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# PRIVATIZATION OF ENFORCEMENT SERVICES – A STEP FORWARD FOR COUNTRIES IN TRANSITION?

## 1. Introduction

Among many areas for reform in post-Socialist justice systems, the reform of the system of enforcement of court judgments and other enforceable documents is one of the most critical. This is due to its importance, because – as stated by the European Court of Human Rights – rights recognized in a judicial process are illusory if domestic legal systems allow a final binding judicial decision to remain inoperative to the detriment of a party.[1] Additionally, this is due to its mixed record, which – at least compared with some other reforms, e.g. in securing independence of the Judiciary and the separation of powers – can be described at best as ambiguous. Finally, the reform of enforcement services is critical because it is a reform with perhaps the most diffused character and the least clear standards.[2]

In this paper I will explore the privatization of enforcement services in transition countries. After a brief presentation of attitudes towards enforcement in Socialist and post-Socialist times, I will concentrate on the following questions: (1) whether and to what extent can privatization of public enforcement services make enforcement more efficient? (2) what are the prerequisites for successful privatization of enforcement services? and, finally, (3) what risks may be encountered and what mistakes should be avoided along the way? While many of the statements in this paper may be relevant for different countries, I will focus on the current plans for privatization of enforcement services in Croatia (and the controversies around them), in the hope that this case study may be indicative for a number of other countries of Central and South-Eastern Europe.

1 *Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II.

2 Lack of common European standards in this field was noted by the European Commission, which described enforcement law as the 'Achilles heel' of the European Civil Judicial Area. See *Green paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts*, Brussels, 24.10.2006, COM(2006) 618 final.

## 2. Historic Roots of Ineffective Enforcement

Why is enforcement still so problematic in the countries that, until a couple of decades ago, belonged to the Socialist legal tradition? Each country has its own story, but some features are common.

In Socialist times, official methods of enforcement of judgments were neglected to the extent that they were almost irrelevant. On the level of ideology, the very judgments that were to be enforced were considered to be remnants of the bourgeois State and its apparatus, so it was only natural that their enforcement was treated in the same way. Even worse, in popular consciousness, the public image of effective enforcement was equated with reckless seizure and sale of the property of the poor in order to satisfy capitalist appetites, and therefore it was stigmatized as another instrument of class exploitation, as is shown even in children's literature of the time.[3] In reality, the Communist regimes did not have a pressing need for effective official mechanisms of enforcement, since the concentrated political power and omnipresent control of the Communist Party served as a strong parallel system which informally guaranteed compliance with all decisions that were considered important. For all other decisions (and most judgments were in this category) there was still a (mainly inherited) 'old' system of enforcement which was in a bad state: low in public esteem, poor in financial means, high in bureaucratization and excessive in formalities.

## 3. Challenges of Reforms – International Aspects

In the 1990s and 2000s, the reform of enforcement services was high on the agenda of many countries. On the European continent, reforms took place both in 'old' and in 'new' Europe. Several international organizations were pushing for reforms. The Council of Europe was rather active in this area, in particular after the ECtHR decided that enforcement of court judgments was to be treated as an integral part of the fundamental human right to a fair trial within a reasonable time.[4] In 2001, the European Ministers of Justice concluded that the proper, effective and efficient enforcement of court decisions was of capital importance for States in order to create, reinforce and develop a strong and respected judicial system.[5] Two years later, the Council of Europe (CoE) adopted its Recommendation on Enforcement.[6] In a number of bilateral and multilateral meetings and seminars, the CoE wanted to stimulate reforms through the exchange of information and presentation of various

3 See the example of story 'Andreshko' written by the Bulgarian author Elin Pelin in Petkova 2009, p. 213.

4 See *Hornsby v. Greece*, *supra* note 1, *ibid*.

5 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', Moscow, 4-5 October 2001.

6 Recommendation Rec(2003)17 of the Committee of Ministers to Member States on enforcement, adopted on 9 September 2003. See also Uzelac 2002.

national practices.[7] These activities were mainly targeted at the Central and South-Eastern European countries and the former parts of the Soviet Union. After establishment of the Commission for the Efficiency of Justice (CEPEJ), a working group on enforcement was established within the Commission CEPEJ-GT-EXE with a mandate to enable a better implementation of the relevant standards of the Council of Europe regarding execution of court decisions in civil, commercial and administrative matters at the national level.

