effective decision or if it is determined to be without effect in some other way;
- if the execution debtor settled the claim of the execution creditor during the execution procedure out of court, so that the claim of the execution creditor was settled twice;
- if the decision on execution is repealed by a legally effective decision and the motion for execution dismissed or rejected, that is, if the decision on execution was altered by a legally effective decision;
- if the execution performed on a specific object of execution was declared impermissible.

The motion for counter-execution may be submitted within three months from the date the execution debtor learns about the reason for counter-execution, and at the latest within one year from the instigation of the execution procedure. The debtor cannot exercise his claim in litigation proceedings before the expiration of this term.<sup>104</sup>

The court delivers the motion to the execution creditor. The creditor needs to reply within eight days. If the creditor objects to the motion for execution within this term the court shall decide on it after the hearing. If the execution creditor does not reply within the term, the court shall evaluate whether to decide on it without holding a hearing. In the ruling accepting a motion, the court instructs the execution creditor to return to the execution debtor what he received as the result of execution within fifteen days.<sup>105</sup>

### ***Determination of debtor's property***

Upon the motion of the execution creditor, the debtor is obliged to give a statement in court, on the whereabouts of objects that could not be found and whose handover or delivery is subject to execution. In Croatian law this statement is called the indicative declaration. This indicative declaration is given publicly at a hearing in court.

If execution involving the collection of a monetary claim is unsuccessful (the objects of execution were not found or are not sufficient to settle the execution creditor's claim or because the objects are encumbered by third party pledges, or other persons demand the objects for themselves), the execution debtor has to submit to the court, upon the motion of the execution creditor, a list of his property, including bank accounts

<sup>101</sup> Art. 54 CEA2011.

<sup>102</sup> Art. 55 CEA2011; similar art. 73 CEA.

<sup>103</sup> Art. 56 CEA2011.

<sup>104</sup> Art. 58 CEA2011, similar art. 76 CEA.

<sup>105</sup> Artt. 59-60 CEA2011, similar artt. 77-78 CEA.

and salary or pension (indicative list of property). A hearing in court is held in order to review and confirm the indicative list of property. A summons for the public hearing is delivered to the execution debtor and the execution creditor. The notification about the hearing is also published on the court bulletin board. The court may also hear other persons as witnesses or request testimonies by other persons or bodies.

If the execution debtor fails to appear at the hearings without a well-founded reason for his absence, or refuses to give an indicative declaration or the indicative list of property, the court shall fine him and threaten him with new fines to be issued against him until the execution debtor complies.<sup>106</sup>

The CEA2011 has special provisions regarding certain institutes:<sup>107</sup>

- The Croatian Pension Insurance Institute. This institute is obliged to provide information within eight days whether a natural person is an insured person with the Croatian Pension Insurance Institute, under what grounds (employment, freelancing, trade or an independent agricultural activity) and with whom, that is, whether he receives pension, disability payment or any other regular receipts on which it keeps records.
- The Ministry of the Interior is obliged to provide information within eight days based on its motor vehicle records whether a person is registered as the owner of a motor vehicle, as well as information about the kind, brand, type, model, year of production, registration number, and burdens on the vehicle, if any.
- The Financial Agency is obliged to provide information within eight days about the regular business account of the business entity, and if he has several, about the regular business account the entity designated as the account for the enforcement of any orders on the payment of legal obligations and public revenues, orders for the collection of securities and security instruments, and orders with respect to the enforcement of court decisions and other enforcement title documents (main account).

### **Stay, suspension and completion of enforcement**

#### **Stay**

Upon motion of the execution debtor, the court may stay execution either in part or as a whole if the debtor makes probable that he would suffer irreparable or nearly irreparable damages as the result of execution, or if he makes probable that such stay is necessary to prevent violence, e.g. if a legal remedy has been filed against the decision based on which execution was ordered or the debtor has made an appeal against the decision on execution or a ruling confirming the enforceability of the enforceable document. In general the creditor is provided an opportunity to declare himself about it.

*The CEA: If the enforcement debtor, in procedures for settlement of monetary claims, deposits within 15 days, collateral in the amount of the principal and interest, and appropriate collateral in procedures for settlement of non-monetary claims, respectively, the enforcement authority shall, upon motion of the enforcement debtor, render a decision on the stay of the enforcement. The stay of the enforcement upon motion of the enforcement debtor may not exceed a period of three years, during which period default interest is paid on the enforcement creditor's claim.*

*By way of derogation the first instance court having jurisdiction to decide on the appeal against the writ of execution, and the court carrying out enforcement, respectively, may stay the enforcement upon motion of the enforcement debtor who may not be obligated to deposit collateral, when the enforcement debtor takes part in the procedure as a party, if he establishes likelihood that the enforcement would cause him irreparable or nearly irreparable harm, or if he establishes likelihood that this is necessary in order to prevent violence. The court shall decide on the motion for a stay of the enforcement within eight days of the receipt of such motion.<sup>108</sup>*

Upon motion of the execution creditor, the court may condition stay on the provision of appropriate security. If the execution debtor does not post security within the term designated by the court, which may not be longer than fifteen days, he is deemed to have abandoned his motion for stay. In that case the court renders a ruling on continuation of the execution procedure.<sup>109</sup>

<sup>106</sup> Art. 16A CEA2011.

<sup>107</sup> Art. 16B CEA2011.

<sup>108</sup> Art. 80 CEA.

<sup>109</sup> Art. 61 CEA2011.

*The CEA provisions are different. The court or public enforcement agent may, upon motion of the enforcement creditor, stay the enforcement, in whole or in part, for a period not exceeding three years. The enforcement authority decides on the motion for a stay of the enforcement in a conclusion.*<sup>110</sup>

Also upon the motion of the execution creditor, the court stays execution either in part or as a whole if the enforcement of execution has not begun, for the duration of the time period proposed by the execution creditor.<sup>111</sup>

Upon the motion of a person requesting execution on a specific object to be declared impermissible, the court stays execution with respect to such object if the person makes probable the existence of his right and that as the result of enforcement of execution he would suffer irreparable or nearly irreparable damages, provided that such third party initiates litigation proceedings as instructed within the designated term.<sup>112</sup>

If execution is stayed, because the execution debtor or a third party have filed a legal remedy, stay lasts until the procedure further to such legal remedy or instrument is concluded. In other cases the court designates the duration of stay. After this period the stayed execution continues.

### *Suspension*

Execution is suspended if the enforceable document is repealed, altered, nullified or in some other way placed out of force by a legally effective decision or if it has been determined in some other way that it has no effect, or in case it becomes impossible or cannot be carried out for other reasons.

Upon the motion of the execution debtor, execution is suspended if the court establishes that after the expiration of the term for appeal the execution covers objects not included in the decision on execution, and which are exempted or limited from execution. The deadline for filing an objection, is eight days from the day on which the execution debtor finds out that execution includes an object, which is exempt from execution. The ruling suspending execution revokes all enforcement actions performed, provided such ruling does not impinge upon the acquired rights of third parties.<sup>113</sup>

### *Completion*

An enforcement procedure is regarded as completed after the decision dismissing or rejecting a motion for execution becomes legally effective, after the enforcement action by which execution is completed is performed or after execution is suspended. The court establishes completion of execution after the last enforcement action is performed in a ruling.<sup>114</sup>

### ***Exemption from enforcement***

In the CEA2011 claims arising out of taxes and other fees, facilities, weapons and equipment meant for defence are excluded as an object of execution.<sup>115</sup>

Under the CEA the exemption will be extended: in addition also resources, equipment and facilities intended for the work of state administration bodies and units of local and regional self-government and judicial bodies may not be the object of enforcement and security.<sup>116</sup>

Regarding movables the following is exempted from attachment:

1. clothing, shoes, underwear and other personal usage items, bed linen, cookware, furniture, cooking stoves, refrigerators, washing machines and other items used in the household if the debtor and members of his household need them to satisfy the standard of living enjoyed in their community;
2. food and firewood for the debtor and members of his household for a period of six months;
3. working and breeding livestock, agricultural machines and other working tools that a debtor - agriculturalist needs to maintain his farm to the extent necessary to sustain him and the family living

<sup>110</sup> Art. 79 CEA.

<sup>111</sup> Art. 62 CEA2011.

<sup>112</sup> Art. 63 CEA2011.

<sup>113</sup> Art. 67 CEA2011; similar art. 85 CEA.

<sup>114</sup> Art. 68 CEA2011; similar art. 86 CEA.

<sup>115</sup> Art. 4 CEA2011.

<sup>116</sup> Art. 3 CEA.

with him in the same household, as well as seeds to be used on the farm and food for the livestock for a period of four months;

4. tools, machines and other items that the debtor who is a trader or an individual merchant needs to perform his registered activity, and raw materials and fuel for a period of three months of work;
5. items that an debtor who performs independently a registered notarial, lawyer's, doctor's, pharmacist's, scientific, artistic or any other professional activity as an occupation would need;
6. ready cash of the debtor based on claims exempt from execution and ready cash of the execution debtor who has regular monthly earnings up to the monthly amount exempt from execution, pro rata to the time until the next time he receives the earnings;
7. decorations, medals, commemorative war ribbons and other decorations and recognitions, wedding rings, personal letters, manuscripts and other personal documents of the debtor, family photographs, personal and family documents and family portraits;
8. aids of an invalid or any other person with physical disability that he needs to perform basic daily tasks;
9. postal parcels or postal monetary remittances addressed to the execution debtor before they are delivered.<sup>117</sup>

Regarding immovables article 86 CEA2011 exempts:<sup>118</sup>

10. Agricultural land and farm buildings of an agriculturalist to the extent required for his support and the support of his nuclear family members and other persons whom he is obliged to support under law may not be an object of execution.

In addition regarding legal persons article 201 and 202 CEA2011 exempts:

11. Real estate built or refurbished for the performance of strictly special activities. This real estate can only be the object of execution if their alienation will not halt the debtor's business activities, especially if what the debtor obtains from the business activities carried out in this real estate can be made up by procurement from the market or if business premises in which the same activity can be done can be leased on the market.
12. Raw materials and semi-finished products meant for processing and production materials (oil, lubricant and the like) beneath the amount necessary to the debtor for an average month's production, if these things cannot be regularly procured on the market and if they are necessary for the proper continuation of production;
13. A vehicle necessary to a legal person that performs transport activities, i.e. leases out vehicles, in case the activities of this person shall be reduced by more than two thirds due to the execution on this vehicle.
14. Funds in the account of the State, municipalities and cities kept with banks or on the Kuna equivalent of foreign currency funds that these persons have in their foreign currency account, if these funds are necessary for the carrying out of these legal persons' principal tasks.<sup>119</sup>

## ***Seizure on movables***

### *Jurisdiction*

The court in whose area the movables are located has territorial jurisdiction to decide on the motion for execution against movables.<sup>120</sup> In case the location is unknown the court in whose area the permanent residence or temporary residence of the debtor is, or any court in whose area the execution debtor's movables are located, has territorial jurisdiction to decide on the motion.<sup>121</sup> In the motion for execution the execution creditor is obliged to indicate whether he wants the seized movables to be entrusted to his care or to the care of a specific third party, unless the movables in question are movables that are deposited as a court or notarial deposit.<sup>122</sup>

<sup>117</sup> Art. 128 CEA2011; similar art. 94 CEA.

<sup>118</sup> Similar: art. 93 CEA.

<sup>119</sup> Art. 204 CEA2011.

<sup>120</sup> Art. 126 CEA2011.

<sup>121</sup> Art. 127 CEA2011.

<sup>122</sup> Art. 129 CEA2011; similar art. 178 CEA.

Execution against movables is enforced by attaching, appraising, seizing, dispatching, entrusting them to the care of the court, execution creditor or a third party, selling them and settling the execution creditor out of the proceeds of the sale.

#### *The inventory*

The court enforcement officer hands over the decision on execution to the debtor before proceeding with the attachment and asks him to pay the amount with respect to which execution was ordered, with interest and costs.<sup>123</sup> The attachment is carried out by drawing an attachment list. The movables of a debtor in the possession of a third party may be included in the list only if such third party gives his approval. If not, the court transfers the right of the execution debtor to hand over the movables to the creditor, upon his motion. The list comprises as many movables as are needed to settle the claim of the execution creditor and the costs of execution.

#### *Safekeeping*

The execution creditor is obliged to procure everything necessary to ensure proper dispatch of the movables (means of transport, man power, equipment, food and water for livestock during transport, etc.) and such accommodation of the movables that is to keep them safe against any damages, decay or deterioration in general, except the one that would occur as the result of regular wear and tear. If the creditor fails to ensure everything necessary for dispatching and accommodating, the seizure and dispatch of the movables is postponed for a period of time proposed by the execution creditor, but not for a period longer than three months. If the execution creditor fails to ensure everything necessary for dispatching and accommodating the movables by the following hearing for their seizure and dispatch, execution shall be suspended.

The listed movables will be handed over to the creditor or a third party for safekeeping in accordance with the decision on execution. In case the movables are left with the debtor, these movables will be marked. Cash, securities and any valuables are deposited in a court or notarial deposit. Other more valuable movables, if they are suitable for such manner of safekeeping, are also deposited in court or notarial deposit.<sup>124</sup>

Before the movables are seized and dispatched, the court enforcement officer examines whether the conditions for their accommodation are fulfilled. The court enforcement officer follows the seized movables to the location where they are placed for safekeeping. He then draws the corresponding minutes, which have to be signed by the person to whom the movables are submitted for safekeeping.

The creditor acquires a lien on the listed movables on the basis of the attachment list. In case of several creditors, the order of priority with respect to the lien acquired by the list or by an annotation in the minutes on the attachment list is determined based on the date of making the list. If the movables are listed simultaneously in favour of several execution creditors, the order of priority is determined based on the date on which the court received the motion for execution, and if the motions for execution were received on the same date, the liens take the same order of priority. If the motion for execution was sent by registered mail, the date of being submitted at the post office is deemed as the date of being received by the court.<sup>125</sup>

In case of an unsuccessful attempt the court notifies the creditor who was not present during the attachment. The creditor may propose attachment to be repeated in the period of three months from the date of delivery of the notification. If the creditor does not propose attachment to be repeated within this period or if in the repeated attachment no movables were found the court suspends the execution procedure.<sup>126</sup>

*Article 186 CEA has some additional provisions.*

*If the objects listed in the writ of execution as objects of enforcement cannot be found with the enforcement debtor, the public enforcement agent may ex officio ask the competent court to order the police, under a special regulation, to issue a notice for finding and seizing objects that cannot be found. The competent court issues a notice for finding and seizing objects that cannot be found and notifies thereof without delay the public enforcement agent who is conducting the execution. The public enforcement agent provides the parties with a copy of the court notice without delay.*

<sup>123</sup> Artt. 130- 132 CEA2011; similar artt. 179-181 CEA.

<sup>124</sup> Artt. 133 and 133A CEA2011; similar artt. 182-183 CEA.

<sup>125</sup> Art. 135 CEA2011.

<sup>126</sup> Art. 136 CEA2011; similar art. 186 CEA.



*If objects listed in the enforcement decision as objects of enforcement cannot be found with the enforcement debtor, the court may decide, upon creditor's proposal, that the police be ordered under a special regulation to issue a notice for finding and seizing the objects that cannot be found, of which the court shall immediately notify the parties.*

*If the enforcement authority conducting the enforcement procedure requests issuance of a notice for finding and seizing the objects that cannot be found, the period for repeated attachment will be six months.*

### Appraisal

Unless the movables are handed over to an official commission agent for sale, at the same time as the attachment list is made the goods are appraised by the court enforcement officer, the court appraiser or a special expert. Any party may propose the appraisal to be made by an expert. Any party may propose to the court within eight days of the appraisal to determine a lower or higher value of the seized movables than the appraised value or to order a new appraisal. The court decides about such a motion in a conclusion.<sup>127</sup>

### Sale

The sale of seized movables may be carried out only after the decision on execution becomes legally effective, unless the execution debtor agrees with an earlier sale, the movables spoil quickly or if there is danger of substantial decrease in their price or if the execution creditor posts a security deposit for any damages. The court decides on the sale before the decision on execution becomes legally effective in a conclusion. Between the date of attachment and the date of sale there should be at least 15 days.<sup>128</sup>

The movables are sold in an oral public auction or by direct dealing. A sale by auction is ordered in the case of more valuable movables, or if it may be expected that they are to be sold at a higher price than the appraised value. The public auction is led by the court enforcement officer. In a conclusion, the court may entrust the conducting of the auction to a notary public. The sale by direct dealing is conducted by and between the purchaser on one hand and the court enforcement officer or the person performing commission activities on the other. The court enforcement officer sells the movables on behalf and for the account of the execution debtor, and the person performing commission activities on his own behalf and for the account of the execution debtor. The sale of movables is announced timely on the court bulletin board.<sup>129</sup>

At the first auction, the movables may not be sold below two-thirds of their appraised value. If this price is not achieved at the first auction, the court orders a new auction upon the motion of the party at which the movables may be sold below that price, but not below one-third of the appraised value. The motion for another auction or for the sale by direct dealing may be submitted by the party within the term of fifteen days from the first auction. The court suspends the procedure if none of the parties proposes another auction within the set term.<sup>130</sup>

*Article 192 CEA has some additional provisions.*

*After the resolution on cancellation of the procedure becomes final, the enforcement debtor may take over the chattels that were taken away from him and placed in another person's custody in order to keep them at his own cost. If the person having custody over the chattels refuses to hand them over to the enforcement debtor, the enforcement debtor may ask the enforcement authority to issue a resolution ordering such person to hand over the chattels.*

*If the court decides that enforcement debtor has the right to receive the chattels back, the enforcement authority issues a resolution ordering the person having custody over the chattels to hand the chattels over to the enforcement debtor, provided the person having custody of the chattels is allowed to voice his opinion on the enforcement debtor's request within eight days. Such resolution shall have the force of a writ of execution or an enforcement decision and may be used for taking the chattels back and handing them over to the debtor even before the resolution becomes final under the provisions on enforcement for handover of chattels.*

<sup>127</sup> Art. 137 CEA2011; similar art. 187 CEA.

<sup>128</sup> Art. 140 CEA2011; art. 190 CEA.

<sup>129</sup> Art. 141 CEA2011; similar art. 191 CEA.

<sup>130</sup> Art. 142 CEA2011.

*The commission agent to whom the chattels have been entrusted for safekeeping and sale may refuse to hand the chattels back to the debtor until all costs and fees have been remunerated. In regard to the debtor's request to be handed back the chattels, the commission agent may file a motion with the enforcement authority asking it to allow him to keep the chattels placed in his custody as a compensation for the due costs and fees. When the resolution entitling the commission agent to keep the chattels becomes final, the commission agent shall become the rightful owner of such chattels.*

The court is obliged to deposit the purchase price and take over the movables immediately after the auction or the sale by direct dealing is concluded. If the purchaser fails to submit the purchase price, the auction shall be deemed unsuccessful. The purchaser is obliged to compensate any damages incurred by the parties as the result of his withdrawal.<sup>131</sup>

#### *The Certified Commission Agent*<sup>132</sup>

The sale of movables may also be entrusted to a certified commission agent. The commission agent may procure the accommodation space, means of transport and man power to perform the activities through contracts with other natural and legal persons (e.g., lease contracts, transport contracts, man power contracts, etc.).

The activities of a certified commission agent are organised and implemented by the Croatian Chamber of the Economy. This Chamber organizes public commission shops for performing the activities of a certified commission agent for the area of one or several counties, depending on the number of execution procedures against movables, their nature, quantity, value and financial feasibility.

The Ministry for Economic Affairs may allow the Croatian Chamber of the Economy to entrust the activities of a certified commission agent in a specific area or for some of the activities of a certified commission agent in a specific area, based on a tender procedure, to a natural or legal person meeting the conditions for the performance of the activities of certified commission agent. The office of state administration in whose area the registered office of the certified commission agent is located, conducts overall control over the work of certified commission agents. The execution judge in charge of the case controls the work of certified commission agents in specific execution cases against movables. The commission agent is entitled to a fee, determined by the Minister of Justice, for the actions performed and to receive compensation of costs.

If specific movables are not sold within two months after the moment of being delivered to the commission agent even if the price was reduced to two-thirds of the appraised value, the court reduces the value of such movables to one third of the appraised value. If specific movables are not sold in a further one-month period, the court suspends the execution, and notifies the execution debtor that he may take over the movables within a term of 15 days. If the execution debtor does not take over the movables within such term, the court orders the commission agent to return them to him, and the execution debtor is ordered in a ruling to repay any delivery costs.

The movables auctions at the commission agent's office are chaired by the notary public. Only persons who have posted a security deposit may participate in the auction. After the movables are sold, the commission agent shall hand them over to the purchaser as soon as he pays the purchase price. The commission agent uses the purchase price to settle first of all any costs of depositing and selling the movables, and his fee, and then pays the remaining amount to the account of the court.

#### ***Enforcement against a motor vehicle***<sup>133</sup>

For an execution on a motor vehicle it is necessary that the motion for execution also contains the police administration certificate that the execution debtor is the owner of the motor vehicle. The court forwards a copy of the decision on execution to the police administration with which the register of vehicles is maintained, so that the recordation of execution could be made. A copy of the decision on execution is also forwarded to the register of creditors' claims subject to court and notarial security on movables and rights, so that an appropriate entry could be made.

<sup>131</sup> Art. 143 CEA2011; similar art. 193 CEA.

<sup>132</sup> Artt. 143A-143I CEA2011; similar artt. 194-202 CEA.

<sup>133</sup> Artt. 143J-143M CEA2011; similar artt. 203-205 CEA.

Within a period of three months from the service of the decision on execution on the motor vehicle, the creditor is obliged to propose seizure of the motor vehicle, specify the location of the motor vehicle and ensure the required means of transport and man power to take the action. If the creditor does not propose seizure of the vehicle within the above term, the court suspends the execution. The seized motor vehicle is handed over for safekeeping to the execution creditor or a third party in accordance with the decision on execution.

*Additional in the CEA: If a vehicle that is the subject matter of enforcement is not found with the enforcement debtor, the enforcement authority, upon creditor's motion or ex officio, requests the police to detain the motor vehicle in carrying out its police duties, notably when monitoring and controlling the road traffic and patrolling and securing the state border, and to notify the enforcement authority thereof.*

*If the enforcement authority fails to pick up the vehicle within three days from receipt of the notification of the police, the police shall hand the vehicle back to the person from whom it was taken, and enforcement authority shall no longer be entitled to request detention of such vehicle.<sup>134</sup>*

Motor vehicles are sold at oral public auctions or by direct dealing, in accordance with the conclusion of the court on the manner of sale, without indicating the registration plate number or the chassis number. Only persons who deposited the security deposit may participate at the auction as purchasers.

The purchaser is obliged to deposit the purchase price and take over the motor vehicle immediately after the auction or sale by direct dealing is concluded. The court authorizes the purchaser in a conclusion to request the police administration in the place where he has permanent residence or registered office to enter the right of ownership on the purchased motor vehicle and issue the vehicle card and the traffic license based on the conclusion. The purchaser becomes owner of the motor vehicle once it is entered in the register of motor vehicles with the competent police administration. By a special conclusion, the court orders deletion of the right of ownership of the execution debtor on the sold vehicle from the register of the police administration in which it was entered.

#### *Settling the claims of execution creditors*

If the claim of a sole execution creditor is to be settled out of the sale price, the court orders in a ruling that the following be settled out of the proceeds of the sale in the order as follows: costs of the procedure, costs determined in the enforcement title document, interest from the date of selling the movables and the main claim.<sup>135</sup>

If several execution creditors are to be settled in the execution procedure, they shall be settled out of the sale price in the order in which they have acquired the lien or some other right that terminates after the sale, unless the law lays down priority in settlement with respect to certain claims. Creditors in the same order who cannot be settled fully out of the sale price are settled pro rata to the amounts of their claims. Costs of the execution procedure, costs specified in the enforcement title document and interest have the same order of settlement as the main claim.

#### **Enforcement against wages and other permanent monetary income**

The decision on execution on pay determines the attachment of a certain portion of the salary and orders the employer who pays the execution debtor's salary to pay, i.e. keep paying, the amount for which execution has been determined to the execution creditor, upon the legal effectiveness of such decision on execution.<sup>136</sup>

If the right to legal maintenance, i.e. the right to an income due to the loss of maintenance caused by the death of the maintenance provider, is claimed from the same execution debtor by several persons, and if the total amount of their claims exceeds the amount of the salary that can be subject to execution, the execution shall be ordered and carried out in favour of each of these execution creditors in proportion to the amounts of their respective claims.<sup>137</sup>

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<sup>134</sup> Art. 205 CEA.

<sup>135</sup> Art. 144 CEA2011.

<sup>136</sup> Art. 173 CEA2011; similar art. 113 CEA.

<sup>137</sup> Art. 174 CEA2011; similar art. 114 CEA.

When the debtor's employment terminates, the execution ruling shall also have an effect against any other employer with whom the execution debtor enters into an employment contract, from the day on which that employer is served the decision on execution. The debtor's prior employer is obliged to deliver the decision on execution, without delay, to the new employer by registered mail with a return delivery note and inform the court of this. The prior employer shall, if he is not known with the new employer, without delay inform the court about the termination of the employment contract. The court informs the execution creditor of this and sets a deadline within which he shall be obliged to acquire information on the new employer. If the execution creditor fails to inform the court the court suspends the execution.<sup>138</sup>

The creditor may put forward a motion for the court to pass a ruling in the execution proceedings ordering the employer to pay to him all the installments which he failed to attach and pay in accordance with the decision on execution. An employer who failed to act in accordance with the decision on execution is liable for the damages so incurred to the execution creditor.<sup>139</sup>

*With the adoption of the CEA the provisions on the exemption from enforcement that used to be regulated in articles 148 and 149 COEA are replaced by articles 91 and 92 CEA. Both provisions from the CEA enter into force immediately.*

Based on these provisions the following is exempt from enforcement:<sup>140</sup>

1. Income on the basis of legal subsistence, compensation for impaired health or decrease in or loss of working ability, or compensation for lost subsistence by reason of subsistence provider's death;
2. Income on the basis of compensation for bodily damage according to disability insurance regulations;
3. Income on the basis of social welfare benefit;
4. Income on the basis of temporary unemployment;
5. Income on the basis of child benefit;
6. Income on the basis of scholarships and financial aid to school children and students;
7. Compensation for prison labor, except for claims on the basis of legal subsistence, and compensation for losses resulting from criminal acts by convicts; and
8. Income on the basis of decorations and recognitions.

In addition there are also certain restrictions:<sup>141</sup>

9. If the enforcement is carried out on salary of the enforcement debtor, the amount exempt from enforcement shall not exceed two-thirds of the average net salary<sup>142</sup> in Croatia;
10. If the enforcement is carried out for settlement of claim on the basis of legal subsistence, compensation for impaired health or decrease in or loss of working ability, or compensation for lost subsistence by reason of subsistence provider's death, the amount exempt from enforcement shall not exceed one-half of the average net salary in Croatia, except in the case of enforcement for forced settlement of monetary amounts for child's subsistence, in which case the amount exempt from enforcement shall equal one-quarter of the average monthly net salary paid per person employed in legal persons in Croatia in the preceding year;
11. If the enforcement debtor's salary is less than the average net salary in Croatia, the amount exempt from enforcement shall not exceed two-thirds of the enforcement debtor's salary;
12. If the enforcement is carried out for settlement of claim on the basis of legal subsistence, compensation for impaired health or decrease in or loss of working ability, or compensation for lost subsistence by reason of subsistence provider's death, the amount exempt from enforcement shall not exceed one-half of the enforcement debtor's net salary;
13. Enforcement on income of disabled persons on the basis of financial compensation for bodily damage and care and assistance allowance is only carried out for settlement of claims on the basis of legal subsistence, compensation for impaired health or decrease in or loss of working ability, or compensation for lost subsistence by reason of subsistence provider's death, but in such cases only up to the amount

<sup>138</sup> Art. 176 CEA2011; similar art. 115 CEA.

<sup>139</sup> Art. 177 CEA2011; similar art. 116 CEA.

<sup>140</sup> Art. 91 CEA.

<sup>141</sup> Art. 92 CEA.

<sup>142</sup> The average net salary is the average amount of the monthly salary paid per person employed, for the period from January to August of the current year, which amount shall be determined by the Central Bureau of Statistics, and published in the Official Gazette "Narodne Novine" not later than 31 December of the same year. The amount thus determined shall be applied in the following year.

of one-half of such income;

14. Enforcement on income on the basis of agreements on whole life subsistence and whole life annuity, and on income on the basis of life insurance agreements is carried out only on the part exceeding the amount of the highest permanent social welfare benefit paid out in the region in which the enforcement debtor has his residence.

### ***Enforcement on a claim***

The territorial jurisdiction to adjudicate on motions for execution on an execution debtor's monetary claims and for the implementation of this execution is with the court on whose territory the execution debtor has permanent residence, or temporary residence. In case the debtor does not even have temporary residence in Croatia, the jurisdiction lies with the court on whose territory the execution debtor's debtor has permanent residence or temporary residence.<sup>143</sup>

The execution on monetary claims is carried out by attachment in the amount necessary for the payment of the execution creditor's claim and transfer.<sup>144</sup> The attachment is carried out on the day when the decision on execution has been served on the debtor's debtor by serving the decision on execution on the debtor's debtor by which the debtor's debtor is prohibited from settling the debtor's monetary claim, and the debtor is prohibited from collecting such claim or disposing of it and the lien provided as its security.

The attachment of monetary claims based on securities transferable by endorsement or for the realisation of which the security itself is necessary, is carried out by the court enforcement officer taking the securities from the execution debtor and surrendering them to the court or notary public. The attachment shall be carried out by seizing the securities from the execution debtor.

The attachment of monetary claims based on shares for which share certificates have not been issued and on registered shares with share certificates is carried out by serving the decision on execution on the joint stock company.<sup>145</sup>

The attachment of claims on savings deposits with a bank or other legal person can be carried out without the prior seizure of the execution debtor's savings book. If the execution creditor does not dispose of the necessary information on the execution debtor's savings deposit, the creditor can propose to the court to pass a ruling by which it shall temporarily attach all the execution debtor's savings deposits with a certain legal person (motion for provisional attachment). Upon receipt of the requested information, the court informs the creditor, who shall, within a period of eight days, file a motion for execution on a certain savings deposit or on certain savings deposits. Upon such a motion, the court passes a ruling on the attachment of a certain savings deposit or certain savings deposits and puts aside the ruling on provisional attachment of the savings deposits.<sup>146</sup>

The attachment of a claim secured by a lien entered into a land register or other public register in which rights on real estate are registered shall be carried out by the entry of the attachment into this register.<sup>147</sup>

The order of priority of the liens of several execution creditors is determined according to the date of the receipt of the motion for execution. If the motion for execution is sent by registered mail, the date of delivery to the post office is deemed as the date of filing the motion for execution with the court. If the motions for execution of several creditors are received at the court on the same day, their liens shall have the same order of priority. Claims with the same order of priority shall be settled proportionally, if they cannot be settled in their entirety.<sup>148</sup>

Upon the creditor's motion, the court asks the debtor's debtor to render, within a period set by the court, his statement on whether he admits the attached claim and its amount, and whether he is willing to settle it, and whether his obligation to pay this claim is conditional upon the fulfilment of some other obligation. The declaration of the debtor's debtor is delivered to the creditor without delay.<sup>149</sup>

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143 Art. 147 CEA2011.

144 Artt. 150-152 CEA2011; similar artt. 97-98 CEA.

145 Art. 153 CEA2011; similar art. 99 CEA.

146 Art. 154 CEA2011.

147 Art. 159 CEA2011; similar art. 100CEA.

148 Art. 156 CEA2011; similar art. 102 CEA.

149 Art. 157 CEA2011; similar art. 103 CEA.

**Transfer**

An attached claim is transferred to the creditor in accordance with his motion, for collection or instead of payment. The execution creditor is obliged in the motion for execution, to ask to have the claim transferred to him for collection or instead of payment.<sup>150</sup> A claim based on securities transferable by endorsement or for the realisation of which the prior submission of securities is necessary, or which cannot be divided with respect to transfer or realisation due to other reasons, may be transferred only in its full amount. If several creditors have filed their motions for transfer on various days, the court shall transfer the claim to the creditor who first submitted the motion, and if several creditors filed the motion on the same day, the claim shall be transferred to the creditor with the highest claim.<sup>151</sup>

The transfer of a claim is implemented by serving the ruling by which the transfer is ordered on the debtor's debtor. The transfer of claims based on securities transferable by endorsement or for the realisation of which prior submission is necessary, are implemented when the court affixes its statement of transfer on such securities and surrenders securities with such statement to the execution creditor.<sup>152</sup>

The debtor's debtor who has been served a decision on execution or a special ruling on transfer, shall fulfil his obligation by depositing money with the court that is carrying out the execution or with a notary public.<sup>153</sup>

**Transfer for payment**

The transfer of a claim for payment authorizes the creditor to seek settlement of the amount stated in the decision on execution or in the special ruling on transfer from the debtor's debtor, if such amount is due, to undertake all actions necessary for the preservation and realisation of the transferred claim and to avail himself of the rights related to the lien provided as security for such claim.<sup>154</sup>

If the obligation of the debtor's debtor to pay a claim depends on the debtor's obligation to surrender to him a certain thing in the debtor's possession, and this obligation is determined by a legally effective judgment, the court shall, at the proposal of the creditor to whom the claim has been transferred for collection, order the debtor to surrender the thing to the court for transfer to the debtor's debtor. A creditor who filed an action for the collection of a transferred claim shall, without delay, inform the debtor of the instituted litigation. Otherwise he shall be liable for damages sustained by the debtor by this oversight.<sup>155</sup>

**Transfer in place of payment**

An attached claim is transferred to the creditor by transfer instead of payment up to the transferred amount, with the effect of assignment of the claim with compensation. If the transferred claim is secured by a lien entered in the land register or some other public register in which rights on real estate are entered, the court shall, ex officio, transfer the debtor's rights to the creditor and delete the lien entered in favour of the debtor. The creditor to whom the claim has been transferred in place of payment collects the claim according to the rules applicable to claims transferred for payment, provided that the money obtained by the realisation of the claim is paid directly to the creditor.<sup>156</sup>

**Enforcement against savings deposit and current account**

Execution on a monetary claim (giro account, a foreign currency account and other accounts with banks), are determined so that a bank is ordered by a decision on execution to pay the amount for which the execution is determined to the creditor. This ruling has the effect of a decision on execution by which the attachment of a monetary claim and the transfer for payment are ordered.

The decision on execution is simultaneously served on the execution creditor, the execution debtor and the bank. If, upon delivery of the decision on execution, there are no funds exceeding the amount for which execution has been ordered available in the execution debtor's account, the bank may not make any payments upon the execution debtor's order from his account to third parties.

<sup>150</sup> Art. 160 CEA2011; similar art. 104 CEA.

<sup>151</sup> Art. 161 CEA2011; similar art. 105 CEA.

<sup>152</sup> Art. 162 CEA2011; similar art. 106 CEA.

<sup>153</sup> Art. 164 CEA2011; similar art. 107 CEA.

<sup>154</sup> Art. 165 CEA2011.

<sup>155</sup> Art. 167 CEA2011; similar art. 109 CEA.

<sup>156</sup> Art. 171 CEA2011.



The execution debtor may ask for stay of execution. If the bank does not receive a ruling on stay of execution, a ruling repealing the decision on execution or a ruling on the suspension of execution, within thirty days from the date of receipt of a legally ineffective decision on execution, it shall pay the attached amount to the creditor. The creditor, upon the delivery of a decision on execution to the bank, obtains rights of lien over the execution debtor's claim against the bank to pay funds from its account, up to the amount of the claim in execution. The bank is not allowed, as long as such execution creditor's right of lien subsists, to effect any payments from the debtor's account under any orders received prior to or after receiving the decision on execution, save if creditors have, under such payment orders, obtained rights of lien on the execution debtor's claim against the bank.<sup>157</sup>

The execution is considered implemented upon the delivery of the decision on execution to the bank. The bank is obliged to notify the court and the execution creditor, within eight days of the receipt of the decision on execution, that there are no or that there are not sufficient funds in the account to implement the decision on execution in full. If the execution creditor's claim is not settled within six months from the delivery of the decision on execution to the bank, and if the creditor fails to propose another means and object of execution, the court suspends the execution.

Both the debtor and the bank are obliged to deliver information on all his accounts and the legal persons with which he keeps such accounts, within eight days from the receipt of this request.<sup>158</sup>

The CEA2011 has special provisions regarding the execution on funds in the account of a legal person or a natural person who performs a registered activity.<sup>159</sup>

The territorial jurisdiction to adjudicate on motions for execution on funds in the debtor's accounts with a bank and for the implementation of the execution lies with the court on whose territory the debtor's seat is located, unless the debtor is the Republic of Croatia or another legal person with public authorities that acts throughout the entire territory of the country. In that case the jurisdiction lies with the court on whose territory the creditor has its permanent residence or seat in Croatia, or in case there is no permanent residence, the court in Zagreb. The jurisdiction for the execution against other legal persons with public authority lies with the court on whose territory their seat is located.<sup>160</sup>

The bank shall carry out the collection successively, according to the time of receipt of the decision on execution. For that purpose the bank keeps special records of the chronology of the decisions on execution, by the date and time of their receipt. Upon request of the creditor the bank issues a certificate of the position of his claim in this order.<sup>161</sup>

The execution creditor is obliged to demand in the motion for execution that the execution be carried out on monetary claims in all execution debtor's Kuna and foreign currency accounts with all banks with which the debtor keeps accounts, with an indication of the number and the bank where the debtor's main account is held. In his motion for execution the creditor may ask the court to provisionally attach, by the decision on execution, all the debtor's claims against accounts that serve for the performance of payment transactions as designated in such motion, up to the amount of the claim for the collection of which the execution has been ordered.<sup>162</sup>

The bank with which the execution debtor keeps his main account is ordered, by a decision on execution, to transfer the amount for which the execution has been ordered to the creditor from this account and, if necessary, from all debtor's Kuna and foreign currency accounts kept with that bank, or, if there will not be sufficient funds on these accounts for the settlement of the creditor's claim, from all his accounts kept with other banks, in compliance with the provisions of the CEA2011. Other banks who keep the debtor's accounts are obliged to, upon the request of the bank that keeps the execution debtor's main account, notify this bank of funds in the accounts that they keep.<sup>163</sup>

If, at the time when a bank has been served the decision on execution, there are no funds available in the debtor's account, this bank shall keep the decision on execution in its records and effect the transfer when funds do come into the account. The bank informs the court within eight days of there being no funds in the account. If it fails to do so it shall be liable for the damage sustained by the execution creditor.<sup>164</sup>

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157 Art. 180 CEA2011.

158 Art. 181 CEA2011.

159 Art. 215 CEA2011.

160 Art. 205 CEA2011.

161 Art. 206 CEA2011.

162 Art. 207 CEA2011.

163 Art. 208 CEA2011.

164 Art. 211 CEA2011.



### ***Enforcement against registered immovable property***

The court in whose area the real estate is located shall have territorial jurisdiction to decide on the motion for execution on real estate and to enforce such execution.<sup>165</sup>

Execution on real estate is enforced by entering a recordation on execution in the land register, by establishing the value of such real estate, by selling the real estate and by settling the claims of execution creditors out of the proceeds of the sale.<sup>166</sup>

In addition to the motion for execution on real estate, the execution creditor is obliged to submit a land registry certificate as proof that the real estate is entered as the property of the debtor. If the right on real estate is entered in the land register in the name of some other person, and not the execution debtor, the motion for execution may be accepted only if the creditor submits a document suitable for the entry of the debtor's right.<sup>167</sup>

### ***Execution procedure***

As soon as the decision on execution is rendered, the court shall request in the line of duty the recordation of execution to be entered in the land register. By the recordation, the creditor acquires the right to settle his claim out of the real estate (right to settlement) even if a third party acquires the right of ownership on the real estate at a later date. After execution is recorded, it is no longer permitted to enter any change relating to the right of ownership or any other real right based on the right to dispose by the execution debtor, regardless of the time of disposing.<sup>168</sup>

After the recordation of execution is entered in the land register, a separate execution procedure may not be performed to settle some other claim of the same or some other execution creditor on the real estate in question. The execution creditor whose claim is subject to subsequent execution on the same real estate joins the execution procedure that has been initiated already.<sup>169</sup>

The claims of lien creditors who have not proposed execution are also settled. Liens registered on real estate cease on the date the ruling adjudicating the real estate to the purchaser becomes legally effective even if the claims of lien creditors are not fully settled.

The purchaser of real estate and the lien creditor may agree (in the form of judicial settlement in the execution procedure or in the form of a notarial deed), at the latest at the sale hearing, that the lien should remain on the real estate even after the ruling adjudicating the real estate becomes legally effective. In that case the purchaser takes over the debtor's debt towards the creditor in an amount which he would receive in the execution procedure. In that case, the purchase price is reduced by the amount of the assumed debt.<sup>170</sup>

Business lease contracts or residential lease contracts concluded and entered in the land register before the acquisition of a lien or right to settlement with respect to whose fulfilment the execution is demanded do not cease once the real estate is sold. The purchaser takes the place of the business lessor or residential lessor as of the moment of acquiring title to the real estate.<sup>171</sup>

### ***Determining Real Estate Value***

The value of the real estate is determined by the court in the form of a conclusion after a hearing. It is possible that parties in a court or out-of-court agreement determine the value of the real estate in order to secure a claim that needs to be settled through a lien or some other corresponding right. In that case such value shall be taken as relevant, except (1) if the parties agree otherwise in a court procedure at the latest by the adoption of the conclusion on sale, or (2) if there are other lien creditors who are to be settled in the enforcement of execution on the real estate before the execution creditor who motioned for execution. The court determines the value of the real estate in the conclusion on sale.<sup>172</sup>

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<sup>165</sup> Art. 74 CEA2011.

<sup>166</sup> Art. 75 CEA2011; similar art. 128 CEA.

<sup>167</sup> Art. 77 CEA2011.

<sup>168</sup> Art. 79 CEA2011; similar art. 132 CEA.

<sup>169</sup> Art. 80 CEA2011; similar art. 133 CEA.

<sup>170</sup> Art. 81 CEA2011; similar art. 134 CEA.

<sup>171</sup> Art. 83 CEA2011; similar art. 136 CEA.

<sup>172</sup> Artt. 87-88 CEA2011; similar art. 139 CEA.

Within eight days from the date of delivery of the conclusion on sale any person entitled to be settled out of the proceeds of the sale of the real estate, and ranking before the execution creditor in the order of priority may propose execution to be suspended if the determined value of the real estate does not cover even partially the amount of claim of the execution creditor.<sup>173</sup>

### *Sale*

In its conclusion on sale, the court designates the time when parties interested in purchasing the real estate may visit the real estate, and through the court enforcement officer ensures undisturbed visit to the real estate. If the execution debtor or other persons prevent or hinder the visit to the real estate, the court orders the execution debtor and such persons to be removed from the real estate during the visit. The ruling on removal is enforced by the court enforcement officer, if necessary assisted by the police.<sup>174</sup>

In the conclusion on sale the court determines the real estate value and establishes terms and conditions of sale, and the time and place of the sale if the sale is to be in the form of an auction. The conclusion on sale is made public by placement on the court bulletin board and is delivered to all parties, lien creditors, participants in the procedure, persons who have the right of first refusal and to the competent tax administration/authority. Upon the motion of any of the parties, the conclusion on sale is published in the media if the party advances the required funds. At least thirty days should pass from the placement of the conclusion on sale on the court bulletin board until the date of the sale.<sup>175</sup>

Any person having statutory or contractual right of first refusal that is entered in the land register has priority over the best bidder if immediately on conclusion of the auction he states that he is to purchase the real estate under the same conditions. If the real estate is sold by direct dealing, before the sale the court shall call on the holder of the registered right of first refusal to declare for the record in court within a specified period of time whether he shall exercise his right.<sup>176</sup>

The real estate is sold at oral public auctions. The hearings for the sale of real estate are held in the court building, unless ordered otherwise by the court, before a single judge, unless the court entrusts the holding of the hearing to a notary public in the conclusion on sale. At the latest by the sale of the real estate at the public auction, parties, lien creditors and the holders of personal servitudes and proprietary charges that are to cease once the real estate is sold, may come to an agreement that the sale of the real estate should be performed by direct dealing within a specified period of time through a person authorised for trading in real estate, a court enforcement officer, a notary public or in some other way. The bill of sale by direct dealing is concluded in written form. Signatures of the parties concluding the bill of sale have to be legalized by a notary public.<sup>177</sup>

The conditions of sale, next to other data, include:

- a more detailed description of the real estate with its corresponding parts;
- an indication of the rights that do not cease by sale;
- an indication whether the real estate is free from persons and objects, that is, whether the execution debtor lives in the real estate with his family or whether it was leased;
- the value of the real estate from the conclusion on sale;
- the price at which the real estate may be sold and who is obliged to pay taxes and fees regarding the sale;
- the term within which the purchaser is obliged to deposit the purchase price;
- the manner of sale;
- the amount of security, the deadline within which it has to be submitted, with whom and how;
- special conditions to be met by the purchaser in order to acquire the real estate.

Only persons who previously submitted a security deposit may participate in a public auction or direct dealing.<sup>178</sup> The deadline within which the purchaser is obliged to deposit the purchase price may not be longer than six months from the date of sale, regardless whether the price is paid in a lump sum or in installments.<sup>179</sup>

<sup>173</sup> Art. 89 CEA2011; similar art. 140 CEA.

<sup>174</sup> Art. 84 CEA2011; similar art. 137 CEA.

<sup>175</sup> Art. 90 CEA2011; similar art. 141 CEA.

<sup>176</sup> Art. 91 CEA2011; similar art. 142 CEA.

<sup>177</sup> Art. 92 CEA2011; similar art. 143 CEA.

<sup>178</sup> Art. 94 CEA2011; similar art. 145 CEA.

<sup>179</sup> Art. 93 CEA2011; similar art. 144 CEA.

At the first auction hearing, the real estate may not be sold below the value of two-thirds of its established value. At the second auction hearing, the real estate may not be sold below the value of one-third of its established value. At least thirty days have to pass between the first and the second hearing.

If the real estate is not sold at the second auction hearing either, the court suspends the execution. The execution creditor may propose the establishment of a lien on the real estate in his favour in order to secure the claim with respect to whose settlement the execution was ordered at the latest at the second auction hearing and if the real estate is not sold at that hearing either.<sup>180</sup>

Once he establishes that the conditions for holding an auction hearing are met, the judge or the notary public announces that the auction is to take place. The auction is concluded ten minutes after the placement of the best offer. After the auction is concluded, the judge or the notary public establishes who offered the highest price and whether he meets the conditions to receive the real estate. On the adjudication of the real estate the court adopts a written ruling (ruling on adjudication), which is displayed on the court bulletin board.<sup>181</sup>

In the event of sale by direct dealing, the court adopts a ruling on adjudication of the real estate sold by direct dealing after it establishes that the conditions for legal validity of the sale are met. The ruling on adjudication is displayed on the court bulletin board and is delivered to all persons to whom the conclusion on sale of the real estate to the purchaser is delivered.<sup>182</sup>

The next step is the purchaser depositing the purchase price in court or with a notary public within the term set in the conclusion on sale. If the purchaser fails to deposit the purchase price within the designated period, the court shall pronounce the sale invalid and set a new sale, under the conditions set for the sale that was pronounced invalid.<sup>183</sup>

In the ruling adjudicating the real estate, the court determines that after the ruling becomes legally effective and after the purchaser deposits the purchase price, the right of ownership on the adjudicated real estate is to be entered in his favour in the land register, and any rights and burdens on the real estate that cease after the sale are to be deleted. After the ruling adjudicating the real estate becomes legally effective and after the purchaser deposits the purchase price, the court adopts a conclusion on handover of the real estate to the purchaser.<sup>184</sup>

### *Settling creditors*

The court begins with the settlement of creditors after the ruling adjudicating the real estate to the purchaser becomes legally effective and after the purchaser deposits the purchase price. The sale price is used to settle creditors upon whose motion the execution was ordered, lien creditors, even when they have not registered their claims, persons who have the right to receive compensation for personal servitudes and other rights that cease after sale, the Republic of Croatia and municipalities, towns and counties on the grounds of taxes and other fees.<sup>185</sup>

### *Settlement*

Proceeds of the sale are used to settle primarily, in the following order:<sup>186</sup>

1. costs of the execution procedure relating to court fees and advances paid to execute enforcement actions;
2. taxes and other mature fees for the last year against the real estate sold;
3. the claims secured by a lien, claims by creditors upon whose motion the execution was ordered, and compensation for personal servitudes and other rights that cease after sale.
4. Other claims

Several claims with the same order of priority are settled pro rata to their amount if the proceeds of sale are not sufficient for full settlement.

<sup>180</sup> Art. 97 CEA2011; similar art. 148 CEA.

<sup>181</sup> Art. 98 CEA2011; similar art. 149 CEA.

<sup>182</sup> Art. 99 CEA2011.

<sup>183</sup> Art. 100 CEA2011; similar art. 151 CEA.

<sup>184</sup> Art. 101 CEA2011.

<sup>185</sup> Artt. 104-105 CEA2011; similar artt. 156-157 CEA.

<sup>186</sup> Artt. 106-110 CEA2011; similar artt. 158-162 CEA.

For the settlement, after the ruling adjudicating the real estate to the purchaser becomes legally effective, the court sets a hearing for division of property of the purchase price. The court decides on the settlement of execution creditors and other persons entitled to be settled in a ruling after the hearing, taking into consideration data from the file and the land register and any facts established at the hearing. In adopting the ruling the court takes into consideration only those claims with respect to which the decision on execution has become legally effective at the latest on the date of the hearing for division of property. If there are any claims with respect to which the decision on execution has not become legally effective at the latest on the date of the hearing for division of property, such claims shall be settled after the decision on execution becomes legally effective out of what remains of the purchase price, if anything, and the rest shall be returned to the execution debtor.<sup>187</sup>

#### *Legal position of the debtor and third parties after the sale of the real estate*

Once the real estate is sold, the debtor loses the right of possession on real estate and is obliged to hand such real estate over to the purchaser immediately after delivery of a conclusion on handover of the real estate to the purchaser, unless the law or an agreement with the purchaser provides otherwise.<sup>188</sup>

In the motion for execution by the sale of the real estate, and even at a later stage until the handover of the real estate to the purchaser, the creditor may also demand the real estate to be vacated and handed over to the purchaser based on the conclusion on handover of the real estate to the purchaser.<sup>189</sup>

After the conclusion on handover of the real estate to the purchaser is adopted, upon the motion of the purchaser, the court shall order the business lessee or residential lessee to hand the real estate over to the purchaser within the term that may not be less than three months, and in the same ruling order involuntary execution by vacation of premises and its handover to the purchaser if the business lessee or residential lessee fails to hand it over within the designated term.<sup>190</sup>

#### **Enforcement against non-registered immovable property**

In areas where there are no land registers, both the legislation applicable in the area in question with respect to documents that have to be enclosed as evidence to the motion for execution as proof of ownership on real estate, and the legislation as to in which official records or in what way the decision on execution on real estate is to be entered, apply accordingly. In case the proof of ownership cannot be obtained the creditor is obliged to indicate in the motion for execution, in place of proof of ownership, the place where the real estate is located, its name, borders and surface area.

In that case the court makes a list of attached real estate with respect to the real estate proposed in the motion for execution, and summons the creditor, the debtor and persons with whose real estate the real estate in question borders to the attachment list hearing. An announcement on the attachment list shall be published in the Official Gazette.<sup>191</sup>

#### **Eviction**

The territorial jurisdiction to adjudicate on motions for the vacation and surrender of real estate and for the implementation of execution shall lie with the court on whose territory the real estate is located. The execution for the vacation and surrender of real estate, is conducted so that the court enforcement officer shall, upon removing persons and things from the real estate, surrender the real estate into the execution creditor's possession. If necessary, the court imposes fines or orders imprisonment against persons who obstruct the implementation of the execution.<sup>192</sup>

The movables removed from the real estate are surrendered to the execution debtor or, if he is not present, to an adult member of his household. If no persons to whom movables can be surrendered are present, or if they refuse to accept them, the goods are surrendered to another person for safekeeping at the execution

187 Artt. 117-118 CEA2011; similar artt. 169-170 CEA.

188 Art. 120 CEA2011; similar art. 172 CEA.

189 Art. 121 CEA2011; similar art. 174 CEA.

190 Art. 123 CEA2011; similar art. 175 CEA.

191 Art. 125 CEA2011; similar art. 177 CEA.

192 Artt. 225-226 CEA2011; similar art. 237 CEA.

debtor's expense. The execution creditor shall ensure the presence of such other person to whom removed things shall be surrendered. The execution creditor may himself take over the execution debtor's things for safekeeping. The court notifies the execution debtor of the surrender to another person and of the safekeeping costs, if this is possible, and grant him a suitable time limit within which he can ask for the surrender of things upon payment of the safekeeping costs.<sup>193</sup> In case the debtor fails to ask for their surrender within the granted period of time and fails to reimburse the safekeeping costs the goods can be sold in accordance with the provisions of the sale of movables.<sup>194</sup>

### ***Enforcement against shares***

The territorial jurisdiction to adjudicate on motions for execution on shares without share certificates and on equity shares in companies, and for the implementation of the execution, lies with the court on whose territory the seat of the joint stock company, i.e. other company, is located.<sup>195</sup>

Execution on shares without share certificates shall be conducted by attachment of the shares, their appraisal, sale and settlement of the execution creditor. Execution on an equity share in a company shall be conducted by attachment of the share, its appraisal, sale and settlement of the execution creditor.<sup>196</sup>

The attachment of shares is done by serving the decision on execution on the joint stock company which keeps the book of such shares. By the attachment, the creditor obtains a lien on the shares. The joint stock company is obliged to enter into the book of shares that the registered share is attached on the same day it was served the decision on execution. At the same time the joint stock company informs the court of the entry that has been made or the reasons for which it was not possible to do this.

Once the decision on execution is served to the joint stock company they may not, with respect to the attached shares, make any entries in the book of shares on the basis of the execution debtor's disposal of the shares. The joint stock company is obliged, without delay, to inform the court of any change with respect to the attached shares, especially regarding compulsory execution for collection of some other claim or regarding the security of any such claim.<sup>197</sup>

The attached shares can be sold at either an auction or by direct agreement. The court enforcement officer, or a person authorised by the court to sell shares can sell the shares by direct agreement.

Before selling the shares, the shares need to be valued. The court enforcement officer ascertains the market value of the shares via an expert witness or an authorised appraiser. A person authorised to sell shares, may determine the price of sale himself, paying attention to market conditions. Assessment, ascertainment of the selling price, the sale of the shares and the execution creditor's settlement, are done via the provisions relating to execution on movables.<sup>198</sup>

### ***Execution on securities entered in the accounts of the Central Depository Agency***

The territorial jurisdiction to adjudicate on motions for execution on dematerialized securities, i.e. shares, bonds, finance papers, treasury notes, commercial papers, certificates of deposit and other series securities (hereinafter referred to as "securities") that are entered into the accounts of the Central Depository Agency or other agency (hereinafter referred to as "Agency"), lies with the court on whose territory the permanent residence or seat of the debtor in the Republic of Croatia is located. In case the debtor is the Republic of Croatia or another legal person with public authorities that acts throughout the entire territory of the country, the jurisdiction for the execution lies with the court on whose territory the creditor has its permanent residence or seat in Croatia. If the creditor does not have its permanent residence or seat in Croatia, the territorial jurisdiction lies with the court on whose territory the seat of the Agency, with whose accounts the securities subject to execution are entered, is located.<sup>199</sup>

The execution on securities is conducted by attachment of the securities, their appraisal, sale and the

<sup>193</sup> Art. 227 CEA2011; similar art. 238 CEA.

<sup>194</sup> Art. 228 CEA2011; similar art. 239 CEA.

<sup>195</sup> Art. 194 CEA2011.

<sup>196</sup> Art. 195 CEA2011; similar art. 221 CEA.

<sup>197</sup> Art. 196 CEA2011; similar art. 222 CEA.

<sup>198</sup> Art. 197 CEA2011; similar art. 223 CEA.

<sup>199</sup> Art. 198A CEA2011.

execution creditor's settlement.<sup>200</sup> Assessment, ascertainment of the selling price, the sale of the securities and the execution creditor's settlement, are done via the provisions relating to execution on movables.<sup>201</sup>

The attachment of securities entered into the Agency's accounts is done by serving the decision on execution on the Agency. By attachment, the execution creditor obtains a lien on the securities, which, in the decision on execution, must be defined by quantity, type and gender (if dematerialized shares are in question), i.e. with an indication of the sign under which they are kept with the Agency.

In case the creditor does not have this information he may propose to the court to pass a ruling by which provisionally all securities entered into all accounts of the debtor with the Agency can be attached at the owner's position registered with the issuer (motion for provisional attachment). By court ruling on provisional attachment, the Agency needs to provide, within eight days, information on the type and sign of the execution debtor's securities entered into the accounts kept with the Agency, the registration of the owner's position, the gender, quantities, real rights and holders of such rights, the limits to real rights and, if possible, of their market value on a regulated public market or stock exchange, with an indication of the trade on the basis of which this value was assessed. The Agency is not allowed to inform the execution debtor on this. Upon receipt of the required information, the court informs the creditor. Within eight days the creditor proposes the court, the execution on securities defined by quantity, type and gender, i.e. by the sign of the securities. The court passes a decision on execution on certain securities and repeals the ruling on provisional attachment of securities.

If securities which are the object of execution are debt securities (bonds, treasury notes, financial papers, certificates of deposit and other securities with a monetary obligation), the court also serves the decision on execution on the issuer as the debtor's debtor.

The Agency has the right to recover its expenses incurred by undertaking the various actions. The Agency can file a request for recovery of expenses to the court within fifteen days from the date of performance of an action. These costs are considered costs of execution proceedings.<sup>202</sup>

In the decision on execution the court appoints an authorised person who is entrusted with the assessment and sale of the attached securities. In his own name and for the account of the person entered as their owner into the Agency's accounts, i.e. the authorised company's custody books, the authorized person tries to undertake the sale of the attached securities on the stock exchange or at the regulated public market, by way of carrying out a public auction at the stock exchange or in some other manner provided for by the law. The authorized person informs the court if he fails to do so within thirty days and shall continue the sale attempts until ordered otherwise by the court. The moneys achieved by the sale of securities is remitted to the court's account determined in the decision on execution. When the securities have been sold pursuant to the decision on execution the Agency shall act as if the sale has been done upon their owner's order.<sup>203</sup>

### ***Claims to handover or deliver movables or immovables***

The territorial jurisdiction to adjudicate on motions for execution on the execution debtor's claim to handover movables or immovables to him, and to implement the execution, lies with the court on whose territory these things are located. The execution is carried out by attachment of the claim, its transfer to the execution creditor and its sale.<sup>204</sup> Also before the legal effectiveness of the ruling on the transfer of the claim, the creditor may file an action against the debtor's debtor who is not willing to surrender the things and demand the surrender, if he has no enforcement title document on the obligation to surrender.<sup>205</sup> In case of chattels, the court, in the ruling ordering the transfer of the debtor's claim, orders the debtor's debtor to surrender chattels, to which the claim relates, to an official person or some other person for safekeeping. The sale is effected in accordance with the provisions on sale of movables.<sup>206</sup>

In case of real estate the court orders, in the ruling ordering the transfer of the debtor's claim, the debtor's debtor to surrender the real estate to which the claim relates to the creditor. Within a time limit which may not

200 Art. 198B CEA2011; similar art. 225 CEA.

201 Art. 198F CEA2011.

202 Artt. 198C-198D CEA2011; similar artt. 226-227 CEA.

203 Art. 198E CEA2011; similar art. 227 CEA.

204 Artt. 185-186 CEA2011.

205 Art. 188 CEA2011.

206 Artt. 190-191 CEA2011.

be longer than thirty days from the day the real estate was surrendered to him, the creditor may, in order for his claim to be settled, propose to the court the sale of the real estate. In case the creditor fails to propose the sale of the real estate within the set deadline, the court suspends the execution. The real estate is sold and the creditor settled in accordance with the provisions of the CEA2011 on the execution on real estate.<sup>207</sup>

### ***Security by preliminary execution***

The territorial jurisdiction to adjudicate on motions for preliminary execution and for implementing such execution lies with the court that would have had jurisdiction for execution on the basis of an enforcement title document.<sup>208</sup>

#### *Requirements*

In order to provide security for a non-monetary execution that cannot be secured by a conditional registration in a public book, the court may, on the basis of a judgment reached in civil proceedings, order a preliminary execution if the execution creditor shows probable the danger that, due to the deferral of execution until the judgment becomes legally effective, execution would be impossible or significantly more difficult and if he provides security for the damage that the execution debtor might incur due to such execution.<sup>209</sup>

#### *Procedure*

Before the court decides on the creditor's motion, the court holds a hearing in order to discuss the motion and the security deposit. If the parties do not reach an agreement on it, the court shall, if it accepts the motion for execution, at its free discretion order the amount of the security deposit and the time limit within which it has to be provided. The implementation of the execution cannot begin before the security deposit is provided.

If the security deposit is not provided within the set time limit, the court suspends execution.

At the request of an execution debtor who shows that it is probable that he would sustain irreparable or almost irreparable damage, the court may reject the motion for execution or condition its rejection on the provision of adequate security within a set time limit. If the execution debtor fails to provide the security within the set time limit, the court shall adopt a decision on execution.<sup>210</sup>

### ***Security by preliminary measures***

The territorial jurisdiction to adjudicate on motions for security by preliminary measures and for the implementation of such lies with the court that would have had jurisdiction for execution on the basis of an enforcement title document pursuant to which the security was ordered.<sup>211</sup>

#### *Requirements*

A preliminary measure is ordered for the purpose of securing a monetary claim on the basis of:

- a decision of a court or administrative body that has not yet become legally effective;
- a settlement made before a court or administrative body, if the claim determined therein has not yet matured;
- a notarial decision or notarial document, if the claim determined therein has not yet matured.<sup>212</sup>

The danger exists if the ordering of a preliminary measure has been proposed on the basis of:

- a payment order or decision on execution on the basis of a trustworthy document issued pursuant to a public document or a document legalised by a notary public, bill of exchange and cheque, against which an objection has been raised in due time;

207 Artt. 192-193 CEA2011.

208 Art. 280 CEA2011; similar art. 297 CEA.

209 Art. 281 CEA2011; similar art. 298 CEA.

210 Art. 282 CEA2011; similar art. 299 CEA.

211 Art. 283 CEA2011; similar art. 300 CEA.

212 Art. 284 CEA2011; similar art. 301 CEA.



- a judgment reached in criminal proceedings on a property law claim against which a retrial is possible;
- a decision that has to be executed abroad;
- a judgment on the basis of an admission against which an appeal has been lodged; a settlement that is challenged in the manner provided for by the law;
- a notarial document that is being challenged in the manner provided for by the law.<sup>213</sup>

#### *Types of preliminary measure*

The court can order the following as preliminary measures:

- conditional registration of a lien on a security debtor's real estate or on a right recorded on the real estate;
- any of the following security measures:
- attachment of real estate not entered into land registers, in accordance with the rules on the implementation of execution for collecting monetary claims on these real estate;
- attachment of the security debtor's chattels;
- attachment of the security debtor's monetary claim;
- attachment of part of the security debtor's income under an employment contract;
- attachment of part of the pension, disability benefit or compensation for lost income;
- attachment of the security debtor's claim against a bank account or savings book;
- attachment of the claim to surrender or deliver chattels or to surrender real estate;
- attachment of other property or real rights;
- attachment of share certificates and other securities and their delivery for safekeeping;
- attachment of shares for which share certificates have not been issued and of equity shares in companies;
- attachment of securities kept with the Agency.
- prohibit the bank from paying to the security debtor or third party, at the security debtor's order, from his account an amount for which a preliminary measure has been ordered.<sup>214</sup>

The sale of listed items is conducted in compliance with the provisions of the CEA2011 on execution on movables. The court orders the sale of attached chattels susceptible to fast deterioration or if there is a danger from the fall in price of such things.

The amount obtained by sale of a real estate or collection of a claim is kept in court or notary public deposit until the preliminary measure is suspended or until the security creditor motions for execution, and at the latest thirty days after the claim has become enforceable.<sup>215</sup>

#### *Revocation of a preliminary measure*

The court shall, at the security debtor's proposal, suspend the proceedings and set aside the actions that have been undertaken if:

- the security debtor deposits with the court the owed amount of the claim being secured, with interest and expenses;
- the security debtor shows that it is probable that the claim has, at the time of reaching the ruling on ordering a preliminary measure, already been settled or sufficiently secured;
- it has been finally determined that a claim has not arisen or that it has terminated;
- the decision on the basis of which the preliminary measure was ordered is revoked in connection with a legal remedy, i.e. if a judicial settlement or notarial document on the basis of which the preliminary measure was ordered has been put out of force.<sup>216</sup>

213 Art. 285 CEA2011; similar art. 302 CEA.

214 Art. 287 CEA2011; similar art. 304 CEA.

215 Art. 288 CEA2011; similar art. 306 CEA.

216 Art. 290 CEA2011; similar art. 307 CEA.

The Court shall directly suspend the proceedings and set aside the actions that have been undertaken if, within fifteen days from the expiry of the time for which the preliminary measure has been ordered, the conditions for compulsory execution have not been met.

