

# **IMPROVING EFFICIENCY OF ENFORCEMENT PROCEEDINGS**

## **RECOMMENDATION ON ENFORCEMENT OF THE COUNCIL OF EUROPE AND ITS RELEVANCE FOR TRANSITION COUNTRIES**

Prof. Dr. Alan Uzelac  
University of Zagreb

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## **I. INTRODUCTION**

The principal aim of every justice system is to ensure just, fair and swift protection of the rights granted to citizens and other persons within a particular jurisdiction yet many countries are not fully satisfied with the functioning of their justice systems. In this paper, we will deal with an aspect of the proper functioning of the justice sector that has currently been recognized as particularly important, i.e. enforcement of judicial decisions and other enforceable documents. First we will present the impact of the new case law of the European Court for Human Rights (hereinafter: ECHR) on the activities of the Council of Europe (hereinafter: CoE). In line with the new Strasbourg jurisprudence, it has been recognized that, in order to prevent violations of human rights and actively contribute to the ideal of a democracy based on the rule of law and human rights, contemporary European states should pay particular attention to the efficiency of the enforcement process. A brief survey of several CoE projects that have contributed to this aim and a chapter of this paper will be devoted to one of the most recent CoE recommendations, enacted in September 2003, the Recommendation on Enforcement (hereinafter: Rec(2003)17). In particular, definitions of main terms, the scope of the application, and the principles of this Recommendation will be outlined. It will also be emphasized that the CoE Recommendation purposed to be neutral with respect to the concrete modalities of the enforcement systems that exist in the 45 member countries. This approach is logical and perhaps even inevitable within a large international organization such as CoE. However, escaping the possible objections of those who wish to impose a particular national or regional system on the other members can only be achieved at the cost of a general approach. An approach that may run the risk of being vague and insufficiently concrete to assist countries in the process of reforming their enforcement laws and practices. Yet, this is not the case if we keep in mind the context of the enforcement recommendation, the basic features of various European enforcement systems, and their strength and weaknesses. In order to facilitate orientation in the sometimes confusing variety of national peculiarities, we present a typology of enforcement systems distinguishing three main models of enforcement. Each of these models has its own logic and inherent advantages and disadvantages.

Both the Recommendation on Enforcement and the proposed typology of enforcement systems have a special relevance in the transition countries as practically all of these countries are currently undergoing legal reforms. Additionally, most of these countries have disputable practices concerning the efficiency, accessibility and quality of enforcement practices<sup>1</sup> with revision of current national enforcement systems is high on the agenda. In the concluding part of this paper we attempt to give an assessment of the direction of current and possible future reforms and the challenges that such reforms are facing.

## **II. ENFORCEMENT AS AN INTEGRAL PART OF THE RIGHT TO A FAIR TRIAL**

### ***1. Classical (narrow) understanding of the right to a fair trial***

The traditional European approach to legal process was, until recently, almost exclusively court-oriented and adjudication-oriented. In other words, the focus of all those who were dealing with the ideals of a just and efficient judicial system was to a large part closed within the borders of the process of adjudication, i.e. the process in which, in the court proceedings, the existence of rights and obligations of the parties was determined. This process typically starts with initiation of the process (filing a suit), and ends with a final and binding judgment. What happens before, and especially what will happen after, was frequently left outside the scope of the legal discussion.

This approach could be found in the wording of many legal documents that dealt with the quality and efficiency of legal process. As perhaps a most prominent example, the wording of Art. 6 of the European Human Rights Convention (ECHR) could be cited insofar that it focuses solely on the adjudicatory or contradictory part of the process. Namely, both English and French wording of Art. 6

speak of “*determination of ... civil rights and obligations*” (“[*décider*] ... des contestations sur ... droits et obligations de caractère civil”). In simple terms, the guarantee to a fair trial would, interpreted from these words, end where enforcement would typically only begin, i.e. when the content of parties’ rights has been established and one or more claims set forth in the process granted. After the content of rights and obligations has been determined, and the dispute finally ended, the concept of “fair trial” would cease to be applicable.<sup>2</sup>

## ***2. New understanding of the right to a fair trial in respect to enforcement***

### **A. Recent case law of the ECHR**

The approach to the issue of the efficiency within the system of justice has exceeded the narrow borders of the courtroom. Moved by practical and pragmatic considerations, growing inefficiencies in the implementation of court decisions, and the necessity of making justice more than just words on paper, the European countries have realized that enforcement legitimizes a critical part of the legal process. “It is not over when it is over, it is over when it has been put into life” - could be one of the slogans of the new approach. This approach begins with the assumption that the legal process does not end with a final and just decision, but when such decision is in fact implemented. In this context, the old Latin saying: **ubi ius, ibi remedium** (there is no right without an effective remedy) has acquired a refreshed importance and meaning.