Activities of the European Union in this field were also noticeable, though ultimately limited to cross-border situations – recognition and enforcement of civil judgments issued in another Member State, and the creation of a special procedure for enforcement of uncontested cross-border claims.[8]

However, all the declarations, resolutions and regulations issued at the European level in this area until today do not contain clear and unequivocal recipes for concrete models of reforms. The proclaimed CoE 'standards regarding execution' operate at a fairly general level, and contain a useful, although relatively vague set of principles which cannot be readily transferred into organizational schemes and legislative provisions. Also, in spite of all harmonization efforts, there are no special Community provisions on enforcement as such in the EU, although the policy of mutual recognition of enforceable judgments contains various measures to strengthen the effects of judgments.[9]

In particular, regarding the basic dilemma encountered in the reform plans – a public or private model of enforcement – the European strategic documents do not give any definite answers, which is easily explainable by the fact that Europe today is a mosaic of rather different structures, practices and procedures of which currently none are dominant.[10] There is also no consensus on the issue of which system is more efficient.[11]

In this context, the European institutions in principle try to preserve a neutral attitude towards the public/private controversy. In the concrete situation this does not make the choice of the direction of prospective reforms much easier, especially for those countries that, like post-Socialist countries, urgently need change. In the international legal assistance projects aimed at improvement of the enforcement system in the region, the choice between public and private system was, and still is,

7 See *inter alia* Compendium on Enforcement 2000; CoE Seminar Croatia 2001; Uzelac 2004 (as well as the other contributions in the 2004 Volume).

8 See Andenas 2005; Andenas & Nazzini 2005.

9 The EU efforts in this area (and the controversies around them) are well described in the paper of M. Freudenthal published in this volume.

10 Hess describes the situation regarding national enforcement practices in Europe as 'fragmented'. Hess 2005, p. 25-26.

11 While the advocates of the system which is based on private enforcement agents argue that such a system brings benefits in terms of efficiency, the opponents have the opposite opinion, or argue that the answer to the issue of efficiency of methods of enforcement should be sought elsewhere (e.g. in the transparency of the debtor's assets) more than in the nature of the authority responsible for enforcement. Del Casso 2005, p. 50.

officially treated as a matter of taste, while concrete suggestions often depend on the background of the experts.[12]

## 4. Privatization Experiences in the Region

Taking into account the aforementioned neutrality in approach, it is indicative that most of the former Socialist countries tend towards some forms of privatization of enforcement services. In the 2000s, privatization was gaining ground, and this trend seems to have continued. The list of countries in which enforcement agents have a private status now includes the Baltic States (Estonia, Latvia, and Lithuania), some Central European countries (Slovakia, Hungary, to a certain extent Poland and the Czech Republic), and two post-Yugoslav States (Macedonia and Slovenia).[13] Privatization is currently either being seriously considered or has already been planned in some further jurisdictions.

What are the reasons for this tendency? Why has privatization become, in reform terms, almost a bestseller in spite of numerous alternatives in the public sector? There are no systematic studies that could provide an answer to these questions, but some possible factors can be singled out. Some of them are of a general political nature and may be related to the fact that the private professions were suppressed in former times, which caused an opposite trend in favour of new paradigms of market economy and liberal capitalism (sometimes identified with the idea of outsourcing various public functions to entities from the private sector). On the other hand, the existing public structures of enforcement were in many cases weak and unstable. Under the new circumstances, in which their functions were gaining importance, they were even less capable of efficiently fulfilling their task. Poorly equipped, untrained and underpaid enforcement officers saw the option of privatization as an opportunity to improve their economic and social status. The attractiveness of privatization for past public and prospective private bailiffs increased further after they realized that in most private models of enforcement in Europe private enforcement agents are quite well sheltered against the risks of market forces (e.g. by fixed prices, territorial monopolies, *numerus clausus* policies, etc.). For the public authorities, the prospects of cutting budgetary expenses by outsourcing enforcement services and increasing the budgetary income on account of taxes collected from private enforcement agents may have been attractive as well.[14]

The new, privatized enforcement structures in the former Socialist countries are still in their infancy. Therefore, it is difficult to compare their results

12 One may compare the 2001 recommendations of the group of experts of the CoE given to Croatia (suggesting the study of Austria, i.e. a court-based public model) and the 2006 Progress Report of the European Commission (suggesting the model of private bailiffs). See CoE Seminar on Execution 2001, p. 4; Progress Report 2006, p. 50.

13 Compare CEPEJ 2007, p. 21.

14 In practice, however, an even stronger motivation might be found in the opportunity for governmental officials to offer appointments to political allies or personal friends (or eventually secure their own transfer to a lucrative private practice).

systematically with the results of the former public-centered system (or with the results of other comparable public systems that function in a similar environment).[15] So far all that we have are more or less anecdotal evaluations, which sometimes arrive from less than unbiased sources. However, it is clear that the reception of the privatized model of enforcement was in different jurisdictions quite diverse, and so was the level of its acceptance among legal professionals and the general public.

According to impressions from various sources, the Eastern European experiences with the privatization of enforcement services may provisionally be divided into two groups: the success stories and the partial or complete failures. The criterion for this division is mainly related to efficiency of enforcement, especially in comparison with the state of affairs before privatization. Examples of success stories (at least according to the dominant views at the moment of writing this paper) can be found in the introduction of private bailiffs in Bulgaria, Macedonia and Slovakia. On the other hand, the Slovenian case was less successful. There, the introduction of private bailiffs was controversial[16] and its initial results are generally not seen as an improvement of the quality and speed of enforcement services.