### *Interim measures*

Before instituting litigation proceedings or some other judicial proceedings on a claim that is being secured, the territorial jurisdiction to adjudicate on motions for security by interim measures lies with the court that would otherwise have had jurisdiction to adjudicate on motions for execution.<sup>217</sup>

The interim measure may be proposed before the institution or during the course of judicial or administrative proceedings and after these proceedings terminate, until the execution is implemented. In a motion for ordering an interim measure a security creditor must put forward a request in which he shall exactly indicate the claim that he wants to secure, determine the type of measure he seeks and its duration and, when necessary, the means of security by which the interim measure shall be compulsorily realized and the object of security, with the appropriate application of the rules of the CEA2011 on the means and object of execution. The motion must contain an indication of the facts on which the request for ordering an interim measure is founded and propose evidence that corroborate these statements. The security creditor is obliged to attach this evidence, if possible, to the motion.<sup>218</sup>

The court may, in a ruling on ordering an interim measure, at the security creditor's proposal, also order the means by which it should be compulsorily realized and the object of security, with the appropriate application of the rules of this Act on determining the means and the object of security in a decision on execution. A Ruling on ordering interim measures shall have the authority of a decision on execution.<sup>219</sup>

### *Interim measures for securing monetary claims*

An interim measure for securing a monetary claim may be ordered if the security creditor shows probable the existence of the claim and the danger that without such a measure the security debtor shall prevent or make significantly more difficult the collection of the claim by alienating his property, concealing it or disposing of it in some other way. The security creditor does not have to prove this danger if he shows probable that the security debtor would sustain only inconsiderable damage by the proposed measure. According to Croatian law the danger is considered existing if the claim has to be realised abroad.<sup>220</sup>

### *Types of interim measures for the purpose of securing monetary claims*

For the purpose of securing a monetary claim any measure can be ordered through which the purpose of such security can be achieved, in particular the following:

- to prohibit the security debtor to alienate or encumber chattels, to seize these things and confide them to the security creditor or other person for safekeeping;
- to seize and deposit cash, securities and the like with the court or notary public;
- to prohibit the security debtor to alienate or encumber his real estate or real rights that are registered on the real estate in his favour, with a recordation of this prohibition in a land register;
- to prohibit the security debtor's debtor to voluntarily fulfil his obligation to the security debtor and to prohibit the security debtor to receive the fulfilment of this obligation, i.e. to dispose of his claims;
- to order a bank to refuse payment from the security debtor's account to the security debtor or third party at the security debtor's order, in the amount for which the interim measure has been ordered.<sup>221</sup>

217 Art. 292 CEA2011; similar art. 309 CEA.

218 Art. 293 CEA2011; similar art. 310 CEA.

219 Art. 294 CEA2011; similar art. 311 CEA.

220 Art. 296 CEA2011; similar art. 313 CEA.

221 Art. 297 CEA2011; similar art. 314 CEA.

### *Interim measures for securing non-monetary claims*

For the purpose of securing a non-monetary claim an interim measure can be ordered if the security creditor shows probable the existence of his claim, and if:

- he shows probable the danger that the security debtor would, without this measure, prevent or make significantly more difficult the realisation of the claim, in particular by altering the current state of things, or
- he shows probable that the measure is necessary in order to prevent violence or emergence or irreparable damage that is threatening.<sup>222</sup>

For the purpose of securing a non-monetary claim any measure can be ordered through which the purpose of such security can be achieved, in particular the following:

- to prohibit the alienation and encumbrance of chattels against which the claim is directed, their seizure and confiding them for safekeeping with the security creditor or third party;
- to prohibit the alienation and encumbrance of shares or equity shares against which the claim is directed, with a recordation of the ban in the book of shares or equity shares; where necessary in the court minutes; to prohibit the use or disposition of rights on the basis of such shares or equity shares; to confide shares or equity shares to the management of a third party; to set up an interim management board in the company;
- to prohibit the alienation and encumbrance of other rights against which the claim is directed and to confide the management of these rights to a third party;
- to prohibit the alienation and encumbrance of a real estate against which the claim is directed or real rights recorded on the real estate against which the claim is directed, with a recordation of the ban in the land register; to seize the real estate and confide it to the security creditor or third party for safekeeping;
- to prohibit the security debtor's debtor to surrender a thing, transfer a right or undertake any other non-monetary obligation against which the claim is directed to the security debtor;
- to prohibit the security debtor to undertake any actions which might inflict damage to the security creditor and to prohibit any alterations on the things against which the claim is directed;
- to order the security debtor to undertake certain actions necessary to preserve chattels or real estate or to preserve the current state of things;
- to authorize the security creditor to retain the security debtor's things that are kept with him and to which the claim refers, until the litigation is finally settled;
- to authorize the security creditor to undertake certain actions or obtain certain things alone or by proxy, especially for the purpose of restoring a prior status;
- to temporarily return the employee to work; to pay compensation during a work dispute, if this is necessary for his upkeep and the upkeep of persons whom he is obliged to support under the law.<sup>223</sup>

### *Security deposit in place of interim measure*

The security deposit creditor may, in a motion for the ordering of an interim measure, or subsequently, state that he shall be satisfied with the provision of a security deposit by the security debtor instead of an interim measure.

The provision of a security deposit in place of an interim measure can also be ordered at the security deposit debtor's motion. The circumstance that the security deposit debtor has put forward a motion for the provision of a security deposit shall not postpone the implementation of the security deposit until a decision is made on this motion.<sup>224</sup>

The court may also order an interim measure at the security creditor's proposal even when he has not shown probable the existence of a claim and danger, if he has previously, within a time limit set by the court, provided security for damage that the security debtor might incur by the ordering and implementation of an interim measure. If the security creditor does not provide the security deposit within the set time limit, the court shall reject the motion for security.<sup>225</sup>

<sup>222</sup> Art. 298 CEA2011; similar art. 316 CEA.

<sup>223</sup> Art. 299 CEA2011; similar art. 316 CEA.

<sup>224</sup> Art. 300 CEA2011; similar art. 317 CEA.

<sup>225</sup> Art. 301 CEA2011; similar art. 318 CEA.

*Time for which an interim measure is ordered*

The ruling by which an interim measure is ordered also orders the duration of this measure and if the measure is ordered before an action has been filed or some other proceeding instituted it shall also order the time limit within which the security creditor must bring an action, i.e. motion for institution of other proceedings, in order to justify the measure. At the security creditor's proposal, the court may extend the interim measure's duration, provided that the circumstances under which the measure was ordered have not changed.<sup>226</sup>

*Legal remedies<sup>227</sup>*

An appeal against the ruling on a motion for the issuance of an interim measure is permitted within eight days from the service of the ruling. This appeal is not sent to the other party for answer.

If the security creditor does not bring an action within a certain time limit, or if he does not institute any other proceedings for the justification of the interim measure or if the time for which the interim measure was ordered has expired, the court, at the security debtor's proposal, suspends the proceedings and sets aside the actions that have been undertaken.

**6.2.5. Challenges and problems in enforcement***Backlog*

The organization, scope of work and competence of courts, as well as the internal organization of the courts are regulated in the Law on Courts. Both municipal and commercial courts are involved in enforcement.

Special attention needs to be given to the municipal court in Zagreb. This is by far the largest court. The court (together with the other large courts - Rijeka and Split) also has the most significant backlog in cases. Although there is a possibility for the Supreme Court to reallocate cases between these overburdened courts and medium and small 'non-overburdened' courts, in practice this possibility, until some years ago, was rarely used.

The Law gives to parties the right to use numerous legal remedies like various objections, appeals, proposals for postponing the execution, by which they are able to extend cases. Enforcement proceedings were regularly used and also abused in order to re-examine issues related to the trial proceedings of the case. The purpose of the enforcement process is to enforce a judgment as efficiently and quickly as possible. It should never be a re-adjudication of the trial proceedings of a case. This means a clear distinction between the functions of litigation proceedings and enforcement proceedings is necessary.

However also the opposite was the case. What causes the backlog are mainly the so-called minor cases like the non-payment of water supply, electricity, heating, etc. In some courts execution cases represent 1/3 of all cases. To reduce the backlog in these cases, a change in the attitude of these creditors will be necessary: "In meetings with judges, court staff, and businessmen, it became apparent that many businesses were using the courts as a collection agency or debt management institution rather than pursuing normal credit and collection procedures before filing a claim in court."<sup>228</sup>

The problems in enforcement are numerous. "Particular progress was made in reducing the backlog of enforcement cases, including through the use of notaries for the execution of non-disputed decisions. However, enforcement cases still make up around one quarter of all pending court cases and procedures for the enforcement of court decisions need to be further reformed. Execution and enforcement cases are the main problem in 93% of the courts. Croatia needs to consider taking the enforcement process out of the hands of the courts, for instance through the use of special enforcement officers vested with public powers. Courts and parts of the state administration themselves do not always respect or execute in a timely manner the decisions of higher courts. This practice is contributing to cases against Croatia before the ECtHR."<sup>229</sup>

This was the opinion of the European Commission in 2006. However as we have seen in paragraph 6.1. progress has been made during the last years. This progress is also reflected in the statistics. Based on the EU Progress Reports we found the following data:

<sup>226</sup> Art. 303 CEA2011; similar art. 320 CEA.

<sup>227</sup> Artt. 304 and 305 CEA2011; similar artt. 321-322 CEA.

<sup>228</sup> The Strategy of the reform of the judicial system, 2008.

<sup>229</sup> 2006 Progress Report, page 50.

	June 2005	June 2006	June 2007	December 2007	June 2008	December 2008	December 2009	December 2010
2006	1,640,000	1,230,000						
2007			1,000,000					
2008				969,100	937,000			
2009						887,000		
2010							796,000	
2011								785,561

Looking at the backlog we see that the backlog is slowly reducing. A significant drop can be seen in 2007. For this several reasons can be found. First the involvement of the notaries public in the enforcement process. Secondly a change in the statistical rules of the Court Rulebook. Article 92 which states: “Article 391 is amended thus: Cases where enforcement writs were issued pursuant to authentic documents or decisions following an appeal, motions and requests in cases based on authentic instruments will be marked as finally resolved after the decision was issued and delivered, regardless if it is enforceable.” It is clear that this causes a difference between actual enforcement and statistical enforcement.<sup>230</sup> Thirdly, of course, the extra attention of the Croatian authorities to solve the backlog.

***FINA and the Cash Assets Repossession Act***<sup>231</sup>

From 1 August 2010 the Cash Assets Repossession Act entered into force. Based on this law from 1 January 2011, the FINA, the Financial Agency, has become the sole institution for cash asset repossession. Based on this Act, except for cash in domestic and foreign currency bank accounts, cash which the debtor (both enterprises and private persons) holds in savings deposits and term deposits accounts can be repossessed upon expiry of the contract on term deposit. This repossession of cash is executed by FINA, with bank accounts being accessed first, followed by term deposit accounts; FINA requests banks to execute the payment. The Cash Assets Repossession Act has given FINA power to issue enforcement orders to the banks, without court interference. It seems clear that such a system frustrates the enforcement measures as taken by the public enforcement agent or the notary public.

**6.2.6. The future organization of enforcement**

***Introduction***

With the introduction of the CEA, the Croatia Enforcement Act, and CPEAA, the Croatia Public Enforcement Agents Act, Croatia introduced a new system of enforcement. From January 1, 2012, with these two regulations, enforcement becomes the responsibility of public enforcement agents. From this date courts only have jurisdiction over enforcement for the award of custody of a child to a parent and enforcement regarding parent visitation time.

The public enforcement service acts as a public service<sup>232</sup> and is performed by public enforcement agents as autonomous and independent officers acting as persons of public trust.<sup>233</sup> Persons other than public enforcement agents are prohibited from performing any of the activities that fall within the area of competence of public enforcement agents.<sup>234</sup>

230 As it was also noted in the Study on the enforcement of court decisions in Croatia, final report, The European Union's IPA Programme for Croatia, April 2009, page 99-107.

231 Cash Assets Repossession Act, NN91/10.

232 Art. 1 CPEAA.

233 Art. 2 CPEAA.

234 Art. 120 CPEAA.

The CPEAA also contains a number of provisions<sup>235</sup> on the drawing up and issuance of writs. One could wonder whether such provisions should be regulated in a formal law, rather than a regulation, or bylaw.

### ***Number of enforcement agents***

The number of public enforcement agents is defined as the number “as necessary for the due performance of public enforcement service on the entire national territory”.<sup>236</sup> The number is determined by the Ministry based on the opinion issued by the Chamber and the county courts in Croatia and taking into consideration the demand for enforcement agent services and the volume of economic and legal activity in each district. The number is based on certain criteria:

- At least two public enforcement agents are appointed per eighty thousand inhabitants;
- At least one public enforcement agent in the district under the jurisdiction of each county court;
- In case appointment in such a district under jurisdiction of a county court is not reasonable due to a small population or a low demand for enforcement agent services, the Ministry shall decide which public enforcement agents from the adjacent court districts will perform the enforcement agent tasks in such county court and according to which schedule. The Chamber will give its opinion on those matters.<sup>237</sup>

The public enforcement agents shall have a so-called principal place of office and area in which they perform their duties.<sup>238</sup> This principal place of office in the court district for which a public enforcement agent has been appointed is stipulated by the Ministry based on the opinion of the Chamber. In case the court merges with another court, the public enforcement agent is relocated to the district under jurisdiction of such other court to which the merged court was assigned.<sup>239</sup> Based on article 29 CPEAA also a part of (a large) city can be designated as public enforcement agent’s principal place of office.

### ***Appointment procedure***

The requirements for appointment are rather considerable:

- Croatian nationality;
- Legal capacity as well as health capability to carry out the public enforcement agent duties;
- A degree in law received from a university in Croatia or a formally recognized degree in law from an accredited institution outside of Croatia;
- Have passed the bar examination;
- Have passed the public enforcement agent examination;
- Be worthy of public trust in the performance of the enforcement agent profession. This means:
  - no criminal proceedings have been instituted for a criminal offence for personal gain or other criminal offence that is prosecuted in the line of duty;
  - no conviction of a criminal offence for personal gain or other criminal offence that is prosecuted in the line of duty, for as long as the legal consequences incident to conviction persist;
  - no removal from the office of a judge or prosecutor, or a suspension from the office of lawyer, public enforcement agent, notary public or civil servant office, due to a disciplinary decision, until three years expire from the day of removal or suspension from office;
  - no exclusion from office as a public enforcement agent, until five years expire from the date of exclusion from office;<sup>240</sup>
- Agrees from the appointment as a public enforcement agent to abandon any other paying service or other paying job or membership in the bodies of an entity engaged in a commercial activity;
- Agrees from the appointment as a public enforcement agent, to procure equipment and facilities

235 Artt. 42-50 CPEAA.

236 Art. 9 CPEAA.

237 Art. 18 CPEAA.

238 Art. 4 CPEAA.

239 Artt. 29 and 30 CPEAA.

240 Art. 96 CPEAA.

necessary and appropriate for the performance of enforcement agent duties according to standards set out by the Ministry.<sup>241</sup>

The public enforcement agent is appointed by the Minister of Justice. The procedure itself is conducted by the Chamber upon the request of the Ministry of Justice. The announcement of the appointment procedure states the district for which a public enforcement agent will be appointed. Within 15 days after the Chamber receives the request from the Ministry to initiate an appointment procedure, an announcement is done in the official gazette *Narodne Novine*.

The applications for positions are submitted to the Chamber. On expiry of the appointment period (at least 30 days after the announcement), the Chamber forwards the applications received to the Ministry together with Chamber's opinion within thirty days after the expiry of the appointment period. A request is done by the Ministry to previous employers of candidates or authorities at which they were employed (e.g. Chamber for public enforcement agents and deputy enforcement agents; the Croatian Bar Association for lawyers; the Croatian Association of Notaries for notaries public and the president of the higher instance court for judges). In addition also the candidates' success in the bar examination and the enforcement agent examination are taken into consideration.<sup>242</sup>

Once appointed, within two months the public enforcement agent takes an oath before the president of the Supreme Court of Croatia, with the Minister of Justice and the president of the Chamber present. Upon taking the oath of service for public enforcement agent, a Certificate of Appointment is handed over to the enforcement agent by the Minister. A copy of this certificate is sent to the Chamber who then will determine and announce in the official gazette (*Narodne Novine*) the date on which a public enforcement agent will enter upon his duties.<sup>243</sup>

### ***Commencing the enforcement service***

#### ***Official seal and stamp***

Prior to commencing the enforcement service the public enforcement agent needs to have obtained an official seal and stamp. Both are used for authentication of orders and documents issued, drawn up or inspected in connection with actions taken in the performance of enforcement agent duties. The seal needs approval and certification by the president of the municipal court in whose area of jurisdiction the enforcement agent's office is situated. In this court the public enforcement agent also deposits his signature.<sup>244</sup>

#### ***Separate accounts***

The public enforcement agent is obliged, in addition to the regular account, to open two separate accounts with a bank:

- one account to be used exclusively for depositing amounts derived from the seized property that belong to the enforcement creditor. All funds deposited on this separate account will be transferred to enforcement creditor's account, within one working day;
- one special account to be used exclusively for depositing amounts paid in enforcing execution.

Any money paid by mistake to another account or paid in cash, needs to be transferred without delay by the public enforcement agent to one of these accounts. These separate accounts cannot be levied upon under a writ of execution or other authentic document against a public enforcement agent who is an enforcement debtor. The public enforcement agent is solely authorized to dispose of the funds deposited in these bank accounts, unless he authorizes another person under his jurisdiction, either permanently, periodically or on a case by case basis, to dispose of the funds kept in the enforcement agent's separate accounts.<sup>245</sup>

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241 Art. 14 CPEAA.

242 Art. 15 CPEAA.

243 Art. 16 CPEAA.

244 Artt. 5 and 19 CPEAA.

245 Art. 7 CPEAA.



*Liability insurance*

A public enforcement agent (and the Chamber<sup>246</sup>) is liable for damage, including illegal or improper work, caused through his own fault and his staff with all his property. He is entitled to recourse from deputy enforcement agent, assistant enforcement agent, enforcement clerk, and trainee enforcement agent under the general terms of recourse liability of officials. The government cannot be held responsible for any damage caused by a public enforcement agent or his staff. For that reason, prior to entering upon his duties, the public enforcement agent is obligated to take out a liability insurance policy to cover against liability for damage he may inflict upon third parties in the course of performance of his official duties. The conditions for the insurance are negotiated annually between the insurance companies and the Chamber and the Ministry. The contract is made either directly between the insurance company and the public enforcement agent, or through the Chamber. Violation of the obligation to take out a liability insurance or violation of the obligation to make payments for liability insurance to the Chamber is considered a gross breach of an enforcement agent's official duties.<sup>247</sup>

*The staff of the office*

The CPEAA describes the different functions in the office: the deputy enforcement agent, the assistant enforcement agent, public enforcement clerks, trainee enforcement agents and acting enforcement agents. Persons exercising these functions are a compulsory member of the Chamber and take an oath before commencing their job. All tasks carried out by a deputy enforcement agent, an assistant enforcement agent or a trainee enforcement agent have the same legal effect as if performed by the public enforcement agent himself. The public enforcement agent shall be responsible for such tasks in accordance with the CPEAA and other acts. The deputy enforcement agent and assistant enforcement agent may enter on duties with a public enforcement agent only after depositing their signature with the competent municipal court.<sup>248</sup>

*Deputy Public Enforcement Agents<sup>249</sup>*

A deputy public enforcement agent is authorized to perform any and all functions that belong to the legally defined scope of duties of a public enforcement agent. The deputy public enforcement agent may sign writs of execution with a note that he is signing the writ in his own name and for the public enforcement agent with whom he is employed. Upon a public enforcement agent's request, the Chamber may limit the scope of duties to be performed by a deputy public enforcement agent.

Deputy public enforcement agents need to meet the following requirements:

- Croatian citizenship;
- legal capacity as well as health capability to carry out the deputy public enforcement agent duties;
- a degree in law received from a university in Croatia or a formally recognized degree in law from an accredited institution outside of Croatia;
- passed the bar examination and the public enforcement agent examination;
- be worthy of public trust in the performance of the enforcement agent profession;
- on being appointed as a deputy public enforcement agent, abandon any other paying service or other paying job or membership in the bodies of an entity engaged in a commercial activity;
- listed in the register of deputy public enforcement agents kept by the Chamber.

The deputy public enforcement agent is employed in the public enforcement agent's office. In case the public enforcement agent needs a deputy public enforcement agent he announces this need to the Ministry and the Chamber. The need for opening a deputy public enforcement agent position is decided upon by the Ministry upon the Chamber's opinion. The approved deputy public enforcement agent positions are filled in a recruitment procedure to be conducted by the Chamber. The final decision on the selection and appointment of a deputy public enforcement agent is made by the Ministry based on the candidate's performance in the graduate diploma and his previous experience the previously obtained opinion of the Chamber and of the public enforcement agent.

<sup>246</sup> Art. 80 CPEAA.

<sup>247</sup> Artt. 40 and 41 CPEAA.

<sup>248</sup> Art. 75 CPEAA.

<sup>249</sup> Artt. 70 and 76 CPEAA.

#### *Assistant Public Enforcement Agents<sup>250</sup>*

An assistant public enforcement agent can independently perform all duties for which he has been empowered by the public enforcement agent. They are employed in a public enforcement agent's office and will meet the following requirements:

- Croatian citizenship;
- legal capacity as well as health capability to carry out the deputy public enforcement agent duties;
- a degree in law received from a university in Croatia or a formally recognized degree in law from an accredited institution outside of Croatia;
- at least eighteen months of experience in legal work;
- listed in the register of assistant public enforcement agents kept by the Chamber.

#### *Public Enforcement Clerks<sup>251</sup>*

The public enforcement clerk carries out administrative and other supporting work required in connection with public enforcement agent duties for which he has been authorized by the public enforcement agent. He is employed at a public enforcement agent's office and is listed in the register of public enforcement clerks which is kept by the Chamber. In order to be registered a clerk is required to have minimum secondary school level education, completed state qualifying examination or examination stipulated in other legislation or the Chamber's internal regulations.

#### *Trainee Public Enforcement Agents<sup>252</sup>*

The trainee enforcement agent performs the duties entrusted to him by the public enforcement agent, but always under professional supervision of the public enforcement agent, deputy public enforcement agent or assistant public enforcement agent. The trainee public enforcement agent meets the following requirements:

- Croatian citizenship;
- legal capacity as well as health capability to carry out the deputy public enforcement agent duties;
- a degree in law received from a university in Croatia or a formally recognized degree in law from an accredited institution outside of Croatia;
- be worthy of public trust in the performance of the enforcement agent profession;
- listed in the register of trainee public enforcement agents kept by the Chamber.

The recruitment procedure is announced and conducted by the Chamber upon request of the public enforcement agent. The traineeship may be interrupted for six weeks per year, due to illness, leave of absence, including holidays.

#### *Acting Public Enforcement Agent*

The acting public enforcement agent is a person who is appointed ex officio by the Ministry upon recommendation of the Chamber in the event of the public enforcement agent's death, removal, suspension or resignation from office. The acting public enforcement agent is a neighboring public enforcement agent or deputy public enforcement agent. The acting public enforcement agent shall take possession of the public enforcement agent's files and account books as well as any documents and items of value placed in his custody. The acting public enforcement agent resumes the enforcement activities and conducts them for his own account.<sup>253</sup>

#### *Access to information<sup>254</sup>*

The public enforcement agent is authorized to request information necessary for carrying out enforcement from any and all government bodies, public entities, or legal and natural persons who are in possession

250 Artt. 71 and 76 CPEAA.

251 Artt. 72 and 76 CPEAA.

252 Artt. 73 and 76 CPEAA.

253 Art. 78 CPEAA.

254 Art. 58 CPEAA.

of such information. The requested information shall be provided to the public enforcement agent within eight days of receipt of the request.

### *Croatian Chamber of Enforcement Agents*

All public enforcement agents, deputy enforcement agents, assistant enforcement agents, enforcement clerks and trainees in Croatia are a compulsory member of the Croatian Chamber of Public Enforcement Agents (hereinafter referred to as: Chamber), a legal entity, located in Zagreb. The Chamber bodies are the Assembly, the Management Board and the Chairman of the Chamber. The Chamber is governed by by-laws and other internal regulations, that need, in general, approval by the Minister of Justice. The by-laws stipulate the number, appointment procedure, and the rights and obligations of the representatives of enforcement agent deputies, assistant enforcement agents, enforcement clerks and trainee enforcement agents in the Chamber bodies.<sup>255</sup> Incomes of the Chamber are the membership fees of its members and, in addition, a contribution by the public enforcement agents, in proportion to their income.<sup>256</sup>

Unless foreseen otherwise, an administrative action can be filed against resolutions issued by Chamber bodies in regard to the rights and obligations of public enforcement agents, deputy enforcement agents, assistant enforcement agents, enforcement clerks, trainee enforcement agents and acting enforcement agents.<sup>257</sup>

Towards the Chamber the Minister has strong powers. The Minister may dissolve the Management Board and dismiss the Chairman of the Chamber if serious incompliance is discovered in their work and the Board or the Chairman fail to comply with regulations after receiving a warning of incompliance. In his resolution the Minister defines the deadline for election of a new management board and a new Chamber chairman, and appoints a commissioner from among the public enforcement agents in Croatia who will be in charge of such bodies until election of the new bodies. This commissioner executes his duties at the Chamber principal office and is entitled to an appropriate fee and reimbursement of costs defined by the Minister and at the expense of the Chamber.<sup>258</sup>

### *Chamber Assembly*

The Chamber Assembly passes the by-laws and other internal regulations of the Chamber, elects the members of the Management Board, chairman of the Chamber and members of other Chamber bodies; reviews and approves the Chamber's budget; defines the membership fee and contribution and the mode of their payment; reviews and approves the Management Board invoices; defines the registration fee in agreement with the Ministry; decides on the use of fines and other issues provided for by CPEAA and the by-laws.

An ordinary meeting of the Chamber Assembly is held each year to decide on the Chamber's budget for the following year. In addition the Chairman of the Chamber may convene a special meeting of the Assembly based on the decision of the Management Board or a written request of at least one fifth of the Chamber members. Public enforcement agents are obligated to attend the Assembly meetings and to perform their elected duties. The decisions of the Assembly are valid if at least one fifth of the Chamber members is present. The Chamber Chairman has the deciding vote if votes are divided equally.<sup>259</sup>

### *The Management Board*

The Management Board members are elected for a term of three years.<sup>260</sup> The Management Board draws up draft by-laws and other internal regulations of the Chamber; prepares Chamber Assembly meetings; implements the Chamber Assembly's decisions; maintains a record of public enforcement agents, deputy enforcement agents, assistant enforcement agents, enforcement clerks, trainee enforcement agents, and acting public enforcement agents; draws up a draft annual budget of the Chamber; determines the fiscal year, approves the financial statements for the previous fiscal year and proposes the budget for the next

<sup>255</sup> Art. 87 CPEAA.

<sup>256</sup> Artt. 10 and 79 CPEAA.

<sup>257</sup> Art. 85 CPEAA.

<sup>258</sup> Art. 88 CPEAA.

<sup>259</sup> Art. 81 CPEAA.

<sup>260</sup> Art. 81 CPEAA.

fiscal year; as well as handles the Chamber's economic matters, collects registration fees, membership fees and other charges that the Chamber is authorized to collect and decides on other matters that fall within its competence pursuant to the CPEAA or Chamber by-laws.

The number of Management Board members is defined by the Assembly. They will meet at least ten times a year. For a Management Board's decision to be valid, a majority of Board members must be present.<sup>261</sup>

#### *Chairman of the Chamber*

The Chairman of the Chamber Assembly is elected for a term of three years.<sup>262</sup> He acts as both the chairman of the Chamber Assembly and the Management Board. The Chamber vice-chairman shall be elected by the Management Board from among its members. The Chairman shall represent and act on behalf of the Chamber. In the Chairman's absence, the chairman's duties will be performed by the vice-chairman or, in his absence by the most senior member of the Management Board.

It is the task of the Chairman of the Chamber to attempt to resolve in an amicable manner any misunderstandings between Chamber members, between public enforcement agents, deputy public enforcement agents, assistant enforcement agents, enforcement clerks and trainee enforcement agents, to warn Chamber members and enforcement agent assistants and trainees of their conduct, and to make sure that Chamber acts in accordance with the law.<sup>263</sup>

#### *Training*

Public enforcement agents are obliged to regularly attend training seminars and other forms of continuous training organized by the Chamber.<sup>264</sup>

The time spent in apprenticeship with a public enforcement agent as a trainee enforcement agent is put on an equal level with the time in training spent in a lawyer's office or at a court or a public prosecutor's office in terms of qualifications for taking the bar examination in accordance with the provisions of the Croatian Judicial Trainees and Bar Examination Act. The professional education programme for public enforcement agent trainees is developed by the Chamber in compliance with the Ministry and in harmonization with the Judicial Academy's programme.<sup>265</sup>

#### *Termination of Office*

The enforcement agent's office terminates:<sup>266</sup>

- In the event of the public enforcement agent's death;
- Upon the public enforcement agent turning 70 years of age;
- Upon the dismissal from office based on the enforcement agent's written request;
- If a public enforcement agent is convicted of a criminal offence for gain or a severe or particularly dishonorable criminal offence for which he is prosecuted in the line of duty, or if a public enforcement agent is given a non-suspended sentence of imprisonment of more than six months or if he is prohibited from discharging his enforcement agent office;
- If, for no justifiable reason, he fails to enter upon his duties on the date defined by the Chamber as the date of entry into office;
- If he is dismissed from his position as a result of a disciplinary sanction;
- If he is relieved of his duties;
- In the event of bankruptcy;
- In the event of removal:<sup>267</sup> e.g. failure to take the oath of service within two months, if his legal capacity

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<sup>261</sup> Art. 82 CPEAA.

<sup>262</sup> Art. 81 CPEAA.

<sup>263</sup> Art. 83 CPEAA.

<sup>264</sup> Art. 17 CPEAA.

<sup>265</sup> Art. 77 CPEAA.

<sup>266</sup> Art. 20 CPEAA.

<sup>267</sup> Art. 22 CPEAA.

is taken or restricted as a result of a court order, if due to a physical handicap, bodily or mental infirmity or disease he becomes incapable of duly performing his duties for a longer period, if his business relationships or the way he operates his business jeopardizes the interests of parties or if he fails to regularly renew his liability insurance or fails to pay insurance to the Chamber;

- In the event of incapacity due to illness. If a public enforcement agent becomes incapable of the performance of his official duties for a longer period of time due to illness, the Chamber Management Board shall request him to resign. In case the Management Board fails to do so within a reasonable time the Minister will do such a request. This request states the reason why resignation is being requested. If the public enforcement agent fails to do as requested within a specified time, the Management Board shall ask the competent municipal court at the headquarters of the county court in whose district the public enforcement agent has his principal place of office to initiate a procedure for declaring him permanent incapacity for the performance of service due to illness.<sup>268</sup>

In the event of termination or if the public enforcement agent is appointed as a public enforcement agent within the district under jurisdiction of another county court, the custody over his files, account books and official documents passes to the Chamber, unless the Ministry decides that another public enforcement agent is to take custody over such files, account books and documents.<sup>269</sup>

The CPEAA has special provisions on the safeguarding of the documents, files, registers, account books, stamps and seals, cash, documents and items of value by the Chamber.<sup>270</sup> In case any files are found to be missing, the Chamber shall call upon the former public enforcement agent, his estate administrator or the former acting officer to bring back the files within a specified time. If the file is not returned within the specified time, the participants will be notified by the Chamber in order to allow them to take the necessary steps to uphold their rights. The Chamber can issue copies, excerpts and certificates on the basis of the enforcement agent's files that are kept in court's custody, and shall approve insight into such files as well as return documents received from a public enforcement agent.

### **Exemption**

A public enforcement agent cannot refuse to take on a case or to undertake official activities without a good reason. In case of refusal to take on a case or to undertake an official activity, the party is entitled to lodge a complaint with the Chamber. In case of such complaint, the Chamber may designate another public enforcement agent to take over the case or perform an official activity.

A public enforcement agent, deputy enforcement agent or assistant enforcement agent is not allowed to undertake any official activities when the public enforcement agent himself, his spouse, common-law partner, or blood relative in the direct line or collateral line up to the fourth degree is a party or a participant in the enforcement procedure.<sup>271</sup> A complaint for self-exemption or a public enforcement agent's exemption request is decided on by the Chamber.<sup>272</sup>

The public enforcement agent is not allowed to associate with a lawyer, a notary public or any other individual or legal entity for joint performance of office or use of the same office space. Two or more public enforcement agents may jointly perform their office only if approved to do so by the Ministry on the basis of a previously obtained opinion of the Chamber. The public enforcement agent may not act as a lawyer or a notary public or be employed in any other collection service, nor engage in any other paying employment, or be a member in supervisory or management boards or act as an authorized representative of a legal entity involved in a commercial activity.<sup>273</sup>

## **6.3. Training of professionals involved in enforcement**

For judges it is clear that this professional group can mainly rely on its education, which has been delivered on the way to become a judge (4 years of law school and 4 years of training as a high judicial advisor or 2

<sup>268</sup> Art. 91 CPEAA.

<sup>269</sup> Art. 25 CPEAA.

<sup>270</sup> Artt. 66-69 CPEAA.

<sup>271</sup> Art. 33 CPEAA.

<sup>272</sup> Art. 35 CPEAA.

<sup>273</sup> Artt. 36-37 CPEAA.

years practice as a lawyer), and which, besides a university study, consists of traineeships and an additional “judges-examination” under the auspices of the Ministry of Justice.

Still it has to be underlined that a concrete specialisation in the education for enforcement judges is missing already at the initial phase of education. Looking into the chapter of ongoing training for judges it has to be stressed that also here (at least until recently) a concrete and structured training in the field of enforcement law and procedure is missing.

There is no uniformity among the courts in the country on how to organize training at initial and ongoing level. At the level of the Commercial Court in Zagreb there are periodic meetings of enforcement judges in order to exchange the latest information in the field and to help each other with problems, which recently occurred. A similar exchange of information is organised at the Municipal Court of Zagreb. Even if on the one hand these initiatives have clearly to be appreciated, it has to be underlined, that they are not able to replace a clearly structured training at the initial and ongoing level. This is even more true for the smaller courts in the country, where sometimes only one or two judges are working with enforcement cases and where therefore a simple exchange of information is either not possible or at least extremely limited.

The additional problem is that lack of organised training cannot be compensated by self-study as there is no training material available which would allow focusing on the special needs of enforcement judges’ practice. Available materials are made for the transfer of theoretical knowledge regarding the enforcement law and are not dealing with practical issues during the enforcement process.

At most courts the court clerks are not part of the informal training network (if any). The court clerks are the ultimate enforcers of judges’ decisions, who have to translate judges’ findings into concrete action. Therefore it is clear that also this professional group requires a clear defined and tailor-made training as described in the CoE Rec17(2003). The fact that special knowledge for enforcement court clerks is indispensable, becomes clear when taking into consideration that they are the ones who are the visible part of the system, carrying out delicate duties.

At the moment court clerks have neither a specialised education nor a special status, but are more or less “normal civil servants”. Within the group of “civil servant court clerks” there is no clear specialisation for “enforcement court clerks”.

With the adoption of the CEA and the CPEAA the Croatian legislator has created an obligation to develop training for the enforcement authorities. First: in order to be appointed as a (deputy) public enforcement agent one needs to hold a degree in law received from a university in Croatia or a formally recognized degree in law from an accredited institution outside of Croatia and one needs to have passed the bar examination and the public enforcement agent examination.<sup>274</sup> Only those persons who have passed the bar examination and who, following the bar examination, have spent two years at judicial posts in courts, in a lawyer’s office or public enforcement agent’s office, or three years in other legal posts are qualified to take the public enforcement agent examination.<sup>275</sup>

Also for the assistant and trainee enforcement agent there are similar requirements. According to article 17 CPEAA public enforcement agents are obligated to regularly attend training seminars and other forms of continuous training organized by the Chamber.

Regarding the staff of the public enforcement agent the CPEAA is also clear: the time spent in apprenticeship with a public enforcement agent as a trainee enforcement agent is put on an equal level with the time in training spent in a lawyer’s office or at court or a public prosecutor’s office in terms of qualifications for taking the bar examination in accordance with the provisions of the Judicial Trainees and Bar Examination Act. This provision puts an obligation on both the Chamber and the Ministry to develop a professional education programme for public enforcement agent trainees in harmonization with the Judicial Academy’s programme.<sup>276</sup>

#### 6.4. Ethics, monitoring and control, disciplinary issues

We already indicated that the CEA describes the Enforcement Authority as: the public enforcement agent, the court and the notary public.<sup>277</sup> Describing the ethical standards, monitoring and disciplinary proceedings we need to have a look at those three groups separately.

274 Artt. 14 and 70 CPEAA.

275 Art. 116 CPEAA.

276 Art. 77 CPEAA.

277 Art. 2 CEA.

### *The courts*

Having a closer look at the courts a distinction needs to be made between the judge and the court clerk.<sup>278</sup>

#### *Judges*

According to article 10 CEA2011 in the first instance and in the second instance, the execution procedure and the security procedure are conducted and decisions are made by a single judge. In the new CEA (as from 1 January 2012) the role of the judge seems to be less prominent:

“(1) In the first instance, the enforcement procedure shall be carried out and decisions brought by a public enforcement agent or notary public, and exceptionally, if provided in this or any other Act that the enforcement be ordered and carried out by the court, by a single judge (first instance authority).

(2) In the first instance, the security procedure shall be carried out and decisions rendered by the court or notary public.

(3) In the second instance, decisions shall be rendered by a single judge.”<sup>279</sup>

Croatia has a Code of Ethics for judges. In March of 2003, the Parliament adopted a general justice reform plan and in February and October 2004, amendments to the Law on the Courts were passed. The Law also has a new edition titled “Code of Ethics for Judges” that set down the principles and rules of behavior that will bind judges, both on and off duty. In December 2005, through amendments to the Law on the State Judicial Council, a Disciplinary Council was established, consisting of three members. At the same time the time limit for initiating disciplinary proceedings was extended from two to three years. Also adopted in December 2005 was a new Law on the Courts. This Law included improvements on the evaluation criteria for the work of judges, obligatory training for judges, and the introduction of a judicial inspection. In December 2006 the Supreme Court adopted another Code of Judicial Ethics to enhance impartiality and professionalism of the judiciary. So far the number of disciplinary proceedings against judges seems to be limited. Nevertheless citizens complain with the ombudsman or the Ministry of Justice. On the situation in 2007 the European Commission concluded in its progress report: “The Ministry of Justice received 11,846 complaints about the work of courts in 2006, of which 30% were considered well founded.”<sup>280</sup>

In January 2007 the Croatian Parliament adopted another set of amendments to the 2005 Law on the Courts. These amendments widened the obligation to submit property declarations to all judges. In March 2007 an Ordinance on the content and manner of handling property declarations of judges, state attorneys and deputy state attorneys was adopted. In addition the Ministry of Justice has set up an inspection team for all types of courts: “In 2008 about eleven inspections were performed resulting in the removal of the two court presidents, disciplinary procedures and internal court reorganisation. However, staff shortages have led to few inspections being carried out in 2009.”<sup>281</sup>

#### *Court Clerks (court enforcement officer)*

The physical part of the enforcement process lies also in Croatia with the court clerks, or as they are called in the CEA, the court enforcement officer. The CEA pays only limited attention to the ethical standards of the court enforcement officer and in very general words: “The court enforcement officer shall proceed with due respect for the person of the enforcement debtor and members of his household on the occasion of the search of the enforcement debtor’s apartment or clothing that he is wearing, and during any other enforcement action.”<sup>282</sup> As the court enforcement officers are the ones, who, during the enforcement process, get in direct touch with debtors, their professional and ethical behavior is of the highest importance. In our opinion it seems at least doubtful to let them operate under a very general code for civil servants.

Control of the court enforcement officers is carried out by the courts: a party or participant may file a pleading requesting the court to remedy any irregularity made by the court enforcement officer in the carrying out of enforcement. The court may issue a conclusion revoking the court enforcement officer’s unlawful and irregular actions.”<sup>283</sup>

<sup>278</sup> see Art. 10 of the Croatian Law on Enforcement.

<sup>279</sup> Art. 9 CEA.

<sup>280</sup> 2007 Progress Report, page 49.

<sup>281</sup> 2009 Progress Report, page 52.

<sup>282</sup> Art. 70 CEA.

<sup>283</sup> Art. 72 CEA.



## **The public enforcement agent**

### ***Supervision over enforcement agent's office***

The public enforcement agent is obliged to keep a record of all requests for ordering and executing enforcement and other requests and to keep financial books, i.e. record all receipts and expenditures. The type, form and content of registers and account books to be kept by public enforcement agents is stipulated by the Minister in public enforcement agent's rules of procedure.<sup>284</sup>

The public enforcement agent is obligated to send an annual report on his work to the Ministry and the Chamber each year. This report relates to the total number of pending enforcement cases, total number of processed cases, total number of unprocessed cases, ratio of total monetary proceeds of enforcement and total claims, other information when requested by the Ministry or Chamber. In addition the Chamber will send a report on the activities of the Chamber and its findings on the public enforcement agents annually to the Ministry.<sup>285</sup>

The supervision of a public enforcement agent's office is carried out by the Ministry and the Chamber.<sup>286</sup>

The Ministry may, ex officio or in response to complaints by interested parties, instruct a review of the work of the Chamber, individual public enforcement agents, deputy enforcement agents, assistant enforcement agents, enforcement clerks and trainee enforcement agents and may take the necessary steps to eliminate or sanction the discovered violations. For this the Ministry has access to the files and account books of both the Chamber and the aforementioned persons. A review of the enforcement agents' account books is carried out by special officers. Specific reviews may be entrusted to the president of the municipal or county court in whose district the Chamber or a public enforcement agent has his principal office.<sup>287</sup>

The control over work and conduct of public enforcement agents, acting officers and enforcement agent deputies, assistant enforcement agents, enforcement clerks and enforcement agent trainees through the Chamber, is carried out by the Management Board and the Chamber Chairman. The CPEAA enables the Chamber to develop a by-law in which the supervision can be performed by a special body. While writing this publication such a by-law was not developed (yet). The intention is that such a supervisory body reports on its work to the Management Board and the Chamber Chairman on a quarterly basis and advises the Chamber bodies on actions to be taken in accordance with the supervision outcome.

At least once a year the Chamber Management Board needs to conduct an inspection of public enforcement agents' offices to review their operation. Such an inspection covers the enforcement agent's entire business. The inspections may be done by members of the Chamber possibly in the presence of the chairman or vice-chairman of the public enforcement agents Association in the territory in which the public enforcement agent has his principle office. Both the Management Board and the Chamber Chairman are authorized to give instructions and make comments on the work of public enforcement agent deputies, assistant enforcement agents, enforcement clerks and enforcement agent trainees or to undertake further necessary steps, such as disciplinary proceedings.<sup>288</sup>

### ***Disciplinary proceedings***

The public enforcement agents and the deputy enforcement agents, assistant enforcement agents, enforcement clerks, trainee enforcement agents and acting enforcement agents are subject to disciplinary sanctions for acting in violation of the CPEAA or other laws or conduct in a manner that offends the honor and dignity of the public enforcement agent's office.<sup>289</sup> Disciplinary offences in the CPEAA are divided into minor breaches and other disciplinary offences.<sup>290</sup> The minor breaches will be sanctioned with a written reminder or a monetary fine up to the amount of a monthly average salary of a municipal court judge. The other disciplinary offences are sanctioned with a written reprimand, a monetary fine up to the amount of twelve monthly salaries of a municipal court judge, a temporary exclusion from office for a period of up to one year or an exclusion from the enforcement agent's office. An exclusion is limited only to gross

284 Artt. 64 and 65 CPEAA.

285 Art. 86 CPEAA.

286 Art. 11 CPEAA.

287 Art. 88 CPEAA.

288 Art. 89 CPEAA.

289 Art. 92 CPEAA.

290 Artt. 93 and 95 CPEAA.

disciplinary offences due to which, according to the decision of a competent body, the enforcement agent has forfeited public trust.

A final decision on imposition of a fine on a public enforcement agent is an enforceable title. If the public enforcement agent fails to pay the imposed monetary fine within the stipulated period, the competent body of the Chamber is able to institute enforcement proceedings. A written reminder or reprimand is recorded in the public enforcement agents' register. A reminder may be deleted after six months, a reprimand after one year. In case of suspension the public enforcement agent is removed from the register during the period of suspension.<sup>291</sup>

#### *Disciplinary bodies*

The disciplinary bodies are: the disciplinary investigator, the Chamber Management Board, and the Chamber Disciplinary Body. The further composition, operation and decision-making procedure of the Chamber Management Board and the Chamber Disciplinary Body shall be regulated in detail in the Chambers by-laws. While preparing this publication the by-law was not yet drafted.<sup>292</sup> The Chamber's Management Board is the competent disciplinary body for minor breaches. An appeal against the decision of the Chamber Management Board is decided upon by the Chamber's Disciplinary Body. Disciplinary action for other disciplinary offences are conducted and decided on by the Chamber's Disciplinary Body. In this case an appeal is decided on by the Ministry through a commission composed of three members. The composition, operation and decision-making procedure of this commission shall be laid down by the Minister in by-laws. An administrative action can be filed against the Ministry's decision.<sup>293</sup> The disciplinary investigator in a disciplinary action is a public enforcement agent designated by the Chamber for a period of one year.<sup>294</sup>

#### *The disciplinary proceedings*<sup>295</sup>

Any disciplinary action taken is notified to the Ministry. The initiative for a disciplinary action is taken by the Chamber bodies, government bodies, public administration bodies, parties or their legal representatives. The motion for disciplinary action can be filed by the disciplinary investigator. This disciplinary investigator institutes a disciplinary action if, based on available information, there are grounds to suspect that a public enforcement agent has committed a minor breach of the enforcement agent's duty or another disciplinary offence.

Upon receipt of the motion from the disciplinary investigator, the respective disciplinary body forwards the motion to the public enforcement agent against whom the motion is filed, requesting him to respond to the statements made in the motion within fifteen days of receiving it. Upon receipt of the reply or upon expiry of a period of fifteen days, the respective disciplinary body sets a date for a hearing. This hearing is not public, unless explicitly requested by the public enforcement agent against whom disciplinary action is taken. In case the public enforcement agent fails to appear at the hearing, despite being duly summoned, the decision may also be taken in his absence. The competent disciplinary body issues the decision upon completion of the hearing.

Against this decision a complaint may be lodged by the public enforcement agent against whom disciplinary action is taken or by the disciplinary investigator within eight days of receipt. In appeal the decision shall be acknowledged, annulled or modified.

#### *Temporary exclusion from office*

One special procedure needs to be mentioned here: the temporary exclusion from office (suspension). After a disciplinary action has been taken, the disciplinary body may issue a resolution, upon proposal of the disciplinary investigator or ex officio, to temporarily remove the public enforcement agent, deputy enforcement agents, enforcement agent assistant, enforcement clerk, enforcement agent trainee and acting enforcement agent from office if this is necessary to safeguard the interests of the parties and the public trust in the enforcement agent's office.

<sup>291</sup> Art. 96 CPEAA.

<sup>292</sup> Art. 99 CPEAA.

<sup>293</sup> Artt. 100 and 101 CPEAA.

<sup>294</sup> Art. 103 CPEAA.

<sup>295</sup> Artt. 104-108 CPEAA.

Such a temporary removal from office shall always be ordered:

- if criminal charges are filed against the public enforcement agent for criminal acts committed in the line of duty making him unworthy of the enforcement agent office;
- if in a criminal procedure a security measure has been imposed on the public enforcement agent prohibiting him to carry out a specific job or profession, and the resolution on this has not become enforceable yet.

In cases of emergency, the decision on temporary exclusion from office, may also be taken by the president of municipal court in whose district the public enforcement agent's office is located.<sup>296</sup>

In the event of temporary removal from office, if no acting public enforcement agent is appointed, the Chamber shall take custody over the files, account books, stamp, and seal for the duration of removal from office.<sup>297</sup>

## **The notary public**

### ***Supervision***

Supervision of the work performed by a notary public is performed by the Ministry of Justice and the Chamber of Notaries.<sup>298</sup> The provisions for supervision of the notaries public are similar to the provisions on supervision of the public enforcement agents. The ministry may, ex officio or upon complaint by an interested person determine to review the work of the Chamber, the notary public, the deputy notary public and trainees and undertake the necessary measures to rectify irregularities and sanction violations. Both the Chamber and the notary are obligated to grant access to the files and account books. Normally the audits are performed by inspectors of the Ministry. If necessary, the president of the court may be entrusted with the review. The Minister may dissolve the board or the president of the Chamber in case of serious irregularities. As is the case in the CPEAA in its decision, the Minister shall determine a deadline to elect a new Board and President of the Chamber, and will appoint a notary public as a temporary representative. The persons authorized to carry out supervision may impose a reprimand on a notary public in case of minor violations and misconduct or to initiate disciplinary proceedings.<sup>299</sup>

Supervision over the work and conduct of the notaries public, may also be performed by the Management Board and the President of the Chamber. At least once every three years the Management Board inspects the office of the notary public.<sup>300</sup>

### ***Disciplinary proceedings***

Notaries public are subject to disciplinary sanctions for violating the official duties or insulting the honor and reputation of the profession in their professional or private life. Disciplinary infringements are either minor breaches or a disciplinary offense. An irregularity will be sanctioned with a written reminder or a monetary fine up to the amount of an average monthly salary of a municipal court judge. The disciplinary offences are sanctioned with a written reprimand, a monetary fine up to the amount of three monthly salaries of a municipal court judge, a temporary exclusion from office for a period of up to one year or an exclusion from the notary's public office. An exclusion is limited only to gross disciplinary offences due to which, according to decision of a competent body, notary public has forfeited public trust.<sup>301</sup>

### ***Disciplinary bodies***

Disciplinary proceedings for disciplinary irregularities will be conducted and decided on by the Management Board of the Chamber. An appeal against the decision of the Management Board is filed with the court in the area where the notary public has his office.

The appeal is submitted through the Chamber. In case of a disciplinary offense the disciplinary proceedings are decided upon by the Disciplinary Council in the courts of either Osijek, Rijeka, Split or Zagreb. An appeal is

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296 Art. 98 CPEAA.

297 Art. 28 CPEAA.

298 Art. 10 CLNP.

299 Art. 140 CLNP.

300 Art. 141 CLNP.

301 Artt. 145-147 CLNP.

judged by the Notary Disciplinary Council of the Supreme Court.<sup>302</sup> The disciplinary investigator in a disciplinary action is a judge of a court, authorized by law for the establishment of disciplinary councils. The disciplinary investigator is designated by the President of the court for a period of one year.<sup>303</sup> The first instance disciplinary council consist of two judges of the statutory court and a public notary. The second instance disciplinary council consists of two judges of the Supreme Court and a notary public. The notaries public are elected by the Chamber for a period of three years. The judges are elected for the calendar year ahead.<sup>304</sup>

Disciplinary proceedings are initiated by the Ministry, the Chamber, the government bodies, the state prosecutor or the party. State bodies and legal persons with public authority are obliged by law to submit an application to the State Attorney's Office.<sup>305</sup> The decision of the Disciplinary Council is an enforceable title.<sup>306</sup>

#### *Temporary removal from the office*

When necessary the first instance Disciplinary Council may, on proposal of the Chamber, by law or ex officio, decide on a temporary removal of the notary public from office. In case of emergency, the decision on temporary exclusion from office, may also be taken by the Management Board of the Chamber or the president of the court competent to establish a Disciplinary Council.<sup>307</sup>

### **6.5. Working circumstances, infrastructure and material resources**

In the various progress reports of the European Commission, the infrastructure and equipment of courts has been constantly criticized. Already for several years Croatia is developing an integrated case management system (ICMS). So far this has not been completely rolled out. In 2008 the European Commission concluded: "With regard to the infrastructure and equipment of courts, there has been limited progress. The pilot testing of the integrated case management system (ICMS) was finalized in four courts and testing has begun in several other courts. However, the foreseen roll-out of ICMS to 60 courts by 2009 is behind schedule. Misdemeanour courts continue to suffer from a shortage of equipment and a very low standard of premises."<sup>308</sup>

From 2008 to the end of 2010 limited progress was made: "With regard to the infrastructure and equipment of courts, there has been limited progress. The integrated case management system (ICMS) is in the process of being rolled-out to all commercial, county and some of the municipal courts. ICMS is now in place in 69 out of a planned 103 courts. A special case tracking system was also tested in two prosecution offices. However, the budget allocated to court IT infrastructure remains insufficient to cover the needs and may delay further roll-out of ICMS. Misdemeanour courts continue to suffer from a shortage of equipment and a very low standard of premises. The lack of a unified statistical system related to case management remains an obstacle to the adoption of appropriate, tailor-made measures for tackling the case backlog. Further improvement to random case allocation in courts is needed."<sup>309</sup>

The enforcement departments in the courts are understaffed. Until recently only in large courts like Zagreb, there are special execution officers working at the execution department. Now with the adoption of the CEA and the CPEAA, Croatia is radically changing its enforcement system. Time will tell if these new laws will lead to a more effective and efficient enforcement system. In the new system the understaffed courts will only play a limited role in the enforcement process.

### **6.6. Service of documents**

#### *The provisions of the Civil Procedure Code*

In Croatia the service of documents is regulated under the provisions of the Civil Procedure Code (CCPC).<sup>310</sup> Documents (or as referred to in CCPC "Communications") are served by mail, or through a particular court officer or court employee, through the competent administrative body, through a notary public or directly

302 Art. 150 CLNP.

303 Art. 103 CPEAA.

304 Art. 152 CLNP.

305 Art. 153 CLNP.

306 Art. 155 CLNP.

307 Art. 154 CLNP.

308 2008 Progress Report, page 52.

309 2010 Progress Report, page 48.

310 Civil Procedure Code 84/08, hereafter CCPC.

by the court (or as per 1 January 2012 through the public enforcement agent). If the service is not performed by mail, the person who performs the service is obliged to prove his/her authorization to the person on whom the documents are served at his/her request. If necessary, the courier is authorized to seek police assistance to establish the identity of persons he finds at the place where the service is to be effected and for the performance of other service activities.<sup>311</sup>

At the request of a party, by a non-appealable ruling, the court might order that the service of a document is assigned to a notary public, provided such a party is willing to pay the costs of the notary public. Those costs shall be paid directly to the notary public. In case the notary public does not receive advance payment of the costs he may refuse the service. In that case he directly informs the court.<sup>312</sup>

In case of a written agreement, service can be effected on the address as mentioned in the agreement. If the respondent is a natural person without a registered occupation, such an agreement is only valid if the signature of the respondent has been notarized. If the respondent is a natural person who does perform a registered activity, the agreement is only legally valid if the respondent's signature on it is notarized. If service that way is not possible, the court orders further service of communications on the respondent to be effected by placing the communication on the court bulletin board. The service shall be deemed to have been effected on the expiry of the eighth day from the day the communication is displayed on the court's bulletin board. If the parties reach an agreement during the proceedings, the court shall allow them to send submissions and other court communications directly to each other, by registered mail with a return slip. In litigation where both parties are represented by attorneys or public prosecutors, the court may order the representatives of the parties to send communications directly to one another – by mail with a return slip, or to hand them in directly to the office or the registry office.<sup>313</sup>

Service to state bodies and legal persons is made by delivering the communication of the court to the person authorized to receive service or to an employee found in the office or business premises.<sup>314</sup>

Service on a legal person who is registered in a specific court or other register and natural persons who pursue a specific registered business activity, is effected at the address given in the complaint. If service at the address given in the complaint is not effected, service is effected at the address of the seat of that person written in the register. If service is not effected at that address either, it is effected by displaying the communication on the court's bulletin board and shall be deemed to have been effected on the expiry of the eighth day from the day the communication is displayed on the court's bulletin board.<sup>315</sup>

With the approval of the president of the court, service can be effected on a respondent at the court, through a post box in a room assigned by the court for this purpose. The president of the court may order by a ruling rendered in administrative proceedings, that all attorneys who have their own registry offices in the territory of his/her court shall receive court communications through those post boxes too. On each communication served in this manner a note is made of the day it was placed in the post box. If a document is not collected within eight days, it is served by placing it on the bulletin board of the court and shall be deemed to have been effected after the expiry of the eighth day from the date of placing the document on the bulletin board of the court.<sup>316</sup>

Army personnel, members of the police and employees in the land, river, maritime and air transport are served through their headquarters or their immediate superior officer, and, if necessary, they may be served other documents in this manner as well.<sup>317</sup>

Service shall be made on persons in prison through the management of the prison, penitentiary or correctional home.<sup>318</sup>

When proceedings have been jointly instituted by multiple claimants who do not have a joint legal representative or agent, the court may invite them to appoint, within a specified time limit, a joint agent for receiving communications of the court.<sup>319</sup>

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311 Art. 133 CCPC.

312 Art. 133A CCPC.

313 Artt. 133B and 133C CCPC.

314 Art. 134 CCPC.

315 Art. 134A CCPC.

316 Art. 134B CCPC.

317 Art. 135 CCPC.

318 Art. 137 CCPC.

319 Art. 147 CCPC.

Service can be made on a working day and in particular from seven a.m. to eight p.m. and in the dwelling house or workplace of the person on whom the service is to be made, or at the court when the said person is found there. These times do not apply to service by post or by a notary public. Upon obtaining consent from the person on whom the service is to be made service may also be made in another time and place. When necessary, the court orders for the service to be effected in any other place or at any other time. In that case a copy of the ruling needs to be served too.<sup>320</sup>

In case a person who is to be served cannot be found, service can be effected by handing the document over to a member of the household who has legal capacity and who is obliged to receive the document. In case a document cannot be served to any of his household members who have legal capacity either, such document may be served to a janitor or a neighbour, provided that they consent, and service shall be effected in that manner. Where service is made at the workplace and such person is not found there, service may be effected to a person working at the same workplace if he consents to receive such document.<sup>321</sup>

In case of refusal the courier notes this on the document, returns it to the court, and leaves a notice on the attempted service in the flat or at the workplace where the person concerned works, or in a mailbox with a caution that service shall be effected through placing the document on the bulletin board.<sup>322</sup>

Where a person who is to be personally served is not found in the place where the service is to be effected, the courier leaves a written notice with any of his household members who have legal capacity, or a janitor or a neighbor, requesting that he be in his flat or at his workplace on a specific day and at a specific hour. In case at that moment the respondent is not present the service may be done to any of his household members who have legal capacity, or such document may be served to a janitor or a neighbour, provided that they consent, and service shall be effected in that manner.<sup>323</sup>

In case repeated service on one of these persons cannot be effected, an additional attempt will be made after the expiry of a period of thirty days, unless a habitual residence at another place is known from the registers. If such additional repeated service may not be effected either, service shall be made by placing such document on the bulletin board of the court. Service shall be deemed to have been effected upon expiry of the eighth day from the date of placing such document on the bulletin board of the court.<sup>324</sup>

Any natural person is authorized to request a competent police administration, based on the place of his residence or habitual residence, to enter a declaration in the records of residence and habitual residence of citizens, that in his case any service of documents in court proceedings is to be made at a specified address or to specified persons at a specified address in Croatia. Such an address might be a post office, a notary public, an attorney-at-law or any other natural person with legal capacity; or a legal entity registered to pursue the activity of receiving service of documents on behalf of other persons may be designated instead of serving a document on a natural person.<sup>325</sup>

Service on persons or institutions in a foreign country or on foreigners enjoying the right to immunity is made through diplomatic channels unless otherwise provided in an international agreement. A respondent or his agent in a foreign country who do not have an agent in the Republic of Croatia, are obliged, when filing a complaint, to appoint an agent to receive communications from the court within Croatia. If they fail to do this, the court dismisses the complaint. For the service of the first communication from the court, the court orders a respondent or his/her representative who are in a foreign country to appoint an agent for receiving communications from the court in Croatia, with a caution that if he fails to do so, the court will appoint a representative for the respondent, at his/her expense, to receive court communications, from the ranks of attorneys or notaries public. Parties who revoke the power of attorney of an agent for receiving court communications but at the same time do not appoint another agent, will be served by placing the communications on the bulletin board of the court, until the party appoints another agent to receive communications.

An agent for receiving communications who informs the court of the fact that he/she has revoked the power of attorney and presents indisputable evidence that the party has received that revocation, is obliged to continue receiving communications for the party until the expiration of thirty days from the day when he/she presents this evidence to the court.<sup>326</sup>

320 Art. 140 CCPC.

321 Art. 141 CCPC.

322 Art. 144 CCPC.

323 Art. 142 CCPC.

324 Art. 143 CCPC.

325 Art. 143A CCPC.

326 Artt. 136 and 146 CCPC.



The recipient is to sign the certificate of service (acknowledgement of delivery). If the service is on a state body, legal person or natural person who performs a registered occupation, the recipient in addition places the seal of that body or person. The courier marks on the acknowledgement of delivery why no mark of a seal or stamp was placed on the acknowledgement of delivery when the communication was served on that body or person. If the recipient is illiterate or unable to sign, or refuses to sign, the courier writes his or her name and surname and date of receipt in letters, and makes a remark about why the recipient did not sign. A courier who is not a notary public indicates legibly on the acknowledgement of delivery his/her name and surname and capacity, and signs it. If necessary the courier shall write written minutes of the service and enclose it with the acknowledgement of delivery.<sup>327</sup>

The court may impose a monetary fine on a person who, unjustifiably refuses to prove his/her identity or to receive the communication from the court, and a person who in any way hinders service consciously making it impossible or difficult to carry out the service. The court may also impose a monetary fine on a courier who does not perform the work of service conscientiously and as a result causes a significant delay in the proceedings.<sup>328</sup>

### ***The service under the CEA2011***

Based on article 19 CEA2011 the provisions of the CCPC apply accordingly to the execution procedure and to the security procedure. The delivery is done by an officer of the court or by a notary public. In case the notary public is involved, delivery is done via the post or directly. A legalized copy of the document is then forwarded to the court. Article 8 CEA2011 provides a more detailed description of the delivery of documents. Delivery to a legal person entered in the court, or any other register or natural person performing a specific registered activity (tradesmen, individual merchants, notaries public, attorneys, doctors, etc.) for issues relating to such an activity, is made at the address given in the motion. If the delivery to the address as given in the motion is not successful, delivery is made at the address of the registered office entered in the register. If the delivery is not successful at that address either, the writ that should have been delivered is displayed on the court bulletin board and is deemed executed on expiration of the eighth day from the placement of the writ on the court bulletin board.

With the approval by the president of the court, certain deliveries can be made within the court building, by depositing the documents in sealed envelopes in special pigeon-holes in a room designated for such purpose within the court. Delivery is made by an officer of the court. On the document is noted the day when it is placed in the pigeon-hole of the person. If the writ is not collected within a period of eight days, delivery is made by post or in some other way provided by law.

### ***The service under the CEA***

Under the CEA the provisions of CCPC also apply accordingly to the enforcement procedure and security procedure. In case the delivery is provided by the public enforcement agent or the notary public, rendering a decision in the procedure directly, and such delivery is to be provided outside their area, they forward the documents to another enforcement authority of the same type in whose area the enforcement debtor's address is located.