Since 1997, this understanding has become a part of the well-established case law of the European Court of Human Rights. In the landmark case *Hornsby v. Greece*<sup>3</sup>, the European Court has found that the guarantee of the right to a fair trial from Art. 6 ECHR also applies to enforcement, as “[i]t would be inconceivable that Article 6 § 1 should describe in detail procedural guarantees afforded to litigants - proceedings that were fair, public and expeditious - without protecting the implementation of judicial decision”. Therefore, as the Court has emphasized ever since, “**execution of a judgment given by any court [...] has to be regarded as an integral part of the ‘trial’ for the purposes of Article 6**”.

The importance of enforcement has become even greater in the further ECHR cases. In a 1998 case *Estima Jorge v. Portugal*<sup>4</sup>, the Court has recognized that enforcement has an independent value, irrespective of the nature of the enforcement writ, the existence of previous disputes concerning the rights and obligations of the parties, and even with regard to the prior existence of court proceedings. In the cited case dealing with the enforcement of a notary deed received as a security for mortgage, the Court held that “Article 6 § 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”. By contrast, in the *Estima Jorge* case, there was neither a dispute, nor prior court proceedings for “determination of rights” since the sole object of the proceedings was recovery of debt. Instead the Court found that “conformity” with the spirit of the Convention required that the word ‘contestation’ (dispute) should not be construed too literally and that it should be given a substantive rather than a formal meaning. Therefore, even in the absence of a pre-existent (fair) trial, the Court found violation of the reasonable time provision under Article 6 § 1 of the Convention.

The lack of proper enforcement (or administrative and/or legislative action that prevents enforcement) can have harsher consequences than simply excessive length of the proceedings. The *Immobiliare Saffi v. Italy*<sup>5</sup> case of 1999 was yet another case in which there was no dispute - the only alleged violation was the impossibility of enforcing an uncontested court order confirming termination of the lease and requiring the tenant to vacate the premises.<sup>6</sup> As established in *Immobiliare Saffi*, a governmental regulation that postponed assistance to the owner of an immovable property concerning the repossessing of his apartment for some eleven years<sup>7</sup>, amounted not (only) to violation of Article 6 with respect to the reasonableness of the time needed, but also in violation of the further aspect of the

Art. 6 - access to court right. Even further, the Court found that in this case “the balance that had to be struck between the protection of the right of property and requirements of the general interest” had been upset, and therefore also established a violation of the right to protection of property under Article 1 of the Protocol No. 1 to the Convention, i.e. the right to the peaceful enjoyment of possessions. Thereby, the failure to implement enforceable titles can amount not only to violation of procedural rights<sup>8</sup>, but also to violation of substantive human rights.

## **B. Efforts of the Council of Europe - Conclusions of the 2001 Moscow Conference**

Turning from the legal to the political arena, one could follow the same path of reasoning when analyzing the activities of European countries concerning the improvement of their legal systems. Activities of the Council of Europe in the area of enforcement first began with the Hornsby case. In October 1997, the multilateral seminar held in Strasbourg at the *Palais de l'Europe* reaffirmed the legal and political importance of enforcement to the proper functioning of the judicial system in a State governed by rule of law.<sup>9</sup> Several bilateral and multilateral seminars, both regional and national, were organized on a case-by-case basis under the auspices or with the participation of the Council of Europe (see *infra* at 2.2.4).

In October 2001, at the 24th Conference of European Ministers of Justice held in Moscow, the main topic was “implementation of judicial decisions in conformity with European standards”. After discussing the current problems of enforcement in light of the cited case law of the ECHR, the European Ministers of Justice in the adopted Resolution No. 3 unanimously agreed that “**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**”.