Therefore, one cannot conclude that privatization is the only option for countries that are reforming their enforcement systems. Privatization as a model has certain advantages, but also brings several risks and disadvantages in comparison with court-based or executive-based public models of enforcement.[17] In the new Member States of the CoE one can find both good and bad examples of privatization; equally, in the well-established legal systems of Western Europe there are examples of well-functioning 'public' systems and some less efficient examples of dysfunctional practices of 'privatized' enforcement.

Below I will concentrate on the evaluation of opportunities and risks regarding 'privatization' of enforcement services in the countries that are considering such an approach, but have still not made their final decision. As the developments presented above demonstrate, there are no ready models, and success or failure depends on the ability to produce a well-balanced consistent model which is designed to fit the concrete circumstances of a particular legal system. As the movement towards privatization is quite likely to continue, the focus will be on the issues of *how* privatization should take place, not *if* and *when* it will happen. The concrete case that will be studied is Croatia, which is a country that is currently at the crossroads, and therefore very suitable as a test case for particular reform scenarios.

15 Some early comparisons are given in the CEPEJ Study of enforcement (see CEPEJ 2007) and in some other documents of the Council of Europe and the European Union (see e.g. Compendium of Enforcement 2000 and Enforcement Agency Practice 2005) but these comparisons do not offer a qualitative analysis of results of particular systems. For rare academic writing comparing national enforcement systems, see Kennett 2000.

16 Rijavec 2009, p. 222.

17 For more, see Uzelac 2004, p. 9-11.

## 5. Reforming Enforcement in Croatia: What to Do and Not to Do?

The reform of the enforcement proceedings in Croatia has been on the agenda ever since the beginning of the 1990s. The Enforcement Act (hereinafter: EA) was first introduced in 1996, but it was subject to frequent amendments – six times in the period 1996-2008.[18] As noted recently by a group of experts, due to this frequency of change, the law (rather extensive in the very beginning) was constantly further expanded to become finally 'far too extensive' for easy comprehension, interpretation and application.[19] Its 311 articles (or about 50,000 words) are now a challenge even for the knowledgeable readers. Although not contributing to efficiency, the high level of formalism and rather sophisticated complex formulas of the law have often served as a good excuse for the extensive duration of enforcement proceedings.

Although many provisions of the law were changed (sometimes more than once), the main structure of the Croatian enforcement law remained the same: it is still a law in which the responsibility for carrying out the enforcement procedure is almost exclusively given to courts. The enforcement procedure is a new judicial procedure which, in case of debtor's default, has to be initiated after termination of the regular legal procedure in which an enforceable judgment recognizing the debtor's obligation is issued. Enforcement is carried out by the courts, under very close supervision of regular judges, and with only technical assistance by the court's staff. Before satisfaction of their claims, creditors are therefore often forced to have recourse to two rather complex and lengthy judicial procedures.[20]

This structure of the enforcement process is inherited from former Yugoslav law,[21] which was to a large extent copied in the Croatian EA. The Yugoslav law, in turn, had its origins in the law of the Kingdom of Yugoslavia that, in its turn, was based on the laws formerly applicable in the Austro-Hungarian monarchy. The lack of efficiency of this model was noted a long time ago, even prior to dissolution of Yugoslavia.[22] However, attempts to improve the efficiency of enforcement proceedings were most often solely made at the level of legislation by way of amending procedural rules. Until the 2003 amendments to the EA, no attempt had been made to change the organization of the enforcement services and take enforcement out of the hands of the courts. This may partly be the result of the perception that a court-based enforcement structure is part of the legal tradition of Croatia, but there may have been other reasons too, such as the distribution of

18 See *Ovršni zakon* (Enforcement Act), first published in *Narodne novine* (Official Gazette) 57/96, subsequently amended six times: see *Official Gazette* 29/99, Decision of the Constitutional Court of the Republic of Croatia No. U-I-510/1996, U-I-717/1996, U-I-1025/1999 of 5/04/1999, *Official Gazette* 42/00, OG 173/03, OG 151/04, OG 88/05, OG 67/08.

19 Jean, Djuric & Jurisic 2009, p. 70.

20 *Ibidem*, p. 71.

21 Enforcement Procedure Code of the Socialist Federal Republic of Yugoslavia (SFRY) of 1976.

22 This was the main reason for the extensive amendments of the Yugoslav law of enforcement in 1990 (which were later introduced in Croatian law, but also into the laws of other successor States of the SFRY). See *Zakon o izvršnom postupku* (Enforcement Law), *Službeni list* (Official Gazette SFRY) 20/78, 6/82, 74/87, 57/89, 20/90, 27/90 i 35/91.

powers in the former federation[23] and the conservative attitude of some parts of the legal profession that was not too unhappy with the excessive formalism of the enforcement structures.[24]

It is quite likely that, without international pressure, the Government would never seriously have considered any far-reaching changes. However, in the context of the EU accession negotiations, the malfunctioning of the national Judiciary was one of the few stumbling-stones, and concrete steps were necessary to address judicial backlogs and delays.[25]