The delivery is done either by mail or personal delivery. From the delivery minutes are drawn up. A copy is delivered to the competent person or authority requesting legal aid in delivery. No fees are payable by the parties for actions undertaken with regard to delivery through public enforcement agents or notaries public, but the cost of delivery shall be added to the costs of enforcement. The public enforcement agent or notary public can be replaced by a notary public's deputy and legal staff, respectively, assistant, advisor, and notary public clerk.<sup>329</sup>

### ***Experiences***

The service of documents in Croatia is a major issue and one of the reasons for the backlog of cases. Unfortunately there are no statistics available on the exact effect of the functioning of the service system

327 Art. 149 CCPC.

328 Artt 149A and 149B CCPC.

329 Art. 13 CEA.



on the backlog. From various discussions in the past we know that the system was not functioning optimally. The European Commission in its progress reports made several critical remarks: "One of the main problematic areas remains enforcement cases, out of which approximately 50% fail because of the lack of a proper notification system to the parties."<sup>330</sup>

The larger courts (e.g. in Zagreb) have a special post office within their court for the delivery of documents. In these offices post is prepared to be delivered by special officials. Medium and small sized courts do not have such offices and they are dependent on the Croatian Mail Company. In practice it appears that documents are either not delivered at all or are not delivered in time. Furthermore, due to financial constraints (the courts frequently have a lack of money to pay for postage and the Mail Company requires payment in advance before delivering the court documents) some courts are unable to serve documents for extended periods. The court-based service causes delays and is open to the possibility of abuse.<sup>331</sup>

In 2008 amendments were adopted in order to resolve those difficulties. For the moment it is unclear whether these amendments have contributed to a more effective system of service. The 2008 amendments and the recently adopted CEA at least enable other persons than the Post Office to act as a process server. However, one has to realize that avoiding service of documents is not only done by the debtor. Also the creditor has an interest. The IPA report notes: "It appears that in Croatia, income is taxed based on issued invoices and that to avoid paying taxes on such invoices the Creditor need to show that these have not been paid through court or public notaries proceedings. As a result many procedures before public notaries are not in effect to obtain enforcement but rather to obtain an enforceable title to show to the tax authorities. These Creditors, often utility companies, do not wish to go through the process and expenses of enforcing decisions, especially for small invoices."<sup>332</sup>

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330 2008 Progress Report, page 52.

331 See: Council of Europe, Assessment Report on how best Croatia could usefully develop and strengthen the enforcement of court decisions in civil and commercial cases, 2003.

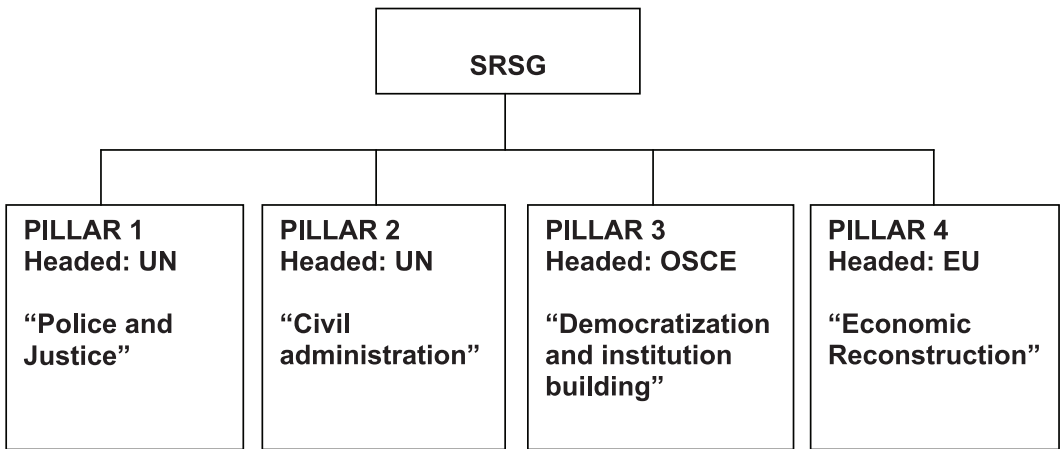
332 Study on the enforcement of court decisions in Croatia, final report, The European Union's IPA Programme for Croatia, April 2009, page 126.

## Chapter 7: Kosovo

### 7.1. Political context

Before we can discuss a government strategy in Kosovo, some general remarks should be made about the political background and the legal and judicial status of today's Kosovo.

After the abolishment of the autonomy status of Kosovo in the framework of the Socialist Federal Republic of Yugoslavia in 1989, the Kosovar judicial system was run by Serb lawyers until 1999. In 1999, after the cessation of the war, Kosovo was placed under interim UN-administration. Pursuant to UN Security Council Resolution 1244 the United Nations Interim Administration Mission in Kosovo (UNMIK) was established. UNMIK was headed by a Special Representative of the Secretary-General (SRSG) and established a structure with 4 "pillars":



From 1999 the system has been dominated by the UNMIK presence. The institutional set-up of Government In Kosovo consisted of both the UNMIK administration and the Provisional Institutions of Self-Government (PISG). Under Pillar I a judiciary in Kosovo was reestablished and a legislative framework for the judiciary was created. Through the UNMIK's own Department of Justice (DOJ) a court system was developed with both Kosovar and international judges. The DOJ mainly focused on the development of a legislative framework for the judiciary, the creation of an effective and efficient court system, investigations of allegations of judicial misconduct, and oversight of criminal trials prosecuted and adjudicated by international prosecutors and judges.

In 2001 the Kosovo Judicial and Prosecutorial Council (the KJPC), a body consisting of local and international members was established by UNMIK. The KJPC advised the UNMIK DOJ on matters pertaining to appointment, removal, and discipline. In 2005 KJPC has been dissolved as part of the creation of separate councils for judges and prosecutors with much broader responsibilities.

In December 2005 the Kosovo Judicial Council (KJC) was established as the successor of the KJPC. The nominations for the KJC were approved by the Assembly in March 2006, and members were officially appointed in April 2006. On 10 March 2006, following the establishment of the Ministry of Justice in December 2005, new ministers were appointed for the Ministry of Internal Affairs and the Ministry of Justice. On this date also a regulatory framework for the justice system in Kosovo was introduced.

Although the development of Kosovo's judiciary was affected mainly by Pillar I, a number of topics were covered by the other areas of authority. The daily operations of the local judicial system, including the management of space and facilities, supervision of statistics and information technology, appointment and compensation of court staff were covered by Pillar III through the Department of Judicial Administration, a division of the Ministry of Public Services. Also training was performed under Pillar III: training of the judiciary through the Kosovo Judicial Training Institute (KJI) and training of court staff by the Kosovo Institute for Public Administration.

In April 2006 the Law on the KJI was promulgated. With this law The KJI was established as an independent body to coordinate training of judges and prosecutors and of judicial and prosecutorial candidates. The responsibility for the administration of courts passed from the Ministry of Public Services to the KJI.

UNMIK transferred powers to the Ministry of Justice and the KJC. In 2007 the Ministry adopted a Strategic Plan for the period 2007-2012. In April 2007, the KJC also approved a strategy for 2007-2012, setting key priority tasks and actions for the establishment of a fully functioning judiciary in Kosovo. In January 2007 the KJC became responsible for collecting statistics from the courts and the prosecution service.

Most justice-related laws were drafted and promulgated by UNMIK through the UNMIK's legislative regime of Regulations. As a result of the developments in Kosovo from 1989 until today, the complicated Kosovo legislative framework consists of:

- The law in force in Kosovo on March 24, 1989, the last day on which Kosovo held autonomous status within the SFRY;
- The law promulgated in Kosovo after March 24, 1989 and before June 1999, insofar as it addresses a subject matter or situation not covered by the prior law, the UNMIK law, or PISG law, and is non-discriminatory;
- UNMIK regulations adopted as of 1999. These Regulations include the Constitutional Framework of 2001 which established the Provisional Institutions of Self-Government (PISG) and incorporated several international human rights instruments, and subsidiary UNMIK instruments;
- Laws adopted by the Provisional Institutions of Self-Government (1999 – 2008);
- Kosovo Assembly laws, as entered into force by UNMIK;
- Laws from the Assembly of Independent Kosovo (as of February 2008).

"This [complicated legislative framework] has continued to hamper the delivery of justice as judges are not always certain of the legal basis for their judgments," the European Commission concluded already in 2006.<sup>1</sup>

On 17 February 2008 after long discussions within Kosovo and with the international community, Kosovo declared its independence from Serbia and thus this administrative set-up was ended. On 9 April 2008 the assembly of Kosovo adopted the Constitution of the Republic of Kosovo. This Constitution entered into force on 15 June 2008.

The Constitution is based on the Comprehensive Proposal for the Kosovo Status Settlement (CSP) as prepared by United Nations Secretary-General special envoy, Martti Ahtisaari. The Kosovar Constitution confirms that the provisions of the CSP take precedence over all other legal provisions in Kosovo. Furthermore, it confirms the CSP as the key reference to verify compliance of the Constitution itself and other laws and legal acts. It confirms the International Civilian Representative as the final authority in Kosovo regarding the interpretation of the civilian aspects of the CSP.<sup>2</sup>

The declaration of independence and the entry into force of the Constitution had created a new reality in Kosovo, as it was mentioned by the Secretary-General of the United Nations. On 8 October 2008 the UN General Assembly passed a resolution requesting the advisory opinion of the International Court of Justice on the legality of the declaration of independence of Kosovo. As a consequence the international civil presence in Kosovo needed a reconfiguration. In the area of "Rule of Law" UNMIK started to cooperate with the European Union.

Already before February 2008, the European Union had decided to establish a rule of law mission, known as EULEX in Kosovo. An EU Special Representative was appointed. His tasks included giving advice and support to the political process and to ensure the consistency of EU Action in Kosovo. After the declaration of independence the European Council reconfirmed that the EU remained committed to playing a leading role in ensuring the stability of Kosovo, including through EULEX Kosovo, the EU Special Representative

1 Kosovo (under UNSCR 1244) 2006 Progress Report, European Commission, 8 November 2006, SEC(2006) 1386, hereafter called the 2006 Progress Report, page 11.

2 Artt. 146 and 147 of the Kosovar Constitution:

**Article 146 [International Civilian Representative]**

Notwithstanding any provision of this Constitution:

1. The International Civilian Representative and other international organizations and actors mandated under the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007 have the mandate and powers set forth under the said Comprehensive Proposal, including the legal capacity and privileges and immunities set forth therein.
2. All authorities in the Republic of Kosovo shall cooperate fully with the International Civilian Representative, other international organizations and actors mandated under the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007 and shall, inter alia, give effect to their decisions or acts.

**Article 147 [Final Authority of the International Civilian Representative]**

Notwithstanding any provision of this Constitution, the International Civilian Representative shall, in accordance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007, be the final authority in Kosovo regarding interpretation of the civilian aspects of the said Comprehensive Proposal. No Republic of Kosovo authority shall have jurisdiction to review, diminish or otherwise restrict the mandate, powers and obligations referred to in Article 146 and this Article.

and its contribution to an international civilian office as part of the international presence and to assist the economic and political development of Kosovo. Kosovo continued to cooperate with EULEX and the EU Special Representative. The EU Special Representative is also the International Civilian Representative for Kosovo.

In December 2008, EULEX was deployed throughout the territory of Kosovo. One of the responsibilities of EULEX lies in the area of the judiciary. Already for some years Kosovo participates in the Stabilisation and Association Process Tracking Mechanism (STM). This way the EU underlines its commitment to play a leading role in ensuring the stability of Kosovo and the Western Balkans as a whole and its willingness to assist the economic and political development of Kosovo by offering clear prospects for EU membership. Through the European partnership the EU sets out reform priorities for the Kosovar authorities. A revised European Partnership for Kosovo was adopted by the European Council in February 2008. The Kosovar government approved its European Partnership Action Plan (EPAP) in July 2008. In April 2008, the government adopted the Plan for European Integration 2008 – 2010, which aims to improve inter-governmental coordination and communication. The relevant institutional structures were set up in September.

In July 2010, the International Court of Justice issued an advisory opinion according to which Kosovo's declaration of independence did not violate general international law or Security Council resolution 1244 (1999). On 9 September 2010 the UN General Assembly adopted a joint resolution tabled by Serbia and co-sponsored by EU Member States as a follow-up to the ICJ opinion. The resolution aims at opening the way for a process of dialogue between Kosovo and Serbia to promote cooperation, achieve progress on the path to the European Union and improve the lives of the people. To date 31 December 2010, Kosovo has been recognized by 71 UN Member States, including 22 EU Member States.

The UN Secretary-General issued several reports on Kosovo.<sup>3</sup> The Secretary-General noted that the changing circumstances on the ground have led to gradual adjustment of the functions and priorities of the UN mission in Kosovo. The strategic goal of the mission is to promote security, stability and respect for human rights.

A transfer of competencies from UNMIK to the Government of Kosovo is taking place. One of the areas which is still in the process of being transferred from UNMIK to the Ministry of Justice is the international cooperation in justice matters. An important question in this regard is related to the issue of what to do with old agreements by the SFRY and Serbia. UNMIK is still responsible for international judicial cooperation with countries that have not recognized Kosovo, including for requests coming from Serbia. Requests from countries that already recognized Kosovo are handled with by the Ministry of Justice.

Regarding the judicial system progress has been made. In December 2010, Kosovo had adopted a package of reform laws: on the Courts, on the Kosovo Judicial Council and on the Prosecution and on Prosecutorial Council. A number of laws have been adopted relating to the judiciary: the Law on Notaries, the Law on Contested Procedure (Civil Procedure Law), the Law on the Bar, the Law on Mediation and the Law on Executive Procedure.

### ***European Commission Progress Reports***

The European Commission has been very critical of the status of the legal system in Kosovo. "The efficiency of the judicial system is low and Kosovo's judicial institutions have made little progress in delivering an effective service, both in civil and criminal justice. The length of procedures and the case overload remains a major problem. Poor case management is one of the key reasons for the existing backlog that now stands at over 45.000 cases and is still increasing. A modern case management system is being implemented, but this is not always put to use by judges. Courts face enormous problems in executing summons due to the fact that there is no civil register, that most houses do not have a proper address and because of the absence of Kosovo Serb court messengers. [...] Progress has also been slow with regard to the enforcement of judgments. Court decisions are often not fully enforced. There are reports of individuals threatening or applying force to stop judges from performing their duties. Some municipalities ignore court judgments or interim measures ordering them to perform or abstain from performing certain actions", the European Commission concluded in its 2006 Progress report.<sup>4</sup> Kosovo offers a "business-friendly environment in terms of minimum administrative requirements for market entry. However, deficiencies in law enforcement and

<sup>3</sup> Latest reports: September 2009 and January, April and June 2010.

<sup>4</sup> 2006 Progress Report, page 10.

the judicial system, corruption, uncertainty over property rights and the status, as well as poor infrastructure and unreliable electricity supply, continue to impede investment and economic activity.”<sup>5</sup>

2007 also did not give any improvement. Although the European Commission concluded that co-operation between the judiciary, the treasury and the private banking sector improved the enforcement of judgments, at the same time it concluded that “[t]he backlog of cases is increasing, with more than 50.000 civil cases and over 36.000 criminal cases pending. Management capacity in courts, the efficiency of the system and relevant legislation are insufficient. Execution of judgments remains weak. This is partly due to the fact that there is no civil register, proper addresses are missing in many cases and there are no Kosovo Serbs among the court messengers.”<sup>6</sup>

On 2008 the European Commission could not be positive either: “The backlog of cases continues to be a serious problem, especially in civil proceedings. Available data do not provide a clear picture of the backlog. There is confusion between backlog and pending cases. At the beginning of October, the total of unsolved civil cases pending before the municipal courts of Kosovo stood at 160.477. There is no operational system for the execution of civil judgments. [...] The legislative framework is still incomplete. There are no laws in the following areas: notaries, executive procedure, prosecution, courts, constitutional court and Kosovo Prosecutorial Council. The strategy for the reform of the judicial system does not include a comprehensive plan to streamline the three sources of legislation and create legal certainty. [...] Overall, the judicial system remains weak at all levels. There has been little progress during the reporting period.”<sup>7</sup> “Overall, difficult and costly enforcement of contracts aggravates access to finance and is continuing seriously to hamper the business environment...[...] In general, use of courts for enforcement of contracts remains underdeveloped, while at the same time courts continue to face a heavy backlog of pending cases”<sup>8</sup> “The ineffective enforcement of creditor rights and of contracts in Kosovo pushes up costs for financial institutions and undermines the value of collateral. [...] Access to finance is still uneven and hindered by weak enforcement of contracts and high borrowing costs.”<sup>9</sup>

The 2009 report did not change the negative opinion: “informal methods of contract enforcement continue to be widespread.”<sup>10</sup> “Ineffective enforcement of creditor rights and of contracts continues to maintain high costs and risks for financial institutions, as reflected in high interest spreads, and undermines the value of collateral.”<sup>11</sup> The 2009 report paid special attention to the electricity companies: “Non-payment for electricity represents a major challenge for the company. Technical and financial losses continue to be high: of the energy that the Corporation can sell, over 20% was stolen and commercial losses constituted a further 20%. Only some 60% of the energy available for sale is paid for. The Corporation lost some €90 million last year. Vigorous and increased efforts are needed to increase electricity billing and collection rates. The police and the judiciary have an important role to play. As a consequence of endemic bill non-payment, power consumption continues to increase at an unsustainable rate (some 8% in 2008), far higher than the Corporation can keep up with.”<sup>12</sup>

The 2010 Progress Report seems to have a more positive tone. The report has some positive remarks on the developments in Kosovo and notes that progress has been made in the judicial sector.<sup>13</sup> However, the report also notes, “[t]he legal system continued to exhibit poor accessibility and efficiency, and some areas are not covered by relevant courts. There have been some improvements in enforceability of contracts, although informal methods of enforcement continue to be widespread. The situation regarding property rights remains a cause for concern. Only a few municipalities have digital immovable property rights registers. These are not linked to the central land registry and there is a lack of communication between

5 2006 Progress Report, page 20.

6 Kosovo (under UNSCR 1244) 2007 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2007-2008, European Commission, 6 November 2007, SEC(2007) 1433, hereafter called the 2007 Progress Report, page 11-12.

7 Kosovo (under UNSCR 1244) 2008 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2008-2009, European Commission, 5 November 2008, SEC(2008) 2697, hereafter called the 2008 Progress Report, page 14-15.

8 2008 Progress Report, page 30.

9 2008 Progress Report, page 31.

10 Kosovo (under UNSCR 1244) 2009 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2009-2010, European Commission, 14 October 2009, SEC(2009) 1340, hereafter called the 2009 Progress Report, page 24.

11 2009 Progress Report, page 25.

12 2009 Progress report, page 40.

13 Kosovo 2010 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2010-2011, European Commission, 9 November 2010, SEC(2010) 1329, hereafter called the 2010 Progress Report, page 9.

municipal and central authorities. [...] Overall, the existing legal framework remains underdeveloped and its implementation remains poor. The difficult and costly legal enforcement of contracts and prevalent corruption continued to hamper the business environment.”<sup>14</sup> “The overall performance of the Kosovo justice system remains weak. There is still a significant backlog of court cases and the overall efficiency is very low. Along challenges such as corruption and nepotism, the continued political interference at different levels and in different forms in a number of cases, including in the work of the Kosovo Judicial Council, is of serious concern. In several instances, judges and prosecutors have refused to deal with sensitive cases. There have been reports of threats and intimidation against them. Some municipalities have continuously refused to comply with court decisions. The low level of enforcement of court decisions is a major impediment to creating confidence in judiciary.”<sup>15</sup> “Property cases continue to be the bulk of the civil cases backlog before the courts, including approximately 21.000 compensation claims. Trials in property cases are often repeated due to irregularities, either in the judgment or in the proceedings. [...] Overall, there has been limited progress in the area of property rights. The weak enforcement of the property-related legislation is the major obstacle to protect and enforce property rights, which is a key European Partnership priority.”<sup>16</sup>

### **Recent developments**

A “Law on Executive Procedure” has been adopted on 2 June 2008.<sup>17</sup> In the same month the “Law on Contested Procedure” (Civil Procedure Code) was adopted.<sup>18</sup>

Despite the introduction of new legislation an effective and efficient execution of court decisions is hampered by a number of (partly) interrelated shortcoming and problems. The main issues relating to the legislation are connected to the fact that the present Law on Executive Procedure is largely based on the old Yugoslav Law on Executive Procedures (ZIP) of 1978.

As a result there are still too many opportunities for objections and appeals in enforcement proceedings. This results in misuse of legal remedies. Furthermore the organization of enforcement hampers. There is an insufficient number of enforcement judges and clerks. In some courts in Kosovo there is no enforcement judge at all. The result is that timeframes are not observed and that procedures are applied in a wrong way. There is a lack of training for the present enforcement agents. The present enforcement system also lacks proper information about issues like e.g. addresses of debtors. This is caused by the fact that some registers are insufficiently developed, contain outdated information and are inaccessible for enforcement judges and clerks.

For this reason the Minister of Justice decided to establish a Working Group<sup>19</sup> to improve the efficiency and effectiveness of the enforcement system.

This Working Group started its work in June 2010. Main focus of the Working Group is the improvement of the legislative framework (not only the Law on Executive Procedure, but also other laws, such as e.g. the Law of Obligations, the Law on Pledges and the Law on Mortgages) and the assessment on changing the organization of enforcement. In addition attention will be given to the improvement of the access to registers, training of the enforcement agents and a reduction of the backlog in cases of the courts.

## **7.2. Legislation and organization of the enforcement process**

### **7.2.1 Legislation**

Until recently the enforcement law in Kosovo was a combination of post 1999 UNMIK Regulations, a number of subsidiary pre-1989 instruments and laws like ZIP 1978. A new Law on Executive Procedure was passed on June 2, 2008, and was promulgated on June 24<sup>th</sup> 2008.

In order to reform the judicial sector, the Ministry of Justice adopted a 5-year Strategic Plan for the Period 2007 – 2012.

<sup>14</sup> 2010 Progress Report, page 26 -27.

<sup>15</sup> 2010 Progress Report, page 11.

<sup>16</sup> 2010 Progress Report page 18.

<sup>17</sup> Law on Executive Procedure, 2 June 2008, Law No. 03/L-008, hereafter called KLEP.

<sup>18</sup> Law on Contested Procedure, 30 June 2008, Law No. 03/L-006, hereafter called KLCP.

<sup>19</sup> The Working Group consists of representatives from the Ministry of Justice, the Judiciary, the Bar Association, the USAID sponsored project “Systems for Enforcing Agreements and Decisions (SEAD) Program in Kosovo”, the USAID sponsored project “Kosovo Justice Support Program (KJSP)” and the Dutch Government sponsored “Balkans Enforcement Reform Project (BERP)”.



Since the independence of Kosovo, the Kosovo Assembly has followed an active legislative agenda. According to some interlocutors of the BERP team, many laws seem to have been adopted in Kosovo because of pressure from the international community. As a consequence these laws are elaborated and adopted in a hurry with no proper attention to its content and internal logic, and insufficient harmonization within the entire legislative framework.

Furthermore the system of enforcement was criticised a lot: “State systems are simply unable to efficiently enforce contracts. Kosovo Government institutions are not equipped to deal with the burden of an ever expanding demand to adjudicate disputes and enforce judgments. The fledgling Court system struggles as a result of being under-resourced, and execution clerks are even more overburdened than the courts. An enormous backlog of execution cases languishes - backlogs can result in a delay of several years before execution even begins. The information and institutional infrastructure to enable efficient enforcement is not present: cadastral records, pledge and business registries, etc., are not well enough developed to readily enable the identification and location of judgment debtor property. To make this essentially broken process more effective; in order to more nimbly and effectively provide just results for businesses that have disputes; and to address an enormous backlog of unenforced judgments, will require genuine and coherently planned effort on the part of government institutions to address a range of systemic deficiencies. Because of the inability of state institutions to perform the role of neutral arbiter of private disputes, businesses ultimately see no incentive to using formal mechanisms to enforce their agreements,” concluded a USAID project.<sup>20</sup>

It is too early to say what the consequences of the 2008 law will be. The question is whether this new law will change the attitude of the people towards enforcement. Kosovar legal professionals are very sceptical about the new law and advocate a privatisation of the Kosovo enforcement system.

What is clear however is that further improvement of the legislative framework is necessary. The Kosovar Government put enforcement as one of the priorities on the legislative agenda for 2010. In June 2010 the aforementioned Working Group (paragraph 7.1) was set up to draft changes to this legislative framework and to come up with suggestions for changes in the organization of the enforcement system.

### 7.2.2. The enforcement process

Enforcement in Kosovo is mainly regulated in the Law on Executive Procedure (KLEP) and the Law on Contested Procedure (KLCP).<sup>21</sup>

The Law on Courts was approved by the Kosovo Assembly on 22 July 2010 and promulgated by the Decree of the President of the Republic of Kosovo on 9 August 2010.<sup>22</sup>

Some other laws also contain provisions relevant to enforcement. These include: the Law on managing sequestrated or confiscated assets,<sup>23</sup> Law on leasing,<sup>24</sup> Law on property and other real rights,<sup>25</sup> Family law,<sup>26</sup> Laws on Pledges and Mortgages<sup>27</sup> and recording of immovables<sup>28</sup> and laws regulating payments and payment institutions.<sup>29</sup>

#### *Enforceable titles*

Enforcement is based on an enforceable title: court decisions, court settlements, decisions and settlements in an administrative procedure providing the decision regarding a monetary obligation, notary enforceable documents and other documents called enforceable by law.<sup>30</sup> Based on article 25 KLEP the arbitration

20 Systems for enforcing agreements and decisions (SEAD) Program in Kosovo, Streamlining enforcement of contracts: report and recommendations regarding commercial case procedures and enforcement of judgments, 30 April, 2010, page 4.

21 Art. 22 KLEP.

22 Law on Courts, 22 July 2010, No. DL-047-2010.

23 Law No. 03/L-141. This law entered into force on January 1, 2010.

24 Law No. 03/L-103.

25 Law No. 03/L-154, hereafter KLPR.

26 UNMIK Regulation 2004/32.

27 UNMIK Regulation 2001/05 on Pledges and Law 2002/04 (promulgated by UNMIK Regulation 2002/21) on Mortgages.

28 Law no. 2002/05 (promulgated by UNMIK Regulation 2002/22) and Law no. 2003/13 (promulgated by UNMIK Regulation 2003/27).

29 UNMIK Regulation 1999/04 on Currency Permitted to Be Used in Kosovo as amended, UNMIK Regulation 2001/26 on Payment Transactions and UNMIK Regulation 2006/47 on the Central Banking Authority of Kosovo.

30 Art. 24 KLEP.



settlement is also considered an enforceable title. Another example of a document called enforceable by law can be found in the Law on property and other real rights (KLPR): in case of delay or another breach of contract by the debtor, the mortgage creditor can acquire the right to sell the mortgaged immovable property unit by civil action and to satisfy the secured claim in priority (from the proceeds of the sale).<sup>31</sup>

Furthermore the so-called confident documents can be enforced: invoices, bills of exchange, cheques, with protest and returning bill if it is needed for establishment of a credit, public documents, and extracts from the business books for payment of municipal water services, electricity, heating, garbage collection bills and private documents certified according to the law. In such a case these documents have to meet certain requirements, e.g. names, object, type, volume and time of fulfillment of the obligation.<sup>32</sup>

Through Chapter 29 (article 492 and further) KLCP a payment order can be issued against a main debtor.<sup>33</sup> After the deadline has been expired such a payment order also becomes an enforceable document.<sup>34</sup>

KLCP also has certain provisions regarding security measures in a contested procedure. Based on KLCP the decisions for those security measures can also be considered enforceable documents.<sup>35</sup>

Decisions of foreign courts are considered enforceable when recognized as provided by law or international agreement.<sup>36</sup> If not the provisions of the KLCP are applicable.

### ***Initiation of the enforcement procedure***

The creditor has a central role in the Kosovar enforcement procedure: the creditor initiates the procedure, states the means and objects of enforcement in the proposal and is able, without the consent of the debtor, to completely or partially withdraw the enforcement.<sup>37</sup>

The creditor requests the court (whose territorial jurisdiction is depending on the means and object of enforcement)<sup>38</sup> for enforcement. It is the Municipal Court that has general jurisdiction over the execution of court judgments in both civil and criminal matters. The court is also competent for the execution of "authentic documents" such as invoices, bills and checks.

Besides the involvement of the enforcement judge there is a task for the enforcement clerk, the enforcement agent to review and verify the execution proposal. The District Court functions as the second instance court. In case of incomplete proposals article 99 and 102 KLCP are applicable. In that case the court will request the creditor to provide additional information within a certain time limit. In case the submission is corrected or supplemented within the specified period of time, it is considered to have been submitted to the court on the day when it was originally presented. The proposal will be considered withdrawn if not returned to the court within the specified period. If returned uncorrected or not supplemented, the submission shall be rejected.<sup>39</sup>

In his proposal the creditor states the means and objects of enforcement. The court, with a decision assigns the execution through that means and on that object of execution, as mentioned in the proposal for execution.<sup>40</sup> The court might decide to hear parties before a decision is given.<sup>41</sup> The court is obliged to proceed instantly and take subjects in the order in which the court received them, unless the nature of the demand or special circumstances request it is proceeded differently.<sup>42</sup>

In addition, the execution proposal, on the basis of a confident document, also contains a request by which the court orders the debtor to fulfill his obligation within a 7 days time-limit (or in case of a bill of exchange or cheque within 3 days) from the day the decision on the execution is delivered.<sup>43</sup>

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31 Art. 199 KLPR.

32 Art. 30 KLEP.

33 Art. 494 par. 4 KLCP.

34 Art. 497 par. 3 KLCP.

35 Art. 307 KLCP.

36 Art. 17 KLEP.

37 Art. 43 KLEP.

38 Artt. 4 and 39 KLEP.

39 Art. 102 KLCP.

40 Art. 8 par. 1 KLEP.

41 Art. 10 par. 4 KLEP.

42 Artt. 2 par. 1 and 10 par. 2 KLEP.

43 Art. 40 KLEP.

**Decision on execution**

When all criteria are met the court will issue the decision on execution. The decision contains the execution document or confident document, the names of the creditor and debtor, the obligation to be enforced, the means and object of execution, and other data needed for application of execution such as the calculation of interest and expenses.<sup>44</sup> The decision does not necessarily contain an explanation, unless the proposal is partially or entirely rejected.<sup>45</sup>

Enforcement is performed by the “official court person”, the court enforcement agent.<sup>46</sup> When necessary the police is obligated to assist this court enforcement agent.<sup>47</sup>

**Service of documents**

The decision on the proposal for enforcement is served to the debtor.<sup>48</sup> Either in the court decision or in the decision on enforcement the court defines the time-limit for voluntary fulfillment.<sup>49</sup> The time-limit for voluntary fulfillment starts to run from the day of delivery of the decision to the debtor and ends with the expiry of the last day assigned by the court decision. If in the execution document the time for voluntary fulfillment of the obligation is not assigned, such time-limit will be assigned by the decision on execution.

How is the service performed?

Documents can be served between 7h00 and 20h00.<sup>50</sup> The methods of service can be found in Chapter 8 KLCP (article 103 and further). In general documents are served by mail. However service may also be effected through an official of the court or through a registered and authorized legal person for conducting of communication services. The documents shall be served directly to the addressee in the court or through any other form that is determined by the law. For example service can also be effected through electronic mail. In such a case it is considered that the submission is submitted at the moment when it is sent by electronic mail.<sup>51</sup> For certain groups KLCP has specific provisions:

- to a state body or other legal person service is done to an authorized person or the employee in the office or working facility;<sup>52</sup>
- to military persons, police service employees and employees in ground and air traffic service can also be done to the command respectively their direct superior;<sup>53</sup>
- to the municipal public advocate the delivery is done by delivering the document to him personally or his secretary;
- to persons or institutions abroad or foreigners who are entitled to immunity the delivery will be done in a diplomatic route, unless otherwise foreseen by international agreement or law;<sup>54</sup>
- to persons deprived of their freedom, the delivery is made through the directorate of the prison, or correctional institution;<sup>55</sup>
- in case the party has a legal representative or a representative with proxy, the delivery is made to the legal representative, respectively to the representative with proxy by giving the documents to the official involved in his office of advocacy;<sup>56</sup>

Based on articles 110 and 111 KLCP the decision on execution and the decision against which a special appeal is allowed needs to be served personally to the party, respectively, his legal representative or representative with proxy. If the person on whom the document must be personally served is not found where the service is to be effected, the person effecting the service shall find out when and where that person may be found and shall leave with any adult member of his family a written notice directing the

44 Art. 44 KLEP.

45 Art. 46 KLEP.

46 Art. 51 KLEP.

47 Art. 53 KLEP.

48 Artt. 11, 47 KLEP and the KLCP.

49 Artt. 26 and 28 par. 2 KLEP.

50 Art. 109 KLCP.

51 Art. 103 KLCP.

52 Art. 104 KLCP.

53 Art. 104 par 4 KLCP.

54 Art. 105 KLCP.

55 Art. 106 KLCP.

56 Artt. 108 and 111 KLCP.

addressee of the document to be in his or her dwelling or workplace on a particular day and hour in order to receive the document at the appointed day and time in his own apartment or place of work. If the person effecting the service still does not find the person to whom the document must be delivered, then he can deliver the document to any adult member of his family, guardian of the house or neighbours if they accept, and it will be assumed that the service has thereby been effected. In case of refusal the document will be left in the apartment or premises where this person works or the document will be stuck on the door of the apartment or his working premises. In the delivery sheet will be marked the day, time and the reason of rejection and also the place where the document was left. The delivery will then be considered legitimate. In case the service cannot be effected the court will determine that all documents addressed to these parties should be placed on the court announcement table. Delivery will be considered completed after 7 days have elapsed from the date when the decision has been placed on the court announcement table.<sup>57</sup>

The certificate of completed delivery is signed by the recipient and the person effecting the delivery.<sup>58</sup>

### ***Objection***

Within 7 days after the service an objection can be made. The decision on the objection needs to be served too. The response regarding the objection needs to be presented within a 3 days' time-limit, from the day of delivery of the objection.<sup>59</sup> Within 7 days after the service of the decision on the objection, an appeal can be filed.<sup>60</sup>

After the time-limit for voluntary fulfillment has expired the decision can be enforced.

A notary deed is directly enforceable,<sup>61</sup> provided that such a document includes valid mandatory provisions agreed upon by the parties, and a statement of the party required to perform certain action, to the effect that direct and compulsory enforcement of the obligation may be carried out pursuant to the notarized deed, upon maturity of the obligation.

### ***Conclusion on wealth of debtor***<sup>62</sup>

In the execution proposal the creditor might request from the court that before issuing the decision on execution, the debtor or other subjects mentioned in the proposal, respectively the bodies or administrative services, or other institutions, are requested to provide data about the wealth of the debtor. Such a request can also be done after issuance of the decision on execution, if the execution was not successful through the previous means and object.

The person who does not act upon court order might be fined and can be criminally prosecuted for a false, an incomplete or untrue statement, if he gives incomplete or untrue data regarding the debtor's wealth. When necessary the court can request a verbal statement in court session.

### ***Expenses***

The expenses for enforcement are paid by the creditor in advance.<sup>63</sup> The time-limit for prepayment is not stated in the law, but is determined by the court. In case of nonpayment within the time-limit, the enforcement will be suspended. The debtor has a duty to pay the expenses that were necessary for enforcement. The court decides in an executive procedure on the request for payment of those expenses and will in this procedure assign the enforcement.

### ***Interest***

The debtor also has to pay the interest-delay. Based on article 44 KLEP the interest is calculated by the court, unless the enforcement is carried out through an attachment on a bank account: in that case it is the bank who effects the calculation.

<sup>57</sup> Art. 11 KLEP and 114 KLCP.

<sup>58</sup> Art. 121 KLCP.

<sup>59</sup> Art. 56 KLEP.

<sup>60</sup> Artt. 12, 54 and further KLEP.

<sup>61</sup> Art. 32 Law on notaries (2008) and art. 37 par. 3 KLEP.

<sup>62</sup> Art. 42 KLEP.

<sup>63</sup> Art. 19 KLEP.

Kosovo has chosen for a very cautious approach: if after the creation of the execution document the level of the interest-delay is changed, then the court upon the proposal of creditor or execution debtor, will make a new decision on execution for the payment of those interests according to the changed level.<sup>64</sup>

There is some uncertainty on the method of calculation of the interests. Based on articles 277 and 278 Law on obligations, the interest rate is determined by the Federal Executive Council. For the moment it is still unclear which new structure replaces this body.

### ***More creditors***

If there are more creditors who have a claim on the same debtor, using the same execution object, enforcement is realized according to the order in which those creditors have obtained the right on such execution object.<sup>65</sup>

### ***Seizure on movables***

Regarding seizure on movables the court in whose territory the movables are situated is competent to decide on the execution proposal.<sup>66</sup> If the place of the movables is not mentioned in the execution proposal, the court where the debtor has his/her residence is competent. Certain movables such as goods that are necessary for the debtor and his family for fulfillment of their daily needs, food and flammable materials for heating (for three months) are excluded from seizure.<sup>67</sup> In practice this article causes discussions: from the text of the law it is not clear what is meant by "items which are necessarily needed for the debtor and his family members for fulfillment of their daily needs".

In case no goods are found the court will notify the creditor. Within three months from the date of the attempted registration or from the date of the receipt of the notice the creditor may file a request to the court for another registration. If the creditor does not file such a request the court will suspend the execution procedure. If during the second attempt for registration there are no suitable assets for execution the court will suspend the execution procedure.<sup>68</sup>

The seizure on movables is done through the sequestration, evaluation and registration and selling of those movables.<sup>69</sup>

Before the sequestration the court enforcement agent delivers a copy of the executive decision to the debtor and requests the debtor to pay. In case of nonpayment an inventory is made with as many goods, as are necessary for fulfillment of the claim and for payment of the procedural expenses. The inventoried goods are left with the debtor unless the court has given permission to hand over the goods for preservation. The evaluation is done by the court enforcement agent, unless the court, at the proposal of one of the parties, has assigned another person.

On the registration and sequestrive evaluation the court drafts a record stating the sequestered items and their determined value, and the statements of the parties, other participants in the procedure and third persons for eventual existence of their rights which might obstruct the execution of the sequestered items.

After 15 days from the day of the sequestration the public sale might be conducted.<sup>70</sup> The sale of the goods is done through a verbal public auction, or through direct settlement between the purchaser and the court enforcement agent. The manner of sale is determined through a court conclusion. The sale will be published on the notification table of the court at least 15 days before the public sale. Furthermore the court can prescribe publication in a manner as foreseen for publication of the sale of immovable items. Both the creditor and the debtor will be informed on the public sale.

During the first public sale the goods cannot be sold at a lower price than the one assigned during the registration and evaluation of the goods respectively in the time-limit assigned by the court for their sale through direct settlement.

64 Art. 29 KLEP.

65 Art. 74 KLEP.

66 Art. 76 KLEP.

67 Art. 78 KLEP (and art. 71 ZIP1978).

68 Art. 86 KLEP.

69 Art. 79 and further KLEP.

70 See art. 91 and further KLEP.

Upon proposal from parties, the court can assign a new auction in which the sequestered goods might be sold at a lower price than the one determined during their evaluation. The proposal for such a second auction, or for the sale through direct settlement can be done within 15 days from the day of first auction, respectively from the day of expiration of the time-limit for sale through direct settlement, as assigned by the court.

When the goods are not sold in the second auction, then the court will schedule a session for a new auction, only upon the proposal of the executive creditor. Such a proposal for scheduling a new session of auction cannot be done before 15 days have passed since the previous session, but has to be done no later than 45 days after this session. In case neither party submits such a proposal the execution will be terminated by the court.<sup>71</sup>

### *The right of pledge<sup>72</sup>*

The creditor gains the right of pledge for the inventoried items. Such a pledge is described by article 133 KLPR as “the creation by agreement or by law of an interest in movable property or over a right, which gives the pledge holder the right to take possession of such property or exploit such right for the purpose of satisfying an existing and sufficiently identifiable obligation that is secured by the pledge.” The pledge needs to be registered at the pledge registration office.

The inventoried items that can be used as pledge are described in article 138 paragraph 2 KLPR: any movable item or right that is legally transferable, including subsoil minerals and hydro-carbons and rights to subsoil minerals and hydro-carbons. According to the Regulation on pledge 2001/5 only property within the territory of Kosovo may serve as a pledge.

### *Attachment on personal income*

The decision on execution might also determine the execution on personal incomes. The execution on personal incomes, on reward instead of salary and on pensions, might be assigned and applied up to the half of their height.<sup>73</sup> Although in other countries such an attachment might be a good solution, in Kosovo the possibilities for such an attachment are limited. In general such an attachment can only be effected when the debtor, e.g. through the statement on wealth, informs the court on his source of income. If not, it will be difficult to obtain this information, the more so as Kosovo does not have a register on employment.

The decision on execution also has a legal effect against a new employer with whom the debtor concludes an employment contract. The former debtor's employer has the duty through an urgency letter to inform the new employer on the execution decision and for this to inform the court.<sup>74</sup> An employer who has not acted according to the decision for execution, or who has not informed the new employer is responsible for the damage which the execution proposer has suffered due to his omission.<sup>75</sup>

### *Execution on monetary credits*

The court in the territory where the debtor has his/her residence is competent regarding a proposal for execution on monetary credits of the debtor and for application of such type of execution.<sup>76</sup> The KLEP has certain limitations regarding these kind of attachments.<sup>77</sup> For example the attachment on personal incomes, on reward instead of salary and on pensions, might be assigned and applied up to the half of their height; the attachment for life rent, and also for income on the basis of a contract for life insurance, might be applied only in a part which exceeds the amount of the highest permanent social assistance which is paid in the territory where debtor has his residence.

Upon the creditor's proposal, the court will request from debtor's debtor to declare, within a time-limit assigned by the court, what amounts are to be paid and which other obligations there are towards the

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71 Art. 95 KLEP.

72 Art. 85 KLEP.

73 Art. 105 KLEP.

74 Art. 139 KLEP.

75 Art. 141 KLEP.

76 See art. 102 and further KLEP.

77 See art. 105 KLEP.

debtor. The statement of debtor's debtor is delivered to the creditor without delay. In the enforcement decision, or in a special decision for transfer of credit, the debtor's debtor is invited to deposit to the court the obligated amount of money. In case of an attachment on salary or other regular income<sup>78</sup> the employer is ordered to pay to the creditor.

In case the debtor ends the labor relation, the obligation from the attachment is transferred to the new employer.

### ***Attachment on bank accounts***

According to article 144 KLEP the execution for realization of the monetary credit against the execution debtor may be applied to all monetary means that the debtor has in his bank accounts, unless the law foresees otherwise.

Regarding an attachment on a bank account the court, through the enforcement decision, obliges the bank to send a notification about all changes on the debtor's account within a time period of 30 days, from the day of delivery of the enforcement decision. Such a statement contains each transaction in the account, including withdrawal of cash money, deduction of means or withdrawal from debtor's account and the transfer within the bank or between banks.<sup>79</sup>

The bank is obliged to conduct the payment in the order and according to the time of delivery of the execution decisions. For that reason the bank keeps a special register to classify the order of execution decisions, according to the day and time of receipt of the execution decision and to supply the creditor a certificate which includes the place of his claim according to the time of the decision in such classification.<sup>80</sup> In case of periodic payments, those payments are also made in accordance with the order provided in the decision on execution.<sup>81</sup> In case of insufficient funds the money will be taken from the other bank accounts or the transfer will be made as soon as there are funds in the account.<sup>82</sup>

### ***Attachment on shares***

An attachment on shares<sup>83</sup> is conducted by handing over the enforcement decision to the institution which keeps the register of valuable papers. At the same time the enforcement decision is delivered to the depositor and eminent of shares. Shares which according to the law and other legal acts for valuable papers, are put into circulation through the stock exchange, or in another public market, are sold as foreseen by the Law on valuable papers. The sale is performed by a trading inter-mediator selected by the court. Shares which are not put into circulation in the stock exchange, or in another public market, are sold in public auction or through direct settlement. In that case the evaluation, determination of sale prices and sale of shares, is conducted by applying in an appropriate manner the provisions on enforcement on movable goods. The shares need to be sold within a time-limit of two months from the day of first offer for sale on the stock exchange.

### ***Attachment on immovables***

Regarding the attachment on immovables,<sup>84</sup> the court in whose territory the immovables are situated, is competent to give the enforcement decision. In the proposal for execution the creditor is obliged to present an extract from the public book of immovables to prove that the immovable item is registered as ownership of the debtor. In case another person and not the debtor is registered, the prove can be given through the statement on wealth. In case of non-registration KLEP provides the requirements to prove the ownership of the immovables by the debtor.<sup>85</sup>

Within 7 days from the day of the ruling the debtor may propose the execution of another subject.<sup>86</sup>

<sup>78</sup> See art. 135 and further KLEP.

<sup>79</sup> Art. 145 KLEP.

<sup>80</sup> Art. 146 KLEP.

<sup>81</sup> Art. 147 KLEP.

<sup>82</sup> Art. 148 KLEP.

<sup>83</sup> See art. 157 and further KLEP.

<sup>84</sup> See art. 177 and further KLEP.

<sup>85</sup> Art. 184 KLEP.

<sup>86</sup> Art. 186 KLEP.

Several stages can be distinguished:

- Registration of the immovable property in public books,
- Establishment of the value of immovable property,
- Sale of immovable property, and
- Payment of creditors from sale of immovable property.

The attachment is done by noting the attachment into the public book of immovable items. In those areas where real estate's public books do not exist, or where they are destroyed or obliterated, the court, by proposal and on costs of the creditor, shall publish the decision on enforcement in the Official Gazette of Kosovo and, at least, in a daily newspaper which is usually distributed all over the territory of Kosovo.

The court decides on the manner of determination of the value of real estate.<sup>87</sup> When necessary the court may hold a court session with parties. The value of the real estate is determined on the basis of an expert evaluation and other facts related to its market price on the day of evaluation. The court may also request the competent tax body to provide data on the value of real estate. Once the procedure for determination of the value of real estate is completed, the court issues the conclusion on the sale of real estate. This way the court determines the value of real estate and the manner and conditions for sale, as well as the time and venue of sale, if the sale shall be performed through public auction.

The real estate sale conclusion is published at the court billboard. The party involved has the right to publish the sale conclusion on his costs in public information means, respectively to inform on conclusion the persons who mediate in sale of real estate. From the time of publishing the sale conclusion on the court billboard until the day of the sale a period of at least 30 days must pass.

The sale of real estate is performed through oral public auction.<sup>88</sup> This session for real estate sale is held at the premises of the court unless the court determines another sale venue. The sale session is exercised in front of a single judge or a professional court associate assigned by a judge. By a special conclusion the court will allow interested buyers to have a look at the real estate. As buyers in a public auction only those persons, who prior to the public sale have deposited a guarantee, may participate. The amount of the guarantee should be equal to one tenth of the determined value of the real estate, but may not be higher than 5.000 Euro.

The session of public auction shall take place even if only one bidder participates. A person who has the priority right to realize his credit, may request the court to postpone the session of public auction. In the first session of a public auction, real estate can not be sold against a price that is lower than half of the determined value. The starting offers for the first session, that are lower than half of the determined value will not be reviewed.

In case the real estate could not be sold in the first session, the court will determine the second session within the timeframe of 30 days. During the second session the real estate can not be sold for the price that is lower than one third of the assigned value with the selling conclusion. The starting offer in the second session can not be lower than one third of the determined value.

In case the real estate is not sold in the second session, the court will determine the third session in the timeframe of 15 to 30 days. In this session the real estate can be sold for whatever price, without taking into consideration the determined value of the real estate.<sup>89</sup>

In case the immovable property was not sold even in the third session of the public auction, or by straight agreement within the foreseen timeframe by the court, the court may hand over the immovable property to the creditor for an amount that corresponds with two thirds of the determined value of the immovable property.<sup>90</sup>

Creditors, whose rights are secured by mortgage, and the debtor may agree, at latest until the moment of the sale of real estate in public auction, that the sale of real estate is performed within an assigned term through direct sale. Such a contract should be in writing and needs to be certified by the competent body.<sup>91</sup>

From the selling price the creditor is paid by whose initiative the enforcement procedure started, as well as the other creditors. The remaining money will be paid to the debtor. If the price of selling the real estate is not sufficient for a complete fulfillment of loans of the same turn, their fulfillment is done in proportionality

87 Art. 203 KLEP.

88 Art. 210 KLEP.

89 Art. 218 KLEP.

90 Art. 231 KLEP.

91 Art. 211 KLEP.



to the height of such loans.<sup>92</sup> Once the selling price is deposited, the court issues a decision that the immovable property is sold to the buyer.<sup>93</sup>

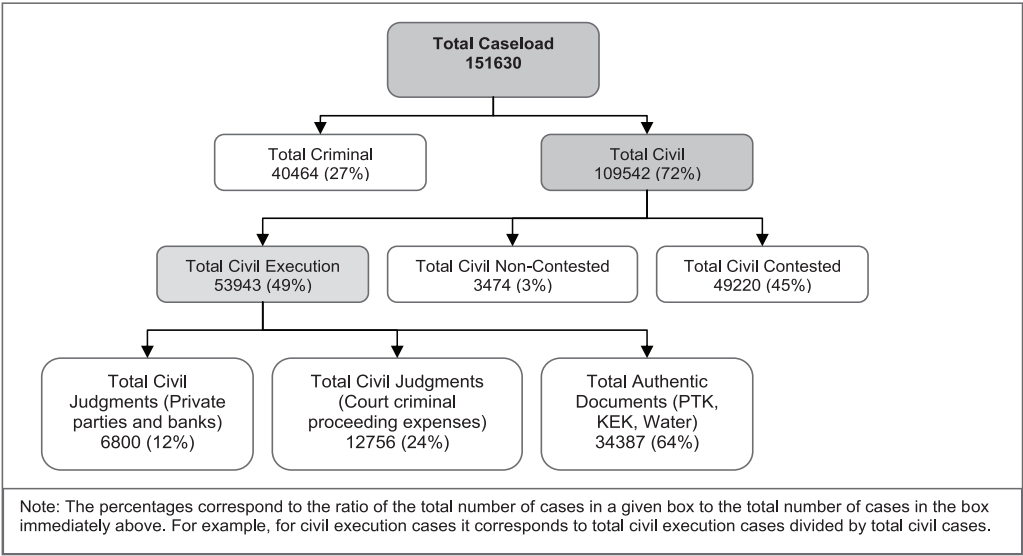
7.2.3. Challenges within the enforcement system

The challenges within the enforcement system are numerous. “The major concern identified is the fact that in several cases binding judgments were either not being executed or executed with excessive delays, thus seriously hampering the right to a fair trial within a reasonable time. According to the information collected by the OSCE this ineffectiveness is both caused by violation of provisions of the Law on Executive Procedure, and by external factors such as threats or assaults against judges dealing with executive cases, or the corruption in executive procedures.”<sup>94</sup> Let us have a closer look at the challenges within the enforcement system.

Backlogs in courts

In 2004 UNMIK released the “Kosovo Standard Implementation Plan”. This Plan describes the actions to be undertaken by the PISG and other institutions to achieve the standards. According to standard 13 “Judgments in civil law matters are being enforced, court execution officers are functioning, and court fines are routinely being paid.”<sup>95</sup> Unfortunately this standard was never met. Kosovo has substantial backlogs of cases in courts.

The backlog is mainly enforcement related. USAID has done several analysis of pending caseload in Kosovar courts in the past. For those analyses the backlog status for civil execution cases has been set as cases pending for 24 months or more with no adequate explanation for delay in resolving the case. Most cases relate to the confident (authentic) documents with rather small amounts (e.g. bills of utility and phone companies). The following chart presents the caseload pending in the 25 Municipal Courts of Kosovo as of January 1, 2008.<sup>96</sup> The enforcement cases represent 50% of the total number of civil cases pending in Municipal Courts. These cases represent 36% of the total number of cases pending in Municipal Courts.



92 Art. 237 KLEP.

93 Art. 226 KLEP.

94 Organization for Security and Co-operation in Europe (OSCE), Department of Human Rights and Rule of Law, Legal System Monitoring Section, Kosovo first review of the civil justice system, June 2006, Chapter 4.

95 Kosovo Standard Implementation Plan, UNMIK, 31 March 2004, page 35.

96 See: USAID, Civil Execution Caseload Report, Analysis of Pending Caseload in select Municipal Courts, Violaine Autheman, Kosovo Justice Support Program, March 2008, page 4. Regarding the chart the report notes: “The 2007 Annual Statistical report includes some data discrepancies. These are usually below 5% of the recorded amount, either in excess or missing. Verifications conducted by reviewing case registers in Prizren Municipal Court and Gjilan Municipal Court showed much more significant discrepancies, respectively an excess of 2762 cases and 326 cases missing. All the numbers in the overall caseload table have been adjusted to correct these two errors.”

In 2009 there was no improvement: <sup>97</sup>

Cases in all Municipal Courts in Kosovo 2009				Unresolved cases at beginning of reporting period	Cases received during the period	Total number of cases in process	Disposition decision					Total (sum of columns 1 - 5)	Cases unsolved at end of reporting period
a	b	c	d				Decision for execution	Procedure suspended	Proposals withdrawn	Cases directed to civil control	Other dispositions		
1	2	3	4	5	6	7	8	9	10	11	12	13	14
<b>I Execution of authentic documents (rows 1 - 8 below)</b>				80481	16279	66756	1543	1610	823	1066	238	4679	62277
1	1	KEK		7961	3509	11490	74	107	19	494	88	784	10736
	2	PTK		21706	9140	30846	595	196	343	395	129	1899	29251
	3	Heating		5435	870	4365	75	955	23	144	0	1197	3108
	4	Water		6661	2955	9616	180	301	67	14	18	585	8436
	5	Garbage		471	213	684	46	26	51	34	17	184	800
	6	Other authentic document cases		10227	188	10415	73	25	12	42	17	165	10246
<b>II Collection of all other executive titles</b>				24618	12389	40017	4688	1286	281		798	6886	33029
1	1	Collection of all non-monetary titles		2645	1355	4000	471	75	67		42	653	4347
	A	Recovery of possession		146	45	191	47	5	4		8	68	123
	B	Verification of ownership		541	951	1524	326	45	15		16	394	1130
	C	Eviction from dwellings		69	64	149	16	1	0		2	21	126
	D	Selling of immovable property		26	16	42	5	1	0		2	8	34
	E	Selling of movable property		50	110	160	2	7	45		6	60	100
	F	Other non-monetary executions		2759	135	2934	79	12	3		8	182	2813
	2	Monetary requirements, collection of court expenses, collateral, mortgages		28974	14041	43015	4217	1177	154		747	6338	28652
<b>Total (sum of rows I and II)</b>				78100	21673	104773	8731	2896	798	1066	1024	11467	95206

97 Based on Report for 2009, Statistics on regular courts, Secretariat of Judicial Council, department of statistics, page 17.

Despite the fact that a new law was adopted, the backlog continued growing:

Uncompleted cases at the beginning of the year	75.100
New filed cases	<u>31.673</u>
<b>Total number of cases in process</b>	<b>106.773</b>
Completed cases	<u>11.467</u>
<b>Uncompleted cases</b>	<b>95.306</b>
Uncompleted cases end of the year	95.306
Uncompleted cases beginning of the year	<u>75.100</u>
<b>Increase in number of uncompleted cases</b>	<b>20.206 (26,9%)</b>

The total of confident (authentic) documents is 64% of the total civil execution caseload. As already indicated, those authentic documents mainly relate to public utility bills filed by companies such as PTK (Post Telecommunication of Kosovo, the public telephone company), KEK (Kosovo Energy Corporation), and regional utility companies (water, garbage collection, heating). The Court criminal proceeding expenses are the second largest category (24%). This category relates to civil monetary debts resulting from a criminal judgment e.g., collection of expenses and fees incurred by the government in prosecuting the case. The third category (12%) are the civil judgments held by a private party (individual, bank, other company or legal entity). Most of these cases represent larger amounts.

The utility cases (electric, telephone and water companies) seem to be one of the main problems in enforcement. Estimated, utility cases are 60% to 80% of the total execution caseload. Consequently the large number has its influence and also slows down the execution of other cases. The utility bills can be regarded as authentic documents. This means the creditor can submit them directly to court for enforcement. In practice it seems the utility companies do not have an internal collection system at all: they simply “dump” the invoices at the court.

Depending on the court, between 50 and 80% of cases in the execution process concern authentic documents. Most if not all of these cases are PTK utility bills. As an example an overview from three Kosovar Municipal Courts from 2006:<sup>98</sup>

Overview of Caseload Analysis  
Gjilan MC\*, Pristina MC, Prizren MC

	Gjilan MC	Pristina MC	Prizren MC
Total number of pending cases (June 2006)	2173	10721	2361
Authentic documents (% of total)	72%	77%	51%
PTK (% of authentic documents)	99%	79%	80%
KEK (% of authentic documents)	0%	5%	0% (6 cases)
Civil judgments (% of total)	26%	23%	49%
Court expenses (% of civil judgments)	70%	48%	55%

Although the authentic documents represent two thirds of the total caseload this does not mean that they also represent two thirds of the outstanding debt. PTK and the water utility cases have an average value around € 200,--.

The USAID funded National Centre for State Courts selected four Municipal Courts and concluded:<sup>99</sup> “PTK and water utility cases tend to be for small amounts, with an average value slightly below €200. The outstanding amounts for PTK and water utility cases are estimated at, respectively, €1.355 and €0.972 million, corresponding to 2.3% and 1.65% of the total outstanding debt in the four selected courts. By contrast, KEK cases, which represent only a small percentage of authentic documents, have an average value around €2,000. The outstanding amount for KEK cases is estimated at €1.493 million, corresponding to 2.53% of the total outstanding debt in the four selected courts. However, there are 8 times more water utility cases than KEK

98 Justice System Reform Activity, quarterly report, July 2006-September 2006, USAID, prepared by National Center for State Courts, page 13.

99 NCSC is National Centre for State Courts. See: USAID, Civil Execution Caseload Report, Analysis of Pending Caseload in select Municipal Courts, Violaine Autheman, Kosovo Justice Support Program, March 2008, page 7. The four selected Municipal Courts were in: Peja, Ferizaj, Prizren and Gjilan.

cases, and 11 times more PTK cases than KEK cases.[...] Combined together PTK, KEK and water utility cases represent 68% of the total caseload in the four selected courts but only 6.5% of the total outstanding debt.”

The table above relates to the situation in 2006.

However when we have a closer look at the situation in 2009 there are no signals for any improvement:<sup>100</sup>

Kosovo Municipal Courts 2009	Number execution agents	utility cases awaiting execution	total execution cases awaiting execution	utility cases per execution agent	total execution cases per execution agent
December 31, 2009					
Gjilan	4	3368	4592	842.0	1,148.0
Viti	1	982	2302	982.0	2,302.0
Prizren	5	5961	9329	1,192.2	1,865.8
Dragash	1	160	257	160.0	257.0
Maliseve	2	268	805	134.0	402.5
Rahovec	1	1158	1832	1,158.0	1,832.0
Suhareka	1	916	1438	916.0	1,438.0
Peja	7	9649	11127	1,378.4	1,589.6
Decan	1	1894	3571	1,894.0	3,571.0
Gjakova	6	7735	10009	1,289.2	1,668.2
Istog	1	1719	2180	1,719.0	2,180.0
Klina	2	937	2062	468.5	1,031.0
Pristina	9	17008	26886	1,889.8	2,987.3
Ferizaj	5	5025	7008	1,005.0	1,401.6
Strepce	1	11	104	11.0	104.0
Glogove	1	432	1001	432.0	1,001.0
Lypian	2	988	2344	494.0	1,172.0
Podujeve	1	1770	4111	1,770.0	4,111.0
Vushtrri	1	807	1476	807.0	1,476.0
	52	60,788	92,434	975.9	1,659.9
	total	total	total	average	average


As said the court criminal proceeding expenses are the second largest category (24%). Also these cases are of small value of the total outstanding debt: these “cases are of small value, amounting to less than €0.5 millions or 0.8% of the total outstanding debt. They often prove uncollectible but execution staff is reluctant to dispose of them since the creditor is the court.”<sup>101</sup>

100 Source: Kosovo Judicial Council, Statistical Office. Not all the courts are mentioned: courts without enforcement agents and without enforcement cases are not mentioned.

101 USAID, Civil Execution Caseload Report, Analysis of Pending Caseload in select Municipal Courts, Violaine Autheman, Kosovo Justice



In 2010 (first six months) there was no improvement:<sup>102</sup>

REPORT ON THE TASK ACCOMPLISHMENT MID - YEAR 2010											
ALL MUNICIPAL COURTS											
Uncompleted cases at the beginning of the R.P.	New filed cases	Total number of cases in process	Completed cases during the R.P.	Uncompleted cases at the end of the R.P.	Terminated cases		Case Type		Uncompleted cases at the beginning of the R.P.	Uncompleted cases at the end of the R.P.	Uncompleted cases : mid year 2010 compare to the end of 2009 (+) more or (-) less
							n	n			
R.P.	n	n	n	n	n	n	Case Type		n	n	%
							n	n			
0	4	4	0	4	0	Investigations	1	1	0	4	#DIV/0!
0	0	0	0	0	0	Appeals on investigations	1	1	0	0	#DIV/0!
396	1830	2226	1474	752	0	Preliminary proceedings	0	396	752	356	89.9
52	375	427	399	28	0	Appeals against decision on detention order	0	52	28	-24	-46.2
2893	1016	3909	935	2974	0	confirmation of indictment	1	2893	2974	81	2.8
31434	6697	38131	5737	32394	0	Criminal 1-st instance	0	31434	32394	960	3.1
27	154	181	162	19	0	Criminal for juveniles in preparatory proceedings	1	27	19	-8	-29.6
1261	303	1564	282	1282	0	Criminal juvenile cases before the panel for juveniles -	0	1261	1282	21	1.7
53739	5259	58998	5208	53790	0	Chiefs 1-st instance	0	53739	53790	51	0.1
3422	1930	5352	1747	3605	0	inferiorities	0	3422	3605	183	5.3
3496	1261	4757	1100	3657	0	Non-contested	0	3496	3657	161	4.6
96306	15164	110470	6153	104317	0	Execution of civil cases	0	96306	104317	8011	8.5
6753	2482	9235	2449	6786	0	Execution of criminal cases	0	6753	6786	33	0.5
1065	116192	118157	117985	172	0	Other cases (verifications, verifications of contracts, signatures, others	0	1065	172	-1793	-91.2
206144	152667	353411	143631	209780	0	TOTAL	0	206744	209780	9036	4.5
										Structure of cases in %	Process expressed in %
										0.00	0.00
										0.00	#DIV/0
										1.30	80.55
										0.25	104.40
										0.07	92.03
										4.39	85.67
										0.10	105.19
										0.20	33.07
										3.44	99.03
										1.36	98.53
										0.03	87.23
										9.03	40.58
										1.03	98.07
										76.11	101.54
										100.00	94.08

Support Program, March 2008, page 7.

102 Kosovo Judicial Council Mid-year 2010 Statistics on regular courts, page 18.

On 8 November 2010 the KJC decided to adopt a National Backlog Reduction Strategy. KJC motivated here decision as follows: "Courts in Kosovo are faced with a very high number of old backlogged civil, criminal and execution cases. Actual statistical data show that caseload in the judicial system of Kosovo continues to grow and more than 200.000 cases are pending, the majority of which are old backlogged cases. Moreover, the Council considers that it is important to take adequate measures at this time in order to achieve greater case resolution. Indeed, one of the main reasons used by the media to criticize the judicial system is precisely the excessive backlog of old cases. At the same time, reducing the old backlogged cases has been identified as a priority in the European Commission Progress Report for Kosovo. Therefore, taking into account these factors, it is decided as in the enacting clause of this Decision."<sup>103</sup>

Also relating to enforcement KJC intends to undertake action:

- signing a Memorandum of Understanding between the KJC, the police and the post office regarding the delivery of summons;
- a Memorandum of Understanding between the KJC and Kosovo Police for civil cases and civil execution cases;
- a Memorandum of Understanding between the KJC and the civil registration office;
- a Memorandum of Understanding between the KJC and PTK;
- a Memorandum of Understanding between KJC and the business registration office;
- a Memorandum of Understanding between KJC and the Central Bank in order to regulate cooperation related to identification and freezing of bank accounts, issuing of fines and other sanctions for failure to comply with court orders or to cooperate, processing of cases submitted by banks, etc.;
- more attention for mediation in judicial cases;
- Assignment and training of a working group for the reduction of backlogs of (criminal/civil) execution cases in every Municipal and Commercial Court;
- Identification of support staff ( e.g. interpreters, archivists and legalization clerks) that can help in the execution and issuing of assignment order by court presidents;
- Electronic inventorying of the execution of civil and criminal cases;
- Categorization of cases;
- Establishment of Kosovo Judicial Council Special Enforcement Units that work on the backlog in enforcement cases independent from the courts.

### ***The use of parallel courts***

Another problem that arises in the Kosovar judiciary system is the use of parallel courts in Serb enclaves. These parallel courts further complicate the court and execution structure. "Parallel courts appear to be receding, in part due to the virtual impossibility to execute their decisions in Kosovo. However, the International Crisis Group reports parallel structures as a problem. Parallel courts and structures are not studied in this report, but they are nonetheless a fact to be taken into account in any attempt to reform and strengthen the legal and judicial system."<sup>104</sup>

### ***Locating debtors***

There are many challenges facing civil execution officers in Kosovo. Debtors are often difficult to locate. Court execution units were not fully staffed until 2004. Some debtors in large bank cases are reportedly bankrupt or insolvent. Some debtors delay execution by submitting multiple objections. Large population movements that occurred during the conflict of the late 1990s and immediately following the NATO air campaign were not recorded in creditor registers. This means, for example, that many old PTK or water utility cases are filed against the prior occupant not the person who lived on the premises at the time the phone or water utility costs were incurred, much less the person currently living there.