Thereby, activities in the enforcement area became the priority among the principal bodies of judicial sector in the member countries of the Council of Europe. The Ministers of Justice at the Moscow Conference decided to continue to explore issues of enforcement, with particular attention given to identifying **common European enforcement standards and principles**. This task was then forwarded to the European Committee on Legal Co-operation (CDCJ) and its working bodies. Also included was the establishment of the primary principles of the **role of enforcement agents** (bailiffs).<sup>10</sup>

## **C. The process of defining standards - the emerging of the Recommendation on Enforcement**

The concrete carrying out of the work with regards to enforcement (with exception of decisions in the administrative field)<sup>11</sup> was entrusted to the Committee of Experts on Efficiency of Justice (CJ-EJ), one of the subcommittees of the CDCJ. A working party of the CJ-EJ (CJ-EJ-GT), consisting of representatives of 13 countries,<sup>12</sup> chaired by German representative Eberhard Desch, held several meetings in the second half of the 2002 and produced the draft Recommendation on Enforcement that was adopted by the plenary meeting of the CJ-EJ on November 13, 2002. The text of the Recommendation on Enforcement was subsequently adopted by the CDCJ in March 2003, and by the Committee of Ministers of the Council of Europe on September 9, 2003 as Rec(2003)17. At the same meeting, another recommendation concerning enforcement matters was also adopted – Recommendation on the Execution of Administrative and Judicial Decisions in the Field of Administrative Law.<sup>13</sup>

The main features of the Recommendation will be presented in the second part of this paper (*see infra* at III).

#### **D. Support for the countries in transition - bilateral and regional CoE activities**

Although the cited case law of the ECHR primarily concerns countries such as Greece, Italy and Portugal, problems of efficiency and quality of enforcement processes were noted in the transition countries. Since 1997, the CoE has organized several seminars devoted to support of effective enforcement in the countries of Central and Eastern Europe and the countries of the former Soviet Union. Some of these seminars were organized in the framework of the Demo-droit and Themis programs and the activities for the development and the consolidation of democratic stability (ADACS).

These seminars included:

- Multilateral seminar in Strasbourg in October 1997;
- Multilateral seminar in Jurmala, Latvia, June 1998 (common seminar with the countries of Estonia, Latvia and Lithuania);
- Multilateral seminar in Varna, Bulgaria, September 2002 (seminar with the participation of Albania, Armenia, Azerbaijan, Bulgaria, Georgia, FR Yugoslavia, FYROM, Moldova, Romania, Russian Federation, Turkey and Greece);
- Bilateral seminars in Moldova, Albania, Russian Federation and Ukraine.

In addition the CoE organized programs tailor-made from evaluations of bilateral assessment visits to various countries (Croatia, Georgia, Russian Federation), legislative expertises (Federation of Bosnia and Herzegovina, Georgia, Lithuania, Moldova, Ukraine), and study visits (Russian Federation).<sup>14</sup>

The CoE programs of support for the countries of transition in this area have been, to a large extent, connected to the assistance of enforcement professionals - bailiffs, enforcement judges, governmental enforcement services etc. In particular, the need for proper education and training, clear rules, and sufficient resources has been recognized during virtually all of the aforementioned activities. Conclusions from various seminars and experiences resulting from these events have contributed to the formulation of some provisions in the Recommendation on Enforcement of the CoE.

#### **E. The establishment of the European Commission for the Efficiency of Justice (CEPEJ)**

In addition to the Recommendation, the CoE recently adopted another important instrument that will, in a broader context, contribute to future activities in the field of enforcement for judicial and other decisions. Namely, the committee that designed the first draft of the Enforcement Recommendation (CJ-EJ) faced an additional mandate from the European Ministers of Justice, to create an instrument that would enable member countries to improve the efficiency and functionality of their justice system. The CJ-EJ experts developed a proposal to establish a new organ within the CoE in the form of a separate expert commission. This new body, the European Commission for the Efficiency of Justice, was established by the Resolution of the Committee of Ministers on September 18, 2002.<sup>15</sup> The body will become operational at its first meeting on February 3, 2003.