The first attempt to privatize the enforcement process was made in 2003, when it was decided to delegate certain enforcement tasks to public notaries. After some hesitations and public controversies, the notaries were given powers to issue certificates of enforceability in respect of certain documents and, more importantly, the power to issue enforceable decisions based on several types of documents (invoices, cheques, and bills of exchange). The latter procedure ('enforcement based on trustworthy documents') – essentially inherited from the 1990 Amendments to the Yugoslav Enforcement Law – in effect was very similar to the payment order procedures of Germanic law (*Mahnverfahren*), yet more complex, since it required physical presentation of documents for the mere certification of an uncontested debt. Therefore, 'outsourcing' meant that the public notaries gained a responsibility limited to receiving the claim for payment of the debt and debt-certifying documents from the creditor, and issuing of an enforcement order (*rješenje*) based on the creditor's allegations. Such an order became enforceable only if the debtor, after receipt of the order, failed to contest the debt within the legal deadline. Every contested case had to be transferred back to the court for enforcement, as public notaries were not authorized to undertake any concrete enforcement action (e.g. seizure of the debtor's property). Therefore, although the courts were mainly satisfied by the immediate discharge of some of their burdens, and the notaries were happy with an additional source of income, it may be doubted whether the new 'notarial outsourcing' really brought any more effectiveness into the enforcement process (and, whether enforcement *as such* was in fact 'outsourced' at all).[26]

23 In the SFRY, the procedural law of enforcement was a federal issue, whereas the constituent republics were exclusively competent as regards the organization of courts and other services. See Yugoslav Constitution of 1974, Art. 281 (federal jurisdiction to regulate procedural law).

24 As noted before, the excessive formalism of the enforcement law was a good alibi for procedural delays, and it also brought some additional business to lawyers.

25 From the very beginning of the accession negotiations, the EU publicly criticized 'the widespread inefficiency of the judicial system', partly because 'too many issues are brought before courts', that therefore they suffer from 'serious constraints in their ability to handle the workload'. Opinion on Croatia's Application for Membership of the EU (Avis), Brussels, 20 April 2004, COM(2004) 257 final.

26 According to published annual statistics of the Ministry of Justice, which do not distinguish proper enforcement cases from the issuance of specific payment orders described above, the number of incoming 'enforcement cases' in the courts dropped from 474,011 in 2005 to 271,357 in 2006 and 162,632 in 2007. These cases, however, started to return to courts when →

After continued pressure by the EU, which was suggesting further privatization,[27] the Government decided to consider the introduction of a previously unknown legal profession: private bailiffs. In the revised Action Plan for the Strategy of Judicial Reform of 2008, among measures aimed at shortening the judicial proceedings, the Government announced the production of a 'study on enhancing the efficiency of enforcement against movable assets by the introduction of [private] bailiffs'.[28] Based on this decision, the strategic study of the Ministry of Justice[29] proposed the introduction of a new private profession. The suggestions that were made closely followed the pattern of organization of public notaries. The new 'public enforcement agents' would be members of a free (liberal) profession entrusted with the enforcement of all monetary and non-monetary claims, save some specific types of family cases (such as, e.g., the surrender of a child to his parent). The bailiffs would also be authorized to deliver all kinds of judicial letters and documents. Furthermore, the organization would follow the pattern of organization of public notaries, with a national Chamber that would be set up at the national and regional level.[30]

The first expert reviews of the governmental strategy were mildly positive. In the EU-sponsored study of Croatian enforcement practices, the advantages and disadvantages of public, private and mixed systems of enforcement were discussed, both generally and in the context of the Croatian reforms. Assessing the private system, the Study argued that the main possible advantages 'of creating an independent body of enforcement agents' would be the following:

- Transfer of costs from the national budget to the parties;
- Transfer of responsibility for enforcement;
- Placing the enforcement procedure more clearly in the hands of the parties to the dispute – the courts are less involved;
- Enabling courts to deal with their backlog of cases and discharging them of the enforcement;
- Enabling a more specialized profession to emerge with specific training and ethics;
- Incentives for enforcement are privatized and should thus be stronger;
- Independence should guarantee more efficiency.[31]

actual enforcement was requested, and after 2007 the number of enforcement cases started to rise again.

27 See Progress Report 2006, p. 50, where it was suggested that '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'.

28 Croatian Ministry of Justice, Action Plan for the Judicial Reform Strategy, 2008 Revision (available at <http://www.pravosudje.hr>, last consulted in January 2010), p. 97 (point 69a).

29 Ministry of Justice Strategic study for enhancing enforcement efficiency and creation of public enforcement agents, Zagreb, June 2009 (see Jean, Djuric & Jurisic 2009, Annex III).

30 *Ibidem*, at IV.