103 See: Reasoning for KJC National Strategy for reducing old cases pursuant to Law No. 03/L-122 on the Composition of Kosovo Judicial council and UNMIK Regulation 2005.52 on the Establishment of Kosovo Judicial Council, and Based on the Strategic Plan of the Kosovo Judiciary for the period of 2007-2012, Kosovo Judicial Council.

104 National Center for State Courts (NCSC), Justice System Reform Activity in Kosovo, The Execution of Civil Judgments in Kosovo, Violaine Autheman, Angana Shah, Keith Henderson (IFES).

According to the Law on Civil Registers<sup>105</sup> the courts have the right to access the Civil Register. However practice is different: first the data in the Register are outdated. Secondly the Register is not willing to cooperate and to supply the information requested to the courts.

The same problems affect the commercial registers. The information in the commercial register is outdated and a substantial number of registered businesses have ceased to operate without notifying the Register. At the same time a number of businesses are actually operating without being registered.

### *Locating assets*

The ability to collect on debt cases is also made more difficult by poor economic conditions and the unwillingness of execution staff to seize what limited property may be available, thus forcing individuals into greater economic distress and insolvency.

KLEP does not have a provision that enables the enforcement agent to obtain information on the assets of the debtors. The only provision in KLEP is article 42 paragraph 1 enabling the creditor to request the debtor and other bodies or administrative services or other institutions, through the court, to provide data on the wealth of the debtor.

This provision is considered rather vague. In addition there is no similar provision in ZIP 1978, the law applicable for all cases filed before the implementation of KLEP. The result is that there is no clear procedure to obtain information on the debtors' assets. The unclear situation makes that most institutions are unwilling to provide information. The cooperation with those institutions such as cadaster, institutions holding financial data, employers and other institutions needs improvement.

### *The role of the banks*

An example of the unwillingness can also be seen when we have a closer look at the role of the banks. Although article 145 KLEP provides an obligation for banks to ensure information about bank accounts of debtors, banks routinely refuse to comply with court orders seeking to identify and freeze the bank accounts of debtors. These challenges and many others affect effective execution of court judgments and authentic documents. A USAID Project concluded: "The incentives for non-compliance are strong. The banks see competitive advantage in noncooperation because it is a form of asset protection that is attractive to their clients. Having a reputation for non-compliance is a competitive asset for a bank, even with an occasional penalty. After all, a bank benefits not just from the debtor's account, but from all the other funds that are held at the bank in other parties' accounts because of the bank's reputation for protecting customers; taking an occasional hit for protecting one customer merely enhances the bank's reputation with other customers who seek that kind of service, and may attract more funds. Besides [...] it is really hard to get caught, and the penalty provisions are almost never applied."<sup>106</sup>

Contrary to other countries in the region the Central Bank of Kosovo does not have a Central Database on Bank Accounts. The creditors are fully dependent on the banks to identify the bank accounts of debtors. However banks refuse to supply the information to the creditors and those creditors need to request the bank through the court. Two legal provisions can be mentioned here:

1. article 34 of the Law on the Central Bank of the Republic of Kosovo:<sup>107</sup> according to this article the bank may disclose non-public material information outside the Kosovo Central Bank only in accordance with the procedures provided by the Central Bank, but only if:
  - the request pertains to the fulfillment of obligations towards citizens including the assistance to law enforcement institutions and court order or other competent person. (Article 34.2 under b)
  - they are in concordance with verbal consent or acknowledgment of person that the information relates to. (Article 34.2 under a)
  - during the judicial proceedings the interests of the Central Bank of Kosovo require the disclosure of information. (Article 34.2 under e)

<sup>105</sup> Art 14 Law on Civil Registers.

<sup>106</sup> Systems for enforcing agreements and decisions (SEAD) Program in Kosovo, Streamlining enforcement of contracts: report and recommendations regarding commercial case procedures and enforcement of judgments, 30 April, 2010, page 42.

<sup>107</sup> Law on the Central Bank of the Republic of Kosovo no. 03/L-074.



2. article 27 of Regulation On Payment Transactions,<sup>108</sup> provides that “the bank keeps business secret and does not disclose the bank account of any client except in cases when such a thing is required by a court order under the applicable law or according to the expressed authorization of client”.

### **Corruption**

Another main problem in the judiciary system is corruption. The OSCE concludes: “Moreover the low salaries of judges create conditions in which parties can easily influence judges to speed up their executive cases by offering bribes, while judges are easy targets of these corruption attempts given their power over the management flow of executive cases. Even though there are few reported cases of corruption in the judiciary, it is considered by the population of Kosovo as a major problem affecting the judicial system.”<sup>109</sup>

The Kosovo Anti-Corruption Agency signed a memorandum of understanding with the Independent Judicial and Prosecutorial Commission to allow exchange of information on corruption cases in the judiciary system. Nevertheless, the EU Progress Report 2009 concluded that Kosovo has made limited progress in tackling corruption and that the legal framework for tackling corruption urgently needs to be improved.<sup>110</sup>

### **7.3. Training of professionals involved in enforcement**

The situation of enforcement personnel in the broader sense in Kosovo is quite bad. As already described above, Kosovo is still operating its enforcement system under a *modus* similar to the one set up through the law of 1978. As a result one can find the same group of professionals involved in the enforcement process like in most of the other countries and especially the enforcement judge and the (enforcement) court clerk. The high number of very small courts leads to the additional problem that most judges and clerks, who are involved in the enforcement process are fulfilling these duties besides numerous other functions within the daily work of a court. Therefore one can not even speak of a *de facto* specialisation on enforcement issues.

#### **Judges**

After finishing university, candidate judges undergo a 18 month initial training in the Kosovo Judicial Institute (KJI).<sup>111</sup> This rather short time is used to give the judges all necessary tools for their future profession.

There is no specialisation to become an “enforcement judge” and no in-depth training on enforcement related issues. Once accepted as a judge there is the possibility to participate in ongoing trainings. A so-called programmatic council, a joint venture of the association of judges and prosecutors, is deciding on the topics for the (mandatory) training. These decisions are not based on a clear training needs assessment or a clear training plan, but are taken usually on an *ad hoc* basis. Trainers are usually judges from the Supreme Court, who are more or less unanimously following a strict “frontal teaching/lecturing” approach.

#### **Court Clerks**

In comparison to the situation of judges, the situation of court clerks was even worse. First of all it has to be underlined that the profession of a court clerk hardly exists, as the so-called court clerks in Kosovo are civil servants without any specialised education or training. Court clerks usually do not have any legal background. Among these court clerks are also those, who are dealing with enforcement cases, without being provided with any kind of special education or at least training. Wrapping up the situation of the court clerks in Kosovo one has to realise that they are somehow the “Achilles’ Heel” of the whole process.

Taking into consideration the situation of court clerks it goes almost without saying that no training material is available for the profession. Up to date versions of a commentary on the enforcement law are not available. There is also a lack of other training materials, with the exception of a Handbook for the Practical

<sup>108</sup> Regulation no. 2001/26 on payment transactions.

<sup>109</sup> Organization for Security and Co-operation in Europe, Department of Human Rights and Rule of Law, Legal System Monitoring Section, Kosovo first review of the civil justice system, June 2006, Chapter 4.

<sup>110</sup> 2009 Progress Report, page 11.

<sup>111</sup> The KJI is an independent professional body, based on the Law on establishing the Kosovo Judicial Institute (Law No. 02/L-25, 23 February 2006). The KJI is permanently underfunded and therefore depending on donations. At the moments necessary funds are mainly coming from Norway and Japan.

Implementation of Enforcement Procedures, which was published by USAID in November 2008. However this Handbook is based on the former law, there is no material available concerning the law adopted in June 2008.

In 2010 BERP, in cooperation with the USAID sponsored project Kosovo Justice Support Program and the KJI, set up a training program for court clerks on enforcement. All enforcement clerks followed a ten days training course in the various aspects of enforcement. In 2011 KJI also intends to set up training programs for (enforcement) judges.

#### 7.4. Ethics, monitoring and control, disciplinary issues

For several years now, Kosovo has two codes of conduct for judges and lay judges.<sup>112</sup> The current regulation has been developed by the Kosovo Judicial and Prosecutorial council<sup>113</sup> (now: KJC) and is listing principles for juridical and extra-judicial behaviour.

The quite comprehensive paper is based on well tested and acknowledged principles and also covers the work of enforcement judges in a sufficient way. In developing the new Code, the KJC considered a number of international standards and best practices, including the Bangalore Principles of Judicial Conduct, which the new Code closely tracks in many respects. Thus, the Judicial Ethics Code contains the basic principles and applications required by international documents, providing that judges are required to perform their judicial and extra-judicial activities in a manner which promotes public confidence in the integrity and independence of the judiciary.

The KJC is responsible for the establishment of the Judicial Disciplinary Committee. This Committee initiates and resolves first instance issues of alleged misconduct of judges and determines the appropriate sanctions when necessary. The vice chairman of the KJC is the president of the Committee. In addition two other members of the KJC are appointed as a member. Complaints are investigated by the Judicial Inspection Unit. This Unit determines whether a complaint should be filled with the Judicial Disciplinary Committee. The Committee then decides on the sanctions: reprimand and warning, suspension from office without pay for up to six months, recommendation of removal from office, or recommendation of removal from the function of lay-judge. Judges can be dismissed from their positions in the event of physical or mental incapacity, serious misconduct, or failure to duly execute the office of judge. Appeal is possible to the KJC. The final decision for dismissal is taken by the President of Kosovo.

Regarding corruption first the Provisional Criminal Code of Kosovo as amended in 2008 has to be mentioned. This Code includes provisions for dealing with corrupt judges. In practice also the Ombudsperson Institution has reported several complaints and allegations of corrupt practices within the judiciary.

The 2009 EU Progress Report makes clear that there are major deficiencies in implementing the Codes and in the monitoring procedure. According to Article 108, III of the Kosovo Constitution the KJC is responsible for disciplinary measures against judges, but according to the 2009 EU Progress Report poor implementation is accompanied by weak control activities: "Allegations of corruption and misconduct in the judiciary have not been adequately investigated. The Office of the Disciplinary Counsel responsible for this activity is not fully functional. The Judicial Audit Unit has issued recommendations regarding the functioning of the courts that have not been properly taken into account by the Kosovo Judicial Council."<sup>114</sup>

Therefore it has to be stated that the Codes of Ethics cannot, under the current circumstances, unfold their foreseen impact.

Regarding the court clerks Kosovo does not have its own ethical code. As in other countries of the region this is a consequence of the fact that court clerks are operating under the same regulations as other civil servants. As described above such a situation creates diverse problems as tailor-made regulations, which would take into account the particularities of enforcement court clerks.

#### 7.5. Working circumstances, remuneration

"The courts are in a state of starvation for resources, and the court enforcement offices are among the most undernourished components. Court enforcement agents, though they represent an intrinsically imperfect

<sup>112</sup> Code of Ethics and Professional Conduct for Judges, adopted 25 April 2005 and Code of Ethics for Lay-judges, both referring to UNMIK Administrative Direction No. 2006/8.

<sup>113</sup> UNMIK Regulation No. 2001/8 on the establishment of the Kosovo Judicial and Prosecutorial Council; now: The law on the temporary composition of the Kosovo Judicial Council, thereby amending UNMIK Regulation 2005/52, Law No. 03/L-123, 16 December 2008.

<sup>114</sup> 2009 Progress Report, page 10.

institution and are provided essentially no incentives whatever to perform their jobs effectively, are in most cases swamped with work and are so deprived of manpower, supervision, and resources that they simply cannot effectively handle the workload that has been placed on them. It is nearly impossible to seize most kinds of assets that might be used to pay judgments because the systems designed to seize them are broken, suffering from lack of information, poor incentives, mismanaged public agencies, and a pervasive willingness to flout the authority of courts. Indeed, it is often impossible even to find information about the assets of judgment debtors, again because the systems for that purpose do not work or do not exist, and there is little that prevents judgment debtors from finding ways to hide their assets from their creditors. There seems to be a pervasive unwillingness by courts, prosecutors, and others to impose consequences on those who disobey the orders of courts.”<sup>115</sup> This is how The USAID-SEAD project summarizes the organizational aspects in the enforcement system.

Judges’ salaries have been an issue of discussion already for quite a while. Judicial salaries are considerably lower than those, which are paid to senior government employees. De facto they are not sufficient in order to enable judges to secure a living for themselves and their families without the use of other sources of income. Therefore during the past years one could observe a high number of judges, who were leaving the judiciary and entered practice as an advocate or similar. Having said all this, one should keep in mind that judicial salaries are still considerably higher than the average salaries paid in the country. For 2006 the Judicial Reform Index of ABA/ROLI<sup>116</sup> indicated an average salary of a District Court judge of 550 Euro/month whereas average public and private sector employees earned in average 200 Euro per month.

Aware of the consequences of the current situation, and especially of the difficulties to attract and to keep the best qualified people working in the judiciary, the Kosovo Judicial Council elaborated on this issue in its strategic plan for the years 2008-2010 and proposed proper salaries. According to this plan a District Court judge would then earn monthly 1500 Euro. One still has to wait how quick the Government will be able to address the needs of the judiciary as there are quite a high number of other budgetary emergencies, which have to be tackled. As long as the income level of judges stays on the current unsatisfactory level, society will face the well known problem of corruption also within the judiciary. Respective reports on this topic have shown already that within the society corruption is seen as a common phenomenon within Kosovo’s judiciary.<sup>117</sup> Recent surveys have shown that the corruption is mainly caused by judges and court staff, who are clearly overworked and underpaid and who have to cope with very unfavorable working conditions.<sup>118</sup>

In comparison with 2006 so far the salaries have not increased considerably. A recent survey indicated that the monthly salaries of judges at the different levels of the judiciary range between 420 EUR for minor offense court judges and 666 EUR for the President of the Supreme Court. A municipal court judge receives 471 EUR per month, while at the district court level, the judicial salary is 549 EUR per month. A Supreme Court judge is paid 627 EUR per month. Court Presidents at each level receive a slightly higher salary. The take-home pay is lower due to income tax and pension deductions.<sup>119</sup>

The situation of court clerks in Kosovo is even worse in comparison to the one of judges. Corresponding to the lack of training which they receive, the reputation of the profession is extremely poor; a fact which is mirrored in the salaries. In average a court clerk does not receive more than 180 EUR per month, which is clearly not enough to finance a decent standard of living. Social security is not guaranteed. Therefore it does not come as a surprise that the judiciary did not find a way yet, to attract the best educated candidates and to keep surpassing members of the profession in the job. Contrary to the cases of judges, where the low salary is still above average, many civil servants are even below the average income of private sector employees so that the outflow from this profession is very high. This effect is also fueled through the more than poor working conditions with regard to equipment and physical security. Many court clerks, who are in charge of enforcing judgments and other court decisions, even do not have a copy of the respective law(s) and regulations. Assaults against court clerks are common, there is no adequate protection through the police.

<sup>115</sup> Systems for enforcing agreements and decisions (SEAD) Program in Kosovo, Streamlining enforcement of contracts: report and recommendations regarding commercial case procedures and enforcement of judgments, 30 April, 2010, page 12.

<sup>116</sup> ABA/ROLI Judicial Reform Index Kosovo Volume III, 2007, page 31, factor 11.

<sup>117</sup> ABA/ROLI Judicial Reform Index Kosovo volume III, 2007, page 42, 43; Freedom House, Kosovo country report 2007: <http://www.freedomhouse.org/template.cfm?page=47&nit=442&year=2007>.

<sup>118</sup> ABA/ROLI Judicial Reform Index Kosovo volume III, 2007, page 42, 43.

<sup>119</sup> SIGMA, Support for Improvement in Governance and Management (OECD and EU) KOSOVO (under UNSCR 1244/99) Public Integrity System Assessment 2009 page 16.

## 7.6. Improvements

What improvements are necessary?

The 2008 KLEP is more or less a make-over of the old 1978 law of the Socialist Federative Republic of Yugoslavia. The law does not seem implemented and well used yet. Through training both execution judges and court clerks need to become familiar with the 2008 law.

At the same time legal professionals do not seem to be satisfied with the law. The question is whether it will be feasible to start elaborating a new law while the implementation of the June 2008 Law has just started: based on article 302 KLEP all execution procedures initiated until the start of application of the 2008 KLEP are concluded according to the provisions of the ZIP1978. Due to the backlog in cases it takes several years before KLEP can be implemented. Nevertheless it is clear that also KLEP needs improvement. The aforementioned Working Group will finalize its proposals for amendments early 2011.

A separate Law on Enforcement Agents does not exist in Kosovo. In case of a system change the adoption of such a law will be necessary. Meanwhile attention needs to be given to the improvement of the enforcement procedures under the present law: as in other countries in the region debtors are overprotected. The present law still has a number of legal remedies that can be used, or rather misused, by debtors to delay enforcement. A well-defined list of the criteria for objection or appeal would already be a huge advantage.

Fees and expenses are not well regulated. A fee is paid at the moment the application is filed.<sup>120</sup> After that the creditor does not have to pay any additional fees: no matter the number of attempts of enforcement, no matter the number of requests for additional means and objects of enforcement and no matter when incorrect information supplied by the creditor needs to be corrected. Under these circumstances it seems only logic that a creditor will refuse to dismiss a case.

Another challenge can be found in the area of human resources. Besides a discussion on the legislative framework, local capacity to deal with enforcement procedures will have to be created and strengthened, as this is very limited at present. Here, one has to remind that non-Serb Kosovars were excluded from holding any key positions in the legal and judicial system between 1989 – 1999 and that Kosovo under UNMIK was basically run by the international community until the beginning of 2008. As a result, the local capacities are still quite weak. Needless to say that the working conditions and circumstances of both the execution judge and the court clerk can be improved.

Although there are legal obligations, third-parties (e.g. banks) do not always cooperate with the courts. Attention needs to be given to improve the cooperation with those third parties and public authorities and to improve access to the sources of information and the quality of public registers. Existing registers are incomplete, inaccurate, or inaccessible. Thus, given the lack of addresses it seems impossible to locate debtors and their assets.

Regarding the organization of the enforcement system there is a discussion to adopt a system of private enforcement agents. Such a system might lead to a more efficient and effective enforcement system, provided that the Government is willing to create the conditions that are needed for the success of such a change. The creation of a good legislative framework is a *conditio sine qua non*, but equally important are the establishment of a good and transparent system of monitoring and control, a system of disciplinary proceedings and training.

<sup>120</sup> See: Administrative Direction no. 2008/2 On the Unification of Court Fees, Kosovo Judicial Council, November 2008.

## Chapter 8: FYROM (the former Yugoslav Republic of Macedonia)

### 8.1. Political context

#### *The European Commission progress reports*

In December 2005 the former Yugoslav Republic of Macedonia (hereafter: FYROM) was granted the status of candidate country to the European Union. The Stabilisation and Association Agreement (SAA) between the FYROM and the EU was signed in April 2001 and entered into force in April 2004. In February 2008 the Council adopted the Accession Partnership for the country, including key priorities for reform. In October 2009, the Commission recommended to the Council to open negotiations with the country, as well as to move to the second phase of SAA Implementation. The Council has not yet taken a position on the Commission's proposals.

What was the progress the FYROM made over the years towards meeting the Copenhagen political criteria, or more specific for this publication, the development in the legal system in general and judiciary and enforcement more specific? In that respect the Progress Reports are a good benchmark: since March 2002, the Commission has reported regularly to the Council and the Parliament on progress made by the countries of the Western Balkans region. These reports measure the progress of these countries on the basis of decisions taken, legislation adopted and measures implemented. As a rule, legislation or measures which are under preparation or awaiting parliamentary approval are not being taken into account. This approach ensures equal treatment across all reports and permits an objective assessment.

The judiciary continued to be a bottleneck, the European Commission concluded in the 2006 Progress Report: "However, the judicial system shows the same serious shortcomings as in previous years affecting both its independence and its efficiency. The financial situation of the courts remains a matter of concern. [...] The real effects of judicial reform will only become apparent once the new laws take effect and new, fully operational structures are in place. The effective implementation of the reforms and the improved operation of the judiciary will have to be demonstrated by a sustained track record. [...] Further legislative parts of the Judiciary Reform Strategy have been implemented to improve the functioning of the judiciary. The Laws on Misdemeanours and on Administrative Disputes were enacted in May. They should alleviate the burden on the courts and reduce the backlog of pending cases. Other steps taken conferring the administrative bodies the power to impose sanctions and introducing the concept of alternative dispute resolution for civil and commercial cases will also decrease the burden on the courts. The entry into force of the Laws on Enforcement of Civil Judgements and on Litigation Procedure which changed court procedures and its implementation should improve the enforcement of civil law cases."<sup>1</sup>

"Overall, the constitutional and legal framework for an independent and efficient judiciary is now largely in place. However, most of the reforms in the judiciary have not yet entered into force. There are important challenges in this field, which require a sustained programme of reforms."<sup>2</sup>

For the judiciary, the year 2006 still had serious problems: "Steps have been taken to improve the efficiency of the judiciary. The 2006 budget for the courts has increased by 3% compared to 2005, with about € 21.1 million. This remains insufficient to cover the running costs of the judiciary and the debt of the courts (€ 1.4 million, due mostly to the post office for summoning services). [...] The total number of pending cases in the basic courts was 937.756. There were 534.548 cases registered in 2006. The large number of misdemeanour and enforcement cases remains a major reason for the inefficiency of the judiciary. The Supreme Court remained overburdened, notably with administrative cases which constituted 80% of the new cases received. A Law on Mediation was enacted in May to introduce the concept of alternative dispute resolution for some civil cases as well as for commercial cases and alleviate the burden on courts. Sixty mediators have been appointed. The law will enter into force in November 2006. The Laws on Litigation Procedure and on Enforcement of Civil Judgements adopted in 2005 in order to improve the enforcement of judgements entered into force in January and May respectively. Since June, the new enforcement agents received 2.926 requests for enforcement, out of which 1.201 were completed."<sup>3</sup>

In 2007 the European Commission was rather sceptical on developments within the judiciary: "the judiciary continues to suffer from serious deficiencies, in particular as regards lack of independence and low

1 The former Yugoslav Republic of Macedonia 2006 Progress Report, European Commission, 8 November 2006, SEC(2006) 1387, hereafter 2006 Progress Report, page 10.

2 2006 Progress Report, page 10.

3 2006 Progress Report, page 44.

efficiency. [...] The courts' budget remains insufficient. Efforts on training will have to be sustained to allow for the effective implementation of the reform."<sup>4</sup>

The European Commission was more positive on the developments in the enforcement system: "The implementation of the laws on litigation procedure and on enforcement of civil judgements is gradually having an impact on the enforcement of court decisions. Ministry of Justice statistics point to an increase in solved cases by 8% in the first six months of 2007.[...] Allowing commercial cases to be enforced by licensed enforcement agents has led to significantly faster enforcement of court decisions. However, legal procedures in general are still slow, which impedes proper law enforcement. Therefore, progress on settling ownership disputes has been limited. Overall, progress has been made on further accelerating market entry, clarifying property rights and speeding up enforcement of court rulings. However, weaknesses in the judiciary are still impeding the proper functioning of market mechanisms."<sup>5</sup>

"The new system of enforcement began to show results in its first six months: by the end of 2006, 8% of court decisions had been transferred to the "enforcement agents" introduced in 2006, and over 45% of these decisions have been implemented. The implementation of the law on litigation procedure has allowed the courts of first instance to increase the number of cases solved within a three-month period. [...] The courts of first instance and courts of appeal dealt with 1.698.871 cases during 2006. [...] The backlog of cases, mainly comprising enforcement and misdemeanour cases, as well as administrative cases dealt with by the Supreme Court, still seriously hinder the judiciary's ability to handle the workload."<sup>6</sup>

Good progress was reported in the 2008 Progress Report. The European Commission was positive on the implementation of the strategy on judicial reform and the strengthening of the independence and efficiency of the judiciary: "Overall, good progress has been made in implementing the strategy on judicial reform, a key priority of the Accession Partnership. [...] However further strengthening of the judiciary is required as regards its independence, efficiency, human resources and budgetary framework. A track record of implementation of the new legislative framework has still to be established. In the area of the judiciary the country is moderately advanced."<sup>7</sup> "The budget of the courts was too low to cover their running costs and their debts to utility companies. This recurrent weakness was remedied again by providing a supplementary budget in the course of the year but nonetheless it continues to jeopardize the efficiency of the judicial system."<sup>8</sup> "The implementation of the laws on litigation procedure and on enforcement of civil judgements is gradually improving the efficiency of the judiciary."<sup>9</sup>

"The new system of enforcement has had a mixed record. At the end of 2007, only 27% of court decisions transferred to bailiffs had been implemented, compared with 45% at the end of 2006. The ratio increased to 45% again in the course of 2008. The deadline for transferring the enforcement cases to bailiffs was extended from end-2007 to end-2008, which delayed proper and full execution of a large number of court rulings. Of the 27 basic courts, 22 managed to reduce the very big backlog of cases, which again mainly comprised enforcement and misdemeanour cases as well as administrative cases dealt with by the new Administrative Court. The courts of first instance and courts of appeal dealt with almost 2 million cases during 2007."<sup>10</sup>

Good progress was reported in 2009. "The Judicial Council and the Council of Public Prosecutors have striven to ensure the independence of the judiciary. By mid-July the Judicial Council had completed the first appraisal of the performance of serving judges and found that most of them have been up to the standards. In 2008 the courts received 12.3% fewer cases than in 2007. [...] Of the 27 basic courts, 26 managed to reduce their combined backlog by 16%. The number of cases resolved within six months also increased somewhat. In the first quarter of 2009 the misdemeanour commissions resolved 68.3% of new cases.

However, the absence of a human resources management system has slowed down the recruitment of graduates from the ATJP [Academy for Training of Judges and Prosecutors] into the judiciary. The Skopje 2 basic court, which is the court with the largest number of cases, and the four courts of appeal along with

4 The former Yugoslav Republic of Macedonia 2007 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2007-2008, European Commission, 6 November 2007, SEC(2007) 1432, hereafter 2007 Progress Report, page 10.

5 2007 Progress Report page 10, 21.

6 2007 Progress Report, page 49-50.

7 The former Yugoslav Republic of Macedonia 2008 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2008-2009, European Commission, 5 November 2008, SEC(2008) 2695, hereafter 2008 Progress Report, page 14.

8 2008 Progress Report, page 14.

9 2008 Progress Report, page 14.

10 2008 Progress Report, page 57.



the Administrative Court were unable to reduce their backlogs. [...] A number of courts continue to face budgetary restrictions.”<sup>11</sup>

Regarding enforcement the European Commission noted that “Not all the enforcement cases were transferred to the bailiffs by the end of 2008 thus delaying enforcement of a number of court rulings.”<sup>12</sup>

The inefficiency and ineffectiveness has its impact on the business environment. From the perspective of the business environment the European Commission continued to underline the importance of further improvements: “Some further measures have been taken to improve the business environment, which is a key Accession Partnership priority. The legal system for a functioning market economy is largely in place. Good progress has continued to be made with registration of property rights, by further extending the coverage of the real estate cadastre to more than 90% of the country's territory compared with 82% in September 2008. [...] However, in general, legal procedures are still slow and sometimes the quality of court decisions is low. This is continuing to have a negative impact on legal certainty and is impeding the proper functioning of market mechanisms, with an adverse impact on the business environment and the country's attractiveness to foreign investment. The financial independence and administrative capacity of regulatory bodies were strengthened. However, some regulatory and supervisory agencies are not yet fulfilling their role as guardians of the rule of law and providers of a level playing field for all economic operators. The large informal sector is fuelled by weaknesses in tax and expenditure policies, as well as in law enforcement, including the fight against corruption and organised crime. The informal sector remains an important challenge, as it reduces the tax base and the efficiency of economic policies. Overall, clarification of property rights has further advanced. However, weaknesses in the judiciary, including slow procedures and insufficient resources, are continuing to have an adverse impact on the business environment, for example in the area of contract enforcement. Corruption has been addressed by policy measures, but remains prevalent in many areas.”<sup>13</sup>

The European Commission seems to be rather sceptical on the most recent developments. Over the past year only limited progress was made in implementing the reform of the judiciary. “Regarding the independence of the judiciary, no further progress was made in ensuring that the existing legal provisions are implemented in practice. The role of the Minister of Justice within the Judicial Council raises serious concerns about the interference of the executive in the work of the judiciary. The boundaries between the grounds for disciplinary procedures and the grounds for judicial review are not clearly defined. Further efforts are needed to ensure that the assessment of judges' professional ability is not made primarily on the basis of quantitative criteria, such as reversal rates of judgements, but also on qualitative criteria in line with Council of Europe recommendations. Appointments of some members of the Judicial Council were not in line with established criteria.”<sup>14</sup> “The Ministry of Justice lacked appropriate human resources in key sectors such as for the EU and anti-corruption. The Council for Judicial Reform, whose role is to steer the reform and monitor its implementation in the presence of all key actors in the judiciary, is not meeting regularly.”<sup>15</sup>

“The backlog of old court cases continues to be a major problem. While 20 out of 27 basic courts managed to resolve most of the newly received cases and to reduce their backlog, the four courts of appeal and the administrative court did not.”<sup>16</sup> “The statistics compiled by the Ministry of Justice showed an increase in the duration of court cases in 2009. The basic courts resolved 56% of civil cases within six months, a smaller proportion than in 2008 (65%). A similar trend is observed in commercial and criminal cases.”<sup>17</sup>

“Overall, the backlog of cases in courts in 2009 was approximately 15% lower than in 2008. [...] With more than 900.000 cases pending before the courts, substantial further efforts are needed to reduce the backlogs. The Council for Judicial Reform, chaired by the Minister of Justice, has not met since May 2009. The Ministry of Justice remained understaffed including in priority departments. Further efforts are needed to establish reliable and comprehensive statistics on the implementation of judicial reform.”<sup>18</sup>

11 The former Yugoslav Republic of Macedonia 2009 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2009-2010, European Commission, 14 October 2009, SEC(2009) 1335, hereafter 2009 Progress Report, page 57-58.

12 2009 Progress Report, page 14.

13 2009 Progress Report, page 28.

14 The former Yugoslav Republic of Macedonia 2010 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2010-2011, European Commission, 9 November 2010, SEC(2010) 1332, hereafter 2010 Progress Report, page 12.

15 2010 Progress Report, page 13.

16 2010 Progress Report, page 13.

17 2010 Progress Report, page 16.

18 2010 Progress Report, page 58.



The backlog consists of a substantial number of “old” enforcement cases, still pending in the courts. In 2010, again, the deadline for transfer of these cases to the private enforcement agents was suspended: “However, the law on enforcement was amended in July, extending the deadline for transfer of over 600.000 enforcement cases from the courts to bailiffs to 2011; this has delayed reduction of the backlog in courts.”<sup>19</sup> Further delay in the enforcement of decisions, the European Commission noted, is caused by an insufficient number of enforcement agents.

### ***Government Strategy***

The Government of the FYROM adopted the ‘Strategy on the Reform of the Judicial System’ in November 2004.

The Strategy identified the execution in civil cases as one of the greatest problems in the judiciary. As the main reasons for this situation, the Strategy names: an inappropriate legal framework, favouring the debtor to the account of the creditor (a remnant from the socialist system), lack of adequate registries and records, and the low level of equipment, resources and staff available in the execution departments of the courts. As solutions the Strategy proposes a legal framework with reduced possibilities for objections and appeal, the abandonment of the favourable position of the debtor and an enforcement system outside the courts that will be staffed by people licensed by the Minister of Justice.<sup>20</sup>

A report written in 2003<sup>21</sup> had already provided some direction in the reform effort.

The process of elaboration of the new Law on Enforcement, which was very much supported by the USAID funded Macedonia Court Modernization Project, took approximately two years and the new law was finally adopted in May 2005. It entered into force in May 2006 and thus created a system of private enforcement agents organized through the Chamber of Enforcement Agents of the Republic of Macedonia.

In the FYROM, as in the other countries, the challenge of the reform was to organise a system for the enforcement of judgments that is effective both in law and in practice and ensures their enforcement without undue delay. It goes without saying that these principles are particularly valid for a privatized system as in the FYROM so that the state can not evade responsibility by shifting competences.

Some challenges for the implementation of the new system remained. One of these challenges is the transfer of old cases, initiated under the old system and thus still in the courts, to the private enforcement agents. Originally this was planned for 1 January 2009, but, as we have read in the Progress Reports, this transfer has been delayed several times. At the moment the transfer is planned for 2011.

This will be the main challenge for the coming time: how to decrease the backlog of enforcement cases under the old system by re-distributing them to the newly created private enforcement agents. For the enforcement agents it will be important to have the chance to get mechanisms in place, which would allow them to absorb the additional work of several hundred thousands of cases. Otherwise such a move would not only compromise the new system, but would be followed by a new flood of complaints to the ECtHR. Signals for the civil society and international community would be contra productive.

It is clear that the new privatized system has brought a lot of improvements to the FYROM legal system. However, the process of introducing the new system is a continuing and dynamic process. Still a number of other issues also need to be addressed (e.g. in the field of monitoring and control mechanisms of both the Chamber and the Ministry of Justice).

## **8.2. Legislation and organization of the enforcement process**

### **8.2.1. Legislation**

Until May 2005 the FYROM, like the other countries in the region, had an enforcement system that was mainly based on the 1978 law of the Yugoslav Federation.

A new Law on enforcement was adopted in the FYROM in May 2005. This new “Law on Enforcement”<sup>22</sup>

<sup>19</sup> 2010 Progress Report, page 57.

<sup>20</sup> Strategy on the Reform of the Judicial System with Annexes Attached, Page 16.

<sup>21</sup> Enforcement of Judgments in FYROM: Problems and Proposed Solutions with a Comparative Perspective, Angana R. Shah and Antonio Kostanov (consultants to the USAID funded “Macedonia Court Modernization Project”).

<sup>22</sup> Law on Enforcement, Official Gazette 35/2005,50/2006, 129/2006, 8/2008 and 83/09; hereafter FLOE.

foresees the removal of execution from the courts and the transfer of the performance of this task to private enforcement agents appointed by the Minister of Justice.

In this respect the situation of the FYROM is different from the situation of the other legal systems in the Western Balkan region. Most still are in the process of legal reform, especially in enforcement. The FYROM already completed the legislative reform of the enforcement system in 2006, when the first private enforcement agents became operational.

### 8.2.2. Enforcement agents

According to article 3 FLOE the enforcement is carried out by an enforcement agent, a person representing State authority who is appointed in accordance with the provisions of the law. The enforcement agent is appointed for a certain region (the territory of a basic court) to enforce the enforcement titles of the court or the body which seat is located in territory where the enforcement agent is appointed. During the performance of the enforcement the enforcement agent shall take up actions on the overall territory of the FYROM.<sup>23</sup> Enforcement agent in the FYROM is a legally protected title and only those persons who are appointed are allowed to use this title.<sup>24</sup>

#### *Appointment procedure*

The number of enforcement agents is determined by the Minister of Justice, based on:

- the advice from the president of the basic court on the number of final and enforceable decisions of the basic court;
- the advice from the Government;
- the data on the final administrative decisions pronounced for monetary claims that could be object for enforcement;
- the opinion from the Chamber of Enforcement Agents.<sup>25</sup>

A person who wants to be appointed as an enforcement agent needs to meet certain requirements.<sup>26</sup> Such a person:

- Needs to be a citizen of the FYROM;
- Needs to have trial capacity, supported with a certificate issued by a competent health institution dealing with the employees' health and be in good general health condition;
- Needs to be graduated as a lawyer with completed four year university level of legal studies or graduated attorney, (in accordance with the Bologna declaration and has 300 credits according to the European credit transfer system (ECTS));
- Needs to have at least five years of working experience in legal matters or three years in enforcement matters;
- Needs to have passed the enforcement agent exam according to the programme prescribed by the Minister of Justice;
- Needs to have active knowledge of the FYROM language;
- Is not convicted by final court decision to an unconditional sentence of more than six months imprisonment, or not banned from practicing the enforcement agent occupation;
- Provides a notary statement that he/she will provide the equipment and facilities required and appropriate for carrying out enforcement actions, as prescribed by the Minister of Justice;
- Needs to give a statement before a public notary about his/her financial condition, regarding the property condition, financial claims, obligations, debts and similar. Giving a false statement will be considered a criminal act (article 367 Criminal Code).

The Minister of Justice appoints the enforcement agent on the basis of a competition. Such a competition is announced by the Ministry of Justice in the "Official Gazette of the FYROM" and in at least two daily

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<sup>23</sup> Art. 31 FLOE.

<sup>24</sup> Art. 33 FLOE.

<sup>25</sup> Art. 31 FLOE.

<sup>26</sup> Art. 32 FLOE.

newspapers. Along with applications for the competition the candidates submit a CV and evidences for satisfying the aforementioned conditions. Based on the applications the Minister carries out a selection of candidates.

The candidate who is not appointed for enforcement agent is entitled to file an appeal, within 15 days from the day of reception of the decision, to the Second Instance Commission of the Government.<sup>27</sup>

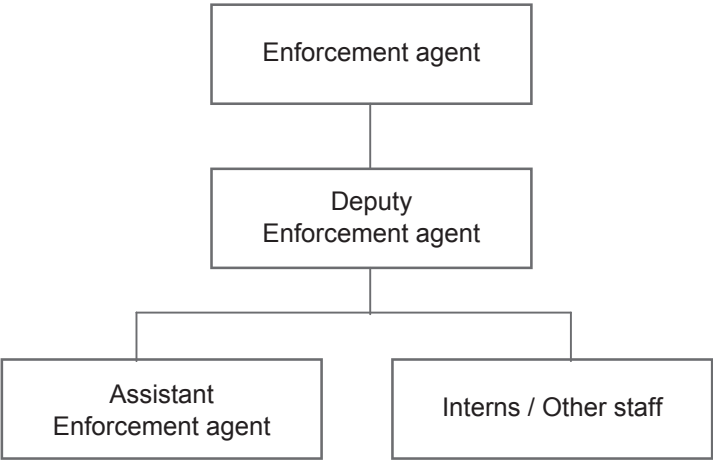
The enforcement agent shall be obligated to give a solemn statement before the Minister of Justice. After this the solemn statement, the enforcement agent deposits his/her signature in the basic court for the territory of which he/she is appointed and the seal and stamp in both the court and the Chamber.<sup>28</sup>

The Chamber of Enforcement Agents of the Republic of Macedonia (hereinafter the Chamber) determines and publishes the date of the start with work of the enforcement agent in the “Official Gazette of the FYROM” after the enforcement agent submits a proof for appointment, the declaration for appointment (which is issued after the solemn statement before the Minister of Justice) and the concluded agreement for liability insurance caused to third party. The appointed enforcement agents are registered in the Enforcement Agents Directory, maintained by the Chamber.<sup>29</sup> In addition also the Ministry of Justice keeps records of enforcement agents, deputy enforcement agents and assistant enforcement agents.<sup>30</sup>

Based on the Dutch legal provisions the FYROM also introduced the special bank account, a separate account of the enforcement agent that cannot be object of forced enforcement of the enforcement title against the enforcement agent as a debtor. According to article 35 FLOE the enforcement agent before starting to work, apart from his/her regular account, is obligated to open such a separate account with one of the payment operations organizations, where only the money from the completed enforcements will be deposited and will be used exclusively for settlement of the creditors.

*Employment of other persons*

The enforcement agent employs different persons in his office. Enforcement actions are carried out personally by the enforcement agent, or by the deputy enforcement agent or assistant enforcement agent upon the authorization of the enforcement agent.<sup>31</sup> Before we describe the various functions in the office, see below for an organogram:



*Deputy Enforcement Agent*

The deputy enforcement agent replaces the enforcement agent when he/she cannot perform his/her enforcement actions due to illness, absence or temporary ban for performing the occupation–suspension. A deputy enforcement agent is either a person who fulfils the requirements for appointment as an enforcement

27 Art. 33 FLOE.

28 Art. 35 FLOE.

29 Art. 34 FLOE.

30 Art. 38 FLOE.

31 Art. 42 FLOE.

agent and works in the office of the enforcement agent or the dismissed enforcement agent himself (for maximum one year) in the event of dismissal from office due to fulfilling the retirement conditions.

Each enforcement agent is obligated to submit a proposal for appointing a deputy enforcement agent within 30 days from the day of initiation with work. The Minister of Justice, upon a proposal from the enforcement agent, appoints the deputy enforcement agent for a definite or indefinite period of time.<sup>32</sup>

A deputy enforcement agent has the same rights, obligations and responsibilities as the enforcement agent. The deputy enforcement agent is replacing the enforcement agent, takes over the records and continues to work with the records of the enforcement agent. The enforcement agent is obligated to grant the deputy enforcement agent access to his records. The deputy enforcement agent is also authorized by the enforcement agent to handle his/her bank accounts, so that regular functioning of the work in his/her office is provided. The actions undertaken by the deputy enforcement agent are subject to additional consent by the enforcement agent, except in case of termination of the occupation of the enforcement agent or temporary ban on performing the occupation.<sup>33</sup>

#### *Assistant Enforcement Agent*<sup>34</sup>

An assistant enforcement agent is a person who assists the enforcement agent while carrying out the enforcement actions. A person may be appointed as an assistant enforcement agent if he/she fulfils certain conditions:

- to be a citizen of the FYROM
- to be capable to work and to be in good general health condition;
- to have completed Law School;
- to have at least three years of working experience in legal matters or two years in enforcement matters;
- to have active knowledge of the FYROM language;
- not to be convicted with final court decision to an unconditional sentence of over six months imprisonment.

The appointment as assistant enforcement agent also needs approval by the Minister of Justice. The Minister of Justice also determines the term for which the appointment is valid, and the number of assistant enforcement agents that can work simultaneously under the responsibility of one enforcement agent.

The function of the assistant enforcement agent is directly linked with the function of the enforcement agent. This means that the dismissal or death of the appointed enforcement agent also results in the termination of the work of the assistant enforcement agent. The assistant enforcement agent cannot undertake any enforcement actions if for the enforcement agent a deputy enforcement agent has been appointed, except if the Minister of Justice has granted him/her authorization, to continue working as assistant enforcement agent under the authorization of the deputy enforcement agent.

#### *Interns at an Enforcement Agent*<sup>35</sup>

An intern is either a lawyer, with completed four year university level of legal studies or a lawyer, who has studied in accordance with the Bologna declaration and has 300 credits according to the European credit transfer system (ECTS) and is employed or volunteer in the Enforcement Agent's office. The intern is being professionally qualified at the enforcement agent, who is obliged to monitor and assist the professional qualification of the intern, and control his/her regular presence. The time passed as an intern with an enforcement agent equals in terms of the right to take a Bar and Notary exam, exam for enforcement agents or other professional exam, if they meet the conditions stipulated for taking the appropriate exams.

#### **Damage Liability**

The enforcement agent can be held liable for all the damage that he/she caused towards the party or third parties, by illegal performance of enforcement actions and by lack of fulfilment of the duties that

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<sup>32</sup> Art. 47 FLOE.

<sup>33</sup> Art. 48 FLOE.

<sup>34</sup> Artt. 49-51 FLOE.

<sup>35</sup> Art. 51A FLOE.

he/she has as enforcement agent according to FLOE. The damage is determined in a civil procedure. The enforcement agent is obligated to conclude a liability insurance. The lowest insurance amount for which the enforcement agent shall be obligated to conclude an insurance contract is 100,000.00 Euros in the denar equivalent value.<sup>36</sup>

### ***Termination of the function of enforcement agent***

Articles 62-64 FLOE, describe the reasons for termination:

- death;
- fulfilling the conditions for age pension;
- written resignation (with a time limit for the release from the authorization of 3 months);
- if convicted by final court decision to an unconditional sentence of over six months imprisonment, or if banned from practising his/her occupation of an enforcement agent;
- if does not start to work within 3 months from the publishing of his/her appointment in the "Official Gazette of the FYROM" without justified reasons; and
- with dismissal: no (longer) meeting the requirements for appointment; not giving a solemn statement; if the enforcement agent starts new employment or starts to use age pension; with a court decision his legal capacity is taken away or limited; permanent loss of the capability to carry out the profession; no liability insurance; a disciplinary measure permanently taking away the right to perform the occupation.

In case of dismissal the Minister will decide, after hearing the enforcement agent. The enforcement agent can file an appeal against the decision from the Minister of Justice at the Second Instance Committee of the Government of the FYROM.

In case of termination the Minister of Justice initiates a procedure for appointing an enforcement agent who will continue working in the office of the enforcement agent whose activity has been terminated. The procedure for appointment is supposed to be completed within 60 days, from the day of determining the termination of the occupation of the enforcement agent.

If no candidate applies at the vacancy announcement, the Minister of Justice, within fifteen days, issues a decision, determining an enforcement agent from among the enforcement agents appointed for the same area, who will immediately take over the office of the enforcement agent whose occupation was terminated and who shall continue working on the cases, with all the authorizations that he/she is entitled to in accordance with the law.

The president of the Chamber authorizes the appointed or determined enforcement agent to handle the separate bank account of the enforcement agent whose activity has terminated.

A creditor who does not like the newly-appointed enforcement agent to continue working on his/her case, can withdraw the request for enforcement and entrust it to another enforcement agent. In that case all the prior action undertaken by the enforcement agent is considered legally valid and the enforcement agent who will be entrusted by the creditor to continue the procedure, shall continue the procedure starting from the current stage of the procedure. The enforcement expenses, for which there is evidence to have been collected by the enforcement agent whose occupation was terminated, shall be acknowledged to the creditor, and the enforcement agent who will continue with the enforcement is obligated to charge them from the debtor and transfer them to the creditor.<sup>37</sup>

### ***Organization of the enforcement agents***

The Chamber of Enforcement Agents

All enforcement agents and deputy enforcement agents in the FYROM are a compulsory member of the Chamber of Enforcement Agents of the Republic of Macedonia.<sup>38</sup>

The Chamber is a legal entity, seated in Skopje. The Chamber is able to make bylaws that are compulsory for all its members. The highest body of the Chamber is the Assembly of the Chamber. In addition there are two

<sup>36</sup> Art. 43 FLOE.

<sup>37</sup> Art. 64A FLOE.

<sup>38</sup> Art. 65 FLOE.

other bodies: the Steering Board of the Chamber and the President of the Chamber. The composition, the manner of selection, the rights and responsibilities of the bodies of the Chamber are regulated with FLOE, bylaws and other acts of the Chamber.

#### *Assembly<sup>39</sup>*

The Assembly of the Chamber is composed of all the enforcement agents and deputy enforcement agents on the territory of the FYROM. Her main task is to protect the respect and the honour of the occupation and to take care that the enforcement agents perform their authorizations diligently and in accordance with the law.

In order to achieve this aim the Assembly is competent:

- to pass the bylaws and other acts of the Chamber;
- to elect the members for the Steering Board, President of the Chamber and members for other bodies of the Chamber;
- to pass the tariff for awards of the enforcement agents upon previous consent from the Minister of Justice;
- to determine the draft programme for continuous education of the enforcement agents;
- to review proposals, requests and recommendations for successful work of the enforcement agents;
- to adopt the annual balance sheet for the previous year and draft financial plan for the following year;
- to review and adopt the report for the overall activities, prepared by the President of the Chamber;
- to decide on the amount of the membership fee and the manner of its payment;
- to decide on the application of the fines, according to the provisions of FLOE.

The Assembly meets once per year in the first week of the month of February. At least half of the total number of the enforcement agents has to be present at the session. Decisions are passed with the majority vote of the present members.

The President of the Chamber can convene an extraordinary session of the Assembly of the Chamber, based on a decision of the Steering Board or based on a written request of at least 30 members of the Chamber. If the President does not convene the session within one month from the day of passing of the decision by the Steering Board, respectively from the day of the submission of the request from the members of the Chamber, the session shall be convened by a member of the Steering Board, selected by this Board, respectively the members of the Chamber that have submitted the request.

#### *Steering Board<sup>40</sup>*

The members of the Steering Board are elected for a period of two years. The Steering Board:

- determines the draft bylaws and other acts of the Chamber and prepares and delivers to the Minister of Justice proposals and opinions that are related to the basic organisation of the enforcement agents, as well as all other issues related to the occupation of the enforcement agent. These proposals include the preparation of the draft tariff that is proposed to the Assembly of the Chamber for adoption;
- undertakes and carries out initiatives for reviewing issues of interest for the enforcement agents, such as the issues for social protection of the enforcement agent, establishing the solidarity fund for financial aid of the enforcement agent, as well as the fund for aid of the persons that permanently develop their skill for independent performing of the profession, and issues regarding organizing the permanent insurance of the enforcement agents;
- carries out supervision over the work of the enforcement agents for initiation of disciplinary procedure;
- prepares, proposes and supervises the Programme for Continuous Education of the enforcement agents;
- takes care of the status of the enforcement agents and the relationship towards the other bodies and third persons in general;
- keeps the directory of the enforcement agents, deputy enforcement agents, assistant enforcement agents and interns with the enforcement agents;

<sup>39</sup> Art. 66 FLOE.

<sup>40</sup> Art. 68 FLOE.

- prepares the sessions of the Assembly of the Chamber;
- enforces the decisions of the Assembly of the Chamber;
- composes a proposal of the annual balance sheet and proposal for the financial plan for the following year.

#### *President of the Chamber<sup>41</sup>*

The President of the Chamber is also the President of the Steering Board and is elected for two years. The Vice President of the Chamber shall be elected from the members of the Steering Board. The President represents the Chamber and shall act on behalf of the Chamber.

The President of the Chamber:

- resolves the conflicts among the enforcement agents or between the enforcement agents and their parties which refer to the application of the FLOE;
- prepares and submits opinions in case of dispute between enforcement agents and their parties regarding the payment of completed activity;
- takes care that the Chamber acts in accordance with the law.

#### *Relationship between the Chamber and the Minister of Justice<sup>42</sup>*

Each year (in the month of February) the Chamber is obligated to submit a written report for its activities to the Minister of Justice, with elaborated opinions, proposals, and positions on the condition of the enforcement agents, as well as the proposal for measures which have to be undertaken in order to improve those conditions.

Every year by April 1<sup>st</sup> the Chamber is obligated to submit a written report to the Minister of Justice regarding the work of each enforcement agent individually for the previous year, including the total number of received enforcement requests, the total number of realized enforcement titles, the total amount of collected finances from the administration fee for the cases, for the undertaken enforcement actions and award for the realized enforcement titles.

### **8.2.3. Enforcement process**

#### ***Enforceable documents***

The ground for the enforcement is either the enforcement title or an authentic title issued by a notary.<sup>43</sup>

The FYROM legislator considers as enforcement titles:<sup>44</sup>

- an enforceable court decision (a judgment, decision, payment order or other order pronounced by the courts, the elected courts and the arbitrages);
- court settlement (settlement concluded before courts, elected courts or arbitrages);
- an enforceable decision in an administrative procedure (decision or conclusion reached by a state administration body or a legal entity, passed in the course of the performance of their public authorizations, determined by law);
- settlement in an administrative procedure if designed for fulfillment of a monetary obligation and in accordance with the Law on General Administrative Procedure;
- enforceable public notary title;
- the conclusion of the enforcement agent determining the enforcement expenses;
- Decision which authorizes enforcement based on an authentic title issued by a notary; and
- other title considered under the law to be an enforcement title.

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41 Art. 69 FLOE.

42 Art. 72 FLOE.

43 Art. 2 FLOE.

44 Artt. 12 and 13 FLOE.



A foreign court decision can be enforced provided the decision meets the requirements for recognition by law or international treaty, ratified in accordance with the FYROM Constitution.<sup>45</sup>

***Request for enforcement***

Enforcement is commenced on the request of the creditor<sup>46</sup> and carried out by an enforcement agent. The enforcement agent is obligated to carry out the enforcement.<sup>47</sup>

The creditor submits the request for enforcement of the enforcement title to the enforcement agent in written form, together with the original of the enforcement title. With the handing over of the enforcement title, whose enforcement is requested, the enforcement agent is authorized to choose assets for enforcement and objects belonging to the debtor for the complete enforcement of the enforcement title.<sup>48</sup> In the course of the procedure, the request can be withdrawn without the consent from the debtor, except in case when with the withdrawal of the request the rights of the debtor are violated. In case the withdrawal causes damage to the debtor, the creditor is obligated to compensate for the damage.<sup>49</sup>

***Enforceability***

In general a court decision is enforceable if it has become final and if the time limit for voluntary fulfilment of the debtor's obligation has expired. However when the law stipulates that the appeal does not postpone enforcement of the decision, the decision can be enforced even before it became final.<sup>50</sup> A court settlement, or a settlement concluded in an administrative procedure becomes enforceable if the claim became due after the settlement has been concluded.<sup>51</sup>

The confirmation for enforceability is issued by the court, respectively the body that has decided on the request in the first instance.<sup>52</sup>

The time limit for voluntary fulfilment of the obligation shall start to run from the day the decision was delivered to the debtor. If the time limit for voluntary fulfilment of the obligation is not specified in the enforcement title, the enforcement agent shall summon the debtor, with an invitation, within eight days from the day of delivery of the invitation to fulfill the obligation determined in the enforcement title.<sup>53</sup>

In case the enforcement depends on a previous fulfillment of an obligation by the creditor, or is subject to a condition, the creditor needs to prove with a public or legally verified title that he/she has fulfilled the obligation, respectively that the condition is fulfilled. In case the creditor cannot prove that this way, the fulfilment of the obligation, or the fulfilment of the condition shall be proven with a final decision reached in a civil procedure.<sup>54</sup>

If, according to the enforcement title the debtor is entitled to choose among several objects of his/her obligation, the creditor is obligated to specify in his request for enforcement the objects with which the obligation should be fulfilled.<sup>55</sup>

***Decision that authorizes enforcement based on an authentic title***

A public notary title becomes an enforceable title if it has become enforceable with a special provision that regulates the enforceability of such title. A decision that authorizes enforcement based on an authentic title issued by a notary becomes an enforcement title after the notary certifies it is a legally valid enforcement title.<sup>56</sup> Competent to pass a decision is the notary in the area where the debtor has his residence or office.<sup>57</sup> The FYROM Law considers as an authentic act: an invoice; bill of exchange or a check with a protest and

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45 Art. 8 FLOE.  
46 Art. 2 FLOE.  
47 Art. 3 FLOE.  
48 Art. 27 FLOE.  
49 Art. 28 FLOE.  
50 Art. 14 FLOE.  
51 Art. 15 FLOE.  
52 Art. 12 FLOE.  
53 Art. 17 FLOE.  
54 Art. 20 FLOE.  
55 Art. 21 FLOE.  
56 Art. 16 FLOE.  
57 Art. 16A FLOE.

reversible account, when it is needed for initiating claim; public act; statement from registered company books; registered private act according to the law and documents which according to separate regulations have the significance of a public act. Calculation of interest is also considered as an invoice.<sup>58</sup>

If the Notary assesses that the proposal for passing a decision that authorizes enforcement based on an authentic title is acceptable and has grounds, he/she will make a decision that authorizes enforcement based on an authentic title and will submit it to the creditor. In case he considers the proposal not acceptable or if it does not have grounds, he will forward the case to the Authorized Court for further proceeding and deciding as if a complaint is being submitted. In case the proposal is incomplete it is returned to the creditor with a request to complete it according to the given guidelines within eight days from the day the notification was received. The proposal will be rejected by a decision in case the proposal is not completed or not within the designated deadline. The creditor can file an appeal to the Court in the area where the office of the notary to whom the proposal was submitted is located, within eight days.<sup>59</sup>

The debtor can file an objection against the decision that authorizes enforcement based on an authentic title to the Notary who made the decision, within eight days from the day the decision was received.<sup>60</sup> The Notary will certify the effectiveness and enforceability of the decision, if he does not receive an objection within eight days, or he rejected the objection as untimely or not allowed.<sup>61</sup>

### ***Obligation for cooperation with the enforcement agents***

The enforcement agent is entitled to have access to all information and data from the employer, banks, public books and registers for a specific debtor. The enforcement agent is entitled to ask for data from a state administration body or from a legal entity which maintains a registry or assistance from a state administration body in order to implement the object of enforcement in accordance with FLOE. All these bodies are obligated to cooperate with the enforcement agent.<sup>62</sup>

### ***Costs of enforcement proceedings***

For performing of the activities related to passing a decision which authorizes enforcement the notary has a right to a reward and compensation of the expenses in accordance with the Rulebook for Notary tariff. This reward and compensation of expenses can be considered part of the enforcement expenses.<sup>63</sup>

In a procedure for passing a decision that authorizes enforcement, as well as upon an objection against the decision that authorizes enforcement based on an authentic title, a court fee is paid according to the Law on court fees, decreased according to the Law on notaries.<sup>64</sup>

The enforcement agent is entitled to charge award and compensation of expenses according to the Tariff for award and compensation of other expenses for the undertaken actions. This Tariff is determined by the Minister of Justice, based on previous consent from the Chamber.

In the determination of the Tariff Chamber and Minister consider the following legal provisions:

- The price for case administration, determined on the basis of the main claim, respectively the value of the object of enforcement, determined in the enforcement title;
- The price of the enforcement actions, which is determined according to the type, extent and duration of the performance of the enforcement actions and the location where the enforcement actions take place; and
- Award of the enforcement agent for the performed actions, which is determined according to the type of the enforcement title and the type of the claim that needs to be enforced, as well as according to the amount of the main claim, determined in the enforcement title with the monetary claims, respectively the value of the object of enforcement with the non-monetary claims, determined in the enforcement title;
- If the value of the non-monetary claim is not determined in the enforcement title the award is 300 Euros in the denar equivalent amount.<sup>65</sup>

<sup>58</sup> Art. 16C FLOE.

<sup>59</sup> Art. 16D FLOE.

<sup>60</sup> Art. 16E FLOE.

<sup>61</sup> Art. 16F FLOE.

<sup>62</sup> Art. 41 FLOE.

<sup>63</sup> Art. 16G FLOE.

<sup>64</sup> Art. 16H FLOE.

<sup>65</sup> Art. 46 FLOE.

### ***Legal challenges: objection and appeal***

Courts are only involved in enforcement procedures when there are irregularities. In comparison with the other legal systems in the region the FYROM drastically said goodbye to the old system of ZIP 1978. Besides the privatization the best example is the legal remedies. In the new law the legal remedies are concentrated in one article only: article 77 FLOE.<sup>66</sup> “The party or the participant that considers that there are irregularities committed during the enforcement, can file an objection to the president of the basic court on the territory of which all or part of the enforcement is carried out.”

The objection, elaborated, argumented and supported with appropriate evidence needs to be filed within three days after the day of finding out about the irregularity, but not later than fifteen days after the conclusion of the enforcement. The president of the court decides upon the objection within 72 hours after the receipt of the objection. If necessary, the president of the court can decide to hear the parties, participants and the enforcement agent. With the decision the president of the court can either dismiss or accept the objection, determine the performed irregularities and declare void the undertaken enforcement actions.

The party or the participant is entitled to file an appeal against the decision of the president of the court, to the appellate court in the area of which the basic court is located within three days from the day of the receipt of the decision. The appeal is filed through the basic court. A copy of the appeal is submitted to the opposite party and participant, who can file an answer to the appeal within 3 days. After receiving the answer to the appeal or after the expiration of the time limit for response, the case is submitted to the appellate court within three days, and the appellate court is obligated to decide upon the appeal within five days. The appeal does not postpone the enforcement.<sup>67</sup>

The party filing the objection is obligated to pay court fees according to the Law on Court Fees. The court fee for the objection shall be paid in the same manner as the court fee for complaint, in accordance with the court fee tariff depending on the value of the contested part. For the appeal the court fee shall be twice the fee for complaint. For the answer to the objection and the response to the appeal half of the fee shall be paid. The expenses for the court fees and service are considered as enforcement expenses.<sup>68</sup>

### ***Counter-enforcement***

When the enforcement has already been performed, the debtor may file a request for counter-enforcement in the court, requesting the creditor to return him/her the property obtained by the enforcement, if the enforcement title has been set aside, reversed, abrogated or rendered invalid with a final decision. The request for counter-enforcement should be submitted within one month following the day when the debtor learned of the reason for counter-enforcement, but not later than one year following the day the enforcement was completed.

The court, or the body that passed the enforcement title, delivers the request for counter-enforcement to the creditor and asks the creditor to file a response within eight days from the day of delivery. In case of a response the court shall pass a decision upon the request. In case the creditor does not respond, or not in time, the court or body accepts the request and shall order the creditor to return to the debtor the property obtained by the enforcement within fifteen days.<sup>69</sup>

### ***Postponement and termination of enforcement***<sup>70</sup>

Upon a request from the creditor enforcement can be postponed for a determined period of time, not longer than 30 days. A request for postponement of the enforcement can be done twice at the most. If the creditor has asked for postponement more than twice, the enforcement agent shall terminate the enforcement. At the time for which the enforcement is postponed, upon the request from the creditor, the creditor loses the obtained order for priority of settlement that was obtained at the time of submission of the request for enforcement. After the expiration of the time for which the enforcement was postponed the creditor obtains a new order for settlement.

<sup>66</sup> Not coincidentally this art. 77 FLOE is very familiar to the Dutch article 438 CPC.

<sup>67</sup> Art. 77A FLOE.

<sup>68</sup> Art. 77B FLOE.

<sup>69</sup> Artt. 79-81 FLOE.

<sup>70</sup> Artt. 81-83 FLOE.

Parties can also request the court for a postponement of maximum 90 days. In that case the court shall condition the postponement of the enforcement by depositing a guarantee in the amount of the value of the main claim.

### ***Determination of debtor's property***

The debtor is obligated, upon a request from the enforcement agent to disclose all the necessary data about his/her personal property and income, necessary for the enforcement of the enforcement title. For disclosing incorrect or incomplete data or not giving any data about the property and income, the debtor and the responsible person of the legal entity, when the debtor is a legal entity, can be held responsible as for giving a false statement in a procedure in front of a court.<sup>71</sup>

Transactions undertaken before the enforcement of the enforcement title, that are necessary for the fulfillment of the claims of the creditor, or with which certain creditors are placed in a more favorable position, or that are undertaken only in order to obstruct the enforcement against that property, shall have no legal effect over the enforcement of the enforcement title. Such transactions are considered void if undertaken in the period of 6 months before the passing of the enforcement title. The transaction will be declared void with a legally valid decision passed in a civil procedure.<sup>72</sup>

### ***Exemption from enforcement***

For enforcement against property of a foreign country the enforcement agent needs previous consent from the Government upon a proposal from the Ministry of Justice, unless the foreign state has explicitly agreed with the enforcement.<sup>73</sup>

According to article 5 FLOE enforcement for collection of a monetary claim cannot be carried out against objects or rights essentially necessary to fulfill the fundamental living needs of the debtor and the persons which, according to law, he/she is obligated to support, or for performing the independent business that is the main source of funds for existence of the debtor.

These subjects to enforcement are described into more detail in articles 84 and 163 FLOE:

- clothes, shoes, underwear and other personal belongings, linen, kitchen utensils, furniture, stove, refrigerator, and other objects with common values that serve for satisfying the basic needs of the household, if they are needed by the debtor and the members of his/her household;
- three months' supply of food and heating materials used by the debtor and the members of his/her household;
- labour and breed livestock, agricultural equipment and other tools, seeds, food for the livestock, tools, machines and other objects that the debtor - farmer or craftsman needs for maintaining of his/her agricultural work, respectively for performing the craftsmen activity, necessary to achieve minimum income necessary to support him/herself and the members of his/her family;
- books and other objects which are needed by the debtor who independently and with personal labour, performs a scientific, artistic or other professional activity;
- cash of the debtor up to the monthly amount, which according to the law is exempt from enforcement;
- the debtor's decorations, medals, military honor certificates and other decorations or recognitions of honor, a marriage ring, personal letters, manuscripts or other personal documents which belong to the debtor as well as family pictures;
- medical aids given to a disabled person or to some other person with a physical handicap in accordance with regulations, or which he/she has personally obtained and which are necessary for performing his/her life functions;
- Mail parcels or postal monetary transfers addressed to the debtor before they are delivered to the debtor;
- agricultural land and business buildings of a farmer, to an extent that is essentially necessary to support himself/herself and the members of his/her immediate family and other individuals who, by law, have to

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71 Art. 25 FLOE.

72 Art. 26 FLOE.

73 Art. 9 FLOE.

be supported by the farmer (except when it regards the enforcement for realization of monetary claims secured by contractual pledge right over the real estate (mortgage));<sup>74</sup>

- Other movable objects when provided by law (e.g. article 198 FLOE: mineral and other natural resources).