There are two main mandates of the CEPEJ. The first is defined as “improving the efficiency and the functioning of the justice system of member states, with a view to ensuring that everyone within their jurisdiction can enforce their legal rights effectively, thereby generating increased confidence of the citizens in the justice system”<sup>16</sup>. The second is better implementation of the international legal

instruments of the CoE concerning efficiency and fairness of justice. The list of applicable instruments is long, and encompasses a number of resolutions and recommendations relating to issues such as access to justice, efficiency of judicial proceedings, the status and role of legal professionals, administration of justice and management of courts, and the use of information and communication technologies.<sup>17</sup>

The first mandate of CEPEJ shows the importance being given to enforcement issues. By stating that the purpose of improving efficiency of justice is **to ensure effective enforcement of legal rights** of citizens, the scope of activities is clearly not linked solely to the stage of courtroom adjudication. The Resolution that established the CEPEJ included several statements related to enforcement of court decisions. In the list of principles, at I.3., the Res(2002)12 is contained the following provision:

“3. Execution of court decisions

- i. All judicial decisions shall be executed in an effective manner and within a reasonable time limit.
- ii. Bailiffs, where they exist, or any other execution agents, shall carry out their work according to the law, fairly, impartially, efficiently and transparently.”

Other principles from Res(2002)12 may also be directly or indirectly applicable to enforcement matters. In particular, the reference to on-going training as “a right and a duty of all those involved in the judicial service” as “an essential requirement for justice to fulfill its functions”<sup>18</sup> undoubtedly refers to the need of a well-trained and highly professional enforcement service. The principles of the proper administration of justice and the promotion of the use of information and communication technologies<sup>19</sup> could also be extended to enforcement agents and their operation.

To conclude, ample references to enforcement are contained in the documents created with the establishment of the CEPEJ which lead us to assume that, after final adoption of the Recommendation on Enforcement, it will become one of the more important legal instruments on the list of CEPEJ. In the next part of this paper, we will outline some basic features of the Rec(2003)17.

### **III. RECOMMENDATION ON ENFORCEMENT AND THE ROLE OF ENFORCEMENT AGENTS**

#### ***1. Definitions***

##### **A. Definition of enforcement**

Rec(2003)17 defines enforcement as “carrying into effect of judicial decisions, as well as of 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”.<sup>20</sup>

This is a functional definition of enforcement that delineates the process in contrast to other processes according to its basis, legal background, and the content of the act that has to be enforced.

The basis of enforcement is defined comprehensively encompassing both enforcement of court decisions (as a core of enforcement activity) and enforcement of other enforceable titles of judicial and non-judicial nature. Such titles may include judicial settlements, notarial deeds and arbitral awards insofar that they are legally recognized as acts that may be directly enforceable (e.g. by providing that

they have the same force as an enforceable court decision).<sup>21</sup> The definition and scope of enforceable titles is left entirely to the national legal systems of member states.

Enforcement in the sense of this definition would encompass only the actions that are carried out in compliance with the law. In other words, instances of “private justice” and uncontrolled self-help would fall outside the scope of this Recommendation.

Finally, not all of the judicial decisions would need enforcement. As noted in the Explanatory Memorandum, the Rec(2003)17 relates only to “those judicial decisions and enforceable titles that require action to be taken to enforce them”<sup>22</sup>. Not all judicial decisions could be subject to enforcement. Some of them may be self-enforceable - e.g. the decisions that by themselves produce legal effects (change existing relationships, as in the case of divorce decisions - annulment of contracts), or would not require enforcement at all, as is the case with decisions of mere declaratory nature (establishment of existence or non-existence of parties’ rights and obligations). Therefore, Rec(2003)17 relates only to enforceable titles that compel the defendant to do something (*facere, dare*), order him to refrain from undertaking a certain action (*non facere, pati*), or pay the adjudged sum (this being a specific, but very common instance of a positive obligation to undertake an action).

## **B. Definition of parties to proceedings**

While certain documents on enforcement define parties as “creditor” and “debtor”, it has been recognized that those terms essentially relate the parties to a legal relationship of substantive law. However, a party that initiates enforcement proceedings need not necessarily be a creditor in such a relationship, and its opponent need not necessarily be a debtor

Therefore, parties of proceedings are defined procedurally, as “claimant” (party seeking enforcement) and “defendant” (party against whom enforcement is sought).

## **C. Definition of enforcement agents**

See *infra* under III.4.