31 Jean, Djuric & Jurisic 2009, at 6.10.7.1 (p. 139).

However, on the other side, the potential disadvantages included the following points:

- Costs of enforcement for the parties will increase;
- New difficulties may arise in evaluating efficiency of enforcement as the collection of data will be more difficult;
- Special systems of monitoring have to be put in place;
- Legal and constitutional changes may be required;
- The Administration may be reluctant to cooperate with private enforcers.[32]

In the concrete Croatian case, it seemed that the experts involved in the cited study were mostly concerned about possible corruption. Analyzing the 15 years of experience with the establishment of the *corpus* of public notaries, it was concluded that privatization in their case was considered to be a success (an assessment that is perhaps not shared by everyone), but that three issues were problematic: 1) higher costs; 2) constitutional issues (whether the right of access to court is sufficiently safeguarded); and 3) corruption. All three issues, in the view of the authors, may also be applicable to the new private profession of enforcement agents. The emphasis was, however, put on the need to ensure the close monitoring of the new privatized function,[33] which is 'essential to ensure that abuses are not committed by those who benefit from important delegated power'.[34] It was emphasized that the new powers granted to enforcement agents and the creation of their privatized body, vested with public powers, will generate new opportunities for corrupt behaviour.[35] Therefore, several measures were recommended, from enhanced training to stronger intervention and an enhanced role of other legal institutions, such as the Ombudsman.[36] The Study also proposed the introduction of public tenders for enforcement actions needed by the State and other public law entities, as well as organizing tenders for the service of documents. Further proposals included simplification of legislation by enactment of 'efficient rules' and the undertaking of pre- and post-regulatory impact assessment (which, as stated in the Study, currently does not appear to take place).

32 *Ibidem*, at 6.10.7.2.

33 The Study repeatedly makes this point, suggesting e.g. that '[a]ny privatization in Croatia of the role and function of the enforcement agent will have to be accompanied by important investments in the design and implementation of a proper monitoring system' and arguing that '[t]he great challenge with the establishment of a private system lies in monitoring and supervision'.

34 *Ibidem*, p. 133.

35 The study supported its emphasis on the fight against corruption by arguing that '[e]nforcement agents are the arm of the state in every day contact with the population' and that therefore '[t]hey represent the state and the law in the eyes of the public and the public's perception of their ethical standards extends to the state'. Jean, Djuric & Jurisic 2009, at 7.1.2.2.

36 A recommendation that would, under current constitutional rules, be impossible to follow, since in Croatia the Ombudsman only has powers to consult the Parliament regarding human rights violations.

Assessing the governmental 2009 Strategic Paper, the international group of experts also noted that the proposed reforms are 'not bad proposals *per se*'[37] but characterized the paper as 'unclear', 'generally vague' with 'no concrete solutions', 'not precise in terms of timelines' of its implementation, and 'closed to the idea of public consultations and regulatory impact assessments'. The main criticisms were directed towards the sheer arbitrariness of the Strategic Paper – it came across as 'a proposal decided among a limited group of people', without objective assessment of prior mechanisms (e.g. of the involvement of public notaries in the enforcement process).[38]

It is interesting to note that the Study, although prepared by a team of French and Croatian experts, originally did not suggest the introduction of a 'pure' private system. Rather, the cautiously phrased recommendation indicated that consideration of a 'mixed' or combined public-private system in which public and private bailiffs coexist would be a good option, at least in the initial transition phase.[39] It mentioned the frequent negative examples of corrupt behavior in regard to the system of private bailiffs. As an example, the study mentions Hungary, where the main complaint with respect to newly introduced private enforcement agents is the abuse of power and position.[40] Therefore, a mixed public-private system might be beneficial for a 'smooth adaptation of the private enforcement agents without eliminating the public enforcement agents'. The authors further argue that such a design would make it possible to come back to the public system, if the private system proves unsuitable for Croatia, phasing out the system of private bailiffs within a period of two to five years.[41]

At the moment of writing the present paper,[42] the Strategic Paper was due to be transformed into a concrete legislative draft. One still cannot foresee what the features of the new system are going to be, but some elements surrounding the preparation of the new draft may be indicative. While having the EU-sponsored study on its table, the Ministry of Justice seems to have missed (or deliberately ignored) some of its main points, at least those regarding the need for transparency, systematic studies and the objective approach. Specifically, the working group appointed by the Ministry started its work far from the eyes of the public, with no prior research or public debate. While its composition was not publicly announced, it seems that the guiding principle was to include professional lobbyists, rather than neutral experts (those involved in the group are more or less delegates assigned by the Supreme Court, lawyers, public notaries, Chamber of Commerce, with some technical assistance by the Ministry).

37 *Ibidem*, at 7.1.2. (p. 141).

38 *Ibidem*, p. 161-162.

39 The comparative example given for such a combined system was the new scheme of enforcement in Bulgaria.

40 Jean, Djuric & Jurisic 2009, at 6.10.5.2. (p. 135). *In passim*, the Study notes that even in France, where the profession is highly regulated, there are regular issues involving the embezzlement of funds.

41 *Ibidem*, at 6.10.5.4. (p. 136).

42 January 2010.

The results of the work of the group will be seen in the near future, but the first information 'leaked' by the Ministry raises some concerns: instead of drafting an entirely new piece of legislation on enforcement (based on local needs and comparative models) the group started with the adaptation of the present act, with only slight modifications of the preset, heavily criticized, Enforcement Act. As to the organization of enforcement, the organizational structures are, at this stage, almost completely copied from the current law that regulates public notaries, with no reflection on either the suitability of its solutions or the appropriateness of their application by analogy.