Regarding enforcement against wages or other permanent monetary income FLOE differs between incomes that are exempted from enforcement and incomes with a limitation on enforcement (see heading enforcement against wages or other permanent monetary income).<sup>75</sup>

Another exemption is regulated in article 210 FLOE: claims of the FYROM and of the units of local self-government, and the funds based on benefits, taxes and other payments cannot be the subject of enforcement.

Regarding the enforcement against movable objects and rights of the FYROM and its Bodies, Units of Local Self-Government and Public Enterprises article 211 FLOE stipulates that enforcement for collection of monetary claims against objects and rights of the FYROM and its bodies, units of local government and public enterprises cannot be permitted if they are necessary for the performance of their respective activities or tasks. The president of the court on the territory of which the enforcement action will be carried out shall determine which objects and rights are necessary for performing the activities and the tasks of the debtor if in the course of the enforcement the parties cannot agree on this, or if this appears to be necessary. In addition article 199 FLOE states that Buildings, armament and equipment for national defense, state and public security cannot be object of enforcement.

#### ***Order of settlement of several creditors***<sup>76</sup>

Several creditors, who fulfil their monetary claims from the same debtor and against the same object for enforcement, are settled following the order in which they have acquired the right to settlement against such object, except in cases for which FLOE provides otherwise.

#### ***Seizure on movables***

Enforcement against movable objects is carried out through inventory, evaluation, seizure and selling of the objects and by settling the creditor from the money received with the sale.<sup>77</sup>

Prior to performing an inventory the enforcement agent orders the debtor to pay the amount that was determined in the enforcement title, together with interest and expenses. This order informs the debtor on the time limit of three days for payment of the debt in the enforcement title and the place and manner of undertaking the inventory, evaluation and seizure if he does not act in accordance with the enforcement title.<sup>78</sup>

Property owned by the debtor, but in possession of a third person may be inventoried only with consent of that person. If the third person does not agree to the inventory, the enforcement agent instructs the creditor, to fulfil his/her right in court.<sup>79</sup>

As a rule, the enforcement is carried out each day from 06:00 a.m. to 21:00 p.m. The president of the basic court may give permission to carry out the enforcement regardless this time.<sup>80</sup>

Enforcement actions in the debtor's apartment during which the debtor, his/her legal representative, authorized agent or an adult member of his/her household are not present, have to be attended by the police and two adult witnesses. When the enforcement action is to be carried out in premises that are locked, and the debtor is not present or does not want to open the premises, the enforcement agent may open the premises in the presence of the police and two adult witnesses. If the representative of a legal entity refuses to abide by the request of the enforcement agent or if he/she is not in the premises while the enforcement agent is carrying out the enforcement action, the action shall be carried out in presence of the police and two adult witnesses. If the enforcement agent cannot provide the presence of the two adult

<sup>74</sup> Art. 163 FLOE.

<sup>75</sup> Artt. 104 and 105 FLOE.

<sup>76</sup> Art. 7 FLOE.

<sup>77</sup> Art. 85 FLOE.

<sup>78</sup> Art. 86 FLOE.

<sup>79</sup> Art. 87 FLOE.

<sup>80</sup> Art. 74 FLOE.

witnesses he/she may invite a public notary. The present witnesses and the police shall sign the minutes. If the actions of the enforcement agent were taken in the presence of a public notary, the public notary shall prepare the minutes in accordance with the Law on Performing Notary Activities.<sup>81</sup>

In case of obstruction the enforcement agent is authorized to remove any person that is obstructing the actual enforcement, and if the circumstances of the case so require, request police assistance.<sup>82</sup>

As a rule the inventoried objects are left with the debtor for safe-keeping. Upon creditor's request the enforcement agent shall give the inventoried objects to the creditor or to a third person for safe-keeping. Cash money, securities and other valuables are deposited by the enforcement agent in the court deposit.<sup>83</sup>

By performing the inventory a creditor obtains a pledge right on inventoried objects. If inventory is performed in favor of several creditors, the order of priority of pledges, obtained by inventory or by entering a remark into the minutes of the inventory, is determined according to the day of inventory respectively the day when the remark was entered into the inventory minutes.

When the inventory of the objects is performed simultaneously in favor of several creditors, the order of priority is determined according to the day and time when the request for enforcement was received by the enforcement agent. If the request for enforcement is sent by registered mail, the day of delivery to the post office is considered as the day of receipt by the enforcement agent.<sup>84</sup>

At the same time of the inventory of the objects, they will also be evaluated. The evaluation is performed by a licensed appraiser, except in a case of previously given consent by the debtor, for the assessment to be performed by the enforcement agent who carries out the inventory.<sup>85</sup>

If after the inventory, the enforcement agent receives a later request for enforcement against the inventoried objects for collection of a different claim of the same creditor, or for the collection of a claim from another creditor, he does not carry out a repeated inventory and evaluation of those objects, but will make a note in the minutes, for the performed inventory.<sup>86</sup>

The sale of the inventoried property is determined by the enforcement agent. It is mandatory to have a period of fifteen days between the day of the inventory and the day of the sale.<sup>87</sup> The sale of the objects is performed by either an oral public auction, or by direct agreement between the buyer from one side and the enforcement agent or other person who performs commission business on the other side. The manner of sale is determined by the enforcement agent, ensuring that the best value in money is received for the objects.

A sale through a bid auction is determined if the objects are of higher value and they are expected to be sold at a price higher than the evaluated value. In case the evaluated value is higher than Euro 1.000,-- a guarantee needs to be deposited. The sale of the objects is announced through the public media, seven days before the public auction takes place. In addition the creditor and debtor shall be notified of the place, day and hour of the sale.<sup>88</sup>

The inventoried objects may not be sold for less than their evaluated value at the first auction respectively within the time limit determined by the enforcement agent for a sale by direct agreement. If the price obtained at the first auction was less than the evaluated value, the enforcement agent shall order, upon request from a party, within fifteen days following the day of the first auction a new auction on which the objects may be sold for less than the evaluated value, but not for less than one third of that value.<sup>89</sup>

The enforcement agent shall stop the enforcement of the inventoried objects if neither party submits a request for second auction within the set time limit, respectively neither party submits a request for performing a second sale by direct agreement, or if the objects could not have been sold at the second auction, respectively by direct agreement within the additional time limit set by the enforcement agent. If the objects could not be sold at the second auction, upon the creditor's request, the inventoried objects will be sold to him for the sale price determined for the second public bidding.<sup>90</sup>

81 Art. 75 FLOE.

82 Art. 76 FLOE.

83 Art. 89 FLOE.

84 Art. 91 FLOE.

85 Art. 93 FLOE.

86 Art. 95 FLOE.

87 Art. 96 FLOE.

88 Art. 97 FLOE.

89 Art. 98 FLOE.

90 Artt. 99 and 180 FLOE.

The buyer is obligated to deposit the sale price with the enforcement agent and take possession of the objects immediately after the conclusion of the auction respectively the direct agreement.<sup>91</sup>

Settling of the creditors is done as follows:<sup>92</sup>

- If only a single creditor's claim is settled from the selling price, the enforcement agent determines that from the amount obtained from the sale of the objects and from the obtained assets a settlement is made in the following order: expenses of the enforcement, expenses specified in the enforcement title, the interest up to the day of conversion of the objects into money, and the main claim.
- In case of several creditors and if the law does not determine the right of priority in settling certain claims, several creditors shall be settled from the selling price in the order in which they have obtained the pledge right. Expenses of the enforcement, expenses specified in the enforcement title and the interest shall be settled in the same order as the main claim. Creditors of the same priority that cannot be fully settled from the selling price shall be settled in proportion to the amounts of their claims.

### ***Enforcement on a claim***

Enforcement against a monetary claim is carried out by ban and by transfer of the claim in the amount necessary to settle the creditor's claim.<sup>93</sup>

The priority order of several creditors is determined according to the day and time the request for enforcement is received by the enforcement agent. If the request for enforcement is sent by registered mail, the day of delivery to the post office is considered as the day of reception by the enforcement agent. If the requests for enforcement of several creditors have been received by the enforcement agent on the same day and time, they have the same priority order. If full settlement is not possible claims shall be settled proportionally.<sup>94</sup>

By an order of the enforcement agent with which a ban on a monetary claim is carried out, the debtor's debtor is prohibited from settling the debtor's claim. The debtor is prohibited from collecting this claim or to otherwise dispose of it and of the pledge which was given for securing that claim.

If the creditor fails to provide the necessary information concerning the debtor's monetary assets in the request for enforcement, the enforcement agent requests this data from the bank or the savings house where those assets are located. The bank or the savings house is obligated without any delay to provide the requested data to the enforcement agent and must not inform the debtor that such data was requested. The enforcement agent is obligated to deliver the order not later than 72 hours from the day of receipt of the requested data. The order for the ban is delivered to the debtor, after the bank or the savings house where the monetary assets are located informs the enforcement agent that the ban has been realized.<sup>95</sup>

A ban on claim secured by pledge right recorded in a public book where the rights to real estate property are recorded shall be realized by recording the ban into those public books.<sup>96</sup> The ban on a claim based on securities which are transferred by endorsement or for which fulfilment that security is otherwise required, shall be performed in such a manner that the enforcement agent shall take the securities from the debtor.<sup>97</sup>

The order is considered to have been carried out on the day on which the order for the ban was delivered to both the debtor's debtor and the debtor.<sup>98</sup>

The enforcement agent, within a time limit that he will determine, requests from the debtor's debtor to give a statement concerning whether and up to what amount the banned claim is recognized and whether he agrees to settle it, as well as whether his obligation to settle the claim is conditioned by the realization of some other obligation. This statement shall be delivered to the creditor and debtor within 72 hours after its receipt. The debtor's debtor shall be liable to the creditor for the damage caused to him/her as a result of the debtor's debtor failure to give a statement, or for giving untruthful or incomplete statement.<sup>99</sup>

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91 Art. 100 FLOE.

92 Artt. 101-103 FLOE.

93 Art. 106 FLOE.

94 Art. 111 FLOE.

95 Art. 109 FLOE.

96 Art. 114 FLOE.

97 Art. 108 FLOE.

98 Art. 107 FLOE.

99 Art. 112 and 113 FLOE.



Upon delivery of the statement of the debtor's debtor to the creditor and the debtor and after the expiration of the time limit determined by the enforcement agent for receiving statement from the debtor's debtor, the enforcement continues with the order for transfer of the claim for collection or instead of a payment.

The transfer of the claim is realized when the order for transfer of the claim is delivered to the debtor's debtor.<sup>100</sup> If several creditors have submitted a request for transfer on different dates, the enforcement agent shall transfer the claim to the creditor who submitted the request first, and if several creditors submitted a request on the same date and time, the claim shall be transferred to the creditor whose claim is the largest.<sup>101</sup> Transfer of a claim for collection that is recorded in a public book where the real estate rights are recorded shall be recorded upon an order of the enforcement agent.<sup>102</sup>

Upon request by the creditor, to whom the claim was transferred, the debtor must, within the time limit set by the enforcement agent, give the explanation necessary to the creditor, for the realization of that claim, and to deliver to the creditor the titles regarding the claim. Upon debtor's request, the creditor, to whom a part of the claim has been transferred, is obligated, within the time limit set by the enforcement agent, to deposit a guarantee that after realization of that claim, the titles regarding the claim are returned. The enforcement agent carries out enforcement against the debtor for the purpose of delivering the titles, in the event the debtor does not deliver them him/herself.<sup>103</sup>

By a transfer of a claim for collection, the creditor is authorized to request from the debtor's debtor to pay the amount specified in the order for transfer, if that amount has matured, to perform all activities necessary for retaining and realization of the transferred claim and to use the rights related to the pledge which has been given to secure the claim.<sup>104</sup> A banned claim can also be passed to the creditor by transfer instead of a payment, up to the transferred amount, with the action of realization of the claim with compensation. The creditor, to whom the claim has been transferred instead of payment, shall be considered to be settled with that transfer to the amount of that claim.<sup>105</sup>

If parties other than the creditor claim rights to the transferred claim, the debtor's debtor may, in favor of all these persons, deposit with the court the full amount of the claim or just the amount of the claim that has matured.<sup>106</sup>

The creditor who has collected from the transferred claim more than the amount of his/her claim, or collected from a claim that is partially exempted from enforcement or that is already banned in favor of other persons, is obligated to deposit this excess amount or the unjustified collection with the enforcement agent. The enforcement agent distributes this excess amount or the unjustified collection to other pledge creditors and to the debtor, if they are entitled to it.<sup>107</sup>

### ***Enforcement Against wages and other permanent monetary income***

Regarding enforcement against wages or other permanent monetary income FLOE makes a difference between incomes that are exempted from enforcement and incomes with a limitation on enforcement:

Exempted from enforcement:<sup>108</sup>

- allowance for legal life support, compensation for damage that results from health problems, decrease or loss of working capacity, and compensation for damage that results from the loss of life support because of the provider's death;
- allowance for compensation for bodily injury according to the regulations for disability insurance;
- allowance for social benefits;
- allowance for temporary unemployment;
- child allowance;

<sup>100</sup> Art. 118 FLOE.

<sup>101</sup> Artt. 116 and 117 FLOE.

<sup>102</sup> Art. 122 FLOE.

<sup>103</sup> Art. 119 FLOE.

<sup>104</sup> Art. 121 FLOE.

<sup>105</sup> Art. 127 FLOE.

<sup>106</sup> Art. 120 FLOE.

<sup>107</sup> Art. 126 FLOE.

<sup>108</sup> Art. 104 FLOE.

- scholarship, credit or support for pupils and students;
- allowance for soldiers and cadets of military schools;
- allowance received by convicts for their work in a penal rehabilitation institution, except for claims for legal life support and claims for compensation of damages that result from the convicts' criminal act;
- travel expenses and per diems;
- assets on the separate account which the enforcement agent has in accordance with FLOE.

Limitation on enforcement:<sup>109</sup>

- enforcement against salary and pension, compensation instead of a salary, for a claim for legal life support, for compensation for damages that result from health problems, decrease or loss of working capacity, for damage compensation for damages that result from loss of life support because of the provider's death, for allowance of persons from the reserve military and police structure are limited to one half of the salary or pension, for claims on different grounds – up to the amount of one third of the salary or pension.

If the debtor receives the lowest salary in accordance with the law and a collective agreement or the lowest amount of pension in accordance with the law, the enforcement can be enforced up to the ¼ of the lowest guaranteed salary or lowest pension.

- enforcement against the allowance for disability of military and peacetime military disabled persons, orthopaedic supplement and disability supplement, may be performed only to settle claims for legal life support, compensation for damages that result from health problems, decrease or loss of working capacity, and compensation for damages that result from loss of life support because of the provider's death, up to the amount of one half of that allowance;
- enforcement against allowance based on agreement to provide life-long support and life-long rent payment, and allowances for life insurance agreement, may be performed only upon that part which exceeds the amount of the lowest social benefit paid in the territory in which the debtor has his/her residence.

A ban over a certain amount of the salary or allowances based on social insurance and other continuous monetary allowances is determined with an order for enforcement against the salary or allowance. The employer or social security institute is ordered to pay the creditor the financial amount which is to be enforced.<sup>110</sup>

If several persons are entitled to legal support or to an annuity for lost support as a result of the death of the provider against the same debtor, and the total amount of their claims exceeds the amount of the salary that can be object of enforcement, the enforcement is performed in favour of each of the creditors in proportion to the amount of their claims. If after the initiation of the enforcement against salary, or against other continuous financial allowances, the employer receives a new order for enforcement of familiar claims the employer shall enforce the received orders in proportional manner.<sup>111</sup>

When the employment has been terminated for the debtor, the order for enforcement also pertains to the other employer that has subsequently employed the debtor. The "former" employer is obligated to deliver the order for enforcement, without delay and by registered mail, to the employer where the debtor has started to work, and to inform the enforcement agent about this. In case the "former" employer is not familiar with the new employer he will inform the enforcement agent without delay.<sup>112</sup>

The employer is obligated regularly to carry out the order for enforcement. If the employer does not carry out regularly the order for enforcement, the enforcement agent may order the payment operations organization, where the employer has an account, to pay the money in the amount of all the unpaid instalments for which enforcement order has been issued. The employer shall be held responsible for the damage that the creditor suffered.<sup>113</sup>

An administrative ban is a ban against the debtor's salary with his/her consent. Such a ban has the legal effect of an order for enforcement against the salary. The administrative ban cannot affect the realization

<sup>109</sup> Art. 105 FLOE.

<sup>110</sup> Artt. 129 and 136 FLOE.

<sup>111</sup> Art. 131 FLOE.

<sup>112</sup> Art. 133 FLOE.

<sup>113</sup> Art. 134 FLOE.

of the enforcement against salary for settling a claim based on legal support, compensation for damaged health or decrease or loss of working capacity, or compensation for damages based on lost support as a result of the death of the provider of the support.<sup>114</sup>

### ***Enforcement against savings deposit and current account***

The enforcement against a monetary claim that, according to a bank account belongs to a natural or legal entity is carried out by ordering the bank with an order for enforcement to pay the amount for which the enforcement order was issued to the account of the enforcement agent. This order has the effect of a ban and transfer for collection.

In case of enforcement of a claim from a bank account registered to a natural person the enforcement agent has to take into consideration the provisions on limitation of enforcement based on salary.<sup>115</sup>

### ***Special provisions for enforcement for the realization of a monetary claim against a legal entity***

The enforcement for the realization of a monetary claim against a legal entity may be carried out against all the assets in his/her accounts at the payment operations organizations where the debtor has accounts.<sup>116</sup>

The payment operations organization carries out the collection, according to the time of receipt of the enforcement orders. For this the payment operations organization maintains records of the sequence order in which the enforcement orders are received, according to the day and hour of receipt, and upon a creditor's request, shall issue a confirmation of the order in which his/her claim was received.<sup>117</sup> Incorrect enforcement orders are returned to the enforcement agent within two working days.<sup>118</sup>

In the enforcement order the enforcement agent states one of the payment operations organizations where the creditor's and the debtor's monetary assets are maintained, the number of the creditor's and debtor's account and their sub-accounts, if any, the creditor's and the debtor's tax number or the personal ID-number and the debt amount. The payment operations organization transfers the amount of money for which the enforcement was ordered from the debtor's account to the account of the enforcement agent. After the enforcement order over the assets at the bank account of the debtor is registered with the payment operations organization, the enforcement agent submits the enforcement order to the debtor.<sup>119</sup>

In case at the time when the payment operations organization received the enforcement order the debtor's account contained no funds, the enforcement agent does not stop the enforcement, and the payment operations organization maintains the order in its records, in order to perform the transfer when the funds arrive at the account.<sup>120</sup>

### ***Enforcement against registered immovable property***

#### ***The order for enforcement***

The enforcement against real estate is carried out by recording the order of enforcement in the public book, by determining the value of the real estate, by selling the real estate and by settling creditors from the amount obtained by the sale.<sup>121</sup>

Certain immovables are exempted from enforcement:<sup>122</sup> agricultural land and business buildings of a farmer, to an extent that is essentially necessary to support himself/herself and the members of his/her immediate family and other individuals who, by law, have to be supported by the farmer (except when it regards the enforcement for realization of monetary claims secured by contractual pledge right over the real estate (mortgage)).

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114 Art. 135 FLOE.

115 Art. 137 FLOE.

116 Art. 200 FLOE.

117 Art. 201 FLOE.

118 Art. 203 FLOE.

119 Art. 201 FLOE.

120 Art. 206 FLOE.

121 Art. 154 FLOE.

122 Art. 163 FLOE.

The order for enforcement against the real estate is recorded in the public book. With that record the creditor obtains a right to settle his/her claim from the real estate (right to settlement) even in a case if a third person later on, obtains an ownership right of the same real estate, or a right to dispose over that real estate. The priority order of several creditors is determined according to the record of the order for enforcement.

Within three days following the day of receipt of the order for enforcement against real estate the debtor may request to carry out the enforcement against some other means of enforcement or to carry out the enforcement against another real estate, different than the one determined in the order for enforcement. The enforcement agent accepts the request provided that the debtor can prove that the claim will be settled by these other means of enforcement, or by sale of other real estate. However, even if other means of enforcement are accepted, the record for the order for enforcement against the real estate remains in force until settling the creditor's claim.<sup>123</sup>

After a record has been put on the order for enforcement against real estate, it is not possible for the purpose of settling another claim of the same creditor or of another creditor to carry out enforcement against the same real estate. The creditor for whose claim an order for enforcement against the same real estate has been issued later on shall be included in the already initiated enforcement. It is possible to join the enforcement before the issuing of the conclusion for sale of the real estate to the buyer. The enforcement agent notifies the creditor, in favor of whom the enforcement procedure was previously recorded in the registry, that another creditor has joined the enforcement.<sup>124</sup> The pledge creditor who has not requested enforcement shall also be settled with the enforcement against the real estate. For the starting with the enforcement the enforcement agent informs the creditor upon whose request the enforcement is carried out.<sup>125</sup>

A creditor who has the right to be settled from the selling price of the real estate, and who has priority over the creditor who requested the enforcement, may propose that the enforcement be terminated if the determined value of the real estate does not cover, even to some extent, the amount of that creditor's claims.<sup>126</sup>

#### *Determining the value of the real estate*

In order to determine the value of the immovables the enforcement agent appoints an expert who, within fifteen days, performs and submits to the enforcement agent an evaluation of the value of the real estate based on its market value on the day of the evaluation and based on other factors that influence its value (e.g. rights remaining over the real estate after the sale such as personal easements and the real burdens registered in the public book or a lease agreement).<sup>127</sup> Based on the expert evaluation, the enforcement agent with a conclusion determines the value of the real estate.<sup>128</sup>

#### *Sale of real estate*

Upon a request from the person interested in buying the real estate, the enforcement agent shall give him/her permission to inspect the real estate.<sup>129</sup>

In a conclusion for the sale of the real estate the enforcement agent determines the manner and conditions of the sale, as well as the time and the place of the sale, if the sale is performed by an auction. This conclusion for the sale is announced in the media and is delivered to the parties, to the pledge creditors, to the participants in the procedure, to the persons that have recorded or legal right of priority in purchasing, and to the responsible body at the agency. The period between the day of the announcement of the conclusion for sale in the media and the day of the sale has to be at least fifteen days but not more than thirty days.<sup>130</sup>

The sale of a real estate is conducted by oral public bidding or with a direct agreement. The oral public bidding for the sale of the real estate is performed in the presence of the enforcement agent in the premises, which he/she will determine. The parties and the pledge creditors may, at any time, agree that the sale of the real estate be performed within a specific time limit by direct agreement.<sup>131</sup>

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123 Art. 155 FLOE.

124 Art. 157 FLOE.

125 Art. 158 FLOE.

126 Art. 166 FLOE.

127 Art. 164 FLOE.

128 Art. 165 FLOE.

129 Art. 162 FLOE.

130 Art. 167 FLOE.

131 Art. 169 FLOE.

Only persons who have previously deposited a guarantee may participate at the public auction. For the sale with direct agreement, the buyer deposits a guarantee with the person with whom s/he concluded a contract, before the contract is concluded. The guarantee shall be one tenth of the determined value of the real estate.<sup>132</sup>

The person who has legal right of priority for purchasing the real estate, subject to enforcement by sale, has priority over the most favourable bidder, provided that immediately after the auction closes this person states that he is purchasing the real estate under the same conditions. If the real estate is sold by direct agreement, the enforcement agent shall summon the person who has legal purchase priority right to state in the minutes whether or not s/he wants to exercise that right.<sup>133</sup>

The public bidding of the real estate shall be held even if only one bidder is present. Upon request by the party or the mortgage creditor, the enforcement agent may determine, depending on the circumstances of the case, that the public bidding be postponed if only one bidder is present.<sup>134</sup>

At this first public bidding the real estate cannot be sold for a price lower than the determined value. If the real estate was not sold at the first public bidding, the enforcement agent schedules a second public bidding, during which the real estate may be sold for a price lower than the determined value, but not lower than two thirds of that value. At least fifteen days, but not more than thirty days, must pass between the first and the second public bidding.

The mortgage creditors and the other creditors may request, in a statement given before the enforcement agent, responsible for the enforcement, the real estate to be sold by auction or direct agreement for a price lower than the determined value, or lower than two thirds of that value, and are obligated to determine the initial price in the statement.<sup>135</sup>

After the conclusion of the auction, the enforcement agent determines which of the bidders offered the highest price and shall announce that the real estate is sold to that bidder. The enforcement agent prepares minutes for the sale of the real estate and passes a conclusion for the sale, which will be delivered to all the participants at the auction. Against this conclusion for the sale a complaint can be filed within fifteen days after receipt of the conclusion.

In case of a sale with a direct agreement the enforcement agent passes a conclusion for sale. The sale agreement is signed by the buyer and the enforcement agent on behalf and for the account of the debtor.

Within 3 days after the price of the real estate is paid the enforcement agent passes a conclusion for the end of the sale, which presents a legal basis for obtaining the ownership right.<sup>136</sup>

The buyer is obliged to deposit the price within the time limit determined in the conclusion for sale. If the buyer does not deposit the price within the determined time limit, the enforcement agent declares the sale void with a conclusion and determines a new sale. The deposited guarantee shall be used to cover the expenses of the new sale and to compensate for the difference between the price obtained at the previous and at the new sale.<sup>137</sup> Within eight days after the payment is done, the enforcement agent shall pass a conclusion for transfer of the real estate to the possession of the buyer.<sup>138</sup>

If the real estate could not be sold at the second bidding, upon the creditor's request, the real estate will be sold to him for the sale price determined for the second public bidding. If the creditor does not request the real estate to be sold to him/her, the enforcement agent shall order another auction only upon the creditor's request. In case the creditor did not submit a request within the set time limit, or if the real estate could not be sold at the first public bidding nor in the second bidding, or within the time limit determined in the agreement for direct sale, the enforcement agent shall terminate the enforcement regarding this real estate.<sup>139</sup>

### *Settling the creditors*

Through the sale price creditors are settled: (1) the creditors upon whose request the enforcement was carried out, (2) pledge creditors although have not reported their claims, (3) persons with a right to

<sup>132</sup> Art. 171 FLOE.

<sup>133</sup> Art. 168 FLOE.

<sup>134</sup> Art. 172 FLOE.

<sup>135</sup> Art. 174 FLOE.

<sup>136</sup> Art. 175 FLOE.

<sup>137</sup> Art. 177 FLOE.

<sup>138</sup> Art. 178 FLOE.

<sup>139</sup> Art. 180 FLOE.

compensation for personal easements and real burdens, (4) authorized bodies for claims regarding taxes, and (5) the persons with certain claims as described in FLOE.<sup>140</sup> The enforcement agent determines the time for division of the amounts from the sale within eight days after passing of the conclusion for the transfers of the real estate to the buyer.<sup>141</sup>

The priority for settlement is as follows:<sup>142</sup>

First priority:

- expenses of the enforcement; and
- debts that matured in the course of the last year that burden the sold real estate.

Second priority:

- the settlement of the claims secured by a pledge right, claims of creditors upon whose request the enforcement was carried out, and compensation for personal easements and real burdens, which cease with the sale (all according to the order of acquiring the pledge right and the right to settlement of the creditors that required the enforcement, or according to the order of recording the personal easement and the real burdens in the public book).

#### *Termination of the debtor's right over a sold real estate*

The debtor, who as an owner resides in a sold family apartment building or apartment, shall not retain the right to reside there further on and is obligated to evict the apartment building or apartment within sixty days, from the day of passing of the conclusion of the sale.

If the debtor, within this time limit does not evict the apartment building or the apartment, the enforcement agent, upon the buyer's request, carries out the eviction in accordance with the provisions for eviction and transfer of the real estate.<sup>143</sup>

#### ***Enforcement against non-registered immovable property***

For the territory for which a cadastre has not been established according to the Law on Land Survey, Cadastre and Registration of Real Estate Rights, or if the real estate has not been recorded in the public book the legal regulations for deeds and intabulation that are valid for that territory shall apply accordingly.

If the enforcement agent cannot provide a proof of ownership, due to any reason, in accordance with the legal regulations that are valid for that territory, instead of such a proof for ownership, the enforcement agent performs an inventory of the real estate against which enforcement was determined, and summons at the inventory the creditor, the debtor, his/her spouse and the persons whose property borders with that real estate.

The minutes of the inventory shall be considered to be a record of the enforcement.<sup>144</sup>

#### ***Eviction***

Enforcement for evicting and transfer of real estate is carried out in the manner that the enforcement agent, after removing the persons and objects from that real estate, hands over the real estate in possession of the creditor.

The enforcement is carried out towards all persons and objects present at the real estate at the moment the enforcement is carried out. Evicting and giving in possession the real estate may commence upon the expiration of the time limit of eight days following the day on which the enforcement order was delivered to the debtor.<sup>145</sup>

The movable objects which are subject of removal are handed over to the debtor, or, if the debtor is not present, to an adult member of his/her household or to his/her authorized representative. If none of the persons to whom the movable objects can be handed over are present or if these persons refuse to take the objects, the objects shall be delivered to another person for safe-keeping at the expense of the debtor. The

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140 Art. 182 FLOE.

141 Art. 192 FLOE.

142 Artt. 183-185 FLOE.

143 Art. 195 FLOE.

144 Art. 196 FLOE.

145 Art. 218 FLOE.

enforcement agent notifies the debtor of such delivery and of the expenses for safe-keeping, allowing the debtor a time limit of eight days in which he can request that the objects are delivered to him/her after he/she compensates the costs for safe-keeping. After expiration of the time limit the objects are sold and the expenses for safe-keeping and for selling the objects are covered from the sale price. Such a sale is carried out in accordance with the FLOE provisions on enforcement against movables.<sup>146</sup>

### ***Enforcement against securities and shares***

#### ***Enforcement against securities***

The enforcement against securities shall be carried out with a ban on disposal and burdening, their sale and settlement of the creditor.<sup>147</sup>

The ban on disposal and burdening of the securities is carried out by delivering an order for ban for disposal and burdening to the Depositary for Securities. By recording the ban the creditor acquires a pledge right over the shares. The Depositary for Securities is obliged to record the ban on disposal and burdening without any delay, and inform the enforcement agent that the record was performed. From that moment the Depositary for Securities cannot record anything in the book of shares for the debtor's disposal as regards the shares covered by the ban on disposal and burdening. The Depositary for Securities notifies the enforcement agent of any change with respect to the securities covered by the ban on disposal and burdening (e.g. forced enforcement for collection of another claim or the securing such a claim).<sup>148</sup>

The sale of the securities is done on the stock market, according to the Law on Securities and its sub-regulations. The enforcement agent concludes a sales agreement for the sale of the securities with the authorized participant at the market for securities on behalf of the debtor. The money gained from the sale of the securities is transferred on the separate account of the enforcement agent. The settlement of the creditor, after the sale of the securities, is performed in accordance with the provisions of the settlement in case of movables.<sup>149</sup>

#### ***Enforcement against a share in a company***

Shares in a company are enforced by seizing the shares, evaluating them, selling them and settling the creditor.<sup>150</sup>

Shares are seized by submitting an order for seizure of the shares to the company that keeps the book of shares. With the seizure the creditor shall acquire a pledge right to the shares. The company is obliged to note in the book of shares that the shares have been seized on the same day and time when the order for seizure of the shares was submitted to the company. The enforcement agent is entitled to inspect the book of shares and other acts of the company, necessary for the enforcement and can ask the court to fine the company, the manager of the company and the managing body of the company, in case they obstruct or disable the enforcement.<sup>151</sup>

The seized shares are sold on a public sale or by direct settlement, if both sides have agreed on that. The enforcement agent shall conclude a sales contract for the share on behalf of the debtor. Before the sale the shares are evaluated by an authorized evaluator. The evaluation, the establishment of the sales price and the sale of the share, as well as settling the creditor, are carried out in accordance with the provisions of FLOE. The buyer of the share acquires the rights and obligations according to the Company Law.

Members in the company are entitled to priority purchase of shares, in proportion with their shares in the company, unless they have agreed otherwise.<sup>152</sup>

### **8.2.4. Challenges**

The experiences with the new system are very positive. For example the Worldbank Business Report 2007 assessed the developments in the FYROM as very positive. However some problems or challenges still remain.

<sup>146</sup> Artt. 219 and 220 FLOE.

<sup>147</sup> Art. 147 FLOE.

<sup>148</sup> Art. 148 FLOE.

<sup>149</sup> Art. 149 FLOE.

<sup>150</sup> Art. 150 FLOE.

<sup>151</sup> Art. 151 FLOE.

<sup>152</sup> Art. 152 FLOE.



### ***The enforcement case backlog***

The main problem was also indicated by the European Commission in the 2008 Progress report:<sup>153</sup> all enforcement cases before the adoption of the new law are still in the various courts. The new law had a transition period until December 2007 to transfer those cases to the private enforcement agents. The deadline for transferring the enforcement cases was extended from end-2007 to end-2008 and then again to 2009 (after the presidential elections). This means that a large number of court decisions in 2009 still needed to be transferred and enforced.

A re-distributing of these several hundred thousands of cases to the newly created private (67) enforcement agents needs a careful planning and the Chamber has to be given the chance to get mechanisms in place, which would allow them to absorb the additional work.

Finally in 2010 some legislation on this issue was adopted.<sup>154</sup>

According to the Law Amending the Law on Enforcement ("Official Gazette" br.83/2009 and 88/2010; hereafter FLALE) a division needs to be made in the enforcement cases in which an enforcement procedure was initiated before 26 May 2006 (the date on which the Law on Enforcement entered into force) :

- cases in which an effective enforcement decision has been made:

In these cases creditors are obliged to submit a statement to the court where the enforcement procedure is performed, within six months from the day of the application of FLALE, to which enforcement agent the case needs to be submitted, and in which scope the claim has been settled. In these cases the enforcement agent can proceed with the enforcement.<sup>155</sup>

- cases for which a legal remedy has been submitted:

For these cases the deadline of six months starts running from the day the decision upon the legal remedy, by which decision the legal remedy has been rejected, was received by the creditor.

If the legal remedy is accepted, the deadline of six months starts running from the day the decision upon the legal remedy by the creditor was received. In this case the enforcement agent continues enforcement in accordance with the instructions by the higher instance court.<sup>156</sup>

- proposals for enforcement submitted before May 26th 2006, which are not effective and the proposals for enforcement submitted on the ground of authentic titles, for which effective decision for enforcement was not made:

For these cases we will describe the procedure later in this paragraph.

In case the creditor does not proceed in accordance with this, he/she will be considered to have withdrawn the proposal for enforcement. In that case the court will make a decision. Against this decision an appeal is allowed within eight days. The court before which the appeal was filed, is obliged to submit the case within three days from the day the court fee was charged to the appellate court, which should decide upon the appeal within fifteen days.<sup>157</sup>

Within eight days after the creditor has given a statement on the choice for an enforcement agent the case is handed over by the court to the enforcement agent. The court is obliged to undertake all necessary actions to hand over the case: sign all undertaken actions, the writs which are in the court case and the expenses charged by the court, to make a conclusion for delivering the case to the enforcement agent.

The enforcement agent receives the case in the stadium in which it was before the court. The enforcement actions undertaken by the court are legally valid as if they were undertaken by the enforcement agent who continues the enforcement. Upon receipt of the case the enforcement agent is obliged to notify the debtor that the enforcement initiated before the court continues with the enforcement agent.<sup>158</sup>

The expenses for which there is evidence that they were charged in the court, are admitted to the creditor. The enforcement agent is obliged to collect them from the debtor and transfer them to the creditor. The obligation for payment of a price for administration of those cases, for which there is evidence that the creditors paid the court fee, falls under the burden of the debtor.<sup>159</sup>

<sup>153</sup> 2008 Progress Report, page 57.

<sup>154</sup> Law Amending the Law on Enforcement ("Official Gazette" br.83/2009 and 88/2010) hereafter FLALE.

<sup>155</sup> Art. 7 FLALE.

<sup>156</sup> Art. 8 FLALE.

<sup>157</sup> Art. 9 FLALE.

<sup>158</sup> Art. 11 FLALE.

<sup>159</sup> Art. 12 FLALE.

The proposals for enforcement submitted before May 26<sup>th</sup> 2006, which are not effective and the proposals for enforcement submitted on the ground of authentic titles, for which effective decision for enforcement was not made, will be transferred by the court for further proceeding to a notary who proceeds as a representative of the court.<sup>160</sup>

The Notary delivers the decision for enforcement to the debtor, with a legal advice that within eight days he is entitled to file an objection through the notary against the court which referred the case.

When the objection is untimely, not allowed and incomplete, the notary rejects it with a decision against which there is a possibility for appeal within eight days to the court which referred the case.

If the notary does not reject the case, the case is submitted to the court and the proceeding continues in the same way as if it is a complaint upon an objection for issuing a payment order.

After the expiry of the prescribed deadline, the notary certifies the effectiveness and enforceability regarding the proceedings against which there is no objection, and delivers the decision to the creditor by notifying that the deadline of 6 months starts running.

The decision for enforcement made by the court, based on an authentic title, which becomes effective and enforceable, acquires the status of an enforcement title for charging a money claim. Within the deadline of 6 months the creditor is obliged to approach the court and give certification for effectiveness and enforceability.

#### *Monitoring and control*

When developing and introducing the new private system, special attention has been paid to a transparent system of monitoring and control of the new profession. In order to set clear regulations a Code of Ethics / Rule Book has been already developed. The general supervision over the profession is with a special department of the Ministry of Justice, which is also responsible for the control of mediators and notaries. In addition, based on FLOE, also the Chamber has its responsibilities to safeguard the profession. Both mechanisms should form a balance in the monitoring and control system. Unfortunately so far there seems to be rather a "misbalance" on the scope of work of each of the two mechanisms. From the law it is unclear what the role of the Ministry of Justice is when it comes to monitoring and control.

#### *Disciplinary proceedings*

Also these provisions are recently amended and have led to protests from the enforcement agents. Under the old law the time limits for a suspension were from one month to one year. FLOE has been amended and the minimum period for suspension is raised to 6 months. Changing the minimum to 6 months might cause severe damage to an office and the staff of such an office. Especially as such a minimum period of 6 months not necessarily reflects the severity of the violation.

### **8.3. Training of professionals involved in enforcement**

With the change from a public to a private system the FYROM also introduced a new system for training and admission to the profession. The training process is under the control and authority of the Chamber. Based on article 67 FLOE the Assembly of the Chamber determines the draft programme for continuous education of the enforcement agents. This document is then submitted as a proposal to the Minister of Justice. This Programme for Continuous Education of the enforcement agents is prepared by the Steering Board. Based on article 68 FLOE the Steering Board also carries out the supervision over the capacity building of the enforcement agents and issues the certificates for completed professional capacity building. The Steering Board organises the continuous capacity building of the enforcement agents by organizing seminars and lectures, in accordance with the programme as it was confirmed by the Minister of Justice. The participation at the seminars and the lectures is obligatory for the enforcement agents, deputy enforcement agents and the assistant enforcement agents, and their unjustified absence shall be considered as a disciplinary violation.<sup>161</sup> The Chamber of Private Enforcement Agents of the Republic of Macedonia has established a training curriculum and many trainings have already been conducted.

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<sup>160</sup> Art. 13 FLALE.

<sup>161</sup> Art. 68 FLOE.

The examination process and appointment of new bailiffs is under the control of the Ministry of Justice. This mixture and overlapping of competences under the present system leads to uncertainties and delays in the administration of the new profession.

Under the present system the FYROM should have 132 Private Enforcement Agents. In reality there are much less private enforcement agents. The fact that too few private enforcement agents have been appointed so far is caused by the examination process, as well as by the fact that the Ministry of Justice seems to delay formal appointments, e.g. in 2007 only 1 private enforcement agent was appointed.

Furthermore, a number of people who passed the relatively challenging examination do not want to become private enforcement agent as they are afraid to run the risks related to the entrepreneurial aspects of the profession.

FLOE (article 235) describes the contents of these exams: (1) the knowledge of the legal regulations with which the occupation enforcement agent is regulated, (2) the manner of enforcing the enforcement titles, (3) the regulation of the field of companies, enterprises and legal entities overall, (4) the payment operations, (5) records of the rights over real estates, (6) the inheritance, family and the material law, criminal law, civil procedure, non-disputed procedure and other regulations necessary for performing the occupation of enforcement agent.

The detailed content of the exam, which consist of an oral and a written part, is defined with a regulation passed by the Minister of Justice.

#### **8.4. Ethics, monitoring and control, disciplinary issues**

##### ***Supervision over the work of the enforcement agents***

The supervision over the work of the enforcement agent is carried out by the Ministry of Justice, either in the form of normal, regular, supervision or in the form of extraordinary supervision.

The regular supervision is carried out at least once a year. The enforcement agent and the Chamber will be informed on the regular supervision at least three days in advance. The supervision covers proper maintaining of record books, case acts and records in accordance with the Law and the regulations. The enforcement agent or the President of the Chamber are obliged to give access to the premises, books, case acts and the overall records of the Enforcement Agent, or the Chamber. The supervision is performed in the presence of the enforcement agent that is being supervised, the President of the Chamber, or a person authorised by the President of the Chamber, if the supervision is performed over the work of the Chamber.

During the inspection, minutes are composed which are signed by the authorised persons performing the supervision and the enforcement agent. If the enforcement agent refuses to sign the minutes he is obliged to state the reasons for this, which will be included in the minutes. A copy of the report is delivered only to the Enforcement Agent and the Chamber of Enforcement Agents, within 15 days after the performed supervision. In case the object of enforcement are assets of the Budget of the FYROM, it is also submitted to the State Attorney.

Depending on the contents of the report for the performed supervision, the Minister of Justice decides whether there are grounds for filing a proposal for initiating a disciplinary procedure or taking up other measures in accordance with the Law.<sup>162</sup>

The extraordinary supervision over the work of the enforcement agent and the Chamber can be done at any time ex officio or upon a request from the president of the court.<sup>163</sup>

Every year an enforcement agent submits a written report about his/her work in the course of the previous year, to the Chamber of Enforcement Agents, not later than March 15<sup>th</sup> in the current year. In this report the enforcement agent lists the total number of received enforcement requests, the total number of realized enforcement titles, the total amount of collected assets for the administration of cases, for undertaken enforcement actions and award for realized enforcement titles. A copy of the final balance sheet as it is sent to the Public Revenue Department needs to be attached to this report.<sup>164</sup>

The Chamber has a similar obligations towards the Ministry of Justice:

- each year (in the month of February) the Chamber shall be obliged to submit a written report for its activities to the Minister of Justice, with elaborated opinions, proposals, and positions on the condition

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<sup>162</sup> Art. 52 FLOE.

<sup>163</sup> Art. 53 FLOE.

<sup>164</sup> Art. 53A FLOE.

of the enforcement agents, as well as the proposal for measures which have to be undertaken in order to improve those conditions;

- each year by April 1<sup>st</sup> the Chamber is obliged to submit a written report to the Minister of Justice regarding the work of each Enforcement Agent individually for the previous year, which includes the total number of received enforcement requests, the total number of realized enforcement titles, the total amount of collected finances from the administration fee for the cases, for the undertaken enforcement actions and award for the realized enforcement titles.

### ***Disciplinary responsibilities of the enforcement agents***

Regarding unethical behaviour, FLOE<sup>165</sup> makes a distinction between:

- Unprofessional behaviour: a violation of FLOE, regulations and the acts of the Chamber, in the course of which, during the enforcement, the enforcement agent violates the rights of the parties in the procedure or of third persons;
- Dishonest behaviour: actions contrary to the ethical norms, professional standards and rules of the enforcement agent occupation.

Depending on the severity of the violation, the consequences from that violation, the level of responsibility of the enforcement agent, the circumstances under which the violation was committed, prior behavior, and other mitigating and aggravating circumstances certain sanctions can be imposed:

### ***Disciplinary measures***

- public reprimand: to be published at the announcement board in the seat of the Chamber, 60 days after pronouncing the measure;
- Fine: in the amount up to 3.000 Euros (or in case the enforcement agent has gained illegal profit in property a fine up to the double amount of that profit);
- temporary taking away of the right to perform the occupation enforcement agent: in duration from six months to one year;
- permanent taking away of the right to perform the occupation enforcement agent.<sup>166</sup>

The final decisions for determining the disciplinary responsibility of the enforcement agent are published at the website of the Chamber and the Ministry of Justice, in accordance with the legal provisions for protection of the personal data.

### ***Temporary ban***

Pending a decision in disciplinary proceedings upon the request from the authorized proposing parties for initiating a disciplinary procedure, the Disciplinary Commission can suspend an enforcement agent temporarily to perform his occupation until the completion of the disciplinary procedure. In certain circumstances a temporary ban for performing the profession is determined always regardless of whether a disciplinary procedure has been initiated against the enforcement agent. Those circumstances for example refer to a legally valid decision for initiating an investigation for criminal acts committed in relation to the official activities where an unconditional prison term of more than six months in duration is pronounced.

### ***Disciplinary Body***

When the FLOE was first adopted, in 2005, the correct implementation of ethical rules was under the supervision of 12 regional disciplinary committees (all consisting of 3 judges, 2 private enforcement agents; and all committees supported by one staff member of the Chamber). Experiences with this system of disciplinary proceedings have shown that the practical implementation was quite problematic. Based on these experiences the law was amended and nowadays one Disciplinary Committee runs the disciplinary procedure in the Chamber.

The Disciplinary Committee is considered a body of the Chamber, selected by the assembly of the Chamber. It is composed of 5 members and their deputies, with a three year mandate, entitled to re-appointment. Two members and their deputies are selected from among the members of the Chamber, two members and

<sup>165</sup> Art. 54 FLOE.

<sup>166</sup> Artt. 54A and 54B FLOE.

their deputies are from among the judges upon a proposal given by the Judicial Council of the FYROM and one member and his/her deputy is selected upon a proposal by the Minister of Justice.<sup>167</sup>

#### *Initiation of a disciplinary procedure*<sup>168</sup>

The time limit for initiating a disciplinary procedure is two years from the day the disciplinary violation is committed.<sup>169</sup>

The president of the Chamber, the President of the Basic Court, in which area of jurisdiction the seat of the enforcement agent is located, and the Minister of Justice are the authorized bodies to file a disciplinary complaint. The Disciplinary Committee implements the disciplinary procedure upon a proposal of an authorized body.<sup>170</sup>

The proposal for initiating a disciplinary procedure contains the facts and the evidence that determines the existence of a disciplinary violation and is submitted to the Disciplinary Committee of the Chamber. Within five days after receipt the disciplinary committee submits it to the enforcement agent it refers to. Within eight days from the day the enforcement agent received the proposal, he is entitled to submit a reply to the proposal and attach evidence to deny the allegations in the proposal.

A decision upon the proposal must be made within thirty days from the day of filing the proposal. The enforcement agent against whom the procedure has been initiated is entitled to a hearing in front of the Disciplinary Committee. When necessary the Disciplinary Committee can perform an inspection or authorize a member to perform an inspection of the files of the enforcement agent's case, and if needed derive other evidence, in order to establish the facts significant for the decision making.

The Disciplinary Committee shall declare the complaint inadmissible, unfounded or founded. The complaint that is wholly or partially founded imposes a disciplinary measure. Both the proposing party and the Ministry will be informed on the decision.

The Enforcement Agent and the proposing party are entitled to appeal against the decision from the Disciplinary Committee to the Steering Board of the Chamber within eight days after the decision was received. The Steering Board decides upon the appeal in the course of the procedure by issuing a decision which dismisses the appeal as untimely or not permitted or accepts the appeal and changes the decision of the Disciplinary Committee or revokes the appeal as ungrounded and confirms the decision made by the Disciplinary Committee.

The enforcement agent is entitled to initiate an administrative Lawsuit against the decision of the Steering Board that confirms the decision made by the Disciplinary committee for issuing a disciplinary measure.

#### *Enforcing the disciplinary decisions*

A final decision passed in a disciplinary procedure is enforced by the President of the Chamber. The final disciplinary decision to impose a fine has the power of an enforcement title and the President of the Chamber shall be entitled to file a request for forced enforcement. The assets obtained from the forced enforcement shall be paid to the account of the Chamber and can be used only for professional development of the enforcement agents within the Chamber.<sup>171</sup>

## **8.5. Infrastructure and material resources**

Regarding the infrastructure and material resources article 32 FLOE states that one of the conditions to be appointed as an enforcement agent in the FYROM is a notary statement that the enforcement agent will provide the equipment and facilities required and appropriate for carrying out enforcement actions. The type of equipment and office space necessary for the fulfilment of this condition should be, according to the same article 32 FLOE, prescribed by the Minister of Justice.

Based on this legal provision<sup>172</sup> the Minister of Justice issued a "Rulebook on equipment and premises necessary for the work of the enforcement agent".<sup>173</sup>

167 Art. 59 FLOE.

168 Artt. 59A-59D FLOE.

169 Art. 58 FLOE.

170 Art. 59 FLOE.

171 Art. 61 FLOE.

172 Also: art. 234 par. 4 FLOE.

173 Rulebook on equipment and premises necessary for the work of the enforcement agent Nr. 07- 414/25 October 18, 2005 Minister of

According to this Rulebook the premises where the offices of the enforcement agent are accommodated, should be a separate construction entity with a separate entrance. The office should have at least two working rooms, waiting room, archives and a toilet. The total surface area of the office of the enforcement agent cannot be smaller than 50m<sup>2</sup>. The office may be located in an individual residential building, in a collective residential building or in a business building. If the office is located in a sky scraper building which does not have an elevator, it may be located up to the second floor only.

The office of the enforcement agent should be clean and tidy and needs to be equipped with firefighting devices and tools, according to the regulations on fire protection in the state administration.

The office should have:

- fireproof metal closets with shelves, with safety locks, which will hold the archives, and a fireproof metal safe for keeping valuables, documents, money and securities, which have been given for safekeeping;
- a telephone and a fax.
- necessary office equipment: desk, necessary number of chairs for the parties in the working room and in the waiting room, a personal computer, printer and other writing material and other necessary office material.

Within thirty days after the decision of appointment, the enforcement agent requests the opinion of the President of the Chamber stipulating that the working premises fulfill the conditions for work. After obtaining the positive opinion of the President of the Chamber the enforcement agent can start working.

If the opinion is negative with respect to the surface area and the equipment of the premises, the enforcement agent may within eight days from the receipt of this opinion ask the Ministry of Justice to inspect the premises.

## 8.6. Service of documents

Article 40 FLOE describes the enforcement actions of the enforcement agent. Among those activities also the service of documents is described: "performs service of court writ; performs delivery of orders, minutes, conclusions and other documents that are related to his work".

The service is done in accordance with the provisions of the Law on Civil Procedure and the FLOE.<sup>174</sup> In general two different methods can be used: either directly handing in the act or service by mail.

The enforcement agent is obliged to record each unsuccessful attempt for service with an official note. If the service remains unsuccessful, the enforcement agent effects the service by public announcement. This means that the enforcement agent performs the announcement through daily press, which is in circulation throughout the overall territory of the FYROM, every day in six consecutive editions. After the expiration of this time limit it shall be considered that the party was properly informed about the writs. In case the party that is being served uses an official language different from the FYROM language, the enforcement agent publishes the announcement also throughout daily press published in the language that is used by the party. The announcement is performed with one-time announcement in the Official Gazette of the FYROM.<sup>175</sup>

Regarding payment of the service a distinction is made between successful and unsuccessful service. If the service of the court writs and acts is performed by the enforcement agent by directly transferring them to the debtor, the enforcement agent is entitled to charge the appropriate tariff for the enforcement activities for service of court writs and acts only if the personal service has been successful. If the service of the writs and acts has been done by post mail, the enforcement agent is allowed to charge only the real expenses in the amount of the post fee.<sup>176</sup>

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Justice.

174 Art. 46A FLOE.

175 Art. 46B FLOE.

176 Art. 46A FLOE.



## Chapter 9: Montenegro

### 9.1. Political context

#### *European Commission Progress Reports*

During recent years Montenegro has made progress in the area of judicial reform, a key European Partnership priority. In 2007 however, the European Commission - in its Progress Report - was rather sceptical towards the developments in Montenegro. Although this report does not specifically mention the problematic issue of domestic enforcement,<sup>1</sup> it is clear that the problems within the judicial system are also enforcement-related: "The significant backlog in both civil and criminal cases is a matter of serious concern, although there was a slight reduction in 2006 compared with 2005. There is no clear strategy to tackle this problem; in particular, insufficient use is made of simplified procedures for minor cases. [...] Overall, despite some progress on strengthening the judiciary, there is a lack of confidence in the system and concern about the level of political influence. Judicial reform is only just beginning."<sup>2</sup>

In 2008 some progress was made: "Backlogs in civil and criminal cases have been reduced. However, the still high number of pending cases and excessively lengthy procedures continue to give cause for concern. Inefficient execution procedures remain part of the problem. A new law granting compensation to citizens whose trial has exceeded a due timeframe was adopted, but is not yet in force. There is still no clear strategy and procedural changes are lacking."<sup>3</sup>

Progress continued in 2009: "Overall, Montenegro is moderately advanced in the area of judicial reform. There has been some progress through the enhancement of the legal framework and the implementation of legislation. Further efforts are required for the consolidation of the independence, accountability, integrity and efficiency of the judicial system."<sup>4</sup> Still a lot of work has to be done: "The efficiency of the judicial system needs to be further enhanced. Judicial enforcement procedures remain inefficient while lengthy court procedures remain a cause for concern. The misdemeanour reform strategy needs to be implemented in a way which will avoid creating further backlogs. The new Law on the Right to Trial within Reasonable Time, granting compensation to citizens whose trial exceeds a set time-frame, has entered into force, but a track record has yet to be established. The reliability of court data needs to be improved. The computerised case management system has yet to be introduced in all courts. Random allocation of cases in courts has not yet been fully implemented and computerised."<sup>5</sup>

The positive developments continued in 2010: "Overall, recourse to the judicial system has increased progressively in recent years, as administrative capacity gradually improved. Weaknesses in the rule of law and prevalent corruption continue to negatively affect the business environment."<sup>6</sup> "The permanent status of judges is guaranteed by the Constitution. However, serious concerns exist over the independence of the judiciary, as the legal framework leaves room for disproportionate political influence. Although judges are appointed by the Judicial Council, the majority of its members are appointed by parliament and the government."<sup>7</sup>

In relation to the backlog of unresolved court cases the 2010 Analytical Report notes: "Montenegro has suffered from a large backlog of unresolved court cases but the authorities introduced measures since 2008 to address this problem. Data presented by the authorities suggest a reduction of over 75% on an annual basis in the beginning of 2010. Yet, there are concerns as to the soundness of the approach and the transparency of the methodology used. Enforcement of both civil and criminal decisions is weak. Additional

1 Except for the remark that recognition and enforcement of court decisions between Serbia and Montenegro apparently was not yet properly regulated, see page 11 of the Montenegro 2007 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2007-2008, European Commission, 6 November 2007, SEC(2007) 1434, hereafter called the 2007 Progress Report, page 11.

2 2007 Progress Report, page 11.

3 Montenegro 2008 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2008-2009, European Commission, 5 November 2008, SEC(2008) 2696, hereafter called the 2008 Progress Report, page 11.

4 Montenegro 2009 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2009-2010, European Commission, 14 October 2009, SEC(2009) 1336/2, hereafter called the 2009 Progress Report, page 11.

5 2009 Progress Report, page 11.

6 Analytical Report, accompanying the Communication from the Commission to the European Parliament and the Council, Commission Opinion on Montenegro's application for membership of the European Union, 9 November 2010, SEC(2010) 1334, hereafter called the 2010 Analytical Report, page 43.

7 2010 Analytical Report page 97.



measures to improve enforcement are required. The administrative capacity of the Montenegrin judiciary is generally adequate for normal administration of justice. Lack of infrastructure and equipment has hindered the judiciary's efficiency, but efforts are being made by the authorities to remedy the situation. A reorganisation of the court system is envisaged in the government strategy on the reform of the judiciary but it has not yet been implemented. Such a reorganisation should be carried out following an objective analysis on the basis of reliable court statistics and a precise account of the current workload of the courts. [...] The right to a fair and public trial within a reasonable time and the presumption of innocence are also guaranteed. The Law on the right to trial within a reasonable time is not being implemented effectively, as almost all complaints are rejected on procedural grounds. [...] The constitutional provision on the right to legal remedy does not fully comply with Article 13 of the ECHR. Enforcement of both civil and criminal decisions is weak. Additional measures to improve enforcement are required.”<sup>8</sup>

### **Government Strategy**

In 2007, the Montenegrin Government elaborated, supported by OSCE, the ‘Strategy for the Reform of the Judiciary (2007-2012)’. The Strategy was adopted in December 2007 and presented with an Action Plan for its implementation at an international conference in Podgorica in February 2008.

The Strategy identifies two major problems for the Montenegrin court system: protracted court proceedings and a considerable backlog of cases. In order to solve the problem of the huge backlogs the Strategy proposes, among others, the following steps:

- delegate certain competences of courts to other bodies and services;
- establish an adequate system of bailiffs with a view to accelerating proceedings, enhancing legal discipline and reducing the number of unenforced decisions.<sup>9</sup>

The further preparation of these steps is regulated by the Action Plan for Implementation of the Strategy for Reform of the Judiciary.<sup>10</sup>

As a first step to implement the above mentioned Strategy and Action Plan, the Ministry of Justice created a working group, consisting of representatives of the judiciary, the Ministry itself and academics, which first met at the end of June 2008.

Based on an analysis of the existing legislation recommendations were made, including proposals for amendments to the Montenegrin enforcement law. The working group received clear directions from the Government to also address in the recommendations the question on how to release the courts of enforcement.

In other words: to also develop a proposal for an alternative system of enforcement. The drafting just recently finished and proposes two new laws: a Law on Enforcement and a Law on Enforcement Agents, based on a system where both court officials and private enforcement agents are involved in execution.

## **9.2. Legislation and organization of the enforcement process**

### **9.2.1. Legislation**

Until 2004 the federal Law on the Enforcement Procedure from 2000 (ZIP 2000) was applicable. In general the public was of the opinion that in the ZIP 2000 the protection of the debtor was overdone. This overprotection had to be abandoned.

At this moment enforcement is dealt with by the Law on Civil Procedure<sup>11</sup> and the Law on Executive Procedure (MLEP). The MLEP was adopted in 2004 when Montenegro was still a member of the State union of Serbia and Montenegro. MLEP entered into force on 13 July 2004.<sup>12</sup> The MLEP intended to abandon the overprotection of the debtor by creating formal procedures and defining a number of stages in the enforcement procedure. Thus a more efficient enforcement procedure should be created. An enforceable document should not be re-examined, changed or adjusted in the enforcement procedure. This principle of

<sup>8</sup> 2010 Analytical Report, page 98.

<sup>9</sup> Strategy for the Reform of the Judiciary 2007 – 2012, page 22.

<sup>10</sup> See Action Plan for Implementation of the Strategy for Reform of the Judiciary 2007 – 2012, page 15.

<sup>11</sup> See: art. 14 MLEP.

<sup>12</sup> Official Gazette of the Republic of Montenegro No. 23/04.

formal legality is given a central position in the enforcement procedure under MLEP.

On a wider scale other important laws are: the Law on Collateral as a Means of Securing Claims,<sup>13</sup> the Law on Mortgage,<sup>14</sup> the Law on Contracts and Torts and the Law on Ownership Relations.

In the previous paragraph we already indicated that under the Strategy for the Reform of the Judiciary 2007-2012, the Montenegrin Government is now preparing new legislation in the field of enforcement: a new Law on Executive Procedures and a Law on Enforcement Agents. We will pay attention to this in the coming paragraphs.

### 9.2.2. The enforcement process

In November 2008 the Montenegrin Ministry of Justice published an assessment report on the implementation of the MLEP.<sup>15</sup> The report underlined the importance of the principle of formal legality: an enforceable document, such as a court decision rendered in a civil or another procedure, may not be re-examined, changed or adjusted in any way. The decision should not be reversed by regular legal remedies. It becomes enforceable upon expiry of the period of voluntary compliance. Enforcement starts once these two requirements have been met: "the principle of formal legality as promoted at this stage as the basic and most important principle is serving the purpose to protect and ensure the rule of law. It is the duty of the enforcement judge to observe the law and do his best to conduct enforcement in an expedient, economical and quality manner. It is understood that the enforcement judge may show a degree of creativity during the enforcement, yet his objective is to carry out the orders included in the enforcing order in the interest of the parties to the enforcement procedure: creditor, debtor, and third parties if any."<sup>16</sup> Against this background the legal framework of the Montenegrin enforcement system was developed.

#### *Enforceable documents*

The court orders enforcement on the basis of an enforceable document. Enforceable documents are the enforceable decisions of the court, the enforceable court settlements and the decisions and settlements prescribed by law as enforceable documents.<sup>17</sup> This means enforceable documents include the decisions in administrative procedures, such as the decisions or conclusions of an administrative body, state agency or an organization acting in public authority as well as decisions by an authorized officer in a ministry or another public administration body or a local administration body. A court decision can be a judgment, a decision, an order for temporary measure, an order for payment, arbitration awards or a court settlement concluded before court.

Another example of enforceable documents are the authentic documents. Under Montenegrin law authentic documents are: an invoice; a bill of exchange or cheque, protested or with a return charge, if necessary for establishment of a claim; an official document; an excerpt from certified business books; a document issued in a legally prescribed form; a lawfully certified private document and a document considered as an official document under special regulations.<sup>18</sup> For the purpose of realization of a monetary claim of a legal person and an entrepreneur, enforcement can also be ordered on the basis of such an authentic document.

#### *Initiation of enforcement procedure*

The enforcement procedure starts with the motion (proposal) for enforcement.<sup>19</sup> The court is obligated to decide on the motion for enforcement within 5 days from the date on which the motion was filed. Decisions are passed in the form of either a decision, or a conclusion. A warrant to a court clerk for performing certain actions is issued by a conclusion. A conclusion also decides on other matters governing of the procedure.<sup>20</sup>

<sup>13</sup> Official Gazette of the Republic of Montenegro No. 38/02.

<sup>14</sup> Official Gazette of the Republic of Montenegro No. 52/04.

<sup>15</sup> Assessment of implementation of the Law on Enforcement Procedure, Ministry of Justice, November 2008. The report was published on the website of the Ministry of Justice. (hereafter called the Montenegro Assessment Report).

<sup>16</sup> Montenegro Assessment Report, page 4.

<sup>17</sup> Art. 16 MLEP.

<sup>18</sup> Art. 22 MLEP.

<sup>19</sup> Art. 2 MLEP.

<sup>20</sup> Art. 6 MLEP.

The court orders enforcement against the means and objects listed in the enforcement motion.<sup>21</sup> In case several means or objects of enforcement have been proposed, the court, acting ex officio, shall limit the enforcement to some of these means or objects if they are sufficient for the settlement of the claim.<sup>22</sup> If there is a significant discrepancy between the value of the object and the value of the claim the court may additionally order enforcement against another object. If the decision on execution on a certain object or means cannot be enforced, the judgment creditor may, for the purpose of settling the same claim, propose new means or object of execution, which shall be decided by the court decision.<sup>23</sup>

In cases where the commercial court has given the decision, this court is also competent to issue the decision on execution. Furthermore this court is competent for conducting enforcement on ships and aircrafts, rendering decisions on recognition and enforcement of foreign decisions rendered by commercial courts and arbitration decisions.

### ***Determination of debtor's property***

In the motion for execution a creditor may require that the court, before the passing of the decision on execution, demand from the debtor and other persons, or bodies and organizations listed in the motion, to submit to the court the data on the debtor's property, if the creditor makes it credible that these persons might have such data. Such a request can also be filed after the passing of the decision on execution if the execution on the proposed means of execution has not been successful. The court shall fine the persons who fail to act according to the request.<sup>24</sup>

### ***Costs of enforcement proceedings***

The creditor has to pay the costs of enforcement proceedings in advance.<sup>25</sup> The court determines within which period payment of the costs has to be effected. The period should at least be 30 days. Within 30 days after the termination of enforcement proceedings the creditor can submit a request to reimburse the costs that were necessary for enforcement.

### ***Interest***

The default interest is decided upon in the decision on execution. If the rate of default interest changes after the issuance of the decision on execution, the court shall, at the motion of a creditor or a debtor, issue a decision on execution determining the collection of that interest at the changed rate.<sup>26</sup>

### ***Decision on execution***<sup>27</sup>

Based on the motion for enforcement a decision on execution is given by the competent court. The decision contains the data regarding the creditor and debtor, the enforceability of the enforceable or authentic document, the obligations of parties, an instruction on legal remedies and the means and object of execution. In case of an authentic document the court also imposes an obligation on the debtor to satisfy the claims together with the estimated costs within eight days.

### ***Service of the decision on execution***

The decision on execution is delivered to the creditor and the debtor (together with the motion for execution).<sup>28</sup> In case a third party is involved ( e.g. debtors' debtor or a bank) the decision is also served to this third party. The decision is regarded as enforceable if it has become final and if the time limit for

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21 Art. 37 MLEP.