## 6. Conclusions

The fate of the Croatian reforms discussed in the preceding chapter of this paper is so far uncertain. However, the course of the events and the issues that occurred in this and other cases may lead us to draw several conclusions regarding the impact of privatization of the enforcement functions in transition countries on the effectiveness and quality of the enforcement services provided to the users of the justice system.

The first, and rather general conclusion, is that the benefits and losses caused by privatization cannot be separated from the number of dependent issues and structural and procedural preconditions that have to be established in order to have a functional private system of enforcement. The second, equally general conclusion is that privatization in a pure form is not an option, since the effects of the private system greatly depend on adequate public regulation and control. Also, some areas of law (such as e.g. family law), some forms of enforcement (e.g. enforcement actions regarding claims that concern personal status), and even, under some circumstances, enforcement against certain debtors (e.g. the State and State agencies, although this point may be controversial), are less suitable for privatization, and therefore some of them are in virtually all systems maintained wholly in the public sector. In this sense, practically all 'private enforcement systems' are to a lesser or greater extent a combination of private and public elements. The final conclusion on this general level is applicable in particular to the transition countries, and deals with the capacity to produce a consistent, comprehensive and well-planned statute and steer the process of introduction of the new privatized system. The devil is in the details, and history has shown that this was the field where the transitional countries most often lost the game, in particular when the game was played under the pressure of time, with problematic motives (sometimes pertaining more to foreign than internal policies) and without sufficient political will for real change.

Therefore, the initial question contained in the title of this paper – is privatization of enforcement services a step forward for the countries in transition? – can be answered only in a conditional way: it depends on the circumstances. However, to put more flesh onto this relativistic submission, I will get back to the first of the cited conclusions, and elaborate on it by setting forth and analyzing five issues that decisively determine the effects of the introduction of a private bailiff system.

*a. Professional Status – Requirements for Education and Training*

The professional status of enforcement agents is perhaps among the least harmonized elements of the enforcement structures in Europe. The only common ground, expressed in the CoE Recommendation on Enforcement, is that 'consideration should be given to the moral standards of candidates and their legal knowledge and training in relevant law and procedure'.[43] Beyond that, and the general requirement that the professional status should be prescribed by law, there is no further indication as to the preconditions for becoming an enforcement agent. Indeed, the need to have enforcement agents 'honourable and competent in the performance of their duties', acting 'at all times according to recognized high professional and ethical standards',[44] may imply a certain level of education and training. However, the current enforcement structures in Europe are in this respect wildly different: while some countries (like France) require from prospective bailiffs cumulatively a law degree, professional education, and a period of practical training, in some others (like England, for certain types of bailiffs) there are no fixed requirements whatsoever.

In the transition countries, this issue plays a rather prominent role. Although in some of them the enforcement agents used to be a part of the administrative structures, while in others they were part of a court-based enforcement system, the standards of education and training for bailiffs were low or nonexistent.[45] In the prospective reforms an important policy decision has to be made – whether to build the new enforcement structures on the basis of the present structures (consisting mainly of persons with a low level of education, training and social status), or to build a wholly new body of professionals, partly educated and trained from scratch, partly recruited from other legal professions.

Such a policy decision has some significant implications. Opting for the evolution of the present structures affects the public image of the profession, which may further lead to the choice of certain procedural and structural arrangements. The most prominent example may be found in Slovenia, where the privatization of enforcement practice was based on the corpus of former court employees, who mainly had no formal education (high school education was sufficient) and had no autonomy in their actions. Due to their low profile in the new system, they were not given much autonomy and, for the most part, in spite of the privatization, the enforcement process remained court-based, requiring judicial intervention throughout the enforcement process. Thus, the resulting structures were no more efficient than the previous ones (and to some extent even less efficient). In such a way the policy choice for the evolution of the present structures contributed greatly to the poor success of the Slovenian reforms.

On the other side of the spectrum, opting for the formation of a wholly new corpus of professionals may also cause difficulties, as recruitment and education takes time. An avenue that may be used to avoid delays in the establishment of new

43 Recommendation Rec(2003) 17, at IV.3.

44 *Ibidem*, at IV.4.

45 For countries with a court-based system, 'enforcement agents' refers to the assisting court staff, and not to the enforcement judges, who essentially belong to another profession.

structures is side-recruitment. It seems that this is where the current reform plans in Croatia are steering to, following the model of the re-establishment of the profession of public notaries 15 years ago. In such a way, the curse of a poor public image of future bailiffs can be avoided, which is a sufficient (though not a necessary) reason for giving them appropriate powers and decision-making authorities. However, the establishment of a high-profiled profession of enforcement agents, recruited from among those who belong to the legal 'elites' (judges, lawyers, notaries) also calls for the resolution of various problems. Practical ones (like the creation of incentives for switching to a new profession) lead to further policy choices (e.g. choices for eventual monopolies (see *infra* at b), or choices for a particular fee system (see *infra* at e). At the conceptual level, one should try to avoid the repetition of problems within previous professions, e.g. the tendency towards formalized judge-like behaviour (see *infra* at c) in case of enforcement agents who are recruited among former judges, or the tendency towards identification with the interests of clients/creditors (which may occur in the case of enforcement agents who used to be attorneys).

The ultimate challenge in the case of side-recruitment is the one emphasized by the EU experts: combating corruption. Corruption should be focused on when first appointing enforcement agents, in particular in a system that knows professional monopolies (see *infra* at b). Without a clear, transparent process of appointment, the first generation of private bailiffs may be chosen from among personal friends, relatives and political allies of the appointing authorities, which, in turn, may have a long-term effect on both the public perception of the profession and its capability to provide independent, professional and neutral services to all citizens.

*b. Monopolies v. a Free Exercise of and Access to the Profession*

While privatization in most sectors means embracing free access to the profession (implied by the rules of market economy), it is interesting to note that in the domain of certain legal services there is still a strong, almost pan-European, inclination towards the policy of monopolies and public concessions given to a closed number (*numerus clausus*) of administratively appointed professionals. The usual justifications for such arrangements are found in the need to provide a high level of quality of services, promote ethical standards and secure adequate monitoring of the system.

The argument about monopolies as a safeguard for good quality (controversial as it might be) is partly based on motivational grounds. Allegedly, if a protected status secures good prospects for a constant high income, it will be easier to motivate the best candidates for the profession. Another argument advanced in this context is that if business is distributed among a small group of service providers, prices might be lower, because the volume of business will compensate for the smaller profit margins.

Interestingly, the latter argument was advocated by the expert group which assessed prospective Croatian reforms as a reason to suggest that monopolies

should be traded against controlled lower service prices (by ensuring that 'incentives such as territorial monopolies and life appointments are recognized as compensation').[46] This may come as a surprise, having in mind that the risks of corruption were constantly emphasized in the same report. By admitting that monopolies have their economic value, one treats monopolies as a concession that is being distributed by the public authorities. Although distribution of privileges to a closed circle of professionals may, in a strictly controlled environment, be used as a tool for the protection of the rights of the citizens, it is much more likely – especially in a transitional environment – that the opposite will take place: monopolies will be distributed as favours to friends and loyal followers. In any case, there was never any doubt about the final financial result for the end user. All studies (the cited one included) show that the costs for customers under a privatized scheme are definitively higher.[47]

It should also be noted that monopolies have several forms and aspects. They occur in the following forms:

- Certain services (e.g. delivery of documents) may be provided only by a particular profession (*service-providing monopoly*);
- Certain services may be provided only by the professionals certified to undertake actions in a defined area (*territorial monopoly*);
- Only a limited number of officials or professionals may be entrusted with the provision of particular services (*numerus clausus*).

All of these forms of monopolies (if stipulated) and their concrete content and extent have an effect on the overall functioning of the system. They also influence other issues, such as the level of centralization (see *infra* at d) and pricing policies (see *infra* at e).

*c. Formalities and the Level of Judicialization*

The purpose of the enforcement process is to implement judicial decisions effectively, fairly and at an affordable cost, both for the parties involved and for society. The purpose of enforcement is not the duplication of trials or the re-adjudication of the disputed claims. While formalities in court proceedings serve an important social purpose, considerations of speed, efficiency and economy step into the foreground when litigation is terminated. This switch is among the most important reasons why court-based systems of enforcement generally prove to be slow and ineffective. The *modus operandi* of courts and judges is hard to change: a court-based system tends to emulate the way the core business of the courts (litigation) is being executed.

With the 'outsourcing' of the enforcement services to private professionals, there is a chance to enhance the effectiveness of the enforcement process. However,

46 Jean, Djuric & Jurisic 2009, at 6.10.6.1., p. 137.

47 When comparing the service of court documents under a privatized system (by private enforcement agents) with service under a public system (using post or courier services), it was established that this presently costs 80.60 Euros in France versus 1.71 Euro in Croatia.

whether this will happen depends on a number of factors. The Slovenian example shows that privatization as such is not sufficient if the system does not stimulate deformalization and dejudicialization of the process at the same time.

While the Slovenian reforms failed because the process remained in the hands of the courts, excessive formalism may also plague an enforcement process which is successfully transferred to private professionals. The likelihood of this is increased if the newly recruited enforcement agents are accustomed to work in a judicialized and formalized environment (e.g. where former judges or public notaries are appointed). Although top professionals may change their approach, whether this happens will finally depend on their motivation. In this context, monopolies (see *supra* at b) and pricing policies (see *infra* at e) may play the most important role.

*d. Level of Centralization of Enforcement Structures*

Privatization of enforcement services generally also means decentralization,[48] because each enforcement agent serves his own clients, usually within a particular territory, and may use tools such as customized information systems. Decentralization may bring some benefits, such as a more flexible approach and the ability to adjust to specific requirements.