22 Art. 5 MLEP.

23 Art. 30 MLEP.

24 Art. 35 MLEP.

25 Art. 33 MLEP.

26 Art. 21 MLEP.

27 Art. 40 MLEP.

28 Art. 41 MLEP.

voluntary fulfillment of the obligation of the judgment debtor has expired. The time limit for voluntary fulfillment starts on the day of delivery of the decision on execution to the debtor.<sup>29</sup> If an enforceable document does not designate a time limit for voluntary compensation, such time limit shall be set in the enforcement order.<sup>30</sup> Any requests for postponement (either from the creditor, debtor or a third party) during the enforcement procedure are decided upon by the court.<sup>31</sup>

A decision on execution on movable assets is delivered to the debtor just before the first executive activity is undertaken.<sup>32</sup> In case the decision on execution on movable assets is made on the basis of an authentic document the decision is served to the debtor before the beginning of the enforcement of the execution.

### ***Appeal***

An appeal may be filed against a decision passed in first instance. Such an appeal does not stay the enforcement. An objection may be filed against the decision on execution passed upon a valid document.<sup>33</sup> Against a conclusion no legal remedy is allowed.<sup>34</sup> An appeal has to be decided upon by the second-instance court (a panel of three judges) within 30 days from the receipt of the case file. Legal remedies (appeal and complaint against a decision) are also filed within 5 days. The debtor (or third party) has the right to initiate a civil litigation or another procedure on grounds of wrongful enforcement, with or without the instructions of the court, when the determination of a fact that pertains to the claim is at stake and is disputed by the parties.<sup>35</sup>

### ***Counter enforcement***

Within a period of thirty days following the date when grounds for counter-execution become known, and at the latest within one year after the conclusion of the procedure a debtor or third party can start counter-execution. Counter-execution means that, after the enforcement has been conducted, the debtor may submit a motion for counter-enforcement to the court, requesting the creditor to return what he/she has acquired through enforcement. The counter-enforcement procedure is used in case the enforceable document or the decision on execution has been finally revoked, reversed, annulled, or has otherwise been cancelled, in case the debtor has voluntarily compensated the creditor's claim in the course of the enforcement procedure or if the execution has been proclaimed inadmissible by a final court decision. A third party may file a motion for counter-execution when this third party proves his/her right on the object of execution.<sup>36</sup>

### ***Seizure on movables***

Regarding a seizure on movables the jurisdiction of the competent court can be decided upon in different ways. First: the competent court to decide on the motion for execution is the court in the territory where the movables are located.<sup>37</sup> However the creditor can also file the motion for execution at the court where the debtor has his permanent or temporary residence. In the motion the creditor can either ask for a decision on execution including the inventory, evaluation and public sale, or file a motion in which the actions are limited to just the inventory and evaluation. In that case within 3 months a motion for sale must be filed.<sup>38</sup>

Immediately before the inventory, the decision on execution is delivered to the debtor.<sup>39</sup> Normally the movables will stay with the debtor, unless the court decides differently. If no movables are found during the inventory, within three months, the creditor can file a motion for repeating the inventory.<sup>40</sup> If the creditor fails to file such a motion, or the movables are not found during the repeated inventory, the court shall discontinue the execution.

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29 Art. 18 MLEP.

30 Art. 20 MLEP.

31 Artt. 65-71 MLEP.

32 Art 76 MLEP.

33 Artt. 8, 49 MLEP.

34 Art. 8 par. 6 MLEP.

35 Artt. 57- 59 MLEP.

36 Artt. 61-64 MLEP.

37 Art. 72 MLEP.

38 Art. 75 MLEP.

39 Art. 76 MLEP.

40 Art. 82 MLEP.

Certain goods are exempted from execution, e.g. clothing, pieces of furniture necessary to the judgment debtor and the members of his household, cooker and refrigerator, food and fuel for a period of three months, working and breeding cattle, agricultural equipment and other tools necessary for maintaining a farm to the extent needed for his maintenance and the maintenance of members of his family, seed for the use on that farm and fodder for the period of four months, cash money of the judgment debtor who has regular monthly income – up to the monthly amount exempted from execution under law in proportion to the time remaining to the next income, decorations, medals, appliances that have been given to an invalid or other person with bodily disabilities which are indispensable for his living.<sup>41</sup>

Simultaneously with the inventory, an evaluation of the movables is conducted by an expert designated by the court. Creditor and debtor however may ascertain the value of the movables by mutual agreement.

At least fifteen days have to lapse between the date of inventory and the date of sale. The sale is performed by public auction or by direct bargain between the purchaser, on one side, and an official or a legal person in charge of commission sale, on the other side. The manner of sale is specified by the court, making sure that the most favorable encashment is achieved. The sale by public auction is determined if the items in question are of considerable value and if it is to be expected that they will be sold at a price exceeding the estimated value. The sale is announced on the court notice board at the latest 15 days from the day of the hearing for the sale of the movables. The law gives the possibility to announce the sale in any other ordinary manner. Both the creditor and the debtor are informed of the place, date and hour of the sale.<sup>42</sup>

The inventoried items may not be sold for a price below the estimated value at the first auction, or within the time limit specified by the court for the sale by direct bargain. If the price in the amount of the estimated value is not reached at the first auction, the court shall, at the party's proposal, order a new public auction at which the items may be sold below their estimated value, but not below one third of that value. Such a proposal needs to be filed within a period of thirty days from the day of the first auction or from the date of expiry of the time limit specified by the court for the sale by direct bargain.<sup>43</sup>

If the movables are not sold at the second public auction, the court shall schedule a subsequent auction only upon the request of the creditor. Such a request may not be filed prior to the lapse of thirty days of the previous term, nor after the lapse of three months of that date.

### ***Garnishment on salary and pension***

Garnishment on salary and pension, as well as reimbursement replacing the salary may be determined and enforced in the amount of up to half of such an income. If the judgment debtor receives a guaranteed salary in conformity with the collective agreement and law, the execution may be enforced up to one third of such salary.<sup>44</sup> Certain incomes are exempted from execution, e.g. income derived from social welfare, temporary unemployment, child benefits or soldiers' salaries (unless they are military officers).<sup>45</sup> When the debtor's employment is terminated, the decision on execution also affects the subsequent employer who employs the debtor, commencing on the date the decision on execution has been served on the employer. The former debtor's employer needs to submit the decision on execution by registered mail to the new employer and inform the court about that. If the former employer of the debtor does not know who the judgment debtor is newly employed with, he shall notify the court. In that case the court shall inform the creditor, specifying a term within which the creditor is bound to obtain information on the new employer and to notify the court thereon. In case of failure the court discontinues the execution.<sup>46</sup>

### ***Enforcement on a claim***

Enforcement on a claim is conducted by an attachment and transfer of the claim. In this case the decision on enforcement needs to be served to the debtors' debtor.<sup>47</sup> At the order of the court the debtors' debtor makes a statement within the time limit specified by the court whether and in what amount he acknowledges the attached claim and which obligations need to be fulfilled to settle the claim.

<sup>41</sup> Art. 74 MLEP.

<sup>42</sup> Art. 87 MLEP.

<sup>43</sup> Art. 88 MLEP.

<sup>44</sup> Art. 96 MLEP.

<sup>45</sup> Art. 95 MLEP.

<sup>46</sup> Art. 126 MLEP.

<sup>47</sup> Art. 99 MLEP.

An attachment on saving deposits can be done with or without a prior seizure of the cheque book of the debtor. If the creditor has failed to specify in the motion for execution the data pertaining to the debtor's savings deposit, the court shall request that data from the bank holding the savings deposit. The bank which holds the savings deposit is bound to submit without delay the requested data to the court.<sup>48</sup>

### ***Attachment on bank accounts***

Regarding the attachment on bank accounts, the Central Bank plays a central role. The court delivers the decision on execution to the Central Bank of Montenegro (hereinafter: Central Bank), which will immediately order the banks with which the debtor has opened accounts to block all the accounts of the debtor and submit data on the state of resources in those accounts. After receiving the statement of resources in the accounts of the debtor the Central Bank orders collection, primarily from the account of the bank indicated in the decision on execution. In case a number of banks have been indicated, collection is made in the order in which the banks have been listed in the decision. If there are no means or no sufficient means in the account of the judgment debtor with the bank indicated in the decision on execution, the Central Bank orders collection from other banks in which the judgment debtor has means in the account.<sup>49</sup>

### ***Execution on real property***

Regarding the execution on real property, the court in whose territory the real property is located is responsible for the decision on execution.<sup>50</sup> In case of a disproportion between the real property value and the amount of the claim, the court may determine execution on another piece of real property than the one proposed by the creditor. Along with the proposal for enforcement, the creditor submits an excerpt from the public registers to prove that the immovables are registered as property of the debtor. In case the real property is registered on some other person, the creditor submits a document necessary to register the property title of the debtor.<sup>51</sup> The attachment is registered in the public register.

The value is determined by a court decision, on the basis of an expert's assessment and its market price on the day of assessment.<sup>52</sup> The next step is the conclusion on sale which is made by the court. In this conclusion the manner and conditions of sale, as well as time and place of sale are determined, if the sale is done by a public bidding. The conclusion on sale is posted on the court notice board and in other customary manners. Upon proposal of the party, and paid by the party, the conclusion on sale is published in the media. There should be a period of at least 30 days between the day on which the conclusion on sale is posted on the court notice board and the day of sale. This period is limited to at least 8 days in case of publication in the media. The conclusion is also submitted to parties, pledge creditors, participants in the procedure and persons who have registered or legal right of preferential purchase.<sup>53</sup>

The sale is done in a oral public bidding, before an individual judge. The parties and pledge creditors may make an agreement at any time to perform sale of real property within a determined time notice through direct agreement.<sup>54</sup> At the first hearing for sale the real property cannot be sold below the determined price. If the real property cannot be sold at first hearing, the court summons a second hearing at which the real property can be sold below the determined value, but not below two thirds of that value. A minimum of 30 days must elapse between the first and the second hearing. Parties and pledge creditors may make an agreement, through a statement given in the minutes of the court before which the executive procedure is conducted or another court, that the real property can be sold by means of public bidding and at a price lower than the determined value, i.e. lower than two thirds of that price.<sup>55</sup> If the real property could not be sold at the second hearing, the court summons subsequent hearings only upon the proposal of the creditor. A proposal for determining a new hearing for sale cannot be placed by the creditor before the three month notice expires from the day of the previous hearing, nor after a year expires from that day.<sup>56</sup>

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48 Art. 101 MLEP.

49 Art. 194 MLEP.

50 Art. 143 MLEP.

51 Art. 145 MLEP.

52 Artt. 155 and 156 MLEP.

53 Art. 158 MLEP.

54 Art. 160 MLEP.

55 Art. 165 MLEP.

56 Art. 171 MLEP.

In some regions there is no cadastre. In those regions enforcement will be effected by the rules that are in effect on that territory in respect of the documents that need to be submitted as a proof of title on the immovable property that is subject of enforcement. If it is impossible to obtain a proof of ownership, the creditor shall indicate in his request the location of the immovables, the name, borders and area. In that case the court shall register the real property for which execution has been proposed and will invite the creditor, the debtor and persons whose real property borders the real property of the debtor to a hearing. The minutes on registration have the effect of registration of execution and will be posted on the court notice board. A copy of the minutes is submitted to the competent body keeping the public book on real property.<sup>57</sup>

**Seizure on shares**

A seizure on shares<sup>58</sup> is performed by submitting the decision on execution to the authorized register. At the same time the issuer of the shares is informed. The assessment and hand-over of the shares is performed in accordance with the due application of the provisions from the MLEP on the assessment and sale of movables, with the court previously informing members of the entity and the entity itself on the sale of the shares, along with an invitation to express their interest in buying the shares within 15 days from the day on which he information is received.

**9.2.3. Problems and challenges**

**Backlog in the courts**

The backlog in the courts was also noted by the European Commission in their progress reports (see par. 9.1).

In 2006, before the courts of general jurisdiction, there were 43.840 enforcement cases in progress. Out of that number, the number of pending cases on 1 January 2006 was 27.212, while 16.628 were new cases. Until 31 December 2006, 19.399 cases were solved (44,25%). Before the Commercial courts, there were 5.851 enforcement cases in progress. Out of that number, the number of pending cases on 1 January 2006 was 441 cases, while 5.410 cases were new. Until 31 December 2006, 5.276 cases were solved (90%).<sup>59</sup>

In 2007 before the courts of general jurisdiction, there were 49.986 enforcement cases in progress. The number of pending cases on 1 January 2007 was 25.055, the number of new cases was 24.932. Until 31 December 2007, 20.755 cases were solved. Before the Commercial courts, there were 5.262 enforcement cases in progress. Out of that number, the number of pending cases on 1 January 2007 was 575, whereas the number of new cases was 4.687. Until 31 December 2007, 5.097 cases were solved (96,8%)<sup>60</sup>

The above mentioned figures exclude the enforcement cases based on authentic documents. As in neighbouring countries we see a substantial number of those cases:<sup>61</sup>

Basic Court	Transfer-red from previous years	Received in 2007	Total cases pending in 2007	Disposed in 2007		Undisposed in 2007	
				Regular	Authentic doc.	Regular	Authentic doc.
Bar	3,051	3,087	6,138	55	747	168	2117
Berane	168	2,778	2,946	665	2,085	112	84
Bijelo Polje	68	8,091	8,159	537	7,443	118	61

57 Art. 187 MLEP.

58 Artt. 204-206 MLEP.

59 European Judicial Systems Edition 2008 (data 2006): Efficiency and quality of justice, European Commission for the Efficiency of Justice (CEPEJ) and the Scheme for Evaluating Judicial Systems 2007, Montenegro (CEPEJ). These figures do not include the enforcement cases based on authentic documents.

60 Assessment report, page 9-10.

61 Assessment report, page 9, Number and structure of enforcement cases (regular enforcement and authentic documents) in basic courts in 2007.



Danilovgrad	1,982	1,600	3,582	36	528	33	2,722
Žabljak	7	430	437	82	346	0	2
Kolašin	238	1083	1321	85	882	74	280
Kotor	4,681	5,459	10,140	1,495	1,723	1,831	5,091
Nikšić	8,608	9,152	17,760	154	368	1,709	8,826
Podgorica	70,418	14,638	85,046	4,063	5,239	4,249	71,495
Plav	49	729	778	91	469	17	201
Pljevlja	526	2,268	2,794	697	1712	155	230
Rožaje	37	2,486	2,523	374	2061	33	55
Ulcinj	2,444	1,702	4,146	20	178	527	3,421
H. Novi	6,148	2,707	8,855	85	67	331	8,372
Cetinje	386	1,904	2,290	133	599	165	1,393
<b>TOTAL</b>	<b>98,811</b>	<b>58,114</b>	<b>156,925</b>	<b>8572</b>	<b>24,447</b>	<b>9,521</b>	<b>104,350</b>

Regarding the number of judges and court enforcement officers that are working on the enforcement cases, the Assessment Report provides the following figures:<sup>62</sup>

*Total number of judges and court enforcement officers acting on enforcement cases in basic courts*

Name of Court	No. of judges	No. enforc. off.
Basic Court in Bar	1	3
Basic Court in Berane	5*	4
Basic Court in Bijelo Polje	1	4
Basic Court in Danilovgrad	1*	1
Basic Court in Žabljak	1	1
Basic Court in Kolašin	1	1
Basic Court in Kotor	1	3
Basic Court in Nikšić	1	6
Basic Court in Podgorica	1	9
Basic Court in Plav	2*	1
Basic Court in Pljevlja	1	2
Basic Court in Rožaje	1	1
Basic Court in Ulcinj	3*	1
Basic Court in Herceg Novi	1	2
Basic Court in Cetinje	5*	2
<b>TOTAL</b>	<b>10 + 16*</b>	<b>41</b>

*\*Marked judges also work on other types of cases.*

62 Assessment report, page 11-12.

Total number of judges and court enforcement officers acting on enforcement cases in commercial courts

Name of Court	No. of judges	No. of enf.off.
Commercial Court in Bijelo Polje	1	1
Commercial Court in Podgorica	2	2

**Public sales**

As in some other countries in the region, in Montenegro public sales are a point of discussion. Both in public sales of movables and immovables during the first bidding the object cannot be sold for an amount that is lower than the assessed value. In practice however interested parties deliberately do not bid at the first auction in order to get the object at a lower price.

But there is another remarkable issue. A creditor in the enforcement procedure can become the owner of a movable object under specific conditions for the purpose of settling the claim, or a real estate may be transferred to the creditor’s possession if the conditions of court sale are unfavourable. Although by some this issue is indicated as a positive improvement, in our opinion there is also the possibility of misuse. Under the SFRJ ZIP 2000 the creditors were only protected from unfavourable conditions of sale by giving them the possibility to withdraw (fully or partly) the enforcement motion without the agreement of the debtor, until the enforcement procedure has been carried out.

**Utility cases**

In all Balkan countries, enforcing unpaid utility bills for water, electricity, and mobile phones, as well as the typical judgments resulting from the adjudicatory process causes an enormous labor-intensive workload for the courts. USAID estimated that of the total number of enforcement cases 73% were for the collection of unpaid utility bills.<sup>63</sup>

**Bank accounts**

Another issue that causes problems in both Montenegro and the neighbouring countries are the attachments on bank accounts. It was often difficult and sometimes impossible for a creditor to obtain the bank account number of the debtor. First reason was that banks often refer to the bank secrecy, but also because the identity of the debtor was incomplete due to errors in its name. In that case the Central Bank could not enforce the decisions but instead returned them to the court which in turn ordered the creditor to clarify data in the application for enforcing order.

What makes it even more complicated is the definition of an account. Under the present legislation the term “foreign currency account” is not known.<sup>64</sup> As there is no legal ground for foreign currency accounts or any justification to give them a special status in the enforcement procedure over monetary funds, existing regulations allowed the debtor to transfer funds onto its »foreign currency account« and thus avoid the settlement of claim and do business using this account although its accounts for payment operations are blocked”, the Assessment Report states.<sup>65</sup>

**Default interest**

Until recently problems also were related to the absence of a law regulating the level of interest rate and the method of computation of default interest.

The instructions for forced collection of payment did not define precisely the level of default interest or the method to be used for its computation. For that reason the interest was computed in accordance with the guidelines of the Supreme Court adopted as far back as in 2000 when a double currency system was in place.

63 USAID, Justice System Reform Project Montenegro, Summary of project accomplishments, 2007, page 26.

64 The Law on Foreign Current and Capital does not recognize the term foreign currency account but only account. The Decision on the standard structure for identification and classification of accounts by IBAN standard for foreign payment operations only uses the term account, which is defined as an “account for foreign payment operations, which is opened with the Central Bank of Montenegro and other banks”.

65 Assessment report, page 13.

Nowadays the interest rate is based on either the contract between parties or article 284 of the new Law on Obligations.

#### 9.2.4. The changes in the enforcement legislation

This paragraph is based on the draft proposal for a new Enforcement Procedure Act and a draft proposal for a Law on Public Enforcement Officers as it was designed by the Enforcement Working Group under the Montenegrin Ministry of Justice. One of the authors of this book, Jos Uitdehaag, participated in this Working Group as international legal expert.

During recent years the number of enforcement cases, particularly those involving authentic documents, increased considerably. The execution judge is the central figure in the Montenegrin enforcement procedure. For each stage, and action, in the enforcement procedure the intervenience of the judge is necessary. It is logical that this causes a huge burden on the courts. For that reason, under the Strategy for the Reform of the Judiciary 2007-2012, the Montenegrin Government started the drafting of a new Law on Executive Procedures and a new Law on Public Enforcement Officers.<sup>66</sup>

The question was how to organize enforcement. Two different directions seemed possible: either strengthening the court enforcement procedure and (additionally) the position of the court enforcement officer or introducing an alternative for the court enforcement procedure through the introduction of private enforcement officers. To strengthen the role of the court enforcement officer it seemed necessary to reform the education system: legal knowledge is an absolute necessity to reduce workload of the overburdened courts. In addition to a professional exam, these court enforcement officers would have to attend professional development courses and have their knowledge tested regularly. The State needs to invest in an improved enforcement system: storage facilities, cars and other equipment and salaries. The second alternative reduces the burden of enforcement on the State budget. In addition the introduction of a private enforcement system improves employment as the public enforcement officer will also hire staff. Public enforcement officers also seems to be more motivated: it is in their interest to settle the creditor in an expedient and quality manner because that leads to his own income.

These are a few of the arguments pro and contra the Working Group discussed. It does not come as a surprise that the Working Group unanimously advised the Minister of Justice to introduce the private (public) enforcement officer and started working on two legislative draft proposals.

Under these draft laws the existing legislative framework, mainly the MLEP, undergoes substantial changes. The main issue is that the draft legislative framework introduces the (private) Public Enforcement Officer (PEO). Until the DMPEO is fully implemented, the courts will also continue to carry out enforcement as outlined in the new Enforcement Law, DMEPA, to accommodate an orderly transition process.

The new public enforcement officer is given wide powers. For example the public enforcement officer is given an exclusive authority to order enforcement on the basis of an authentic document. This way the Working Group intends to solve one of the obstacles we already mentioned in the previous paragraph: the unpaid utility bills for water, electricity, and mobile phones. As we already noted in paragraph 9.2.3. these cases cause an enormous labor-intensive workload for the courts. According to the DMEPA the excerpts from business books showing tariff of utilities (water supply, heating, waste disposal), electricity, telephone bills and other similar services can be considered authentic documents.

The (future) public enforcement officer will have a law degree and at least two years of experience in enforcement or three years in law related service. Other requirements to be appointed as a public enforcement officer are more private system orientated: business capacity, no bankruptcy proceedings pending, no record of prior convictions for a crime punishable by an unconditional punishment for minimum 6 months and a liability insurance.

The court will still have a task in the organization of the enforcement process: the chief justice of the court in the territory where the public enforcement officer is appointed can ask the Ministry of Justice to perform supervision over the lawfulness of the work of the enforcement agent or to initiate disciplinary proceedings. Furthermore the public enforcement officer reports annually on the work performed to the competent chief justice.

<sup>66</sup> DMEPA: Draft Montenegro Enforcement Procedure Act.  
DMPEO: Draft Montenegro Law on Public Enforcement Officers.

Also relating to certain enforcement procedures certain tasks will remain within the competence of the court. According to the proposed draft the court will have exclusive jurisdiction over enforcement concerning the surrender and taking away of a child, concerning reinstatement of employees, and for cases under which a judgment debtor must conduct an action that no other person may conduct in his stead by law or in a legal transaction. In addition the court also has exclusive jurisdiction to issue judgments on application to order security, application for counter-enforcement and for judgment creditor's request for payment of court penalties.<sup>67</sup> In these cases, the court keeps jurisdiction and sees these issues taken care of by court enforcement officers.

The Working Group proposes to redefine enforcement documents. Under the proposal enforcement documents include mortgage agreements, a statement of pledge composed in line with regulations governing mortgages and certain notary documents.

A more detailed description of authentic documents is also proposed: certain bills of exchange and protested cheques; certain bonds or other securities issued in the series that gives the bearer the right to payment of par value; invoices; the aforementioned excerpts from business books showing tariff of utilities (water supply, heating, waste disposal), electricity; telephone bills and other similar services; bank guarantees; letters of credit; certified statements by a judgment debtor authorizing a bank order to transfer money from his bank account into the account of the judgment creditor; the calculation of interest with evidence of maturity and amount of claim.

As said before, the Working Group proposes to exclusively authorize the public enforcement officer to order enforcement in these cases. The enforcement judgment given by a public enforcement officer should impose an obligation on the judgment debtor to satisfy the claims together with the estimated costs within eight days from the service of the judgment, and in case of disputes related to bills of exchange and cheques within three days from the service of the judgment, and order enforcement for forced collection of such debts.

The service of documents should be conducted by the public enforcement officer, either directly or by registered mail. The debtor should pay the fee for such service.

When the domicile or residence, or seat of the party, whose document is served, is unknown to the public enforcement officer, or when the public enforcement officer can not successfully serve the document by direct service, or mail, the public enforcement officer does the service by way of public announcement: the public enforcement officer shall publicly announce the service by publishing the document in two successive issues of a daily newspaper circulated on the whole territory of Montenegro.

Under the present law<sup>68</sup> the Court orders enforcement by those means and over those objects which have been specified in the motion for execution. If more than one means or more than one object of execution has been suggested by a judgment creditor, the court automatically limits the execution only to some of those means or objects if they suffice for the realization or securing of the claim. In case the decision on execution on a certain object or means cannot be enforced, the judgment creditor may, for the purpose of settling the same claim, propose new means or objects of execution, which shall again be decided by court decision.

In order to make enforcement procedures more simple and effective this provision in the draft proposal is changed. Also wide powers will be given here to the public enforcement officer.

According to the draft proposal enforcement shall be conducted by those instruments and on those objects as listed in the claim. However, when the instruments and objects of enforcement are not proposed in the claim, the public enforcement officer shall conduct enforcement through instruments and on objects that he considers to be the most appropriate and that he believes will ensure the most favourable settlement of the judgment creditor. The judgment creditor may require from the public enforcement officer to take all enforcement measures without limitations, or condition taking some measures on his prior consent.

### 9.3 Training of professionals involved in enforcement

#### *Judges*

Training for judges is delivered in Montenegro through the Judicial Training Centre. Judges are receiving initial and ongoing training there. Especially in small courts difficulties have arisen as in those courts no

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<sup>67</sup> Art. 3 DMEPA.

<sup>68</sup> Art. 30 MLEP.

specialisation of judges is possible. In those courts judges have to deal with cases from numerous different fields. In these courts usually it is the chief justice, who is working on enforcement cases. The Judicial Training Centre has started with some ad-hoc training activities regarding the enforcement procedure.

### ***Court Clerks***

Currently court clerks do not receive any special training (on enforcement) at all. There is even not a profile defined for persons, who can apply for the post of court enforcement officer. Usually candidates have 12 years of school education.

An institution, which could deliver the training, does not exist<sup>69</sup> and consequently newly appointed clerks are mainly trained in service through older and seasoned colleagues. This leads to a very unstructured education and a heterogeneous level of knowledge among active court clerks. The unregulated on the job training is in no way sufficient in order to achieve a professional enforcement process.

Recently some initiatives have been taken to design a more comprehensive training program. Several members of the Working Group drafting a proposal for new enforcement legislation will be involved in the development of training courses and training materials for both judges, court enforcement officers and (in the future) the public enforcement officers.

### ***The draft law on enforcement and security***

The Judicial Training Centre in cooperation with the Human Resource Management Agency of Montenegro is developing training courses for both judges, court enforcement officers and the future public enforcement officers in the new legislative framework of enforcement.

## **9.4 Ethics, monitoring and control, disciplinary issues**

### ***Judges***

Judges are operating under a special Code of Ethics, their disciplinary responsibility is regulated in the Law on the Courts.<sup>70</sup> In case of breach of obligations or tarnishing of office they are subject to the following disciplinary sanctions: a reprimand or wage reduction of up to 20% for up to six months.<sup>71</sup>

A proposal for the establishment of the disciplinary responsibility of a judge is submitted to the Disciplinary Committee of the Judicial Council by the President of the court, the President of the immediately higher court and the President of the Supreme Court within the time period of 15 days as of the day he or she learns of the reasons prescribed by Article 45 of this Law and not later than 60 days from the day these reasons emerge.<sup>72</sup> The proceedings to establish disciplinary responsibility of a judge must be completed within three months after the day the proposal was submitted. Should the proceedings not be completed within three months they shall be deemed suspended.

The Disciplinary Committee of the Judicial Council comprises of a Chairman and two members, who will be appointed by the Judicial Council from amongst its members. During the procedure, the Disciplinary Committee hears the judge whose liability is examined and provides evidence necessary for a correct and complete ascertainment of facts. In the procedure of establishing the responsibility of a judge the Disciplinary Committee may: reject the proposal as unfounded; accept the proposal and impose a disciplinary measure; terminate the proceedings if it is established that there are reasons for the removal of the judge and refer the case to the Judicial Council.<sup>73</sup> A complaint against the decision of the Disciplinary Committee may be filed with the Judicial Council within eight days of the receipt of the decision. The complaint may be filed by the person who has submitted the initial complaint and the judge whose responsibility is being established and his/her defence counsel. When acting upon a complaint the Judicial Council may:

- 1) Dismiss the complaint as untimely and inadmissible;

<sup>69</sup> The mandate of the JTC does currently not allow to use resources for the training of court staff.

<sup>70</sup> Chapter 4, Law on Courts 2002.

<sup>71</sup> Art. 44 Law on Courts 2002.

<sup>72</sup> Art. 46 Law on Courts 2002.

<sup>73</sup> Art. 50 Law on Courts 2002.

- 2) Reject the complaint as unfounded;
- 3) Vacate the decision and remand the case to the Disciplinary Committee for reconsideration;
- 4) Revise the decision of the Disciplinary Committee.

### ***Court Clerks***

Montenegro has no separate code of ethics for court clerks. That is why the ethical code for civil servants is also applied for court clerks. As described in connection with other countries, it is at least doubtful whether such a general code can be sufficient for the profession of court clerk and especially those court clerks, who are working in the field of enforcement.

## **9.5 Working circumstances, remuneration**

### ***Judges***

Judges in Montenegro enjoy - after a recent increase - a monthly salary of approximately 1000 Euro.<sup>74</sup> Having said this, one has to take into account that the increase of the salary came in a package with the introduction of an additional working day per week. Beginning with the day on which this regulation entered into force judges now have to work a sixth day per week. This measure is meant to reduce the huge backlog of cases.

Working conditions for judges are quite modest. Not all can make use of proper working space and/or equipment.

### ***Court Clerks***

Court Clerks are suffering from bad working conditions. Besides the lack of proper working space, court clerks have no access to any means of transport, which makes it difficult to fulfil their duties (it makes it for example difficult to seize things etc.). Clerks receive a civil servant based salary without any incentive for successful enforcement. Salaries are in line with those of other civil servants. The salary depends on the education (high school/universities) and is in average 250 Euro. Liability for damages lies with the state and the state is not passing this liability along to its civil servants.

Offices of clerks are not equipped with any kind of IT equipment, which makes it very difficult to track cases and to handle the huge backlog.

The lack of equipment and low salaries can be seen as a mirror of the poor reputation of the service and they contribute to the very low effectiveness.

## **9.6 Service of documents**

Under the present law<sup>75</sup> the service of documents in the enforcement procedure is carried out in accordance with the relevant provisions of the Civil Procedure Code. The Civil Procedure Code provides a very detailed description of the method of service.<sup>76</sup> The delivery is made by post, through an authorized legal person registered to conduct delivery, directly to the court or in some other way stipulated by law. Delivery can also be done by e-mail. In that case it will be considered served at the moment it has been sent by e-mail.<sup>77</sup> If no service could be carried out in accordance with the provisions of Civil Procedure Law, the service shall be carried out through posting on the notice board of the court, and shall be deemed carried out on the eighth day following the posting on the notice board.

Delivery to state organs and legal persons is done by delivery to the person authorized to receive them or to the employee who happens to be in office or business premises. Delivery to a legal person can also be done throughout its business unit if a dispute stems from legal relationship within that unit.<sup>78</sup> If a legal

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<sup>74</sup> Figures 2008.

<sup>75</sup> Art. 7 MLEP.

<sup>76</sup> See artt. 127-148 Montenegro Civil Procedure Code.

<sup>77</sup> Art. 127 Montenegro Civil Procedure Code.

<sup>78</sup> Art. 128 Montenegro Civil Procedure Code.

representative, agent or attorney represents the party, the delivery shall be made to the legal representative, agent or attorney.<sup>79</sup>

The service is carried out every day between 07h00 and 20h00, to the apartment or working place of the person to whom delivery needs to be made or within the court when the person happens to be there. In case the documents cannot be delivered at this address and at the mentioned time, it may be served at anytime and anywhere.<sup>80</sup>

In case the person to whom the service is directed is not found at his place of residence, the document can be delivered to an adult household member who is obliged to accept it. If there are no household members, service shall be completed by serving the document on a landlord or a neighbor if they agree to accept it. In case of refusal by such a person without having any legally acceptable reason, the deliverer leaves the document in the apartment or the premises where the person works, or puts up the document on the door of the apartment or the business premises. He shall note the date, the hour, the reasons for refusing acceptance, and the place where the pleading was left on the proof of service whereby the pleading shall be considered served. In case service cannot be made timely the documents are returned to the court with a note designating the whereabouts of the person to whom the delivery is to be made.

As said: service on a legal person is effected on the address as registered in the public register. In case such a service cannot be delivered to the address for the receipt of official documents listed in the register, the delivery is done by posting the pleading on the court notice board.<sup>81</sup>

In case the service on a natural person is not possible, the delivery is made in such a way that the deliverer returns the documents to the court which has ordered the delivery, or if the service is done by post, to the post office of his permanent residence, leaving at the door, or in the mail box at the address of his residence a notice in which it is specified where the writ is and the term of fifteen days in which the receiver has to accept the delivery. If the recipient fails to pick up the writ within fifteen days, it is considered that the delivery was made on the day when the notice was left on the door or in the mailbox.<sup>82</sup>

Both the recipient and deliverer sign the certificate of performed delivery (the so-called delivery note). The recipient shall write on the delivery note legibly, in letters, the date of receipt. If the recipient is illiterate or unable to sign the delivery note, the deliverer indicates in the delivery note the reason why the recipient did not put his signature on the delivery note. If the recipient refuses to sign the delivery note, the deliverer shall indicate that on the delivery note and put in letters the date and place of delivery and thereby it will be considered that the delivery has been performed. If the documents were served on another person, and not on the person to whom the delivery is directed, the deliverer shall indicate the relationship between that person and the person to whom the pleading was to be delivered. If the date of the delivery has been incorrectly indicated on the delivery note, the delivery shall be considered made on the date when the pleading has actually been handed. If the delivery note has disappeared, the delivery can be proved in another way.<sup>83</sup>

How do these extensive legal provisions work in practice?

As in the other Western Balkan countries in Montenegro the problems in the service of documents are numerous. In 2005 a roundtable entitled "Service of Process: Is There a Better Way?" was held. The participants included court administrators from all Montenegrin courts, presidents of several basic courts, representatives of the Ministries of Economics, Justice, and Internal affairs, the Postal Service, the bar, USAID and international consultants. The conclusions of this roundtable give a clear overview of the problems that prevent an effective service of documents:

- Insufficient number of court couriers;
- Incomplete or incorrect party contact information, e.g., addresses, telephone numbers, mobile telephone numbers, et cetera;
- Lack of communication and cooperation among the Postal Service, courts and responsible administrative bodies;
- Lack of adequate training for court and postal employees;

<sup>79</sup> Artt. 133 and 134 Montenegro Civil Procedure Code.

<sup>80</sup> Artt. 135-139 Montenegro Civil Procedure Code.

<sup>81</sup> Art. 140 Montenegro Civil Procedure Code.

<sup>82</sup> Art. 141 Montenegro Civil Procedure Code.

<sup>83</sup> Art 146 Montenegro Civil Procedure Code.



- Lack of a separate, unique Postal Service department responsible and accountable for all service of process;
- Lack of current technical capability for e-service.

Based on the conclusions an Action Plan was developed:<sup>84</sup> "Effective service of process is the first step toward efficient administration of justice; it reduces delay and contributes to the elimination of the courts' caseload backlog by ensuring that litigants receive timely notice of scheduled events or required documents necessary to prosecute a lawsuit or other legal matter. Montenegro's court administrators, presidents of several basic courts, representatives of the Ministries of Economics, Justice, and Internal Affairs, Montenegro's Postal Service, and USAID representatives participated in the roundtable. As a result of the intense discussions stemming from presentations at the event, the participants produced an Action Plan that was to be implemented within an approximate 90 day time period. The plan consisted of many points, but it primarily was focused on three key aspects:

- Pursuant to Article 135 of the new Civil Procedure Law, the working hours of the courts' couriers will be changed to enable them to serve process during times when it is expected that most parties are likely to be at home (after 3:00 pm daily and on Saturdays);
- The court administrators will meet with representatives of the Postal Service in their respective municipalities to formulate a strategy for change and a methodology to monitor the impact of results, as well as inform the local media of these efforts; and
- Plaintiffs' private attorneys will be responsible for serving process on opposing counsel as well as the parties to their respective cases."

The Postal Service, based on the aforementioned conclusions decided to adopt a number of measures to combat ineffective service of process. In cooperation with the Montenegro Court Administrators Association (MCAA) a training program was developed for the Postal Service delivery personnel.

"The Project monitored progress in the basic courts with respect to the service of process issue, and discovered that the courts' were in fact realizing a slow, but steady upward trend in the percentage of legal documents that were served in a timely manner. Moreover in interviews with judges, the Project ascertained that there were fewer cases that were being delayed due to service of process problems. The workshop provided tangible results,"<sup>85</sup> concluded the USAID Project that organized the aforementioned roundtable.

Despite this, there are still numerous problems with the service of documents. As an example of those problems Durutovic notes: "Specific features of delivery to legal persons have especially come to the fore. Namely, if a delivery cannot be made to the address from the register of legal persons, the delivery takes place through the court's notice board. The posting on the notice board is preceded by an attempt of delivery to the person indicated as the representative in the register. The ratio legis for this stand is in the existing compulsory annual renewal of the registration (using the application system) and special obligation to submit information about the change of seat and address. This type of failure to act by a large number of small and even medium enterprises, especially if they fail both to extend their registration and notify about the change of address, can be considered in practice as the abuse of the legal person status for the purpose of evading obligations towards third parties. For this purpose, creditors who request enforcement protect their interests by initiating a separate litigation procedure on the basis of unlimited liability of one or several owners for the obligations taken by the legal person, in keeping with the Law on Companies."<sup>86</sup>

The aforementioned Working Group proposes in her draft the involvement of the public enforcement officer in the service of documents.<sup>87</sup> Such a service should be effected either directly or by registered mail. The costs of the service should be charged to the recipient. Another novelty the Working Group proposes is the public announcement of documents served in a daily newspaper instead of announcement through posting on the notice board of the court.

84 Summary of Project Accomplishments Justice System Reform Project July 1st 2003- March 31st 2007, USAID/ Checchi Consulting, page 24-25.

85 Summary of Project Accomplishments Justice System Reform Project July 1st 2003- March 31st 2007, USAID/ Checchi Consulting, page 25.

86 New enforcement legislation of the Republic of Montenegro and its implementation, Emilija Durutovic, LL.M., Podgorica October 2007, page 4.

87 Art. 29 DMEPA.

## Chapter 10: Serbia

### 10.1 Political context

#### *Government Strategy*

In April 2006 the Serbian Ministry of Justice published a National Judicial Reform Strategy.<sup>1</sup> The Serbian Assembly adopted the Strategy in May 2006. “There is a compelling need for the implementation of strategic reforms at all levels of the judicial system in order to establish the rule of law and legal security in the Republic of Serbia. The need for reform is caused by a sharp conflict between the outdated political and legal system based on the 1990 Constitution and the new social relations based on completely different principles and values. The constitutional principles of the current Constitution can no longer be compensated with new modern laws, and they created a judicial system susceptible and open to inappropriate influences. The administration of justice in such circumstances has led to the damage to the reputation of the judiciary as an institution of state. Public trust in such judicial system is fragile”, opened the Strategy.

Although the “difficult enforcement of court judgments”<sup>2</sup> was assessed as one of the weaknesses in the legal system, the Strategy itself does not deal with enforcement procedures or the organizational aspects of enforcement. The Strategy mainly focuses on the institutional and organizational aspects of all players in the judicial system, with, as said, the exception of the enforcement official.

#### *European Commission Progress Reports*

On several occasions the enforcement system of Serbia has been criticised by the European Commission. The Serbia 2007 Progress Report does not explicitly mention problems with enforcement. However, in a broader perspective it is mentioned in the context of the judicial system: “Overall, there has been little progress in the judiciary which is a key priority of the European Partnership - and the new legal framework is still pending. At present, the constitution and the constitutional law leave room for political influence over the appointment of judges and prosecutors. Further efforts need to be made to ensure the independence, accountability, and efficiency of the judicial system”<sup>3</sup> [...] “Overall, the judicial system continues to suffer from slow and inefficient court proceedings, poor case management and limited administrative capacity. These circumstances deter economic operators from taking cases to court and undermine effective enforcement of creditor and property rights.”<sup>4</sup>

We already referred to the National Judicial Reform Strategy. “The state that aspires to the rule of law and organization based on the constitutional principle of the division of power needs independent courts and autonomous and independent judges. This comes, on the one hand, from the need to achieve the necessary balance between the other two branches and prevent the prevalence of one over the other, and, on the other hand, to protect individual freedoms and civil rights. The new Constitution must stipulate and guarantee the independence and autonomy of the judiciary honoring the principle of the division of power based on the checks and balances between the three branches,”<sup>5</sup> stated the Reform Strategy.

However in 2008 key legislation necessary for implementation of the new Constitution and the judicial reform strategy was not adopted. “In the absence of new legislation, no new judges or prosecutors are being appointed and vacant positions are not being filled. At the same time, some 200 judges who fulfil the criteria for retirement are still in office, as parliament has not yet taken the decision necessary to relieve them from active service. These factors severely undermine the efficiency of the judiciary”, concluded the European Commission in its 2008 Progress Report. “To counterbalance the influence of parliament over appointing judges and prosecutors, objective selection criteria have been developed including a plan to introduce two years of initial training for all judges plus a final exam. However, in the absence of the new law on the judicial academy, these criteria have not been applied. Furthermore, objective criteria have not yet been established for appointments to be made during the interim period between adoption and full

1 Serbia National Judicial Reform Strategy, page 3.

2 Serbia National Judicial Reform Strategy, page 3.

3 Serbia 2007 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2007-2008, European Commission, 6 November 2007, SEC(2007) 1435, hereafter called Serbia 2007 Progress Report, page 10.

4 Serbia 2007 Progress Report, page 23.

5 Serbia National Judicial Reform Strategy, page 5.

implementation of the new law. No decision has been taken on proposals to re-appoint all practising judges and prosecutors. Concerns remain that such a re-appointment exercise could be affected by undue political influence and disrupt the functioning of the judiciary.”<sup>6</sup>

It is clear that such a situation has its influence on the workload of the courts. No progress was made in comparison with 2007, the European Commission concluded: “[t]he significant backlog in civil, criminal and commercial cases remains a serious cause for concern, as are the delays in enforcement of court decisions. In the absence of efficient court management systems and of legislation streamlining procedures, the Serbian judiciary has been unable to reduce the number of pending cases or average length of proceedings. The efficiency of the court system is, moreover, hampered by the uneven workload of courts and judges.”<sup>7</sup>

Serbia is a potential candidate for EU membership. On 29 April 2008 Serbia signed a Stabilisation and Association Agreement and an Interim Agreement on trade related measures with the EU. Since then the Serbian Government has been drafting a large number of bills aimed at further alignment of national legislation with European standards. “However, the quality has varied considerably across ministries and the Legislative Secretariat has not been given sufficient time to check thoroughly compatibility with existing national legislation” the 2009 Progress Report concludes.<sup>8</sup>

Regarding the judicial system the European Commission seems positive: “There has been progress in the reform of the judicial system, which is a key priority of the European Partnership. In December 2008 a set of judicial laws were adopted, introducing a broad reform of the judiciary. They included laws on the High Judicial Council, on judges, on the organisation of courts, on the State Prosecutorial Council and on the public prosecution service.”<sup>9</sup>

However, the European Commission continues “despite attempts to implement a special programme, the significant backlog in civil, criminal, commercial and administrative cases remains a cause for concern. Enforcement of judgments remains inefficient. There is an important need to streamline court procedures and improve court management systems. [...] Overall, Serbia is moderately advanced in the area of reform of the judiciary. There has been progress in the form of adoption of a new legislative framework and steps to implement it. However, the ongoing reform and its partly hasty implementation pose big risks for the independence, accountability and efficiency of the judiciary. [...] With regard to the legal system, some progress can be reported in a number of acquis-related areas. However, a number of reform-related laws have been held up and implementation of the existing laws is sometimes weak. The courts and administrative bodies sometimes lack the technical capacity and personnel to perform their activities properly and promptly, and corruption remains prevalent in many areas. This has led to inconsistent implementation and very lengthy procedures, which frequently exceed the deadlines set by law. Overall, weaknesses in the judiciary continued to limit legal predictability and to undermine trust in the legal system among economic operators, in particular as regards effective enforcement of property rights.”<sup>10</sup>

Concerning these property rights the European Commission explicitly refers to the restitution process: “With regard to property rights, Serbia has adopted a new law regulating private ownership of urban construction land. However, the continued lack of a legal basis prevents proper launching of the restitution process. Privatisation of some of the properties in dispute has continued with the risk of de facto prejudging future decisions on the return of property. The restitution process faces greater uncertainty, as a result of the economic crisis and consequent limited budgetary resources.”<sup>11</sup>

Was 2010 any better? We already indicated that Serbia is participating in the EU Stabilisation and Association Process. This Stabilisation and Association Agreement (SAA) provides a framework of mutual commitments on a wide range of political, trade and economic issues. The SAA was signed, along with the Interim Agreement, in April 2008. On 22 December 2009, the Serbian President and Prime Minister handed over the country’s application for EU membership. The Interim Agreement entered into force on 1 February 2010. This means that also from the EU point of view certain reforms are necessary. “The government remained

6 Serbia 2008 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2008-2009, European Commission, 5 November 2008, SEC(2008) 2698, hereafter: Serbia 2008 Progress Report, page 11-12.

7 Serbia 2008 Progress Report, page 12.

8 Serbia 2009 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2009-2010, European Commission, 14 October 2009, SEC(2009) 1339, hereafter Serbia 2009 Progress Report, page 8.

9 2009 Serbia Progress Report, page 11.

10 2009 Serbia Progress Report, page 12 and 27.

11 2009 Serbia Progress Report, page 17.

stable and continued to demonstrate a high degree of consensus on EU integration as a strategic priority. The government continued to implement provisions of the Interim Agreement of the SAA in line with the agreed liberalisation schedule and took additional measures in the areas of competition and state aid. [...] The government has been drafting a number of bills aimed at further alignment of national legislation with European standards. However, the quality of the legislation was uneven and continued to be affected by inadequate impact assessment of proposed acts. The government lacks coherent rules and practices for public consultations. Effective implementation and monitoring of the adopted legislation still need to be improved”, the 2010 Progress Report concludes.<sup>12</sup>

The 2010 Progress Report continues: “Serbia made little progress towards further bringing its judicial system into line with European standards, which is a key priority of the European Partnership. [...] New Court Rules of Procedure were adopted in December 2009. They regulate the work of courts and the internal organisation of the new court network. [...] The reappointment procedure for all judges and prosecutors was carried out under the lead of the Ministry of Justice in the second half of 2009 and took effect as of January 2010. The overall number of judges and prosecutors was reduced by 20–25%. More than 800 judges were not reappointed, out of previously around 3.000 judges and misdemeanour judges. A new structure of the court network was implemented as of January 2010. The 138 municipal courts were reorganised into 34 basic courts. In addition, there are 26 higher courts, 4 courts of appeal and the Supreme Court of Cassation. [...]

However, major aspects of the recent reforms are a matter of serious concern. [...] The planned new Criminal Procedure Code, the new Civil Procedure Code, the law on enforcement of judgments and the law on notaries have not been adopted. The large backlog of pending cases remains a matter of concern, in particular as the recent reforms impacted negatively on the overall efficiency of the judicial system. The reduction of the number of judges and prosecutors was not based on a proper needs assessment. Under the new court system, courts which were closed continue to function as court units, in which civil cases are heard. This means that judges and judicial staff have to travel between courts and court units requiring significant resources and creating security concerns. A uniform system for organising the work of the court seats and the new court units has not been established.

Case registration and the IT system connecting all courts and court units and allowing access to files are not fully operational. [...] The European Court of Human Rights (ECtHR) delivered since October 2009 45 judgments finding that Serbia had violated the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Over the same period, a total of 1364 new applications were made to the ECtHR. The largest number of judgments refers to the violation of the right to a fair trial due to the length of the procedure. As of September 2010, there were over 3,000 eligible cases pending before the ECtHR regarding Serbia.”<sup>13</sup>

### ***Recent developments***

In 2006 and 2007, the USAID funded Bankruptcy and Enforcement Strengthening (BES) Project prepared a baseline assessment of enforcement law in Serbia and an overview of developments in neighbouring countries. The findings of these reports were discussed in the fall of 2007 and, based on the discussion that followed, the Serbian government created a working group, entrusted with the elaboration of proposals to make enforcement law in Serbia more efficient. The working group was created under the auspices of the Ministry of Justice at the end of 2007 and this working group later turned into a law drafting committee. The committee is comprised of Ministry of Justice representatives, academics, judges, creditor representatives, private attorneys, representatives from the Ministry of Finance and the National Bank of Serbia. Due to the discussions on the reform of the judiciary (see also the remarks made by the European Commission) it took some time before a first draft was published.

On February 9, 2010 during a conference that was jointly organized by the Serbian Ministry of Justice and the United States Agency for International Development (USAID), the American Ambassador to Serbia Mary Warlick and the Serbian Minister of Justice Snežana Malović presented the first draft of a new enforcement law. In this draft proposal significant reforms to the current enforcement law, including the introduction of a system of professional enforcement, were proposed.

12 Serbia 2010 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2010–2011, 9 November 2010, SEC (2010) 1330, hereafter called the Serbia 2010 Progress Report, page 7–8.

13 Serbia 2010 Progress Report, page 10–12.

The public debate based on this draft finally lead to a draft law that was approved by the Government at the end of 2010. It is to be expected that the draft law will be adopted by the Serbian Parliament in the course of 2011.

## 10.2 Legislation and organization of the enforcement process

### 10.2.1 Legislation

The Law on Enforcement Procedure<sup>14</sup> in Serbia was introduced in 2004. The SLEP is in force since February 23, 2005. Besides this law a number of other laws are relevant as they offer alternatives to court enforcement: the Law on Mortgage (2005), the Law on Registered Charges on Movable Assets (2003) and the Law on Financial Leasing (2003).

### 10.2.2 The enforcement process

In paragraph 9.2.2. when describing the Montenegro enforcement system we already referred to the principle of formal legality: an enforceable document such as a court decision rendered in a civil or another procedure, may not be re-examined, changed or adjusted in any way. Also the Serbian law on enforcement procedure in article 7 SLEP recognizes this principle: when all requirements for issuing an enforcement order and carrying out the enforcement have been met, the court issues a decision on enforcement and undertakes the necessary enforcement measures.

The enforcement is conducted during daytime on working days, before 8 PM. Enforcement on nonworking days or during the nighttime is only possible if there is a risk due to delay and by a conclusion of the court.<sup>15</sup>

#### *Enforceable documents*

Unless this Law provides otherwise, enforcement can only be ordered on the basis of executive title or authentic document.<sup>16</sup> What can be considered enforceable documents? Article 30 SLEP defines the enforceable titles: an enforceable court decision or enforceable court settlement; an enforceable decision issued in an administrative and misdemeanor procedure and settlement in an administrative procedure, stating entitlement to payment of a monetary obligation, unless a specific law provides otherwise and other documents designated as enforceable title by law.

A court decision ordering the satisfaction of a claim is enforceable if it becomes final and if the time period for voluntary compliance has expired.<sup>17</sup> The voluntary compliance period starts on the date on which the decision is delivered to the enforcement debtor and expires on the last day of the period stated in either the court decision or the law. A court decision ordering abstention from action is enforceable when it becomes final, unless the executive title states a later deadline for compliance with such obligation. A decision issued in an administrative procedure is enforceable if it has become enforceable in accordance with the rules governing such procedure. Under certain conditions enforcement can be granted of a non-final court decision or a non-final administrative procedure decision. This is the case if the law provides that an appeal does not suspend the enforcement.

A court settlement and administrative procedure settlement is enforceable if the claim has matured. Such a maturity of the claim can be proved by the minutes or record of the settlement, an official document or a document certified in accordance with law. In case maturity cannot be proved an effective and/or final decision issued in litigation or administrative procedure is necessary.<sup>18</sup>

Enforcement of a monetary claim can also be granted on the basis of an authentic document: a bill of exchange or cheque, with protest and with a return documentation if necessary for establishment of a claim; bonds and other serial securities entitling their holders to be paid in their nominal value; an invoice (bill); a business book excerpt for the price of utilities, water, heating, garbage collection and similar services; an official document constituting an enforceable monetary obligation, except foreign official documents; a bank guarantee; letter of credit and judgment debtor's certified statement authorizing the enforcement creditor to transfer funds.<sup>19</sup>

14 Hereafter called: SLEP: Serbia Law on Enforcement Procedure (Zakon o izvršnom postupku) , published in "Official gazette of the Republic of Serbia", no. 125/04.

15 Art. 55 SLEP.

16 Art. 29 SLEP.

17 Art. 32 SLEP.

18 Art. 33 SLEP.

19 Art. 36 SLEP.

The authentic document is only suitable for enforcement if it designates: the enforcement creditor, the enforcement debtor, the object of enforcement, and the type, scope and time period for fulfillment of the obligation. A same requirement can be found for other executive titles.<sup>20</sup> In case the claim or obligation is transferred to another person who has not been designated as enforcement creditor in the executive title, enforcement is granted on the motion and in favor of such a person provided the transfer can be proved by an official document or a legally attested document or, if this is not possible, a final and enforceable court decision in litigation or decision issued in an administrative and misdemeanor procedure. This also applies to the third party who has not been designated as enforcement debtor in the executive title.<sup>21</sup>

### ***Initiation of enforcement procedure***

The enforcement procedure and security procedure are initiated on a motion of an enforcement creditor or ex officio.

The motion to enforce should also indicate the means and objects of enforcement and other data necessary for carrying out of the enforcement.<sup>22</sup>

The enforcement is ordered and conducted by the court where the enforcement debtor has residence or seat.<sup>23</sup> Where the motion to enforce is not submitted to the court that decided on the claim in the first instance, the motion needs to be accompanied by an original or certified copy of the executive title with certification of enforceability. This certification of enforceability needs to be issued by the court or other authority that has decided on the claim in the first instance.<sup>24</sup>

A court ruling is issued in the form of a decision or a conclusion. A conclusion instructs the court enforcement officer, other court official or other person to carry out specific actions and decides issues regarding management of the procedure.<sup>25</sup>

Based on SLEP the court decides on a motion to enforce within three days following its filing. If the motion to enforce is based on a foreign executive title that has not yet been recognized by a domestic court, the court shall decide on the motion within 30 days following its filing. According to article 5 SLEP acting contrary to these time limits shall be considered to be unconscionable and unprofessional behavior of the judge in the sense of the Law on Judges.

Cases are administered in the order of their submission, unless the nature of the claim or other special circumstances warrant otherwise. In case more than one enforcement creditor is enforcing his monetary claims against the same enforcement debtor and against the same object of enforcement, satisfaction is effected in the order of acquiring the right to satisfaction from such object. In case there is a concurrent ongoing enforcement procedure before another state authority pursuant to provisions regulating priority of enforcement before that particular authority, the court suspends its enforcement procedure.<sup>26</sup>

### ***Decision on execution***

The decision on enforcement includes the executive title or authentic document and the means and objects of enforcement. In case of a decision on enforcement based on an authentic document the court shall obligate the enforcement debtor, within a deadline of eight days, and in disputes on cheques and bills of exchange within three days, after the delivery of the decision, to settle the claim including the adjudicated costs.<sup>27</sup> In case the decision as an executive title does not state a deadline for voluntary compliance with the claim, the deadline is also set in the decision on enforcement.<sup>28</sup>

As we already indicated the court grants enforcement or security by such means and on such objects as have been designated in the motion to enforce or the motion for security. In case more than one enforcement

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20 Art. 34 SLEP.

21 Art. 37 SLEP.

22 Art. 49 SLEP.

23 Artt. 2 and 3 SLEP.

24 Art. 50 SLEP.

25 Art. 9 SLEP.

26 Art. 6 SLEP.

27 Artt. 52 and 8 SLEP.

28 Art. 34 par 2 SLEP.



means or enforcement object has been proposed, the court may, ex officio or on motion of a party, limit the enforcement or security to certain means or objects only, if sufficient for satisfaction or securing of the claim.<sup>29</sup>

### ***The summary enforcement procedure***

The summary enforcement procedure is a special procedure that may be conducted if the enforcement creditor and the enforcement debtor are legal entities, entrepreneurs, or individuals conducting business activity for profit and have an account opened in accordance with provisions on payment transactions, or individuals having the status of debtor in a commercial credit contract.<sup>30</sup>

The summary enforcement procedure may be conducted on the basis of an authentic document that meets certain requirements: the document should prove beyond doubt the existence, the amount and the maturity of the claim. The summary enforcement procedure may not be conducted on the basis of a foreign official document. Art 253 SLEP particularly mentions: the bill of exchange or cheque, with protest and with documentation if necessary for establishment of a claim; the bond and other securities entitling their holders to be paid in their nominal value; the matured unconditional bank guarantee; the matured unconditional letter of credit; the enforcement debtor's certified statement authorizing the enforcement creditor to transfer funds; an official document constituting an enforceable monetary obligation; and every commercial contract, in writing and signed by authorized parties and authenticated by a court having jurisdiction, or by another authorized body in accordance with SLEP.

The enforcement creditor wishing to conduct summary enforcement on the basis of authentic documents is obligated to explicitly state so in the motion to enforce. If not, enforcement shall be conducted in accordance with the provisions regulating enforcement on the basis of authentic document.<sup>31</sup>

The enforcement debtor may file an objection against a summary enforcement decision within three days from the date the decision on summary enforcement decision has been delivered. When filing the objection the enforcement debtor is obligated to submit evidence of his objection.<sup>32</sup>

### ***Costs of enforcement proceedings***

The costs of a procedure for determining and conducting enforcement shall be advanced by the enforcement creditor. The court sets the time period for payment: not less than 30 and not more than 60 days. Enforcement is suspended if the costs are not advanced within such set period. The enforcement debtor is obligated to reimburse the enforcement creditor at his request for the costs necessary for enforcement. Such a request for reimbursement should be submitted no later than 30 days after the conclusion of the procedure. At the motion of a party the court shall decide on the costs in the enforcement procedure and shall grant enforcement for their collection.<sup>33</sup>

### ***Interest***

The interest rate is mentioned in the executive title and the enforcement decision. If a change in the default interest rate occurs after establishment of the executive title, the court shall, on motion of the enforcement creditor or enforcement debtor, state in its decision on enforcement the default interest at the changed rate.<sup>34</sup> For the enforcement of authentic documents the interest rate calculation is considered to be an invoice (bill).<sup>35</sup>

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<sup>29</sup> Art. 8 SLEP.

<sup>30</sup> Art. 252 SLEP.

<sup>31</sup> Art. 254 SLEP.

<sup>32</sup> Artt. 256 and 257 SLEP.

<sup>33</sup> Art. 43 SLEP.

<sup>34</sup> Art. 35 SLEP.

<sup>35</sup> Art. 36 SLEP.



### ***Fines and court penalties***

According to article 45 SLEP a fine may be levied against the debtor, the debtor's debtor, a bank or another natural person or legal entity, as well as the responsible officials of the legal entity, if they fail to comply with the order or ban issued in the enforcement procedure.<sup>36</sup>

Regarding the amount of the fine, SLEP makes a distinction between natural persons (fines in the amount of 3.000 to 150.000 dinars) and legal entities (fines in the amount of 30.000 to 1.500.000 dinars). The determination of the amount is depending on the economic strength or circumstances of the debtor, the significance of the action that should have been performed, and other circumstances of the case. In case the debtor fails to comply with a repeated order of the court or continues to act contrary to the prohibition, the fine may be levied again and in an increased amount, concurrently with the enforcement of the previous fine (up to 10 times the original fine). Before levying the fine the court shall hear the enforcement debtor.

In case of a non-monetary obligation the Court can order the debtor to pay court penalties providing this can be based on the law on contracts and torts.<sup>37</sup> The request for payment of court penalties may be filed before the motion to enforce is filed. Once the motion to enforce is received the court then shall remand the obligation to pay penalties in the future. The court order for penalties is enforced in accordance with the provisions of this Law which are applicable to enforcement of monetary obligations.<sup>38</sup>

### ***Service of the decision on execution***

In general the service in an enforcement procedure is based on the provisions of the Law on Civil procedure.<sup>39</sup> Art 35 SLEP provides that a decision on enforcement is served on the enforcement creditor and the enforcement debtor, unless the motion is rejected: in that case the decision rejecting the motion to enforce is served only on the enforcement creditor. Together with the decision on enforcement, also the motion to enforce is served on the debtor.

As a rule documents are served by mail.<sup>40</sup> However the Serbian Civil Procedure Code (SCPC) also allows service by a designated person of the court, by a competent municipal body or by a legal entity registered for delivery services. Service is carried out between 7:00a.m. to 10:00p.m. For service at another time a special court decision is necessary.<sup>41</sup>

If a party to be served with a document is not at home, the document is delivered to a grown-up member of the household who must receive the document. Should no one be at home, the document is delivered to a neighbor who agrees to receive the document. If service is to be effected at a workplace, and the party to be served is not there, the document may be delivered to a person who works there if they agree to receive it.<sup>42</sup> In case of refusal to accept the document the document is left in the home or office of the party to be served or is stuck to the door of the home or office. The person who effected the service notes the date, time and reason for refusing service on the note of delivery, as well as where the document was left. In such case art 138 SCPC considers the service effected.

Service on public authorities, local self-government authorities and bodies of other territorial organizations is done by delivering a document to the responsible person in the office for the reception of documents. Service on the state or public prosecutor or public attorney is effected by filing a document in the registration room. The date of service is the date of delivery to the registration room. Service on legal entities is effected by delivering a document in the premises of the entity, to an employee authorised to receive deliveries.<sup>43</sup>

36 See for example: art. 76 par 4 SLEP (removal of a copy of the inventory record or inventory mark in case of an inventory and publication of Court Lien); art. 153 SLEP (refusal of the enforcement debtor or third party to carry out a court order to submit documents that are necessary to prove the ownership of nonregistered immovable property); artt. 159 and 160 SLEP (decision of enforcement against a debtor's claim; failure of the debtor and the debtor's debtor to comply with the court order that prohibits the debtor's debtor from settling that claim with the debtor and prohibit the debtor from collecting such claim or disposing of it to a third party or to the debtor's debtor); art. 186 SLEP (failure of the enforcement debtor to state the name of his new employer); art. 211 SLEP (unjustified interference of persons with the enforcement by vacating and handover of immovable property); art. 217 SLEP (refusal of a debtor to perform a certain obligation that can only be performed by the debtor); art. 224 SLEP (failure to hand over a child to the parent or to another person or to the organization entrusted with care and custody of the child) and art. 229 SLEP (failure of an employer to carry out a court order based on an executive title ordering the employer to return an employee to work or to assign him to an appropriate work position).

37 Art. 46 SLEP.

38 Art. 47 SLEP.

39 Art. 10 SLEP.

40 Art. 127 SCPC.

41 Art. 134 SCPC.

42 Art. 135 SCPC.

43 Art. 128 SCPC.

Service on a legal entity is made to the entity's registered office as registered in the registry of business entities. If such service is unsuccessful, service is made to the address of a person authorized to represent the entity and who is registered in the registry. In case this remains unsuccessful, service is made on the posting board of the court. The service is considered successful upon expiration of eight days after the date of posting.<sup>44</sup>

Service on a citizen of Serbia who is abroad may be effected through the relevant consular or diplomatic representative of Serbia who is in charge of consular affairs in that country or an international legal entity registered for delivery services. Such a service is valid only if the person to be served agrees to receive the document. The service to legal entities with their seat abroad and an agency in Serbia may be effected to their agency.<sup>45</sup> If a party is represented by a legal representative or attorney, service is effected on the legal representative or (an employee in the office of the) attorney.<sup>46</sup> In case a party or his/her legal representative is abroad and there is no attorney in Serbia, the court will invite such a party to authorize, within a reasonable period of time, a person to receive documents related to the case in Serbia. If a party or his/her legal representative fails to do so, the court shall appoint such person at the expense of the party and so inform the party or his/her legal representative or attorney.<sup>47</sup>

Where service could not be effected, the documents to be served are put on the notice board of the court. The service is considered effected upon the expiry of 8 days after the day of putting the document on the notice board.<sup>48</sup>

Certain documents need to be served in person. Art 136 SCPC prescribes that a complaint, payment order, extraordinary legal remedy, judgment or decision that may be appealed needs to be served on a party in person or his/her legal representative or attorney. SCPC also gives a power to the court to decide on personal delivery if the court finds that the documents to be delivered require special precaution. In case the documents cannot be served in person or the person is not found where the document should be served a notice is left ordering the party to be served to be at home or at the workplace on a particular day and time. Should, after that, the person effecting service not find the party, the document can be delivered to a grown-up member of the household or to a neighbor who agrees to receive the document, or to a person who works there if they agree to receive it. In case this is not possible in time, the document shall be returned to the court with a note on the whereabouts of the party.<sup>49</sup>

From the service a note of delivery is made. This note is signed both by the addressee and the person effecting the service. If the addressee refuses to sign the note of delivery, the person effecting service shall write so on the note, as well as the date of delivery, whereby service is considered effected. If pursuant to law a document was delivered to a person other than the addressee, the person effecting service shall write a note on the relation of the two persons. If the date of delivery on the note of delivery is incorrect, the date of delivery is the date when the delivery was made.<sup>50</sup>

### ***Legal challenges: objection and appeal***

A legal challenge to an enforcement or security procedure is done in the form of an appeal or an objection and must be filed within three days after the date of delivery of the decision. Only in exceptional cases an appeal can be filed after this time limit.<sup>51</sup> In general an appeal shall not postpone enforcement.<sup>52</sup>

The legal challenge is only possible against a decision, not to a conclusion.<sup>53</sup> The decision on enforcement may be challenged by appeal, except in the case of a decision on enforcement issued on basis of an authentic document or a decision on enforcement in a summary procedure. These may be challenged by objection.<sup>54</sup>

<sup>44</sup> Art. 244 SLEP.

<sup>45</sup> Art. 130 SCPC.

<sup>46</sup> Artt. 132 and 133 SCPC.

<sup>47</sup> Art. 141 SCPC.

<sup>48</sup> Art. 140 SCPC.

<sup>49</sup> Art. 137 SCPC.

<sup>50</sup> Art. 144 SCPC.

<sup>51</sup> Art. 17 SLEP.

<sup>52</sup> Art. 12 SLEP.

<sup>53</sup> According to art. 9 SLEP a conclusion is an instruction from the court enforcement officer, other court official or other person to carry out specific actions or an instruction regarding management of the procedure.

<sup>54</sup> Art. 13 SLEP.

The grounds for an appeal are limited. The creditor can appeal insofar as it relates to costs of enforcement or the motion for enforcement is rejected. Art 15 SLEP describes the grounds for appeal by the debtor: challenge of the jurisdiction of the court that made the decision on enforcement; challenge of the enforceable document; time limits are not respected (deadline for satisfaction of the claim or period for postponement have not expired yet or the deadline for filing of motion for enforcement has expired); enforcement on exempted objects.

The reasons for appeal and the evidence on which the appeal is based need to be stated when filing the appeal. If not, no additional evidence can be submitted in the appeal procedure.<sup>55</sup> The appeal is delivered to the enforcement creditor, who may file a response to the appeal within three days after delivery. After this three day period the court schedules a hearing on the appeal.<sup>56</sup> The (first instance) court in its decision shall reject an appeal which is untimely, incomplete or inadmissible<sup>57</sup> or accept the reasons for the appeal, remand the decision on enforcement, terminate enforcement in whole or in part, and revoke actions already taken. This decision can be appealed to the second instance court.

The decision on enforcement based on an authentic document can be challenged in whole or in a part in which enforcement is granted through the procedure on objection. The court in which the challenge is made can revoke the decision on enforcement in the part in which enforcement is granted. In that case the court shall revoke actions already taken, and further procedures shall be carried out in accordance with the provisions on objection against payment order. In case the decision on enforcement is challenged only in that part in which the manner of the enforcement is stated, further procedures are carried out as a procedure on appeal from the decision on enforcement based on executive title. In case the objection is sustained, the part of the decision on enforcement that grants enforcement shall have the status of executive title on the basis of which enforcement may be requested against other objects.<sup>58</sup>

Third parties asserting rights in an object of enforcement that prevent the enforcement, may, at any time prior to conclusion of an enforcement procedure, file an objection with the first instance court asking the court to declare that enforcement against such object is inadmissible. Such an objection is served on the creditor with a request to respond on the objection.<sup>59</sup>

### ***Counter-enforcement***

After an enforcement has been carried out, the enforcement debtor may file a motion with the court for counter-enforcement in case the executive title has been revoked, reversed, or annulled or has otherwise become legally ineffective; the enforcement decision has been remanded or reversed by a final decision; or a final court decision has declared enforcement inadmissible (within 30 days after the delivery of the decision to the enforcement debtor); or in case the enforcement debtor has voluntarily paid the enforcement creditor's claim in the course of the enforcement procedure (within 15 days after the termination of the enforcement procedure).<sup>60</sup>

The motion for counter-enforcement is served on the enforcement creditor and orders the creditor to answer the motion within three days after the date of service. In case the motion is challenged the court issues a decision on it, with the possibility to conduct a hearing. In case the motion is sustained the court orders the enforcement creditor to return to the enforcement creditor, within eight days, whatever was received as result of the enforcement.<sup>61</sup> In case restitution is no longer possible (e.g. due to legal or factual change of the item) the enforcement debtor may resort to litigation.

### ***Determination of debtor's property***

Art 28 SLEP describes the statement of assets as: "a statement given by an enforcement debtor, under penalty of criminal liability before a court or other relevant body, which contains a list of all the assets of the enforcement debtor as well as all his claims, and states that such information is complete and accurate."

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<sup>55</sup> Art. 16 SLEP.

<sup>56</sup> Art. 18 SLEP.

<sup>57</sup> Art. 20 SLEP.

<sup>58</sup> Art. 21 SLEP.

<sup>59</sup> Artt. 23 and 24 SLEP.

<sup>60</sup> Art. 59 SLEP.

<sup>61</sup> Art. 60-62 SLEP.

In order to obtain such a statement an enforcement creditor who was not fully satisfied in an enforcement procedure may submit a request to the court to obtain such a statement.<sup>62</sup>

Based on the request the court issues a decision ordering the enforcement debtor to submit to the court a statement of assets within 10 days. In case the debtor fails to comply with the decision within this time period, the court issues a decision setting a hearing at which the court shall invite the enforcement debtor to submit a statement of his assets. If the enforcement debtor fails to comply with the court decision or fails to appear at the scheduled hearing, the court shall issue a decision to compel him to appear. Any interested party who determines that a statement of assets is incomplete or false, may initiate a criminal procedure against the enforcement debtor.

A copy of the statement of assets is delivered by the court to the enforcement creditor. In addition each court keeps a so-called Book of Enforcement Debtors. This register contains a record of enforcement debtors with the statements of their assets. Upon request of the enforcement debtor the record shall be deleted on expiration of three years after the date of recording. In case the creditor who requested entry into the Book submits to the court a statement that his claim is satisfied the deletion may be performed earlier upon request of the creditor.<sup>63</sup> The debtor may file an objection to a decision to record in the Book of Enforcement Debtors within three days after delivery of the decision.<sup>64</sup>

Any interested party may request the court to allow him to inspect the Book of Enforcement Debtors or to provide him information on the entry of a specific person in the book of enforcement debtors. Upon request of a person who has a legal interest, the court is obligated to allow inspection of the book or to provide information on the entry on enforcement debtors in the book within three days after filling of the request.<sup>65</sup>

### ***Exemption from enforcement***

Art 42 SLEP describes the objects of enforcement as: "things and rights on which enforcement of the claim may be carried out in accordance with law." This article already refers to certain objects that are not eligible as objects of enforcement: nontransferable property and other objects explicitly so designated by law; claims based on taxes and other public dues and facilities, weapons and equipment which are used for security and defense of the State.

### ***The "objects explicitly so designated by law" can be found throughout SLEP.***

Certain goods are exempted from enforcement: clothes, shoes, underwear and other items of personal use, bed linen, dishes, furniture necessary to the enforcement debtor and the members of his household, as well as stove and refrigerator, food and heating needed by the enforcement debtor and his household for a period of three months, cash up to the monthly amount exempted from enforcement, decorations, medals, certificates of war service and other decorations and awards, personal correspondence, manuscripts and other personal documents of the enforcement debtor, as well as family photographs, orthopedic devices necessary for vital functions of a disabled person or other handicapped person and mail or a postal money order sent to the enforcement debtor, before it is delivered to him.<sup>66</sup>

In addition also certain immovable property is exempted from enforcement. Agricultural land of a farmer up to 10 are may not be the object of enforcement (unless with regards to enforcement of a monetary claim secured by a contracted lien on immovable property (mortgage)).<sup>67</sup>

Regarding garnishment on salary and other earnings enforcement is limited or exempted from enforcement. Exempted from enforcement are statutory maintenance income, compensation for damages for health impairment or loss or diminished working capacity and for lost maintenance due to death of maintenance provider; earnings for corporal disability in accordance with provisions on disability insurance; welfare earnings; temporary unemployment benefits; child allowance; scholarships and grants for pupils and

<sup>62</sup> Art. 92-94 SLEP.

<sup>63</sup> Art. 95 SLEP.

<sup>64</sup> Art. 97 SLEP.

<sup>65</sup> Art. 96 SLEP.

<sup>66</sup> Art. 70 SLEP.

<sup>67</sup> Art. 111 SLEP.

students; earnings of soldiers and military school cadets; remuneration for work of convicts in correctional facilities, except for claims of statutory maintenance, as well as claims for damages caused by the criminal act of the convicted person and other earnings whose transfer is prohibited by law or are related to the personality of the creditor.<sup>68</sup>

A limitation is regulated for e.g. enforcement against salaries and pensions, or against compensation in lieu of salary (may be conducted up to the amount of guaranteed minimal wage, pension or compensation in lieu of salary). If enforcement is conducted against the minimum salary, the object of enforcement may be up to one half of the salary.<sup>69</sup>

### ***Seizure on movables***

Enforcement against chattels is conducted by the inventory and valuation of the chattels, the sale of chattels, and the satisfaction of the enforcement creditor from the proceeds of the sale.

The territorial jurisdiction to decide on a motion and to conduct the enforcement is the court in whose territory the chattels are located. In case the location of chattels is not specified in the motion, territorial jurisdiction to decide on such motion shall be in the court where the enforcement debtor has domicile or residence, or has its registered office.<sup>70</sup> A motion to enforce may request that only inventory and valuation be made. In that case the enforcement creditor is obligated to file a motion for sale of chattels within three months after the date of the enforcement inventory or valuation. If the enforcement debtor does not file a motion for sale within that period, enforcement shall be terminated.<sup>71</sup>

According to art 35 paragraph 4 the decision on enforcement against chattels is served on the enforcement debtor immediately before the initiation of the first enforcement action. This provision is repeated in art 72 paragraph 1: “a court enforcement official shall, immediately prior to inventory, serve the decision on enforcement on the enforcement debtor and shall invite him to pay the amount ordered with interest and costs.” Absence of the parties does not prevent the inventory. If the decision on enforcement cannot be served on the enforcement debtor in the course of the inventory, it shall be served on him subsequently according to the general rules on service.

Items in possession of an enforcement debtor and his items in possession of an enforcement creditor may be subject to inventory. Items of an enforcement debtor that are in possession of a third party may be objects of the inventory only with that person's consent. The enforcement debtor is considered owner of the objects in his possession unless a third party informs the court of his rights in a chattel that is in possession of an enforcement debtor and which is subject to enforcement and provides evidence of these rights. Spouses or extramarital partners are considered joint owners in equal share of all chattels that are found in their house, flat, business office or other real property.<sup>72</sup>

Regarding the scope of the inventory priority of recordation on the inventory list should be afforded to items where no objections regarding rights preventing enforcement have been lodged, and items that are easy to convert into cash, taking into account statements of the present parties and third parties. In case there is substantial discrepancy between the value of an object and amount of the claim the court may subsequently order enforcement on another object.<sup>73</sup> Parties may request the court to revise the inventory within three days after the inventory's completion. The court decides on such a revision within three days of receipt of the request.<sup>74</sup>

An enforcement creditor acquires a court lien on items on the inventory list at the moment in time when the court official signs the inventory record. Where the inventory has been completed in favor of several enforcement creditors, their order of priority in acquiring the lien shall be determined according to the date on which their motion to enforce was filed with the court. In case the motions to enforce were filed on the same date, their liens shall have the same order of priority.<sup>75</sup> The court lien will be registered as a non-

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68 Art. 155 SLEP.

69 Art. 156 SLEP.

70 Art. 69 SLEP.

71 Art. 71 SLEP.

72 Art. 73 SLEP.

73 Art. 74 SLEP.

74 Art. 75 SLEP.

75 Art. 75 SLEP.

possessory liens on chattels from the moment in time when the court lien was acquired through inventory or conclusion. From the moment of registration third parties are stopped from claiming that they were unaware of this right.<sup>76</sup>

Inventoried items that are left in possession of the enforcement debtor are visibly marked that they have been inventoried. At the same time a copy of the inventory record or a conclusion will be visibly displayed in the room in which the item is located at the time of inventory. Removal of the marks or copy of the inventory can be fined.<sup>77</sup> As a rule the items are left for safekeeping with the enforcement debtor. On the motion of the enforcement creditor, the court shall hand over the items to him or to a third party for safekeeping if he establishes the probability that those items might be damaged or disposed of or their value otherwise diminished. Cash, securities and other valuable items are handed over to court deposit for safekeeping.<sup>78</sup>

In the course of a search of an enforcement debtor's premises and in the course of conducting other enforcement actions, at least two adult citizens must be present during enforcement actions at the premises of the enforcement debtor if the enforcement debtor, his legal representative, a person who has the power of attorney or some other adult household member are not present.<sup>79</sup>

In case of an unsuccessful inventory attempt the court informs the enforcement creditor. The enforcement creditor may within three months after the date of receiving the notification on unsuccessful attempt at inventory and/or after the date of unsuccessful inventory which he attended, file a motion for reconducting of inventory. If the enforcement creditor fails to move for reconducting of the inventory within the above deadline or if no chattels that may be objects of enforcement are found during repeated inventory, the court shall discontinue enforcement.

Concurrently with the inventory the valuation of the items is done by the court enforcement official and, if necessary, by a qualified person or an expert witness appointed by court. The expert witness may be appointed at the request of one of the parties. In that case the costs of the expert shall be paid in advance by the party that proposed it within the period set by the court. The valuation is conducted on the basis of the market price of such item at the place of inventory, unless the enforcement creditor and the enforcement debtor agree on the value of an item. Within three days after a valuation a party may submit a motion to the court to determine a higher or lower value of items listed in the inventory as compared to the assessed value, or to order a new valuation, unless the valuation was conducted by a court appointed expert witness.<sup>80</sup> From the inventory and valuation a record of inventory is made.<sup>81</sup>

After the decision on enforcement has become final and after the expiration of 15 days after the date of the inventory the sale may be conducted. The sale can be conducted before the expiration of the 15 day period if the enforcement debtor consents to sale before expiration of that period, if items are susceptible to quick deterioration or there is danger of a significant reduction of their price, or if the enforcement creditor deposits a guarantee for damages that he would have to compensate the enforcement debtor for if the decision on enforcement did not become final.<sup>82</sup>

The court decides on the manner of sale which is either conducted by a public auction or through direct agreement. In general a public auction is ordered when there are items of higher value, and if sale over assessed price is to be expected. The sale through direct agreement is based on a contract concluded between a buyer, on one side, and a court enforcement official or a person acting as commissionaire, on the other side.<sup>83</sup>

The items may not be sold at the first auction or within the period set by the court for sale through direct agreement, for a price below their appraised value. If the appraised value has not been obtained at the first auction or through direct agreement within a period set by the court the court shall, if so requested, order another auction with the opening price set at half of the appraised value.<sup>84</sup> The motion for a second auction or direct agreement should be filed within 30 days after the date of the first auction or date on which direct agreement period set by the court has expired. If not, the procedure shall be terminated. If the item could

<sup>76</sup> Art. 76 SLEP.

<sup>77</sup> Art. 76 SLEP.

<sup>78</sup> Art. 77 SLEP.

<sup>79</sup> Art. 56 SLEP.

<sup>80</sup> Art. 80 SLEP.

<sup>81</sup> Art. 81 SLEP.

<sup>82</sup> Art. 83 SLEP.

<sup>83</sup> Art. 84 SLEP.

<sup>84</sup> Artt. 85-86 SLEP.

not be sold at a second auction hearing or in a direct agreement within the period set by the court, the court shall, on the motion of the enforcement creditor, award the item to the creditor. The enforcement creditor shall be considered satisfied in the amount of one half of the item's appraised value.<sup>85</sup>

When only one enforcement creditor is paid from the sale proceeds, the court shall, without holding a hearing, issue an order to pay in the following order of priority: costs of the enforcement procedure, costs set out in executive title, interest due until the date of sale, and main claim. Any surplus remaining from the sale proceeds after such satisfaction shall be paid over to the enforcement debtor. In case there are two or more enforcement creditors or other persons whose rights cease to exist after the sale, satisfaction is conducted in accordance with the provisions on priority from sale of immovable property and priority of acquisition of liens or other rights that will cease to exist through the sale, unless otherwise provided by law for certain specific claims. Enforcement creditors of the same priority who cannot be fully satisfied from the sale proceeds shall be satisfied in proportion to the amounts of their claims.<sup>86</sup>

### ***Enforcement against wages and other permanent monetary income***

The enforcement against wages or earnings deriving from social security shall provide for attachment on a specified part of the wages and shall direct the government body, legal entity or other employer paying wages to the enforcement debtor, to pay or continue paying to the enforcement creditor the amount stated in the decision.<sup>87</sup> Where several persons have certain rights for the purpose of satisfaction of statutory maintenance right, or a right to annuity for lost maintenance due to death of a maintenance provider against the debtor, and the total amount of their claims exceeds the portion of the salary that may be the object of enforcement, enforcement is ordered and conducted in favor of every such enforcement creditor pro rata to their respective claims.<sup>88</sup> The employer is obligated to pay all past due installments to the creditor pursuant to the decision on enforcement. An employer failing to comply with the decision on enforcement is liable for damages caused to the creditor.<sup>89</sup>

If a debtor's employment with one employer has ceased, the decision on enforcement against wages shall be delivered to the new employer where the debtor has entered into employment, with effect as of the date on which the decision on enforcement is delivered to such employer. The former employer is obligated to deliver promptly and by registered mail the decision on enforcement to the new employer and to inform the court accordingly, or to inform the court that he is unaware of the debtor's new employer. The court shall accordingly notify the creditor, setting a time limit for notifying the court in respect of the debtor's new employer.<sup>90</sup>

An administrative enforcement is an enforcement against a debtor's salary with his consent. Such an enforcement has the legal effect of a decision on enforcement against wages, if imposed prior to issuing of a decision on enforcement. An exception is made for enforcement against wages for satisfying claims based on statutory maintenance, compensation of damages for health impairment or loss or decrease of working ability or for lost maintenance due to death of maintenance provider.<sup>91</sup>

### ***Enforcement on a claim***

Regarding a motion to enforce against a monetary claim of the debtor the court in the territory where the enforcement debtor has residence or seat is competent. In case the enforcement debtor does not have domicile in the Republic of Serbia, the court in whose territory the debtor's debtor is domiciled shall have jurisdiction, and if that person does not have domicile in the Republic of Serbia, the court in whose territory the debtor's debtor has temporary residence shall have territorial jurisdiction. Jurisdiction to decided on a motion to enforce against a debtor's claim for handover of an object and for carrying out of that enforcement shall be in the court of the territory in which the object is located.<sup>92</sup>

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85 Art. 90 SLEP.

86 Artt. 88-89 SLEP.

87 Artt. 181, 189 SLEP.

88 Art. 184 SLEP.

89 Art. 187 SLEP.

90 Art. 186 SLEP.

91 Art. 188 SLEP.

92 Artt. 3 and 154 SLEP.



With the decision of enforcement against a debtor's claim, the court shall prohibit the debtor's debtor from settling that claim with the debtor and prohibit the debtor from collecting such claim or disposing of it to a third party or to the debtor's debtor (attachment of the claim). A fine is imposed for failure to comply with this prohibition.<sup>93</sup> If the attached claim has been secured through lien or mortgage, the enforcement creditor shall acquire through the attachment the status of sub-lien or supra-mortgage creditor. In that case the attachment needs to be recorded in the relevant register. In case of attachment in favor of more than one enforcement creditor the order of priority of liens is established on the basis of the date of receipt of the motions by the court.<sup>94</sup> The creditor who filed a motion for collection of a transferred claim shall promptly notify the debtor of the motion. The creditor is liable to the debtor for any damages caused by failure to do so.<sup>95</sup>

At the request of the court the enforcement debtor's debtor should declare within a time period set by the court whether and to what extent he recognizes the attached claim and whether he is willing to satisfy the claim, as well as whether his obligation to satisfy the claim is conditioned on performance of some other obligation. On motion of the enforcement creditor the court then issues a decision on transfer of the claim to the enforcement creditor. The transfer shall be deemed carried out upon delivery of the transfer order to the enforcement debtor's debtor.<sup>96</sup> The enforcement debtor is obligated to cooperate and to provide within a time period set by the court, the information and documents required by the creditor for the purpose of collecting the claim.<sup>97</sup>

The transfer of the claim for collection authorizes the enforcement creditor to request from the enforcement debtor's debtor payment of the amount designated in the decision on transfer and to undertake all actions necessary for protection and realization of the transferred claim. The enforcement debtor's debtor may make objections against a creditor to whom the claim has been transferred that he would have been entitled to make against the debtor.<sup>98</sup> In case other persons besides the enforcement creditor assert rights, the enforcement debtor's debtor may deposit the whole amount of the claim or only the matured part of the claim with the court.<sup>99</sup>

#### ***Enforcement against savings deposit and current account***

Enforcement against a savings deposit or a debtor's current account is conducted through attachment and payment. The enforcement creditor is obligated to list the information on the savings deposit and the number and name of the bank or other financial organization where debtor has a savings deposit. In case the creditor fails or is not able to provide these data the court shall request such data from the organization where the deposit is kept. The organization is obliged to promptly provide the court with the requested data without informing the debtor that such information has been requested. The attachment is carried out by delivery of the decision on attachment to the organization where the savings deposit is kept.<sup>100</sup>

Regarding the enforcement against financial assets kept in accounts of the debtor the court in whose territory the seat of the bank or other financial institution is located, or the court in whose territory the organizational part of the bank or financial institution where the debtor's account is kept is located, have territorial jurisdiction.<sup>101</sup>

The enforcement order against financial assets in a debtor's accounts with banks or other financial institutions orders such banks or other financial institutions to transfer the amount designated for enforcement from the account of the debtor to the account of the creditor, and for claims where payment by transfer from accounts is not stipulated, to pay that amount to the creditor in cash.<sup>102</sup>

The decision on enforcement is not delivered to the individual bank, but is delivered to the organization for enforced collection. This organization for enforced collection immediately instructs the banks or other financial institutions, which have the accounts of the enforcement debtor, to stop all payouts from all accounts of the debtor until final satisfaction of the claims. At the same time the organization for enforced collection will inform the banks that they may not open new accounts for that debtor and will instruct the banks or other financial institutions to transfer the assets to the account of the creditor or to pay out in cash.<sup>103</sup>

93 Art. 159 SLEP.

94 Artt. 162-164 SLEP.

95 Art. 176 SLEP.

96 Artt. 165, 166, 169 SLEP.

97 Art. 170 SLEP.

98 Art. 173 SLEP.

99 Art. 171 SLEP.

100 Artt. 190-191 and 243 SLEP.

101 Art. 196 SLEP.

102 Art. 198 SLEP.

103 Art. 199 SLEP.

If there are no financial assets in the debtor's accounts with banks or other financial institutions, the organization for enforced collection shall instruct banks that keep foreign currency accounts of the debtor to transfer assets from those accounts, at the exchange rate on the date of the transfer to debtor's account.<sup>104</sup>

The organization for enforced collection is obligated to act following the order of time of receipt of the decision on enforcement unless other legislation provides for priority enforcement of orders of particular creditors or for particular claims. The bank or other financial institution is obligated to carry out transfer of assets from the account of the debtor on the same day on which it receives the instruction from the organization for coercive collection.<sup>105</sup>

### ***Enforcement against registered immovable property***

The court in whose territory immovable property is located has territorial jurisdiction to decide on a motion to enforce against such property and to conduct the enforcement.<sup>106</sup> The enforcement is conducted by recordation of the decision on enforcement in the public book, determining the value of the immovable property, sale of the immovable property, and satisfaction of the enforcement creditor from the proceeds of the sale.<sup>107</sup>

With the motion to enforce the enforcement creditor has to submit an excerpt from the public book evidencing that the immovable property is registered as the enforcement debtor's property. If the immovables are recorded in the public book in another person's name, the enforcement creditor is obligated to submit a document suitable for recordation of the enforcement debtor's ownership.<sup>108</sup>

Enforcement against immovable property co-owned by an enforcement debtor will only be granted when the other co-owners agree. These other co-owners shall be satisfied before satisfaction of the enforcement creditor and before paying costs of enforcement procedure.<sup>109</sup>

The decision on enforcement is recorded in the public book. The recordation entitles the enforcement creditor to satisfy his claim from the immovable property even when a third party subsequently acquires ownership of the same immovable property.<sup>110</sup> Once the decision on enforcement has been recorded a separate enforcement procedure against the same immovable property shall not be allowed for satisfaction of another claim or another enforcement creditor. In that case the other enforcement creditor joins the enforcement procedure that is already underway.<sup>111</sup>

In case there is a substantial disproportion between the value of the immovable property and the amount of the claim, the debtor can file a motion to conduct enforcement against immovable property other than the specific property proposed by the enforcement creditor, or by other means.<sup>112</sup>

A mortgage (lien) creditor who has not filed a motion to enforce shall also be satisfied in the enforcement procedure against immovable property.<sup>113</sup> The lien recorded against immovable property shall terminate on the date that a decision on transfer of immovable property becomes final, even if lien creditors are not fully satisfied.<sup>114</sup> A sale of an office building or office space does not terminate a lease of that building or office space, if possession of the property has been handed over to the lessee before the decision on enforcement was issued. The buyer shall succeed to the rights and obligations of the lessor. The same is the case with the lease of an apartment for an indefinite period which was concluded before acquisition of a lien right or a right of enforcement is requested.

Once the decision on enforcement becomes final the value of the immovable property is determined by the court in a decision.<sup>115</sup> The immovable property shall be valued at its market price on the date of valuation, based on opinions and findings of expert appraisers, other facts, or in accordance with other suitable methods.<sup>116</sup> At least eight days before the sale hearing, the court can redetermine the value of

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104 Art. 204 SLEP.

105 Art. 200 SLEP.

106 Art. 98 SLEP.

107 Art. 99 SLEP.

108 Art. 100 SLEP.

109 Art. 101 SLEP.

110 Art. 102 SLEP.

111 Art. 103 SLEP.

112 Art. 104 SLEP.

113 Art. 105 SLEP.

114 Artt. 107-109 SLEP.

115 Art. 114 SLEP.

116 Art. 112 SLEP.

the immovable property at the sale hearing, if the party provides probable grounds that the value has substantially changed between the date of the previous valuation and the date of the sale.<sup>117</sup>

Once the decision on enforcement and the decision on determining the immovable property value have become final, the court issues a conclusion on the sale of immovable property which states the method and conditions of sale, the time and place of the sale, the time period during the day when inspection of the property will be allowed, if the sale is conducted by public auction. The conclusion on sale is posted on the court's notice board and is delivered to the parties, lien creditors, participants in the procedure and persons that have a recorded statutory preemption right and to the relevant tax office. At their expenses parties may publish the conclusion.<sup>118</sup>

Certain creditors might have a priority. Persons who have a right to be satisfied from sale proceeds of immovable property which is higher in priority than the claim of the enforcement creditor who proposed enforcement, may propose termination of the enforcement if the determined value of the immovable property is insufficient to cover his claim within eight days after the date of delivery of the conclusion on the sale.<sup>119</sup> A person having a statutory preemption right on immovable property that is the object of enforcement through sale shall have precedence over the most favorable bidder, if he declares immediately after conclusion of the sale that he shall purchase the property under identical conditions.<sup>120</sup>

Where no statutory or contractual preemption right exists on the immovable property, or if holders of such rights have not exercised them, the creditor shall have a preemption right by recording of the decision on enforcement respecting that property. The consequence is that in case holders of preemption rights declare on record before the court that they will abstain from exercising such right, the creditor shall have precedence over the most favorable bidder if he states immediately after the conclusion of the sale that he will purchase the immovable property under identical conditions.<sup>121</sup>

The sale of immovable property is conducted by public auction. The hearing for sale of immovable property is normally held in the courthouse before a single judge. Parties and lien creditors may agree at any time to conduct a sale of immovable property through direct agreement within a stated time period.<sup>122</sup>

In the requirements for sale the court determines the time period for the buyer to deposit the price, which may not exceed 30 days from the date of sale, the method of sale, the amount of guarantee, the time limit for depositing guarantee, and who deposits the guarantee and the form of depositing. Through a motion of the enforcement creditor or enforcement debtor, the time, place and conditions of sale shall be published in public media at the cost of the movant.<sup>123</sup> Any person interested in buying the immovable property shall be allowed by the court to inspect the property at an appropriate time.<sup>124</sup>

The participants in the public auction need to deposit a guarantee amounting to 1/10 of the appraised value of the property in advance. The enforcement creditor and the lien creditor are exempted from this requirement. In case of a direct agreement sale, the buyer shall deposit the guarantee with the person with whom he concluded the contract, immediately before the conclusion of the contract. The guarantees are returned immediately after the conclusion of the public auction to the bidders that did not become buyer.<sup>125</sup>

A sale hearing is conducted even if there is only one bidder, unless the enforcement creditor is the only bidder. On motion of the parties or the enforcement creditor and considering the circumstances of the case, the court may adjourn the sale hearing if only one bidder is present.<sup>126</sup>

The immovable property may not be sold below the appraised value at the first sale hearing. If the property could not be sold at the first hearing, the court shall schedule a second hearing (after 30 days after the first sale hearing) at which the property may be sold below appraised value, but not less than two thirds of that value. The parties and lien creditors may agree however that the immovable property may be sold at even a lower price than determined or less than two thirds of that value. This applies accordingly for sale through direct agreement.<sup>127</sup>

The bidding is commenced by announcement of the starting price. If at least one bidder accepts the

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117 Art. 113 SLEP.

118 Art. 116 SLEP.

119 Art. 115 SLEP.

120 Art. 117 SLEP.

121 Art. 118 SLEP.

122 Art. 120 SLEP.

123 Art. 121 SLEP.

124 Art. 110 SLEP.

125 Art. 122 SLEP.

126 Art. 123 SLEP.

127 Art. 125 SLEP.

announced price, the next price shall be announced which shall be higher by at most five percent than that previous price. This procedure shall be repeated until the last offered price remains unaccepted. The auction shall be concluded after expiration of ten minutes following the best bid.

The court issues a separate decision on award of immovable property sold through public auction or through direct agreement which shall be posted on the court's notice board and delivered to all persons who are recipients of the conclusion on sale, and also all participants in the auction.<sup>128</sup> The price is deposited by the buyer within the period determined in the conclusion on sale. If the highest bidder fails to deposit the sale price within the set period, the court declares the sale to such bidder invalid and issues a new decision awarding sale of the real property to the second highest bidder. If the second bidder fails to deposit the price he offered within the set period, the court shall apply these rules to the third bidder accordingly. If the three highest bidders fail to deposit the sale price within the set period, the court declares the sale invalid and schedules a new sale to be held not later than 45 days after the date the decision declaring the sale invalid becomes final. The deposited guarantee of such bidders shall be used to pay costs of the new sale and to cover possible discrepancies between the sale price achieved at earlier and later sales.<sup>129</sup>

Upon depositing the sale price in the case of sale by public auction, or upon depositing the price and finality of the decision on awarding property sold through direct agreement, the court issues a decision to award immovable property to the buyer and to record his right to the property in the public book upon finality of such decision.<sup>130</sup>

Upon the awarding of immovable property, the enforcement debtor shall lose the right to possess such property and shall be obligated to transfer the property to the buyer immediately upon receipt of the decision on awarding the immovable property, unless otherwise provided by law or by agreement with the buyer.<sup>131</sup> On request of the buyer the court then orders the enforcement debtor or other persons by conclusion to vacate the property and transfer it to the buyer.

If the immovable property could not be sold at the second auction hearing or by direct agreement within the period set by the court, the court shall on a motion of the enforcement creditor award the immovable property to the creditor in an amount equal to two thirds of the appraised value of the immovable property.<sup>132</sup>

If the immovable property could not be sold at the second hearing, and the enforcement creditor did not exercise his right to award the immovables to him, the court shall schedule subsequent hearings on motion of the enforcement creditor. A motion for scheduling of a new sale hearing cannot be done before expiration of three months after the previous hearing or after one year after that date. In case of failure to file such a motion the court shall terminate enforcement.<sup>133</sup>

The enforcement creditor who filed the motion for enforcement, the lien creditors even if they have not submitted their claims, and persons who have the right to compensation for personal easements shall be satisfied out of the proceeds of the sale. If the proceeds of the sale are not sufficient for full satisfaction, multiple claims in the same priority shall be satisfied in proportion to their respective amounts.<sup>134</sup>

The Serbian Law on Enforcement Procedure has a certain order of priority for satisfaction:<sup>135</sup>

- 1) The costs of the enforcement procedure;
- 2) The claims based on statutory maintenance, if proven by executive title and if reported no later than the time of the sale hearing;
- 3) The taxes and other dues levied against immovable property for the preceding year;
- 4) The claims based on tort for health impairment or diminishment or loss of working ability and loss of maintenance caused by death of the maintenance provider; claims based on employment relations of the employee with an entrepreneur or other natural person engaged in business activity; and claims of social insurance contributions that are due, regardless of whether such claims are secured by a lien against the sold immovable property;
- 5) The claims secured by lien;
- 6) The claims for settlement of personal easements and real encumbrances that are terminated through sale, if established prior to initiation of the enforcement procedure;

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<sup>128</sup> Artt. 126-127 SLEP.

<sup>129</sup> Art. 128 SLEP.

<sup>130</sup> Art. 129 SLEP.

<sup>131</sup> Artt. 130-132 SLEP.

<sup>132</sup> Art. 134 SLEP.

<sup>133</sup> Art. 135 SLEP.

<sup>134</sup> Art. 139 SLEP.

<sup>135</sup> Artt. 140-141 SLEP.

- 7) The claims of enforcement creditors who filed a motion for enforcement procedure.

### ***Enforcement against non-registered immovable property***

The enforcement procedure becomes more complicated in case the immovable property is situated in an area where there is neither a cadaster nor land book, or there is no register established by law of immovable property rights. In that case the court applies the legal rules which apply to the documents which are attached to the motion to enforce as proof of ownership of the property that is the object of enforcement, and other legal rules governing methods of registration of the decision on enforcement against immovable property.<sup>136</sup> If it is impossible for any reason to acquire proof of ownership in accordance with legal rules applicable in that area, the enforcement creditor shall be required to show in the motion to enforce, instead of proof of ownership, the location of the property, its designation, its borders and its square area. In that case the court carries out an inventory of the property against which enforcement is sought and invites to the inventory hearing the enforcement creditor, the enforcement debtor and persons whose property borders the subject property. The inventory record has the legal effect of recording of enforcement and is posted on the notice board of the court.

Another situation occurs in case of an area which has a cadaster, land book or other register of immovable property established by law, but the property which is the object of enforcement is not recorded.<sup>137</sup> The enforcement creditor shall attach documents sufficient for recording to his motion to enforce. The court delivers the motion for recording to the organ or organizations in charge of the register, and shall suspend the enforcement procedure until recording is completed.

### ***Eviction***<sup>138</sup>

Regarding eviction and the handing over of immovable property the court in whose territory the immovable property is located shall have territorial jurisdiction to decide on a motion to enforce by vacating and handover of immovable property and to conduct the enforcement.

Vacating and handover of immovable property may commence after expiration of eight days from the date of delivery of the decision on enforcement. The enforcement creditor is responsible to provide the required manpower and transport for carrying out the enforcement.

The chattels that must be removed are handed over to the enforcement debtor, and if he is not present, to an adult member of his household or to his proxy. In case during the eviction none of these persons is present or they refuse to receive the goods, the goods will be stored by a third party at the cost of the enforcement debtor. The court notifies the enforcement debtor of the safekeeping to a third person and of the costs of safekeeping thereof, and sets an appropriate time limit for the enforcement debtor to request return of chattels after covering costs of safekeeping. Upon expiration of the set period of time the goods shall be sold and costs of safekeeping and costs of sale shall be recovered out of the proceeds of the sale.

### ***Mortgage on immovable property***<sup>139</sup>

An enforcement creditor may file a motion for securing a monetary claim through establishment of a lien on such property, and to conduct the securing procedure. The lien on immovable property is established by recording the lien in the public book. The recordation of a lien and recordation of the enforceability of the claim means that enforcement against the immovable property may be conducted also against a third party who acquires that immovable property later.

In case the monetary claim cannot be secured through recording in a public book or other public registry, the securing through establishing a temporary lien may be ordered, if the movant establishes the probability that there is a risk that without such securing, enforcement will be impossible or made significantly more difficult.

### ***Enforcement against shares***

The Serbian Law makes a distinction between shares in a joint stock company and shares of a limited liability company.

<sup>136</sup> Art. 152 SLEP.

<sup>137</sup> Art. 153 SLEP.

<sup>138</sup> Artt. 210-214 SLEP.

<sup>139</sup> Artt. 274-280 SLEP.

The decision on enforcement against shares of a joint stock company is served on the enforcement creditor, the enforcement debtor, and the Central Registry of Securities. The service of the decision of enforcement to the Central Registry of Securities is decisive for the moment of attachment. From this moment the enforcement debtor does not dispose of the attached shares and the enforcement creditor acquires a lien on the attached shares. Upon receipt of the decision on enforcement the Central Registry of Securities records the lien on the shares in the Registry.<sup>140</sup>

Regarding the shares in a limited liability company, the decision on enforcement is served on the enforcement creditor, the enforcement debtor, the court, and the organization which keeps the registry in which the limited liability company is registered. Here the service of the decision on enforcement on the court or the organization is decisive for the moment of attachment. The enforcement creditor acquires a lien through attachment. This lien is also recorded in the public register of limited liability companies. The decision on attachment is also delivered to the limited liability company, which is obliged on the same day to record the lien in its book of members.<sup>141</sup>

In both cases the shares are valued by the court. Shares that are quoted on the stock exchange are valued based on the average price of the shares on the stock exchange over the past 30 days. On motion of one of the parties the court may order expert appraisal. The shares that are traded on the stock exchange are cashed out at the stock exchange or in accordance with the law regulating share trading. The provisions of the SLEP regarding sale of movables apply accordingly to valuation and sale of shares and satisfaction of the creditor from the proceeds.<sup>142</sup> Regarding the sale of a share in a limited liability company the other members of the company have a preemptive right.<sup>143</sup>

### ***Temporary measures and preliminary measures***

A temporary measure is a security measure that can be ordered by the court before or in the course of a court or administrative proceeding, as well as after the termination of such a proceeding, until the enforcement is conducted in case the enforcement creditor:

- shows the probability of the existence of a claim and the risk that without such temporary measure the enforcement debtor would prevent or considerably hinder satisfaction of the claim by disposing of, hiding or otherwise making unavailable his property or means or
- shows the probability that the temporary measure is necessary to prevent use of force or infliction of irreparable damage.<sup>144</sup>

At the request of the creditor the temporary measure may be replaced by a deposit by the enforcement debtor of certain amounts as a guarantee.<sup>145</sup> On motion of the enforcement creditor the court orders a temporary measure when the enforcement creditor has shown the probability of the existence of a claim and risk and if prior to that and within a set period the enforcement creditor deposits an amount determined by the court as a guarantee for damages that may be sustained by the enforcement debtor by ordering and conducting the temporary measure. The duration of the temporary measure is decided by the court. In case the enforcement creditor did not file an action within the set period, or did not initiate another procedure for justification of the temporary measure, or the period for which the temporary measure was ordered has expired, the court shall, on motion of the enforcement debtor, terminate the procedure and revoke actions already taken.<sup>146</sup>

SLEP describes different types of temporary measures. For example:

(in case of monetary claims<sup>147</sup>):

- prohibiting the enforcement debtor from disposing of chattels, as well as seizing such chattels from the enforcement debtor and entrusting them to the enforcement creditor or a third party for safekeeping, or for safekeeping in deposit with the court;
- prohibiting the enforcement debtor from disposing of or encumbering his immovable property or rights

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140 Art. 247 SLEP.

141 Art. 249 SLEP.

142 Artt. 248 and 250 SLEP.

143 Art. 251 SLEP.

144 Artt. 299 and 302 SLEP.

145 Artt. 291-293 SLEP.

146 Artt. 294-297 SLEP.

147 Art. 300 SLEP.

to immovable property recorded in his favor in the public book, with recordation of such prohibition in the public book;

- prohibiting the enforcement debtor's debtor from paying the debtor's claim or from handing over objects to the enforcement debtor, and prohibiting the enforcement debtor from receiving such objects, collecting the claim or disposing of what is received or collected;
- ordering a bank or other financial institution where the enforcement debtor has an account to delay payment to the enforcement debtor or a third party on order of the enforcement debtor from such account the amount that is the object of the injunction; or
- seizure of cash or securities from the enforcement debtor and depositing them for safekeeping.

(to secure a non-monetary claim<sup>148</sup>):

- ban on disposing of or encumbering chattels under claim, seizing of such chattels and entrusting them to the creditor or a third person for safekeeping, or for safekeeping in deposit with the court;
- a ban on disposing of or encumbering immovable property under claim, and recording such ban in the public book;
- a ban against the enforcement debtor's debtor handing over to the enforcement debtor objects under the claim;
- a ban against disposing or encumbering stocks and shares which are under the claim and recording such ban with the Central Registry of Securities or in the shareholder registry and public registry of limited liability companies, or
- a ban on use and disposing of rights deriving from stocks and shares and entrusting stocks or shares for management to third parties, including appointment of provisional management of a company.

A preliminary measure can be imposed on the basis of a decision of a domestic court on a monetary claim which has not become final or enforceable, a settlement concluded before a court or body deciding in an administrative procedure, when the claim has not matured or a payment order issued based on a bill of exchange or a cheque, if an enforcement creditor establishes the probability that there is a risk that, without such securing, satisfaction of the claim will be impossible or made significantly more difficult.<sup>149</sup>

The decision imposing a preliminary measure specifies the amount of the claim which is secured with interest and costs, the preliminary measure and its duration. This duration may not last beyond eight days after the requirements for enforcement are met.<sup>150</sup>

The types of preliminary measures are described in art 285 SLEP:

- inventory of chattels;
- prohibiting the enforcement debtor's debtor from satisfying the enforcement debtor's claim or handing over items, or prohibiting the enforcement debtor from collecting claims or receiving those items or disposing of them;
- prohibiting a bank from paying the enforcement debtor, or paying a third party at the order of the enforcement debtor, the amount which is the object of the preliminary measure; or
- prerecordation of a lien on immovable property of the enforcement debtor or on the rights in that property.

### 10.2.3 Problems and challenges

"The environment for the enforcement of civil and commercial judgments in Serbia is a combination of unusual strengths and serious weaknesses", this is how a 2006 USAID report on the enforcement system in Serbia opens.<sup>151</sup>

The report identified a number of weaknesses in the enforcement system:

- "The system of enforcement agents in both commercial courts and courts of general jurisdiction is functioning poorly. Court enforcement agents have to deal with an overwhelming number of cases with a

148 Art. 303 SLEP.

149 Art. 282 SLEP.

150 Art. 288 SLEP.

151 USAID-BES Project, Enforcement of civil and commercial judgments in Serbia, Baseline assessment, USAID/Booz, Allen & Hamilton (July 31, 2006), page 1-2.



low level of resources and poor institutional support, resulting in long delays and inadequate effectiveness;

- Judges are overburdened with formalistic activities in the enforcement procedure. The role of the judge is not a contribution to an effective and efficient enforcement system;
- There is a poor support from local authorities like e.g. the police. The lack of support results in delays and avoidance in enforcement. It also jeopardizes the independence of the judiciary;
- Service of process in enforcement cases functions poorly;
- The provisions on access to information of the debtor are inadequate;
- Debtors try to frustrate enforcement as much as possible: fraudulent transfer of assets, the hiding of assets by debtors seeking to avoid losing them to their judgment creditors, expatriating funds to accounts held outside the country;
- New asset discovery and seizure remedies involving the National Bank of Serbia, the new cadastre, and the Central Securities Registry, are important innovations but require significant procedural improvements;
- A number of issues in court procedure and court structure slow the recovery process unnecessarily and, in some cases, contribute directly to reducing the probability of recovery.”

### ***The role of the Central Bank***

One of the most successful Serbian enforcement instruments appears to be the Serbian National Bank enforced collection activities. These activities are performed in the National Bank of Serbia pursuant to Article 57 of the Law on the Payment System, until the organisation for the enforced collection has been set up. The enforced collection is carried out by the Enforced Collection Department, within the Directorate for Registers and Enforced Collection, and through the activities of two divisions in Belgrade and Kragujevac.

In case of legal persons holding accounts with banks in Serbia, natural persons holding accounts with banks in Serbia and who are engaged in a particular activity, and banks holding accounts with the National Bank of Serbia, collection can be effected through the National Bank of Serbia procedure that allows essentially immediate transfer from bank accounts, usually within about twenty days of submission of the court order. Based on a decision on enforcement the National Bank of Serbia is obligated to perform enforced collection of claims by debiting any of the debtor's accounts (dinar or foreign currency accounts), without the holder's prior consent.

In the motion on enforcement on the bank account a bank account number for the debtor and the creditor and tax identification number of the debtor and of the creditor needs to be mentioned. When the court approves attachment of the enforcement order this order will be forwarded by the court to the NBS's Enforced Collections Division. The procedure is conducted in several phases: receipt and recording of decisions (I and II priority) and payment orders (III priority), inspection of the legality of decisions and payment orders, (illegal decisions and orders to the bearer are returned), entering the decisions on enforcement into the Program. If the order is correct and the information is sufficient, the Bank will immediately debit the listed account of the debtor and place the proceeds in the creditor's listed account. If the amount is not sufficient to satisfy the debt, the Bank will immediately perform a computer search to identify all other accounts associated with the debtor's tax ID number. In case additional accounts are found, those will be debited in the amount of the unpaid portion of the judgment. If the judgment is still not satisfied, the NBS will place a freeze on all the debtor's accounts for the benefit of the creditor, allowing money to flow into but not out of the debtor's accounts. In that case a ban on banks from opening new accounts to such debtors is imposed. Disadvantage is that this system can only be used with commercial entities.

The system is highly computerized.<sup>152</sup> Creditors and debtors can, after the payment of applicable fee, obtain certain certificates:

- certificate of the sequence of priority in respect of collections against a particular blocking order;
- certificate that the debtor has no liabilities and orders on record with regard to enforced collection;
- certificate as to the number of illiquid days;
- certificate of total outstanding liabilities and orders with regard to enforced collection;
- certificate of total outstanding liabilities and orders – list of all outstanding decisions and orders;
- certificate of effected enforced collections of liabilities and orders, and provide other data.

<sup>152</sup> See: <http://www.nbs.rs/export/internet/english/67/index.html>.

Users also have access to the register of debtors in enforced collection and, for a fee of not more than 2 dinars per entity registration number, can obtain information on their customers, suppliers and business partners: information on whether their accounts are blocked or not, the amount of funds blocked and number of days of account blockade. In addition there is also the Register of Received Non-Executed Claim Enforcement Decisions. This register provides unofficial data on received, returned and deferred claim enforcement decisions issued by tax, court and other relevant bodies from 14 May 2005 until the date preceding the Register search. Official data on received and recorded non-executed claim enforcement decisions (sequence of collections and total amount of debtor's funds blocked prior to the execution of claim enforcement decision) can also be issued and are issued in the form of a certificate by the Kragujevac-based Execution Titles and Enforcement Orders Division.

The Annual Reports of the National Bank of Serbia provide the following information:

	2008	2009
Number of decisions on enforcement received from various authorities (tax administration, courts, customs...)	264,751	276.394
returned as deficient	36,558	19,143
returned due to deficiencies ascertained by inspection	23,645	7,741
Returned upon the authorities' request	12,913	11,402
Received from taxes on temporary measures	52,056	52,714

**Backlog in the courts**

Less positive we should be on the backlog of cases in the courts. According to the "Response of the Serbian Government to the European Commission Questionnaire "Information requested by the European Commission to the Government of Serbia for the preparation of the Opinion on the application of Serbia for membership of the European Union", Government of Serbia, November 2010" (hereafter: Response EC Chapter 23) the average duration of a civil litigation in the Basic courts is 1.52 years, in the Higher Court in the first instance it is 1.7 years and in the second instance it is 1.3 years:<sup>153</sup>

*Number of cases pertaining to civil disputes that have been pending in basic and higher courts:*<sup>154</sup>

	Up to 2 years	Up to five years
Basic Court	41998	35928
Higher Court first instance	467	455
Higher courts second instance	11807	9405

Certain reasons are given for these delays:

- 1) abuse of procedural powers of the parties directed towards delaying the proceedings,
- (2) failure of witnesses to appear,
- (3) the increased workload associated with a large number of complaints,
- (4) extended period of evidence collection, etc.

153 Source: Response of the Serbian Government to the European Commission Questionnaire "Information requested by the European Commission to the Government of Serbia for the preparation of the Opinion on the application of Serbia for membership of the European Union", Government of Serbia, November 2010, (Response EC Chapter 23), answer to question 23.

154 Source: Response EC Chapter 23, answer to question 24.

Backlogs have been increasing over the years, also in enforcement cases:<sup>155</sup>

	2006	2007	2008
Total number:			
Municipal courts	2,033,416	1,975,827	2,108,513
District courts	229,137	225,596	236,016
Supreme court	47,148	49,658	51,170
Commercial court		145,292	145,292
TOTAL	2,309,704	2,251,081	2,395,699
Received in 2006	1,610,659	1,579,522	
Unsolved previous years	699,045	671,559	789,850
UNSOLVED:			
MUNICIPAL COURT			
criminal matters	47,044	49,043	58,324
litigations	165,205	143,301	135,466
Unsolved enforcement cases	501,304	372,440	392,334
DISTRICT COURT			
criminal matters in original jurisdiction	4,249	4,592	8,959
criminal matters in appellate procedure	2,255	2,444	2,472
litigations	24,367	32,140	40,257
administrative indictments	1,506	1,968	1,867
COMMERCIAL COURTS	24,151	23,061	18,801
SUPREME COURT			
civil department	3,355	3,490	3,470
criminal department	2,000	2,041	2,185
administrative department.	14,559	10,079	15,251

The number of unresolved cases is increasing. In 2010 there were 20.879 enforcement cases that were unsolved up to 5 year.

Total number of enforcement cases and number of enforcement cases unresolved:<sup>156</sup>

<sup>155</sup> Source: Response EC Chapter 23, answer to question 26.

<sup>156</sup> Source: Response EC Chapter 23, answer to question 30.

	2006	2007	2008
Total number of cases	805,946	871,049	911,420
Unresolved end of the year	334,088	372,440	392,334 *

\* of which 219,382 are unresolved cases in Belgrade.

**Role of judges**

From the description of the enforcement system it is already clear that there is an important role for the judge in the enforcement process. The judge is involved in every phase of the enforcement process and takes all necessary decisions in the process, starting from the decision or rejection of the motion on enforcement until the satisfaction of the enforcement creditor. In addition it is also the judge that instructs the enforcement agent and other bodies (such as the different registers and the National Bank of Serbia) on the execution activities that need to be undertaken.

The judge decides: on the motion on enforcement; on legal remedies (objection or appeal); on enforcement proposals based on authentic documents; on proposals to change the means of enforcement; on proposals to postpone enforcement; on objections of the third party; on imposition and collection of fines; on proceedings referring to securing claims (money or other), by making temporary and prior measures and on securing claims. In addition he is in charge of the sale of immovables, in cases of the physical taking away of minor children from one parent to be given to the other, the judge is in exclusive charge of that procedure. Hearings in the enforcement process are managed by the judge.

One could wonder whether such an involvement is absolutely necessary in enforcement proceedings!

**10.2.4 The draft law on enforcement procedure**

*This paragraph is based on the draft Law on Enforcement and Security (hereafter DSLES) as it was approved by the Government of Serbia (November 2010).*

**Introduction**

We already indicated the intentions of the Serbian Government to radically change the enforcement system. The Serbian Government motivated its choice for a private enforcement system as follows: “According to some statistical data, with which Ministry of Justice disposed of, in average it takes little over 600 days for the enforcement of sentence. There is a plan for improving the execution of sentences and it consists primarily in the fact that the new law regulate enforcement procedure in order to improve the efficiency of conducting enforcement. This would be achieved primarily by introducing private enforcement officers, as well as some changes to the procedure solutions in the current law which should contribute to efficiency. The introduction of private enforcement officers (persons with law degree and state exam passed, with adequate physical and technical conditions, appointed by the Ministry of Justice) should relieve the courts from conducting the enforcement. It is assumed that the private enforcement officers due to their expertise (current court enforcement officers are employees with high school degree and with no special exam for the enforcement job) and the salary, will be able to accomplish their job better and more efficiently. They will carry out all types of enforcement (collection of pecuniary claim, non-financial enforcement, like evictions, cessions of immovables or movables) and the police will be obliged to assist them in enforcement of sentences. Private enforcement officers would allow enforcement based on credible documents related to utilities and similar services, which would relocate these cases that Serbia numbers in hundreds of thousands from the courts in the phase of enforcement, but the courts would retain jurisdiction to decide on complaints against such enforcement decisions. Ministry of Justice as the designated proposer of the law that regulates the enforcement procedure considers that the procedure of enforcement will be improved in a way that judicial remedy submitted against the decision on enforcement, and other decisions of the First Instance Court, which now is a appeal, should be replaced by the complaint decided by the First Instance Court, not the immediate superior, Second Instance Court. The complaint would be decided by the council made out of three judges from the same court that issues a enforcement order and thus is expected to shorten the time needed now for the Appellate court to rule

on the appeal. Postponing of enforcement on the debtor's proposal will not be allowed which also accelerates the procedure, possibilities for exemptions in the procedure are limited and it prevents the possibility to seek delegation to another court, which has been so far subject of abuse by debtors, all to delay the proceedings.<sup>157</sup>

Indeed: the draft law seems very ambitious and introduces some radical changes in the present enforcement system.

### ***Introduction of the private enforcement agent***

One of the major changes is the introduction of the so-called two track system: enforcement is ordered by the court and carried out by either the court or the (private) enforcement officer. Thus a new profession is introduced in the draft Act. However at the same time the involvement of the creditor in the enforcement process still is considerable.

The number of enforcement officers shall be determined by the minister, based on the number of inhabitants (as a rule one enforcement officer per 30.000 inhabitants).<sup>158</sup> The enforcement officers will be appointed by the Minister for the territory of a first instance court and the territory of the commercial court.<sup>159</sup> The enforcement officer will be a highly educated university law graduated person with at least two years of enforcement related experience or three years of experience in legal affairs.<sup>160</sup> A system of monitoring and control, disciplinary proceedings, personal liability and professional training should maintain the moral and ethical standards of the new profession.

### ***Legal remedies***

In paragraph 3.10 we already referred to the substantial number of judgments from the ECtHR against Serbia. The extensive number of legal remedies was one of the problems that were identified by the ECtHR. In the draft law the number of legal remedies is reduced to a strict minimum:<sup>161</sup>

Regarding enforceable documents:

1. If the obligation specified in the enforcement ruling has been fulfilled;
2. If the decision on the basis of which the enforcement was ordered has been reversed, revoked, modified, rendered of no force and effect, is absolutely null and void, without legal effect or lacks the status of an enforceable document;
3. If the settlement on the basis of which the enforcement was ordered has been revoked;
4. If the time limit for fulfilling the obligation has not expired or if the condition specified in the enforceable document has not occurred;
5. If the statutory time limit for making a motion for enforcement has expired.

Regarding authentic documents:

6. The claim in the authentic document has not been established;
7. The authentic document contains untrue content;
8. The claim in the authentic document has not matured;
9. The obligation has been discharged or otherwise terminated;
10. The claim has lapsed under the statute of limitations.

### ***The role of the courts***

Furthermore, in the draft law the courts still have a central role in the enforcement process. A number of provisions relate to the court activities. One of the intentions of the draft is to outsource enforcement from the courts. Practice will tell whether the legislator succeeded. The introduction of the enforcement officer loosened certain ties with the court, e.g. according to article 20 DSLES in case the enforcement

<sup>157</sup> Source: Response EC Chapter 23, answer to question 30.

<sup>158</sup> Art. 315 DSLES.

<sup>159</sup> Art. 312 DSLES.

<sup>160</sup> Art. 313 DSLES.

<sup>161</sup> Artt. 42 and 46 DSLES.

officer is involved it is not necessary to list the means of enforcement in the motion on enforcement: "The enforcement officer shall carry out enforcement against such assets and objects of enforcement as are listed in the enforcement ruling, and if no assets or objects are listed, the enforcement officer shall, on the basis of his or her own conclusion, carry out enforcement against such assets and objects of enforcement as are considered most appropriate for the satisfaction of the enforcement creditor."

### *The role of experts*

Experts have an imported role in the present enforcement system. The role of experts or experts' opinions will be limited in the DSLES: "Expert opinions shall not be allowed in enforcement proceedings."<sup>162</sup> The only reference to the use of an expert is made in article 93 paragraph 3 DSLES: "If the court or enforcement officer orders that a valuation be made after the inventory on the basis of the information supplied by organisations, institutions or legal entities, the valuation shall be entered in a separate record."

### *Family related matters and reinstating employees*

Under DSLES only the court and not enforcement officers will have competence in respect of the enforcement of decisions related to family-related and employment reinstatement matters: "The court shall have sole jurisdiction for carrying out the enforcement of decisions concerning family relations and enforcement with the aim of reinstating employees."<sup>163</sup>

## **10.3 Training of professionals involved in enforcement**

### *Judges*

The Law on Judicial Academy<sup>164</sup> mentions initial training as a precondition for the election of a judge. The content of the training program depends on the professional experience of the judge. Once appointed there is a right (and obligation) of continuous vocational training of the judges. Nevertheless, the attention for enforcement law in both initial training and continuous training is very limited.

### *Court enforcement officials*

As in most of the other countries the training of court enforcement officials in general is not very well structured or organised. The whole profession does not receive the necessary attention and the court clerks, who have to deal with the enforcement, do not receive any special training. An institution, responsible for planning and conducting court enforcement officials' training does not exist.

## **10.4 Ethics, monitoring and control, disciplinary issues**

### *Judges*

A reference to the Code of Ethics can be found in article 3 paragraph 4 of the Law on Judges. Based on this provision on 14 December 2010 the High Judicial Council adopted the Code of Ethics. The Code of Ethics establishes the ethical principles and rules of conduct of judges with which they must comply, with the aim to maintain and to improve the dignity and reputation of judges and the judiciary. The ethical principles as mentioned in the Code of Ethics are: independence, impartiality, professional competence and responsibility, dedication in performing judge's office and the freedom of association. "Judges must comply with the Code of Ethics in any situation, and the principles of this Code shall represent the judges' way of life", as it is mentioned in article 7 of the Code of Ethics.

A violation of the provisions of the Code of Ethics represents a disciplinary offense. The High Judicial Council is the decisive body to judge which actions are contrary to the dignity and independence of a judge and are damaging to the reputation of the court. A violation of the provisions of the Code of Ethics to a greater extent represents disciplinary infringement and violation of the provisions of the Code of Ethics

<sup>162</sup> Art. 30 DSLES.

<sup>163</sup> Art. 3 DSLES.

<sup>164</sup> Law on Judicial Academy, Official Gazette of the RS, No. 104/2009.

is determined in the disciplinary proceedings. When it assumes responsibility of the judge for a serious disciplinary offence, the Disciplinary Commission of the High Judicial Council initiates the procedure for dismissal of the judge. Disciplinary sanctions are public warning, fine up to 50% of salary for a period of one year and prohibition to progress for three years. A judge performing judge's office for at least ten years that has not been disciplinary sanctioned may be appointed as a Disciplinary Prosecutor, President and member of the Disciplinary Commission. The Disciplinary Prosecutor proceeds on disciplinary report, decides on submitting a proposal for disciplinary proceedings and carries out other duties in accordance with the Law on Judges and the Rulebook on Disciplinary Proceedings and Disciplinary Responsibility of Judges.

The inspection of the judiciary is performed by the Department for Judiciary and Minor Offences, the Division for Supervision in Judiciary and Misdemeanor Authorities within the Ministry of Justice (article 70 of the Law on Organization of Courts). The Court Rules of Procedure provide a more detailed regulation of the supervision. Article 4 of the Court Rules of Procedure refers to the supervision tasks: through a person authorised for supervision, the Ministry controls the performance of court administration, proceeding in cases within statutory time limits, proceeding on complaints and petitions, office management in court and other tasks related to internal organisation and operation of the court. Regarding these supervision tasks the Serbian Government states: "Supervisions conducted in 2010: In cooperation with the High Judicial Council, in the first quarter of 2010, the supervision was conducted in the Division for Civil Proceedings, Family Division, Labour Division, Enforcement Division, Division for Non-contentious Matters and Criminal Division of the First Basic Court in Belgrade and the High Court in Belgrade, for the purpose of determining the total number of pending cases (cases taken on and not yet resolved in terms of Article 420 and 421 of the Court Rules of Procedure) and proceeding on solved cases (special records in terms of Article 422 of the Court Rules of Procedure). In cooperation with the Department for Operations and Technologies there were 34 unscheduled supervisions conducted in Basic Courts relating to the application of the Rulebook on Keeping Special Records on Real Estate Purchase Agreements as well as authentication of signatures, manuscripts, transcripts and international authentication. In relation to implementation of the Programme for Automatic Case Management-ACM, there were six supervisions conducted in courts of general jurisdiction and its implementation in all courts is continuously monitored. In 2010 there were 17 regular supervisions conducted in courts of general jurisdiction and in 3 Misdemeanour Courts, as courts of special jurisdiction. It was proceeded in 3,445 cases in period from 1 January to 1 December 2010 on complaints, petitions, and other submissions of the citizens. The largest number of complaints relates to the duration of the proceedings. In addition to complaints submitted in writing, it was proceeded on all oral complaints, submitted by telephone or direct reception of parties."<sup>165</sup>

### ***Court enforcement official***

The court enforcement officials of Serbia are operating under the Law on Civil Servants. On 29 March 2008 the Code of Conduct for Civil Servants, as it was adopted by the High Civil Service Council, became effective. The conduct of a civil servant contrary to the provisions shall be considered a minor violation of official duty, unless specified by law as serious violation of official duty (art 2 Code of Conduct for Civil Servants). According to article 108 Law on Civil Servants, a violation of the code of ethics of civil servants, which is not included within some of the violations of duties from the employment relationship prescribed by the Law on Civil Servants or special law, represents a minor violation of duty from employment. Serious violations of duties from employment are repetitions of minor violations of duty established by a final decision in which the disciplinary sanction is being pronounced (art 109 Law on Civil Servants). Depending on the violation there are certain disciplinary sanctions: fine of up to 20% of the salary for full working hours, paid for the month in which the fine was imposed for minor violations, up to a fine of 20-30% of salary for full working hours, paid for the month in which the fine was imposed, for the period of six months; transfer to the next lower salary grade; prohibition to progress for four years; transfer to the next lower rank position while keeping the salary grade whose ordinal number is identical to ordinal number of salary grade of the position from which he has been transferred (article 110 Law on Civil Servants).

## **10.5 The enforcement agent: the court enforcement official**

In theory the enforcement agent has to carry out the orders from the court. In general the Serbian court enforcement official, the enforcement agent, is rewarded as a low rank person, comparable with the court clerk. In practice the enforcement agent has a lot of responsibilities.

<sup>165</sup> Source: Response EC Chapter 23, answer to question 6G.



The rate of success is rather poor. The USAID BES project did a telephone survey of enforcement agents in eight commercial courts around Serbia.<sup>166</sup>

"In a telephone survey by BES of enforcement officers in eight commercial courts around Serbia, only two respondents estimated that the amount due was collected in enforcement actions as often as in 50% of attempts; five others suggested that it might be as high as 30% to 40% of actions; but all the other respondents said that their success rate in enforcement actions was normally between 10% and 25%. All the respondents stated that enforcement actions are rarely completed with less than three attempts to perform the enforcement action (such as an inventory and seizure of chattels), but all agreed that a significantly larger number of attempts was required in a great many cases; several said that as many as between 9 and 12 attempts are frequently required before the action can be completed. One respondent stated that "three attempts would be ideal, but in 90% of cases enforcement is attempted up to 10 times, so in the end the proceeding is suspended." No one said that enforcement actions could be performed with just a single attempt."

There are several reasons for this low rate of success. The main reason is simple: there is a lack of enforcement agents to handle the court caseload. At some courts in Belgrade enforcement agents receive up to 300 new cases that require actual enforcement activities per month per officer. They have to deal with those cases with a minimum on infrastructure and tools: no assistants, lack of vehicles, lack of computers, phones and other equipment, long travel distances, low income.