However, some significant risks may arise out of decentralization as well. The mixture of the diverse, customized tools at the local level generally costs more than uniform solutions. Coordination of the system becomes difficult, and the use of resources is far from optimized. The efficiency of a decentralized system may also be diminished by territorial monopolies, which may lead to the need for engaging several enforcement agents for enforcement actions that have to take place in territories within the jurisdiction of different authorities. In such a setting it is easy to evade successful enforcement by moving assets from one place to another.

Another drawback connected to decentralization is that collection of data and statistical monitoring may be rather cumbersome, if not almost impossible. Therefore, the very first premise on which the introduction of a privatized model is based – providing better efficiency for the users – becomes difficult to verify (or refute) by objective means.[49]

The nature of the tasks that are being outsourced (and/or decentralized) is also important. Complex tasks that need a high level of professionalism and reasonable assessment adjusted to concrete circumstances may be more convenient for decentralization than routine mechanical tasks that are more appropriate for centralized mass-processing. Unfortunately, in this respect developments in some transition countries, such as Croatia, have been directly the opposite – privatization

[48] The assumption is that enforcement services are provided by a larger number of independent enforcement agents or offices. However, it is also possible that privatization processes (at least under a free market model) lead to mergers of enforcement businesses and formation of a small number of large enforcement firms (or even a factual monopoly of one firm). In such a situation privatization is not implying decentralization, on the contrary it leads to a greater centralization. Similar processes have started to take place in some jurisdictions, e.g. in England and Wales.

[49] This remark was also made in Jean, Djuric & Jurisic 2009, p. 139.

of the enforcement services began with the introduction of a decentralized system of processing of payment orders which are by their nature simple formulary matters best suited for central processing (as demonstrated by the success of the automated payment order systems in Germany and Austria). On the other hand, it seems that at the current stage the Government shows sympathy for the central distribution of 'proper' enforcement services through a central professional body (national enforcement chamber), which – if accepted – may offset many potential benefits of the privatized enforcement system (e.g. the benefit of the free choice of the enforcement agent).

*e. Pricing Policies: Fixed or Proportionate Fees, Success Fees and the Free Market*

An often neglected aspect of privatization projects is the system of fees for enforcement services. Fees may have a decisive impact on the efficiency of the enforcement process – they can stimulate efficient work (sometimes at the expense of the protection of debtors), but they can also have an adverse effect on the speed and effectiveness of the enforcement process. The actual amount of the fees is in this context of only secondary importance; it is more important to determine on which principles and according to which criteria enforcement agents will be authorized to collect their fees.

A fee system is characterized by at least three elements: the calculation of fees (fixed or proportionate fees); the person liable to pay the fees (outcome-related or outcome-neutral fees); and the level of freedom for the enforcement agent and the parties to agree on the fees (free market or regulated fee structure). Each of these elements provides different incentives and therefore may lead to different results. The system of fixed fees may guarantee similar standards in all cases, but does not stimulate flexibility and can be disproportionally expensive (or cheap). The system of proportionate fees guarantees higher compensation for claims of higher value, but may lead to the rejection or neglect of smaller claims that are less profitable for the private enforcement agent. If enforcement agents are paid only in case enforcement actually leads to the satisfaction of the creditor's claim, their interest in the success of the enforcement process grows, which may lead to significantly higher success rates; on the other hand, personal involvement of the enforcement agents can in some cases jeopardize the standards of professional ethics and may put into question the independence of the enforcement agents. Finally, a regulated fee structure provides foreseeability (and may protect against prices of enforcement services that are too high or too low), but discourages competition among the enforcement agents that could lead to benefits for the users in the form of better services and more affordable prices.

As a result of the significance of pricing policies for the establishment of an effective and fair enforcement system, it is important to take them into account. Only a well-balanced and carefully designed pricing policy has a chance to produce the desired social effects. Unfortunately, in the context of the transition countries, such considerations usually come last. So, e.g., the Strategic Paper on enforcement reform in Croatia leaves this issue completely open, announcing that the fees will be determined only at the last stage of the reforms, when – after the enactment of general legislation on enforcement – the implementing bylaws will be enacted by the Ministry of Justice. This approach is likely to have an adverse effect on the

quality and consistency of the reforms, yet it may cause another typical side-effect of privatization in a transitional environment: the formation of a circle of privileged individuals who are given a position to accumulate wealth through the political appointment to a professional monopoly for providing expensive and inefficient (but inevitable) services.

In conclusion: for the countries in transition, some forms of privatization of the enforcement services currently seem to be very likely. Due to difficulties inherited from history in the organization of an effective public system of enforcement of court judgments and other enforceable documents, the introduction of enforcement agents as a new liberal profession may bring gains in terms of efficiency and speed of the enforcement process. However, the introduction has to be carefully planned, implemented and monitored. Unfortunately, just as enforcement law itself is an 'Achilles' heel' of the European Civil Judicial Area, the capacity to plan, prepare, implement and monitor reforms is an 'Achilles' heel' of the transitional States and their societies. The reform journey is consequently risky and considerable time may be needed to bring Ulysses safely home.

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