The USAID Project: "For example, enforcement officers in Belgrade and Zrenjanin reported backlogs of several months in their caseloads, so that each action by the enforcement officer involved a delay of several months (and since many cases require more than one action by the enforcement officer, these delays may be repeated multiple times in the course of a single case). Cases in which no action of any kind was taken against the debtor (for a variety of reasons) run between 10% and 50% of caseloads. In Belgrade commercial court, approximately 95% of enforcement actions undertaken by enforcement officers in the first six months of 2006 resulted in no enforcement."<sup>167</sup>

The fact that the courts are overburdened makes the question arise whether judicial involvement in the ordinary case is an appropriate use of judicial resources, or if judicial involvement should be limited to those cases involving substantive decision-making on matters extending beyond the merely formal. The fact that judges would be divested of most first-instance decision-making responsibilities concerning the enforcement of judgments, means that the enforcement system itself also needs changes.

The Serbian Government acknowledged this. While writing this publication a new Enforcement Law has been drafted, introducing a system of professional enforcement outside the courts.

166 USAID-BES Project, Enforcement of civil and commercial judgments in Serbia, Baseline assessment, USAID/Booz, Allen & Hamilton (July 31, 2006), page 10. The survey, performed by BES in July 2006, comprised a total of 22 respondents – out of a total of 36 commercial court enforcement officers – in 16 commercial courts.

167 Source for all numbers: interviews conducted by BES staff, June-July, 2006; BES commercial court survey, July 2006. USAID-BES Project, Enforcement of civil and commercial judgments in Serbia, 2006.

## Annex 1: Context of the Balkans Enforcement Reform Project (BERP)

On 11 March 2004, Dutch Ministers Ben Bot (Foreign Affairs), Agnes van Ardenne-Van der Hoeven (Development Cooperation) and Henk Kamp (Defense) presented their policy note “Regional Approach of the Western Balkans”<sup>1</sup> to the Netherlands Parliament. According to the policy note, the Netherlands assistance will shift from post-conflict to sustainable development and assistance to the transition process. The policy note identified a number of topics for cooperation. One of these topics is “to strengthen the Rule of Law and public/military security”. Furthermore, the policy note addressed the process of future integration of the countries of the Western Balkans into the European Union and NATO.

As a member of the European Union it seems logical that the Netherlands support the need for the reform of the judicial system in the countries of the Western Balkans as one of the priorities to achieve the so-called ‘Copenhagen criteria’ for a future membership of the European Union. The importance of an efficient and effective system for the enforcement of court judgments has been acknowledged in this context. During one of the missions of the Minister for Development Cooperation (14-21 October 2005) to the Western Balkans, the Rule of Law in the countries of the Western Balkans was one of the main topics of discussion. In her mission report to the Dutch Parliament, then Minister Van Ardenne presented a number of conclusions related to the functioning of the various judicial systems. Regarding enforcement she concluded that the implementation and enforcement of legislation remained an issue in all Western Balkan countries. One of the causes thereof is the weak institutional capacity in the public sector.

The aim of the ‘Balkans Enforcement Reform Project’ (BERP) is to support the countries, or better said, the different systems of the Western Balkans in the reform of their legal system in general and more in particular in ensuring a more efficient and effective functioning of the systems of enforcement law at the national and the regional level.

The project was initiated by the Center for International Legal Cooperation (CILC) in close collaboration with the Union Internationale des Huissiers de Justice et des Officiers Judiciaires (UIHJ) and the German Development Cooperation (GIZ).

In the spring of 2008 a first comprehensive proposal was submitted to the Royal Netherlands Embassy in Belgrade, which on behalf of the Minister for Development Cooperation was responsible for the management of the above mentioned regional cooperation program in the Western Balkans countries. Based on this proposal, the Embassy took the decision to first let the applicants conduct a thorough assessment of the state of play and the exact need for cooperation.

In order to do so, a team consisting of the BERP project director Mr. Eric Vincken, the BERP project senior key expert Mr. Jos Uitdehaag and Mr. Carsten Mahnke, a German lawyer, visited all seven countries of the Western Balkans in July and August 2008. Based on these missions, the team prepared a detailed inception report and a project proposal for the “Balkans Enforcement Reform Project” (BERP).

The purpose of BERP was to assist the relevant governmental structures, professional bodies and NGOs in the countries of the Western Balkans involved in the area of enforcement in:

- the strengthening of regional cooperation in enforcement law;
- the reform of primary and secondary legislation, as well as of regulations governing the profession (as e.g. disciplinary proceedings) and their harmonization with international best practices;
- the development and implementation of training strategies and programs for judges, judicial officers (from the private and public sector) entrusted with the execution of court judgments, as well as for the officers and institutions entrusted with the supervision over enforcement procedures, including training at the regional level on topics like ethics and disciplinary issues, international aspects of enforcement, public awareness and media, quality standards and training methodology;
- the establishment and strengthening of national professional organizations in the area of enforcement law;
- the development and introduction of regional best practices in areas as quality management, monitoring and control, performance measurement, transparency of assets and cooperation with public authorities;

1 “Regionale Benadering Westelijke Balkan” (Regional approach of the Western Balkans), letter of Ministers B. Bot (Foreign Affairs), A. van Ardenne-van der Hoeven (Development Cooperation) and H. Kamp (Defense) to the Parliament (file 29 478).

- the dissemination of reform efforts in the sector among the general public and the awareness raising about enforcement law related issues among other legal professionals.

It has already been mentioned that the overall political context of BERP is the perspective of accession to the European Union for the various countries in the region, as well as the membership of these countries of the Council of Europe. Both the accession process and the Council of Europe membership require that the countries upgrade their legal systems to qualify under the so-called 'Copenhagen criteria' and adhere to the standards set by the European Union and the Council of Europe. Those standards require a more efficient and effective functioning of enforcement law in civil and commercial cases. In order to meet those criteria and standards for the judicial sector, all governments adopted strategy papers, within which the judicial reform process has to unfold itself in the years to come. Furthermore, all participating countries are, some longer than the others, members of the Council of Europe. This also implies that they committed themselves to adjust the legislative framework and the implementation thereof in legal practice to the standards of the Council of Europe.

Through the strengthening of the various systems of enforcement law and through the strengthening of regional cooperation in civil enforcement law BERP intends to contribute to the process of harmonization of the various legal and judicial systems with the standards and criteria of the European Union and the Council of Europe.

The impact of more efficient and effective functioning systems of enforcement in civil and commercial cases and of an enhanced cooperation in enforcement in the region of the Western Balkans is clear. A strengthening of the principles of the Rule of Law will lead to a higher level of legal certainty in society and thus to more trust in and respect for the legal system by the private sector and the general public, particularly with respect to enforcement: the need for 'informal means of enforcement' will decrease; as a result of a more balanced use of legal remedies the backlog cases at the national courts will decrease, as will the number of cases before the European Court of Human Rights in Strasbourg.

Not just the legal environment will benefit. An efficient and effective enforcement system will also create a better economic climate: it will also attract investors to the region and the individual countries. There will be more economic and professional contacts between the countries. This will inevitably also lead to more regional economic and political stability and better chances for integrating the entire region into the Euro-Atlantic structures.

Furthermore, it can be expected that once a good regional cooperation framework will be set-up for the area of civil enforcement, this can also serve as a model for effective regional cooperation in other areas.

The regional cooperation within BERP should be seen against the background of the common problems and challenges the countries are faced with in the area of enforcement law. Legal and practical obstacles in national systems are hampering an effective cross-border enforcement and service of documents, while at the same time one can see a growing cross-border economic activity in the region. These obstacles should be removed and a joint judicial area which ensures an effective and efficient cross-border enforcement and service of documents should be created. More and more structured professional contacts between the countries of the Western Balkans should be institutionalized through a regional network organization and integration into the various regional and international bodies.

BERP has been implemented by three key project partners: the Center for International Legal Cooperation (CILC), The Union Internationale des Huissiers de Justice et des Officiers Judiciaires (UIHJ) and the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)/Open Regional Fund for Legal Reforms in South East Europe (ORF).

#### *The Center for International Legal Cooperation (CILC)*

The Center for International Legal Cooperation (CILC) is an independent Dutch non-profit organization. It is a foundation (non-profit organization) according to the law of the Netherlands, which provides expertise to developing and transition countries engaged in legal and judicial reform. CILC was founded in 1985 in the belief that a functioning, reliable legal system is a critical precondition for the political, economic and social well-being of a country's population.

CILC's Executive Board consists of a number of prominent lawyers from the Dutch judiciary, the Ministry of Justice, universities and the diplomatic service of the Netherlands. The Board of Trustees has seats for representatives of the various Dutch law faculties, the Council for the Judiciary, the Board of Prosecutors-

General, the Netherlands Bar Association, the Association for the Administration of Justice (NVvR), the Royal Organization of Judicial Officers (KBvG), the Association of Company Lawyers (Nederlands Genootschap Bedrijfsjuristen), the Netherlands Notary Organization (KNB), and other professional bodies and specialized institutions whose work is relevant to CILC's mission. CILC's Board of Trustees also functions as the Council for International Legal Cooperation: a platform and network for exchange of information and experiences in international legal cooperation. The aforementioned organizations and institutions have joined CILC leaving the tasks of development, implementation and monitoring/evaluation of projects as well as the process management for an institutionalized legal change process in the hands of CILC's staff. This allows them to focus on the core input of providing high level (comparative) expertise.

Through its structure, CILC, representing the entire legal community of the Netherlands, is able to assure a broad and coherent input of expertise in its projects rather than addressing issues of legal reform exclusively from the perspective of one of the legal professions or one single law school.

CILC has a strong network in the Dutch and European legal professional world, which allows it to draw on a large pool of legal specialists in order to build expert teams for individual cooperation projects. The CILC approach allows these experts to concentrate on providing specific expertise to the beneficiaries and project partners. All other aspects related to the experts' input, such as project management, logistics, embedding the individual expert's input in a broader strategic intervention logic, are taken care of by CILC staff.

#### *The Union Internationale des Huissiers de Justice et des Officiers Judiciaires (UIHJ)*

The Union Internationale des Huissiers de Justice et des Officiers Judiciaires (UIHJ) is the international organization of all bailiffs and judicial officers. The UIHJ was established in 1952. Official languages of the UIHJ are English and French. The headquarter of the UIHJ is based in Paris.

The object of the UIHJ is the promotion of the organization of the profession of officials responsible for carrying out judgments in different countries all over the world.

At this moment, more than 70 associations or national chambers of judicial officers are member of the UIHJ. The organization offers a very diverse profile, varying from states with members of the legal profession in private practice (France, Belgium, the Netherlands, many former Soviet republics, African countries and Quebec) or actors in public office enjoying some prerogatives (Germany, Brazil, Russia) or ordinary civil servants placed under the authority of the judge (Spain, Cuba, Austria), to very fragmented forms as in England and the United States.

As an NGO, UIHJ is an advisory body to the Economic and Social Council of the United Nations, the Hague Conference for Private International Law and the Council of Europe (e.g. observer to CEPEJ). Furthermore, UIHJ is regularly involved in different international commissions, especially in the legal domain.

The UIHJ is closely linked to the organization of the European Judicial Area. The UIHJ has experts working on behalf of the European Union or the Council of Europe. Furthermore, the UIHJ is involved in Africa with the implementation of the OHADA Treaty (for the harmonization of business law in Africa) and in the improvement of The Hague Convention of 15 November 1965. Finally, UIHJ has also embarked on an action aiming at the implementation of a process of harmonization in the Mercosul area in South America.

#### *Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH /Open Regional Fund for Legal Reforms (ORF)*

Since 1 January 2007, GIZ – Germany's Agency for Development Cooperation, established so-called 'Open Regional Funds for South East Europe' (ORFs).

One of these funds aims at legal reform (oriented to the economic legal framework). The ORF for Legal Reform is established by coordinators in all seven participating countries and complements ongoing bilateral projects. Local and regional initiatives can be submitted for funding under the ORF by the various stakeholders (ministries, other governmental agencies, universities, faculties, as well as non-governmental organizations) in the participating countries.

Proposals will have to meet three criteria:

- they must serve EU approximation;

- they must be a step for improving the economic framework; and
- they must serve the regional integration within South East Europe.

One of the projects of the ORF for Legal Reform deals with the harmonization of economic law against the background of cross-border procedures. Within the framework of the ORF cooperation with BERP, relevant legislation will be analysed and recommended, seminars, conferences and trainings will be organised. Also commentaries to the various enforcement laws in force are in preparation. ORF also cooperates with CILC in the joint implementation of BERP by making available local management and coordination capacity to implement the joint project.

### *Strategic partnerships*

Given the common interest with other donors and international organizations to jointly address certain issues, BERP closely cooperates with them (like e.g. USAID, European Union, Council of Europe) in the implementation of its regional program and the various country action plans.

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### Annex 3:

#### **COUNCIL OF EUROPE RECOMMENDATION REC(2003)17 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON ENFORCEMENT**

*(adopted by the Committee of Ministers on 9 September 2003  
at the 851st meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Recognising that the rule of law on which European democracies are based is dependent on the support of fair, efficient and accessible judicial systems;

Considering that the enforcement of a court judgment is an integral part of the fundamental human right to a fair trial within a reasonable time, in accordance with Article 6 of the European Convention on Human Rights (hereinafter referred to as "the ECHR");

Acknowledging also that the rule of law principle can only be a reality if citizens can, in practice, assert their legal rights and challenge unlawful acts;

Considering that member states have a duty to ensure that all persons who receive a final and binding court judgment have the right to its enforcement. The non-enforcement of such a judgment, or a delay in it taking effect, could render this right inoperative and illusory to the detriment of one party;

Convinced of the need to promote greater efficiency and fairness in the enforcement of judgments in civil cases and to strike a positive balance between the rights and interests of the parties to the enforcement process;

Aware of the risk that without an effective system of enforcement, other forms of "private justice" may flourish and have adverse consequences on the public's confidence in the legal system and its credibility;

Recalling Resolution No. 3 of the 24th Conference of European Ministers of Justice on a "General approach and means of achieving effective enforcement of judicial decisions", held in Moscow on 4 and 5 October 2001, in which it was agreed that the "proper, effective and efficient enforcement of court decisions is of capital importance for States in order to create, reinforce and develop a strong and respected judicial system";

Bearing in mind Resolution Res(2002)12 establishing the European Commission for the Efficiency of Justice (CEPEJ), adopted by the Committee of Ministers on 18 September 2002;

Having regard to the importance of information technology in improving the efficiency of the enforcement process and the relevant Council of Europe legal instruments in this field, including Recommendation Rec(2003)14 on the interoperability of information systems in the justice sector and Recommendation Rec(2003)15 on the archiving of electronic documents in the legal sector,

Recommends that governments of member states:

- facilitate the efficient and cost-effective enforcement of judicial decisions, as well as of other judicial or non-judicial enforceable titles, as appropriate;
- take or reinforce, as the case may be, all measures which they consider necessary with a view to the progressive implementation of the "Guiding principles concerning enforcement" set out below.

#### **Guiding principles concerning enforcement**

##### **I. Definitions**

For the purpose of this recommendation,

- a. "Enforcement" means the putting into effect of judicial decisions, and also other judicial or non-judicial enforceable titles in compliance with the law which compels the defendant to do, to refrain from doing or to pay what has been adjudged;
- b. "Enforcement agent" means a person authorised by the state to carry out the enforcement process irrespective of whether that person is employed by the state or not;
- c. "Claimant" means a party seeking enforcement;
- d. "Defendant" means a party against whom enforcement is sought.

## II. Scope of application

1. This recommendation applies to civil matters, including commercial, consumer, labour and family law. It does not apply to administrative matters. This recommendation may also apply to criminal matters which are not concerned with the deprivation of liberty.
2. Moreover, this recommendation applies to the enforcement of judicial decisions, as well as of other judicial or non-judicial enforceable titles.

## III. Enforcement procedures

1. In order for enforcement procedures to be as effective and efficient as possible,
  - a. enforcement should be defined and underpinned by a clear legal framework, setting out the powers, rights and responsibilities of the parties and third parties;
  - b. enforcement should be carried out in compliance with the relevant law and judicial decisions. Any legislation should be sufficiently detailed to provide legal certainty and transparency to the process, as well as to provide for this process to be as foreseeable and efficient as possible;
  - c. the parties should have a duty to co-operate appropriately in the enforcement process; in addition, and, in particular, in family law matters, the relevant authorities should facilitate this co-operation;
  - d. defendants should provide up-to-date information on their income, assets and on other relevant matters;
  - e. states should set up a mechanism to prevent misuse of the enforcement process by either party which should not be considered as a re-adjudication of the case;
  - f. there should be no postponement of the enforcement process unless there are reasons prescribed by law. Postponement may be subject to review by the court;
  - g. during the enforcement process, a proper balance should be struck between claimants' and defendants' interests, bearing in mind, in particular, the provisions of both Articles 6 and 8 of the ECHR. Where appropriate, the interests of third parties should also be taken into account. When the enforcement process concerns family law matters, the interests of the members of the family should be taken into account; in addition, when the enforcement process concerns, in particular, the rights of children, the best interests of the child should be a primary consideration, in accordance with international and national law;
  - h. certain essential assets and income of the defendant should be protected, such as basic household goods, basic social allowances, monies for essential medical needs and necessary working tools.
2. Enforcement procedures should:
  - a. be clearly defined and easy for enforcement agents to administer;
  - b. prescribe an exhaustive definition and listing of enforceable titles and how they become effective;
  - c. clearly define the rights and duties of defendants, claimants and third parties, including, in the two latter cases, their rankings and entitlements to monies recovered and distributed amongst claimants;
  - d. provide for the most effective and appropriate means of serving documents (for example, personal service by enforcement agents, electronic means, post);
  - e. provide for measures to deter or prevent procedural abuses;
  - f. prescribe a right for parties to request the suspension of the enforcement in order to ensure the protection of their rights and interests;
  - g. prescribe, where appropriate, a right of review of judicial and non-judicial decisions made during the enforcement process.
3. Enforcement fees should be reasonable, prescribed by law and made known in advance to the parties.
4. The attempts to carry out the enforcement process should be proportionate to the claim, the anticipated proceeds to be recovered, as well as the interests of the defendant.
5. The necessary costs of enforcement should be generally borne by the defendant, notwithstanding the possibility that costs may be borne by other parties if they abuse the process.
6. The search and seizure of defendants' assets should be made as effective as possible taking into account relevant human rights and data protection provisions. There should be fast and efficient collection

of necessary information on defendants' assets through access to relevant information contained in registers and other sources, as well as the option for defendants to make a declaration of their assets.

7. Assets should be sold promptly while still seeking to obtain the highest market value and avoiding any costly and unnecessary depreciation.

#### **IV. Enforcement agents**

1. Where states make use of enforcement agents to carry out the enforcement process, they should comply with the principles contained in this recommendation.
2. Enforcement agents' status, role, responsibilities and powers should be prescribed by law in order to bring as much certainty and transparency to the enforcement process as possible. States should be free to determine the professional status of enforcement agents.
3. In recruiting enforcement agents, consideration should be given to the moral standards of candidates and their legal knowledge and training in relevant law and procedure. To this end, they should be required to take examinations to assess their theoretical and practical knowledge.
4. Enforcement agents should be honourable and competent in the performance of their duties and should act, at all times, according to recognised high professional and ethical standards. They should be unbiased in their dealings with the parties and be subject to professional scrutiny and monitoring which may include judicial control.
5. The powers and responsibilities of enforcement agents should be clearly defined and delineated in relation to those of the judge.
6. Enforcement agents alleged to have abused their position should be subject to disciplinary, civil and/or criminal proceedings, providing appropriate sanctions where abuse has taken place.
7. State-employed enforcement agents should have proper working conditions, adequate physical resources and support staff. They should also be adequately remunerated.
8. Enforcement agents should undergo initial and ongoing training according to clearly defined and well-structured aims and objectives.

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### **EXPLANATORY MEMORANDUM**

#### **I. INTRODUCTION**

1. The Council of Europe has, for many years, been dealing with questions concerning the enforcement of court decisions in the framework of its work aiming at setting standards in the field of Human Rights and the Rule of Law and at promoting law reform in States.
2. The European Court of Human Rights decided, in the landmark case of *Hornsby v Greece* in 1997, that enforcement forms an integral part of the fundamental human right to a fair trial within a reasonable time in accordance with Article 6 of the European Convention on Human Rights. The Court has, since then, recurrently reaffirmed that States are under a duty to ensure that all persons in receipt of a final and binding court decision have the right to enforcement and that the right of access to a court "would be illusory if a Contracting State's domestic legal system allowed a final binding judicial decision to remain inoperative to the detriment of one party".
3. The Conclusions adopted by the participants of the Council of Europe multilateral seminar on "The execution of court decisions in civil cases" held at the Palais de l'Europe, Strasbourg, on 15 and 16 October 1997, reaffirmed the legal and political importance of enforcement in the proper functioning of the judicial system in a State governed by the rule of law.
4. In Resolution No. 3 of the 24th Conference of European Ministers of Justice on "The implementation of judicial decisions in conformity with European standards", held in Moscow on 4 and 5 October 2001, it was agreed that the "proper, effective and efficient enforcement of court decisions is of capital importance for States in order to create, reinforce and develop a strong and respected judicial system". To this end, the European Ministers of Justice invited the Committee of Ministers to instruct the European Committee on Legal Co-operation (CDCJ) to identify common European enforcement standards and principles as regards the procedures to be applied and the role and practices of enforcement agents (e.g. bailiffs).

5. During the Council of Europe multilateral seminar on "The role, organisation, status and training of enforcement agents" held in Varna, Bulgaria, on 19 and 20 September 2002, the Conclusions adopted by the participants reasserted the importance of fair and efficient enforcement carried out by an effective profession of enforcement agents.
6. As a follow-up to Resolution No.3 of the Conference of European Ministers of Justice, and on the basis of the legal co-operation activities carried out by the Council of Europe on a bilateral, regional and multilateral level, the Working Party of the Committee of experts on efficiency of justice (CJ-EJ-GT) held two meetings at the Palais de l'Europe in Strasbourg (24-26 June 2002 and 9-11 October 2002) to prepare a draft Recommendation on enforcement for the attention of the CJ-EJ at its meeting held at the Palais de l'Europe on 13-15 November 2002. The draft Recommendation has been submitted to the European Committee on Legal Co-operation (CDCJ) which approved it on 23 May 2003.

## II. COMMENTS ON THE DIFFERENT PARTS OF THE RECOMMENDATION

7. Directly following the Preamble, the Recommendation invites the governments of member States to facilitate the enforcement of those judicial decisions and enforceable titles of a judicial and non-judicial character requiring enforcement<sup>1</sup>.
8. The Recommendation applies to judicial decisions and to other judicial and non-judicial enforceable titles which are, in the wider sense, acts of a binding nature often issued by other authorities (e.g. settlements of a public notary, arbitral awards). It must be understood that not all such decisions and titles require action to be taken to enforce them as is the case, for example, for acts of a declaratory or self-executory nature or for judgments that change existing relationships (e.g. divorce or annulment of contracts).

### *Principle I - Definitions*

9. Principle I concerns the definitions of the main references relating to enforcement: the process of enforcement, the enforcement agent, the claimant and the defendant.
10. The reference to "enforcement agent" covers a wide variety of persons responsible for carrying out the enforcement process (e.g. bailiff, huissier de justice, enforcement judge etc). It must be pointed out that, in many states, the role, responsibilities, organisation and professional status of these persons vary considerably as does their working conditions and remuneration.
11. At the time of preparation of this Recommendation, many states were re-examining their enforcement procedures and practices. In the majority of Council of Europe States, enforcement agents are classed either as civil servants subordinated to the Ministry of justice, judicial officers subordinated to the courts, self-employed persons acting independently or are employed as a combination of the above.

### *Principle II – Scope of Application*

12. Principle II concerns the legal scope of application of the Recommendation.
13. This Recommendation applies to civil matters (including matters of a commercial, consumer, labour and family nature) and may apply to certain specific criminal matters (e.g. fines, confiscation and, in so far as it is not considered a civil matter, compensation for victims). This Recommendation does not deal with the question of immunity and enforcement.
14. In contrast, the Recommendation does not concern criminal matters involving the deprivation of liberty often relating to custody in prison nor does it concern administrative matters. In the latter instance, reference should be made Recommendation Rec (...) of the Committee of Ministers to member States on the execution of decisions in the field of administrative law, the provisions of which are without prejudice to the present Recommendation.
15. States may apply the principles contained in the Recommendation to other appropriate areas.

### *Principle III – Enforcement procedure*

16. Throughout the Recommendation States are invited to consider different ways of improving the effectiveness of enforcement procedures and practices.

<sup>1</sup> The reference to the term 'judicial decisions and enforceable titles of a judicial and non-judicial character' is also cited in Principle I. a. on definitions and in II.2. on scope of application which, in all cases, should be considered to have the same meaning.



17. Principle III.1. a. makes clear that enforcement procedures should be clearly defined and laid down in a legal framework with reference to the powers, rights and responsibilities of the parties, including third parties such as maintenance claimants and defendants of an attached debt. This Principle underlines that enforcement is more effective when procedures are clear and easy to follow. This also enables the parties to more effectively understand their roles and comply with their responsibilities.
18. The reference, in Principle III.1.b., to 'compliance with the relevant law and judicial decisions' envisages two recurrent problems in many States: (i) the misuse and abuse of enforcement procedures by the parties thereby delaying the process and justice as a whole, and (ii) the risks of private forms of justice emerging when the enforcement process is inefficient.
19. To combat the emergence of such problems, States are invited to develop detailed legislation with legal certainty, transparency and easy applicability to encourage the parties to use and to rely upon enforcement to strengthen the credibility and visibility of the process.
20. The reference, in Principle III.1.c., to the duty of the parties to co-operate appropriately is necessary to increase compliance with, and reduce misuse of, the enforcement process (e.g. vexatious appeals). By co-operating and, therefore, by better communicating with each other, the vulnerability of the defendant and adverse reactions to the enforcement process (e.g. hiding assets), may be reduced. For example, a cooperative claimant may be more open to agreeing with the defendant on the assets to be attached or on payment arrangements (e.g. by instalments). In member States where these actions are permitted enforcement agents can therefore play a key role in facilitating such co-operation.
21. In addition, the co-operation of third parties, such as banks, can be extremely beneficial in the search and seizure of defendant's income and assets subject to Human Rights and data protection standards.
22. In the same vein, Principle III.1.d. refers to the duty of defendants to provide up-to-date information on their income, assets as well as other relevant matters (e.g. declarations referring to the whereabouts of a child) so that they may feel more responsible (even liable) and thereby discouraged from acting adversely. Defendants should provide such information if and as required by national law.
23. Principle III.1.e. reasserts the importance of preventing and deterring abuses of procedures by inviting States to establish mechanisms which combat procedural abuses for example by giving judges and/or enforcement agents more authority to penalise parties who are abusive (e.g. issuance of fines, increasing investigative powers).
24. In the light of the above, States should consider the ways in which the parties and the actors (i.e. judge and enforcement agent) may play a more active role during enforcement to empower and motivate them.
25. Principle III.1.f. reasserts the importance of avoiding unnecessary delays which may be brought about by unnecessary postponement of enforcement (e.g. vexatious appeals by the parties, by the decision of the enforcement agent). States are invited to overcome such delays by requiring reasons to be prescribed by law, which are subject, ultimately, to judicial review.
26. Considering the different positions of the (demanding) claimant and (often vulnerable) defendant, it is extremely important that enforcement procedure and practice strikes an appropriate and considerate balance of their interests which respects in particular Articles 6 (right to a fair trial) and 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR).
27. When the enforcement process concerns family law matters, the interests of the members of the family should be taken into account. In addition, when the enforcement process concerns the rights of children, the best interests of the child should be a primary consideration in accordance with international and national law. The main application of this Recommendation in family matters is to issues concerning the maintenance of dependants.
28. Nothing in this Recommendation should supersede the European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children<sup>2</sup> and other relevant international instruments concerning the unlawful removal of children.
29. In certain family law cases, relevant authorities, such as social services, may have an important role to play in promoting co-operation both between authorities and between the parties concerned.
30. The vulnerable and precarious position of the defendant is further emphasised in Principle III.1.h. It recommends that certain basic assets and income of the defendant should not be seized so that he/she has sufficient means to live as a measure of respect for that person's private life and human dignity. Similar exemptions can be found in the enforcement and civil procedural codes of many states. These essential items should, nevertheless, be underlined.

<sup>2</sup> European Treaty Series - No. 105.

31. States should also ensure that the rights of claimants' dependants such as children (e.g. maintenance) are guaranteed.
32. In some states, the law exempts the attachment of the principle dwelling of the defendant (e.g. family house) while in many other states it does not. In the latter event, the seizure of the principle dwelling and the eviction of the defendant and his/her dependants is a stressful event causing unnecessary hardship especially in states with low levels of social security and alternative housing plans. The opportunity to attach alternative assets, where appropriate, should be available within the enforcement system.
33. In Principle III.2.a., States are invited to ensure that enforcement procedures are clearly defined and easy for enforcement agents to administer to reduce any unnecessary complexity that may cause confusion and delays as well as to avoid their misuse and/or abuse.
34. In the light of the above, Principle III.2.b. invite States inter alia to exhaustively list, for the benefit of both legal certainty and transparency, all titles which may be enforced.
35. Principle III.2.c. reasserts the importance of the clarity and transparency of the enforcement process by underlining the rights and duties of the parties and of third parties in particular as regards their rankings and (percentage) entitlements to monies recovered and distributed amongst claimants.
36. States often employ different methods of serving documents pertaining to the enforcement process<sup>3</sup>. Some states use the postal service as an efficient and affordable means of service while in other states documents are served personally. In certain states, the service of documents is more problematic because of a lack of public service infrastructure.
37. Taking account of these variations and difficulties, Principle III.2.d. invites States to employ the most effective and appropriate methods of service. In strengthening the efficiency of enforcement it is therefore important that service is both assured and rapid.
38. The coercive measures referred to in Principle III.2.e. highlights the utility of measures such as fixed and variable penalties for late payment and the freezing of defendant's assets after judgment, to encourage parties to comply with, rather than to abuse, enforcement procedures.
39. In the same vein, disciplinary sanctions provide a similar incentive to combat situations where State employed enforcement agents abuse their position (e.g. suspension from office, deduction in salary).
40. Principle III.2.f. (coupled with the limitations to postpone enforcement in Principle III.1.f.) reasserts the importance of protecting the interests and rights of the parties. This is reinforced in Principle III.2.g. by the right of review of judicial and non-judicial decisions. These safeguards are offered by most if not all states but should, nevertheless, be underlined.
41. The cost-effectiveness of the enforcement process is of considerable importance in many states with limited (justice) budgets<sup>4</sup>. At the same time, justice should be an affordable option for the parties. Principle III.3. recommends that fees (e.g. of the enforcement agent) are reasonable and not excessive, are prescribed by law, are fixed and transparent and are made known to the parties in advance so that they may foresee enforcement events and act appropriately within a reasonable time. Some member States consider the use of variable interest rates on fees as an effective incentive on defendants to pay their debts more quickly. In countries where between claimants and enforcement agents there is freedom of contract concerning enforcement fees, the part of Principle III.3. which provides for enforcement fees to be prescribed by law may be restricted to fees to be born by the defendant. Indeed, in these countries, claimants should continue to have the possibility to negotiate with enforcement agents the amount of the enforcement fees, while defendants will be protected by paying the enforcement fees as prescribed by law.
42. As regards the practical actions taken by the enforcement agent, Principle III.4. underlines the importance of the principle of proportionality when carrying out the enforcement process with regard to the amount of income and/or assets needed to be attached to satisfy the claim. In so doing, the interests of the (vulnerable) defendant should be borne in mind.
43. In the light of the above, it is recommended that enforcement agents take the most appropriate and effective means of action that is best suited to the claimant and defendant and which is proportional to the objective of the enforcement (e.g. not seizing excessive amounts of assets to satisfy the amount adjudged). As previously mentioned, alternative solutions should be sought where it is practicable to do so.

3 This is without prejudice to the Council Regulation (EC) No 1348 of 29 May 2000 on the service in the (EU) Member States of judicial and extrajudicial documents in civil or commercial matters.

4 It is also one of the reasons why many states seriously consider allowing enforcement agents to become self-employed because, in doing so, the operation of enforcement becomes a cost neutral operation for the State.

44. Principle III.5 recommends that a defendant should generally bear the costs of enforcement because the enforcement will usually only have been initiated because of the defendant's failure to pay or to comply with a court order, or to contact the court or claimant to explain his/her failure to do so. Where a claimant is offered an 'enhanced' form of service for an extra fee, it would only be fair for the defendant to bear that fee if he/she had been warned of the possibility that the claimant might access that service if the defendant did not comply with a court order.
45. Principle III.5 places a general onus on the defendant to bear costs. It does not preclude the possibility of other parties who abuse the process to bear costs also. States may however make exceptions to this principle, for instance in family law cases. This is without prejudice to the way in which the costs of the enforcement, including costs based on a fixed scale, may be calculated.
46. With regard to the search and seizure of defendants' assets, Principle III.6. highlights the importance of collecting information using (electronic) registries of assets (e.g. land, company and tax registers) and other available sources (e.g. banking information). This information should, where appropriate, be accessible to enable effective enforcement. In so doing, the dematerialisation of assets may be avoided.
47. In the same Principle, States are also invited to consider the useful option of making defendants declare their assets - preferably in writing and as early as possible - to avoid the temptation for parties to act irresponsibly or even fraudulently.
48. At all times during the search and seizure of defendants' assets, States should take account of relevant Human Rights and data protection provisions in particular the right to respect for private and family life pursuant to Article 8 of the ECHR and the Convention for the Protection of individuals with regard to automatic processing of personal data (ETS No. 108) and its Additional Protocol regarding supervisory authorities and trans-border data flows.
49. Principle III.7. further highlights the importance of being prompt in the sale of defendants' assets, particularly when selling by auction, to ensure that the highest market value is obtained and to avoid depreciation. The aim of this Principle is to best realise the potential value of assets in the interests of both the claimant and defendant.

#### *Principle IV – Enforcement agents*

50. The reference, in Principle IV.1. to "enforcement agent" is, as previously mentioned, a generic term for persons authorised by the state to carry out enforcement but who are not necessarily employed by the state. No formal position is taken on the professional and institutional status of enforcement agents.
51. States should bear in mind their responsibilities to properly regulate the practices of enforcement agents subject to appropriate levels of monitoring and scrutiny (e.g. Ombudsperson) and to the possibility of judicial control. Enforcement agents should act, at all times, within the law even if they are paid by, or act upon the instigation of, claimants.
52. The regulation of the role, responsibilities and powers of enforcement agents is considered to be of particular importance. This also allows the parties to better understand the authority and role of enforcement agents.
53. In deciding on the extent of the role, responsibilities and powers of enforcement agents, States should consider ways of motivating enforcement agents when deciding on the level of autonomy they may exercise in their work.
54. The recruitment of enforcement agents, referred to in Principle IV.3., invites States to consider the moral standards of candidates (e.g. no criminal record) in particular because of the important and delicate role that enforcement agents play when interacting with the parties. To this end, it should be noted that enforcement agents need to be particularly sensitive to the interests of defendants.
55. Candidates' legal knowledge and training in relevant law and procedure is of considerable importance when recruiting enforcement agents and it is recommended, in Principle IV.3., that pre-selection examinations are conducted to assess their theoretical knowledge (e.g. civil procedure law) and their practical knowledge (e.g. oral examinations, case study assessments).
56. The profile of enforcement agents is further explored in Principle IV.4. States are urged to ensure that enforcement agents are honourable and competent in their duties. This, in particular, refers to the high profile of enforcement agents as persons authorised by the state who, at all times, should act in an appropriate (competent) manner in accordance with recognised high professional and ethical standards that are fitting to the profession. Enforcement agents should act responsibly with regard to the interests of the claimant, while recognising and responding to the needs of vulnerable defendants.

57. In member States where enforcement agents act as intermediaries between the parties, Principle IV.4 also invites States to ensure that they are professional in their dealings and do not act in a biased manner.
58. Principle IV.5. reasserts the importance of clearly defining the powers and responsibilities of enforcement agents in particular in relation to those of the judge to ensure that there is a clear delineation of authority in the carrying out of the enforcement process.
59. Principle IV.6. recommends that appropriate proceedings are used to ensure that an enforcement agent who is alleged to have abused his/her position is subject to disciplinary, civil and/or criminal proceedings so that the allegations are investigated fairly, and, if abuse is found, that the enforcement agent will be subject to appropriate sanctions. This gives the enforcement agent the reassurance that false allegations will be dismissed, and the defendant confidence that he/she has an effective remedy against the unfair behaviour of an enforcement agent.
60. States who employ enforcement agents as public servants are invited, in Principle IV.7., to provide proper working conditions (e.g. premises, vehicles and computers), adequate physical resources (e.g. sufficient numbers of agents to manage and carry out enforcement) and support staff (e.g. administrative staff). The effective enforcement of court decisions necessitates a certain degree of financial commitment.
61. It should also be noted that Principle IV.7. refers only to state employed enforcement agents and not to self-employed enforcement agents who finance and remunerate themselves independently of the state.
62. In addition, state employed enforcement agents should be adequately remunerated to reflect their high profile role and responsibilities. In so doing, they may be motivated to act in the manner that is expected of them.
63. Once recruited, States are invited, in Principle IV.8., to maintain the professionalism and high standards of enforcement agents by ensuring that enforcement agents undergo initial and continuous training according to clearly defined and well-structured aims and objectives. In so doing, they may be motivated according to high professional standards.

## **Annex 4:**

Strasbourg, 17 December 2009  
CEPEJ (2009) 11 REV

### **EUROPEAN COMMISSION ON THE EFFICIENCY OF JUSTICE (CEPEJ)**

### **GUIDELINES FOR A BETTER IMPLEMENTATION OF THE EXISTING COUNCIL OF EUROPE'S RECOMMENDATION ON ENFORCEMENT**

#### **INTRODUCTION**

##### ***Methodology***

1. At the Council of Europe's 3rd Summit (Warsaw, May 2005), the Heads of State and Government undertook to "make full use of the Council of Europe's standard-setting potential and promote implementation and further development of the Organisation's legal instruments and mechanisms of legal co-operation". At this summit, it was decided to "help member states to deliver justice fairly and rapidly".
2. As the Secretary General of the Council of Europe underlined in October 2005, the enforcement of judicial decisions is an essential element in the functioning of a state based on the rule of law. It constitutes a serious challenge both at national and European level (CM/Monitor(2005)2 of 14 October 2005)
3. This statement, as confirmed by the relevant case-law of the European Court of Human Rights (ECtHR), and problems in the enforcement of its judgments, as well as the work of the CEPEJ inclined the Committee of Ministers to dedicate a monitoring process for the enforcement of national judicial decisions. CEPEJ will also take into account the further important developments in the case law of ECtHR since the drafting of Recommendation Rec(2003)17 on enforcement.
4. The CEPEJ, whose statute includes the objective of facilitating the implementation of the Council of Europe's international legal instruments concerning efficiency and fairness of justice, included enforcement of judicial decisions into the list of its priorities . As a first step, the CEPEJ commissioned an in-depth study relating to the issues of enforcement in Member states, in order to gain a better understanding of how this works and to facilitate the application in practice of the relevant Council of Europe standards and instruments. The study, carried out by the legal scholars of the University of Nancy (France) and the Swiss Institute of Comparative Law (Lausanne) , proposed a set of guidelines intended to facilitate the application of the principles contained in the Council of Europe recommendations .
5. As a second step, the CEPEJ created a working group on enforcement of judicial decisions (CEPEJ GT-EXE) , in charge of elaborating Guidelines for effective application of the existing Council of Europe standards. On the basis of the proposals made in the In-Depth Study, each member of the Working group drafted a paper addressing a definite set of issues relating to the future Guidelines. The CEPEJ then mandated a scientific expert, M. Julien LHUILLIER (France), to carry out the synthesis of the elaborated briefs.

##### ***Principles and Objectives of Enforcement***

6. For the rule of law to be maintained and for court users to have confidence in the court system, there needs to be effective but fair enforcement processes. However, enforcement may only be achieved where the defendant has the means or ability to satisfy the judgment.
7. Enforcement should strike a balance between the needs of the claimant and the rights of the defendant. Member states are encouraged to monitor enforcement procedures, control court management and take appropriate actions to ensure procedural equality of the parties.

8. The enforcement process should be sufficiently flexible so as to allow the enforcement agent a reasonable measure of latitude to make arrangements with the defendant, where there is a consensus between the claimant and the defendant. Such arrangements should be subject to thorough control to ensure the enforcement agent's impartiality and the protection of the claimant's and third parties' interests. The enforcement agent's role should be clearly defined by national law (for example their degree of autonomy). They can (for example) have the role of a "post judicial mediator", during the enforcement stage.

### ***Court Processes***

9. Member states should take measures to ensure that information is available on the enforcement process and there is transparency of the activities of the court and those of the enforcement agent at all stages of the process, provided that the rights of the parties are safeguarded.
10. Notwithstanding the role of the court in the enforcement process, there should be effective communication between the court, the enforcement agent, the claimant, and the defendant. All the stakeholders should have access to information on the ongoing procedures and their progress.
11. Member states should provide the potential parties to enforcement procedures with information on the efficiency of the enforcement services and procedures, by establishing performance indicators against specified targets and by indicating the time different procedures might take.
12. Each authority should provide for the adequate supervision (having regard to any relevant case law of the ECtHR) of the enforcement process and should bear responsibility for the effectiveness of the service. Accountability may be achieved by management reports and/or customer feedback. Any reports should allow for verification that the judgment has been executed or (if not) that genuine efforts have been made within a reasonable time whilst respecting the equality of the parties.

## **I. PREPARATION OF ENFORCEMENT**

### **1. Accessibility of enforcement services**

#### **1.1. Distribution of enforcement services**

13. The geographical distribution of enforcement agents within a country should ensure the widest possible coverage for all potential parties. Within a single member state, when different authorities are tasked with taking action in different areas of enforcement (i.e. the judge responsible for enforcement and treasury officials), it is important to pay close attention to the distribution, both geographical and case-type, of all the authorities concerned. Every part of the jurisdiction should have adequate coverage for each type of enforcement activity.
14. Where enforcement agents carry on their profession as a private practice, member states should ensure that there is sufficient competition and clearly defined geographical competence.

#### **1.2. Language Used**

15. Measures should be taken to ensure that the parties are able to understand the process of enforcement in which they are involved, and, where possible, have the option of participating in the proceedings without the need for legal representation. To this effect, the enforcement processes and legislation should be rendered as clear and comprehensible as possible (i.e. by creating plain-language versions of legislation, enforcement handbooks, by reducing the time of contact the parties need to have with the court both in person and by correspondence, etc.).

#### **1.3. Availability of stakeholders involved in the enforcement procedure**

16. All of the stakeholders that are likely to be involved in enforcement processes (police, experts, translators, interpreters, local authorities, risk insurers, child care experts, etc.) should have sufficient legal status to help the enforcement agent and should be promptly available, in case their help is necessary for the enforcement of a judgment. Social workers should be particularly available in cases where children or other vulnerable persons are concerned by the enforcement procedure.

## **2. Notices to parties and third parties**

17. Notices to parties concerning the enforcement of judicial decisions or enforceable titles or notarised or other documents are an essential aspect of the law of enforcement. Due notification of parties is a necessary element of a fair trial, in the sense of Article 6.1 of the European Convention on Human Rights.
18. The member states may draw up standard documents to notify parties. These standard documents could relate to the different stages in the enforcement process and to any possible remedies allowing enforcement to be challenged. They could have the following purposes:
  - notifying the defendants of the consequences of enforcement (including the cost of enforcement) and of the costs of a failure to comply with a decision ordering them to pay;
  - notifying the defendants of the enforcement measures to be taken against them, as they are implemented, so as to enable the defendant to comply with or, where applicable, challenge each measure;
  - keeping the claimants fully informed of the stages reached by the enforcement procedure;
  - notifying the third parties to ensure, firstly, that their rights are upheld and, secondly, that they are able to fulfill any obligations incumbent on them and to be aware of the consequences of a failure to comply.
19. Notification in all cases should encourage the defendant to comply with the court order voluntarily and include a warning that in case of non-compliance enforcement measures could be used, including, if appropriate, further costs may be applied.
20. It should be possible to entrust enforcement agents with the service of notices. To this end, member states should determine conditions for a secure method for the service of documents.
21. Where notices generate rights or obligations, it is the duty of the enforcement agent to ensure that the parties are served with adequate notice in a timely manner.
22. Where the defendant's assets are to be sold at a public auction following their seizure, potential buyers should be notified in advance by efficient means of communication, guaranteeing rapid dissemination of information to the broadest possible public, while safeguarding the defendant's privacy. Member states should propose minimum dissemination standards taking account of the nature of assets, their estimated value and the date of sale.

## **3. Enforceable Title: Definition and form of the title**

23. National legislative framework should contain a clear definition of what is considered an enforceable title and the conditions of its enforceability.
24. Enforcement titles should be drafted in clear and comprehensible way, leaving no opportunity for misinterpretation.

## **4. Enforcement agents**

### **4.1. Qualification requirements**

25. For the fair administration of justice it is important that the quality of enforcement should be guaranteed. Member states should accredit enforcement agents only if the candidates concerned are of a standard and training commensurate with the complexity of their tasks. A high quality of training of professionals is important for the service of justice and to increase the trust of users in their justice system.
26. Enforcement agents should also be required to follow compulsory continuous training.
27. It is recommended that links be forged between national training institutions. Member states should ensure that enforcement agents are given appropriate training curricula and should set down common minimum standards for instructors in the different member states .
28. Initial and continuous training could encompass:



- the principles and objectives of enforcement;
- professional conduct and ethics;
- stages in the enforcement process;
- the appropriateness, organization and implementation of enforcement measures;
- the legal framework;
- role-playing and practical exercises as appropriate;
- assessment of trainees' knowledge;
- international enforcement of judicial decisions and other enforceable titles.

#### **4.2. Organisation of the profession and enforcement agent's status**

29. With a view to good administration of justice, it is desirable that enforcement agents should be organized in a professional body representing all members of the profession, thereby facilitating their collective representation and the gathering of information.
30. Within the member states which have established professional organisations of enforcement agents, membership of this representative body should be compulsory.
31. Enforcement agents' status should be clearly defined so as to offer potential parties to enforcement procedures a professional who is impartial, qualified, accountable, available, motivated and efficient.
32. Where enforcement agents are state employees, they should enjoy appropriate working conditions and sufficient human and material resources. For example, enabling staff to work with access to functioning modern communication and IT equipment (computers, telephones, fax machines, Internet connections, job-specific upgradeable IT systems) and with appropriate means of transport sufficient to allow them to perform their role as effectively as possible.

#### **4.3. Rights and obligations**

33. Enforcement agents, as defined by a country's law, should be responsible for the conduct of enforcement within their competences as defined by national law. Member states should consider giving enforcement agents sole competence for:
  - enforcement of judicial decisions and other enforceable titles or documents, and
  - implementation of all the enforcement procedures provided for by the law of the state in which they operate.
34. Enforcement agents may also be authorized to perform secondary activities compatible with their role, tending to safeguard and secure recognition of parties' rights and aimed at expediting the judicial process or reducing the workload of the courts. These may be, among others:
  - debt recovery;
  - voluntary sale of moveable or immoveable property at public auction;
  - seizure of goods;
  - recording and reporting of evidence;
  - serving as court ushers;
  - provision of legal advice;
  - bankruptcy procedures;
  - performing tasks assigned to them by the courts;
  - representing parties in the courts;
  - drawing up private deeds and documents;
  - teaching.
35. Enforcement agents should be obliged to perform their role whenever they are legally required to do so except in cases of impediment or where they are related by blood or marriage to a party. Enforcement agents should be precluded from being assigned disputed rights or actions in cases with which they are dealing.

36. Where enforcement agents are independent professionals, they should be obliged to open a non-attachable account specifically intended for depositing funds collected on behalf of clients. This account should be subject to inspection. They should also be required to take out professional and civil liability insurance. Enforcement agents should benefit from social insurance cover.

#### **4.4. Remuneration**

37. Where enforcement agents are state employees, the state should ensure that they receive appropriate remuneration, particularly in the light of their level of training, experience and the difficulties inherent in their task.

#### **4.5. Ethics and professional conduct**

38. Enforcement agents should be subject to clearly stated rules of ethics and conduct, which could be set out in professional codes of conduct. These Codes of conduct should inter alia contain professional standards regarding:
- information to be given to parties by enforcement agents concerning the enforcement procedure (grounds of action, transparency and clarity of costs, etc.)
  - the rules governing the formulation of notices to parties (enforcement agents' social role, duty of advice, etc.)
  - professional ethics (behavior, professional secrecy, ethical criteria governing the choice of actions, etc.)
  - smooth enforcement (predictability and proportionality of costs and lead-times, co-operation between enforcement services, etc.)
  - procedural flexibility (autonomy of enforcement agents, etc.)

## **II. REALISATION OF ENFORCEMENT**

### **1. Information about defendants and assets**

#### **1.3. Information accessible to the claimant**

39. In order to ensure the claimant's right to adequate assistance to the enforcement proceedings, the latter should be allowed to access public registers so that they can confirm essential information about the defendant, such as information identifying the defendant and his whereabouts for enforcement purposes and the data accessible through public registers (i.e. land registers, court registers of companies, etc.) subject to the freedom of information and data protections laws of the national State.

The aforementioned data should be available to the claimant upon a written request and upon production of sufficient proof of interest (i.e. judgment or another enforceable title).

#### **1.4. Information accessible to the enforcement agent**

40. So that enforcement agents may produce an estimate of costs and ensure that any measures taken are proportionate to those costs, member states should allow them speedy and preferably direct access to information on the defendant's assets. Member states are encouraged to consider making such information available to the enforcement agent by Internet through a secured access, if possible.
41. In order to prevent the defendants from avoiding enforcement by relocating their assets, Member states are encouraged to establish a unique multi-source restricted access database about debtor' attachable assets (i.e. ownership rights over a vehicle, real estate rights, payable debts, tax returns, etc.). Member states should provide the database with an acceptable level of security, with respect to the risks incurred. Access of the enforcement agent to the database should be restricted to that data pertaining to the pending enforcement procedure and will need to be subject to thorough control. Member states should provide the defendants with effective legal means to ensure that any inquiry about their personal assets is justified.
42. Co-operation between the various organs of state and private institutions, subject to compliance with the data protection legislation, is essential for enabling a speedy access to the multiple-source

information on defendants' assets. Protocols and uniform procedures should be drawn up to ensure inter-departmental co-operation, on one hand, and cooperation between these departments and enforcement services, on the other hand.

### **1.5. The duty to provide information**

43. All state bodies, which administer databases with information required for efficient enforcement, should have a duty to provide the information to the enforcement agent, within an agreed time-limit if such information is compatible with data protection legislation.

### **1.6. Data protection**

44. It is recommended that national legislation on personal data protection should be scrutinized in case it needs to be adapted to allow for efficient enforcement procedures.
45. Enforcement agents must bear a responsibility for maintaining confidentiality when secret, confidential or sensitive information comes to their attention in the course of enforcement proceedings. In case of a breach of this duty, measures of disciplinary liability should be applicable, along with civil and criminal sanctions.

### **1.7. Multiple use of information**

46. Member states are invited to consider allowing enforcement agents to reuse information on the defendant's assets in subsequent procedures that involve the same defendant. The reuse of information should however be subject to clear and precise legal framework (i.e. setting strict timeframes for data retention, etc.).

## **2. Costs of enforcement**

### **2.3. Regulation of costs**

47. Each member state is encouraged to introduce regulations governing the level of enforcement costs to ensure effective access to justice notably through legal aid or schemes allowing for the waiver of costs or a postponement of their payment, where such costs are likely to fall to the parties. The parties should be protected to ensure that they will pay only the costs determined by law.
48. Where, within the same member state, there are enforcement agents working in both the private and public sector, the state should avoid any discrimination in terms of the costs for the debtor between enforcement agents of different status but equal competence.
49. Member states should introduce a procedure whereby parties may challenge the costs of the enforcement agents.

### **2.4. Transparency of enforcement costs**

50. Where enforcement costs are likely to fall to the parties, the member states should ensure that the latter are informed as fully as possible about the enforcement costs (enforcement fees and the performance fees due upon successful completion). This information should be made available to the parties not only by the enforcement agent but also by the courts, consumer organisations, procedural codes or via the official Internet sites of the judicial and professional authorities.
51. In recognition of the growing mobility of persons and services in Europe, there is an increasing need for international enforcement of court decisions. The transparency of enforcement costs should therefore go beyond mere domestic level: the member states should agree to set up a data base of the amounts charged for the procedural acts most frequently performed and make it as broadly available as possible, with the aim of giving persons in other member states access to each country's structure of charges .

### **2.5. Clarity and predictability of enforcement fees**

52. Enforcement fees should be public. Member states are encouraged to require that any procedural document clearly indicate the amount of the action and provide for sanctions in the event of non-compliance (i.e. invalidity of documents failing to comply with the requirement etc).

53. Where the defendant's financial situation is known to the enforcement agent and he recommends a particular enforcement process he should inform the claimant about the type of action envisaged and the likely resulting costs at the beginning of and at each stage in the procedure.
54. The clarity of fees is a factor in the transparency of enforcement costs. In order to be as intelligible as possible, the fee for an action should depend on a limited number of factors. The fee should be set out in the regulation as simply, clearly and concisely as possible.
55. When setting enforcement fee tariffs, Member states should exchange their experiences and consider the need to take certain factors into account, such as the amount of the debt, any particular urgency and the difficulties that the enforcement agent is likely to encounter.

## **2.6. Relevance of taking action**

56. The ultimate cost of enforcement should be in due proportion to the remedy sought. States should endeavour to provide an effective enforcement procedure for all level of debts, either large or small.
57. It is the responsibility of the enforcement agent to take all reasonable and necessary steps in enforcement and to decide which enforcement action is most appropriate. Where costs are considered irrelevant or wrongfully incurred these costs should be borne by the enforcement agent.
58. Member states which grant legal aid should verify the relevance of the costs incurred, so that the community does not have to bear unjustified costs.
59. Where an enforcement agent has a duty to offer proper advice, he/she should be required to explain clearly to claimants their situation and the relevance of the action they suggest be taken.

## **2.7. Allocation of enforcement costs**

60. Enforcement fees should be borne by defendants, where he or she is solvent, together with the possibility of a performance fee borne by the claimant. Where the defendant is insolvent, the enforcement fees should be paid by the claimant.
61. Where enforcement is deemed to be wrongful or irregular, liability for the costs should be borne by the persons or the bodies responsible for the wrongful or irregular act.

## **2.8. Legal aid**

62. In order to guarantee access to justice, legal aid schemes, or alternative funding schemes, should be available to claimants who are unable to pay enforcement fees (i.e. by means of State funding or by remitting the fees). Where legal aid is granted, the State may, if considered just, avail itself with mechanisms allowing it to recover its outlay from the proceeds of enforcement.

# **3. Timeframes and reports**

## **3.3. Timeframes for enforcement procedures**

### ***3.3.1. Reasonable and foreseeable time limits***

63. The time lines for enforcement procedures should be reasonable and member states should not impose any arbitrary cut-off deadlines for enforcement to end.
64. Member state should set forth clear and precise criteria regarding the reasonable nature of the duration, which could vary according to the nature of the case and the type of action requested.
65. In view of the importance of being able to foresee the length of enforcement proceedings from the point of view of legal certainty, member states should consider establishing publicly accessible statistical databases enabling the parties to calculate the likely duration of the different enforcement measures possible in domestic legislation (i.e. attachment of salary, attachment of bank assets, and attachment of vehicle). The databases should be compiled in collaboration with enforcement professionals and should be made as broadly available as possible, with the aim of giving persons in other member states access to each country's structure of duration so comparisons can be made.

### **3.3.2. Factors of smooth and prompt enforcement**

66. At the stage of the enforcement of decisions, swift (such as e-mail) communication between the court, the enforcement agents and the parties should be possible.
67. Member states may ensure that the legal framework of enforcement is not unnecessarily prolonged. Member states are encouraged in particular to take measures to ease the procedural enforcement framework to give enforcement agents the necessary autonomy to choose for themselves, without prior authorisation, the procedural steps that are the most appropriate for the case in question.
68. Member states should also ensure that the defendant can take action to challenge enforcement measures within a reasonable timeframe, provided this does not unjustifiably halt or delay the enforcement proceedings; for example where a defendant wishes to appeal a decision, machinery should be in place to allow him to provide security for the protection of the claimant.
69. Member states should provide for an accelerated and emergency enforcement procedure in cases where a delay could result in an irreversible damage (i.e. cases within the province of a family court, cases of defendant absconding, eviction, deterioration of assets, etc.).
70. Priority should always be given to reaching agreement between the parties in order to coordinate enforcement timeframes. Where the parties agree between themselves a timeframe for enforcement then any procedures put in place by the Member state should not preclude these agreements from taking effect.
71. The defendant's allegations of misconduct against an enforcement agent should not hamper or delay the enforcement process except where there is judicial intervention. Complaints against enforcement agent should be investigated simultaneously with the enforcement proceedings.

### **3.4. Reporting on enforcement procedures**

#### **3.4.1. Reporting on each enforcement measure**

72. The defendant should be informed as to the extent of his liability during the enforcement process.

#### **3.4.2. Reporting on completed enforcement procedure**

73. Once the claimant's interests are satisfied, this information should be communicated to the claimant. Member states are encouraged to establish clear regulations governing the obligation to report pending and/or completed enforcement procedures (e.g. by the way of a public register where the outcomes of enforcement actions against individual defendants are recorded).

#### **3.4.3. European standards on information**

74. Member states are strongly encouraged to draw up together European quality standards regarding the information that needs to be provided to the parties and to the general public with respect to enforcement procedures.

## **III. Supervision, control and disciplinary procedures**

### **1. Quality control of the enforcement proceedings**

75. In order to undertake quality control of enforcement proceedings, each Member State should establish European quality standards/criteria aiming at assessing annually, through an independent review system and random on-site inspection, the efficiency of the enforcement services. Among these standards, there should be:
  - a. Clear legal framework of the enforcement proceedings establishing the powers, rights and responsibilities of the parties and third parties.
  - b. Rapidity, effectiveness and reasonable cost of the proceedings
  - c. Respect of all human rights (human dignity, by not depriving the defendant of a minimum standard of mere economic subsistence and by not interfering disproportionately with third parties' rights, etc.)

- d. Compliance with a defined procedure and methods (namely availability of legal remedies to be submitted to a court within the meaning of Article 6 of the ECHR)
- e. processes which should be documented
- f. Form and content of the documents which should be standardised
- g. Data collection and setting up of a national statistic system, by taking into account, if possible, the CEPEJ Evaluation Scheme and key data of justice defined by the CEPEJ
- h. Competences of enforcement agents
- i. Performances of enforcement agents
- j. The procedure, on an annual basis:
  - the number of pending cases,
  - the number of incoming cases,
  - the number of executed cases
  - the clearance rate,
  - the time taken to complete the enforcement
  - the success rates (recovery of debts, successful evictions, remittance of amounts outstanding, etc.)
  - the services rendered in the course of the enforcement (attempts at enforcement, time input, decrees, etc.)
  - the enforcement costs incurred and how they are covered
  - the number of complaints and remedies in relation to the number of cases settled.

76. The performance data should be based on representative samples and should be published.

77. These assessment criteria could be defined at a European level, in order to strengthen confidence between member states, particularly given the prospect of a growing number of international enforcement cases

## **2. Supervision and control of enforcement activities**

78. The authorities responsible for supervision and/or control of enforcement agents have an important role in also guaranteeing the quality of enforcement services. The Member states should ensure that their enforcement activities are assessed on an ongoing basis. This assessment should be performed by a body external to the enforcement authorities (for example, by a professional body). The Member states' authorities should clearly determine the control procedures to be performed during inspections.

79. Member states should ensure that the arrangement for monitoring the activities of enforcement agents does not hamper the smooth running of their work.

## **3. Disciplinary procedures and sanctions**

80. Breaches of laws, regulations or rules of ethics committed by enforcement agents, even outside the scope of their professional activities, should expose them to disciplinary sanctions, without prejudice to eventual civil and criminal sanctions.

81. Disciplinary procedures should be carried out by an independent authority. Member states should consider introducing a system for the prior filtering of cases which are filed merely as delaying tactics.

82. An explicit list of sanctions should be drawn up, setting out a scale of disciplinary measures according to the seriousness of the offence. Disbarment or "striking off" should concern only the most serious offences (the principle of proportionality between the breach and the sanction should be observed).

## GLOSSARY

For the purposes of these Guidelines, the following terms should be understood as follows:

**Enforcement:** the putting into effect of court decisions, and also other judicial or non-judicial enforceable titles in compliance with the law which compels the defendant to do, to refrain from doing or to pay what has been adjudged (source: Recommendation Rec(2003) 17 of the Committee of Ministers to member states on enforcement).

**Claimant:** A party seeking enforcement. In civil cases, the claimant is usually a creditor, but the two terms are not synonymous as the claimant may equally well seek the enforcement of an “obligation to do” or “to refrain from doing”.

**Clarity of enforcement fees:** Enforcement fees should be set out simply, clearly and concisely. Clarity of enforcement fees is an indicator of the transparency of enforcement costs (q.v.).

**Control of activities:** Control of activities means control of the lawfulness of the actions carried out by the enforcement agents. It may be carried out a priori (before the enforcement agents act) or a posteriori (after the enforcement agent acts) by a “disciplinary” authority (See supervision of activities).

**Defendant:** A party against whom enforcement is sought (source: Recommendation Rec (2003) 17 of the Committee of Ministers to member states on enforcement). In civil cases, the defendant is usually a debtor, but the two terms are not synonymous (see Claimant).

**Enforcement agent:** A person authorised by the state to carry out the enforcement process (source: Recommendation Rec (2003) 17 of the Committee of Ministers to member states on enforcement).

**Enforced case:** In order to be enforced, the case must have been the subject of an action that has fully satisfied the claimant (in a civil case).

**Enforcement costs:** Enforcement costs consist of the enforcement expenses (= enforcement fees) and any performance bonus (= performance fees) paid by the claimant to the enforcement agent in the form of fees (See enforcement fees and performance fees).

**Enforcement Fees:** The expenses of the process itself, in other words, the total of the amounts for each action undertaken by the enforcement agent in the course of a single case (see Enforcement costs).

**Enforcement services:** All the professions performing the task of enforcement.

**Enforcement timeframe:** In theory, the period of action or waiting between the beginning and the completion of the enforcement process. In practice, it is the sum of the periods necessary for the completion of all the actions carried out by the enforcement agent.

**Flexibility of enforcement:** The nature of a system of enforcement that enables the agent to choose the procedural framework that is most appropriate to the features of a case. Flexibility of enforcement is closely connected with the autonomy of the enforcement agent (see Smooth enforcement).

**Foreseeable time limits:** In theory, the time within which the user is informed that the enforcement process should be completed. In practice, this time is often limited to the time necessary for the completion of the next enforcement measure.

**Performance fees:** The sum payable by the claimant to the enforcement agent in the event of satisfaction. Under the legislation of different countries fees may be negotiated, set in advance or prohibited (See Enforcement costs).

**Predictability of enforcement costs:** In theory, expenses of which the user is informed by the enforcement agent, usually corresponding to the expenses of the whole enforcement process. In practice, predictability is often limited to the expense necessary for the completion of the next enforcement measure. Predictability of expenses should not be confused with transparency (q.v.).

**Quality (norms of or standards of):** Quantitative or qualitative criteria making it possible to identify and/or supervise compliance with the minimum requirement of satisfactory enforcement.

**Relevance of taking action:** Relevance of taking action is the assessment of the appropriateness of starting an enforcement process. It is assessed differently by the claimant and the enforcement agent. It is an indicator of the predictability of enforcement costs (q.v.).



**Stakeholders:** persons indirectly involved in the enforcement procedure.

**Smooth enforcement:** Enforcement within a reasonable time with no administrative obstacles or unjustified periods of inactivity; this concept is based not only on the promptness of performance of actions, but also on promptness between the various actions. Flexibility of action (q.v.) is therefore a factor in smooth enforcement.

**Supervision of activities:** Supervision of activities means the process whereby an authority makes observations to the enforcement agent on his or her working methods (scheduling problems, lack of courtesy, etc.); it is a sort of simplified control that does not involve actual examination of a complaint, but the aim of which is to guarantee fair administration of justice (see Control of activities).

**Third party:** Neither claimant, nor defendant in the procedure.

**Transparency of enforcement costs:** Information about enforcement costs should be easily accessible. Transparency is an indicator of the relevance of taking action (q.v.) and should not be confused with predictability (q.v.).