## ***2. Scope of application***

The Rec(2003)17, although relatively wide in application, does not cover all instances of enforcement. Under p. 4.1 the two types of cases are outside of the scope of its application. First, the enforcement of administrative matters is covered by another recommendation prepared by a specific group of experts for administrative law. Second, it is certainly not applicable to enforcement of criminal matters that concern deprivation of liberty. However, in spite of some doubts expressed in the discussions of the CJ-EJ, the draft text submitted to other bodies of the CoE for consideration provided that Rec(2003)17 may be applicable to enforcement of some other decisions in criminal matters, e.g. the imposition of fines, confiscation of property, or compensation for victims. Some uncertainties were expressed with respect to family law matters, but the general view was that, although there are some specific concerns in enforcement of such decisions, the principles from Rec(2003)17 are generally still applicable in such matters as well. Therefore, it has been stated that Rec(2003)17 applies to practically the whole area of “civil matters”, including commercial, consumer, labour and family law matters. Such a comprehensive scope of application, irrespective of some uncovered areas, may justify that the

Recommendation does generally refer to “enforcement”, rather than a specific type of it (e.g. enforcement in civil matters).

### ***3. Principles related to enforcement procedure***

After determining the scope of application and the meaning of the used terms, the Recommendation sets forth in two main parts the joint principles and standards enforcement procedure (p. 5) and enforcement agents (p. 6) applicable to all member states of the CoE. The following rules and principles that should be followed in order for enforcement procedures to be effective and efficient as possible are stated:

- the need for a clear legal framework, i.e. establishment of procedures that are clear and easy to follow<sup>23</sup> (5.1.1.);
- actual compliance with legal requirements, resulting in foreseeability and transparency of the enforcement processes (5.1.2.)<sup>24</sup>;
- co-operation between the parties (5.1.3)<sup>25</sup>;
- the obligation of defendants to provide relevant information on their income and assets (5.1.4)<sup>26</sup>;
- misuses of the enforcement process should be prevented, in particular the attempts to turn enforcement process into re-adjudication of the case (5.1.5),<sup>27</sup>
- postponement (delay) of enforcement process may be granted only for reasons prescribed by law, and, eventually, be subject to review by the court (5.1.6);<sup>28</sup>
- there should be a fair balance of claimant’s and defendant’s interest (5.1.7)<sup>29</sup>; therefore, *inter alia*, for humanitarian reasons some essential assets and income of the defendant may have a privileged position (5.1.8)<sup>30</sup>.

Further principles deal specifically with the desirable characteristics of the enforcement procedures. They should be easy to administer; the enforceable titles should be exhaustively enumerated and defined in the legislation; rights of the parties should be clearly defined, in particular where the ranking of claims and entitlements to monies recovered is concerned. Measures to prevent procedural abuses and provide effective and appropriate means of serving documents are desirable too.<sup>31</sup> Costs of enforcement, in particular the enforcement fees, should be reasonable and foreseeable and in principle be borne by the defendant.<sup>32</sup>

### ***4. Enforcement agents - bailiffs***

The first half of the Recommendation on Enforcement deals with the functional characteristics of “good enforcement proceedings” and the second half with organizational, i.e. devoted to those who carry out enforcement. In the preparatory work related to Rec(2003)17, the notion of “bailiff” was used, but during the discussions attention was drawn to the fact that some legal systems virtually do not make use of bailiffs in the enforcement process (or have bailiffs that deal with very minor and technical tasks), and instead use other persons or services (e.g some countries, such as Austria, employ enforcement judges to undertake a significant portion of tasks that are in other countries given to bailiffs).



In formulation of recommendations that would apply to bailiffs, it was recognized that in the member states of the Council of Europe there are different systems of enforcement, in the procedural and in the organisational sense. Therefore, the very notion of a “bailiff” was somewhat controversial. Starting with the problem of translation, the term “bailiff” is used for persons of rather different professional and social status. One typical demonstration of such differences relates to the social status and respect enjoyed by those who are called “bailiffs” in different legal systems. In some legal systems, the bailiff’s profession is a highly desired, esteemed, and attractive post, whereas in the others it is associated with hard, repugnant and poorly paid jobs. Further differences exist in respect of education, knowledge, skills and authority of bailiffs.

Therefore, a more comprehensive term was used in the Rec (2003)17 - the notion of **enforcement agent**, defined as “a person authorised by the State to carry out the enforcement process irrespective of whether that person is employed by the State or not”<sup>33</sup>. This definition would, include “bailiffs” in the narrow sense of the word and also cover all other persons who fall within the scope of the phrase “authorised to carry out enforcement”. As stated in the draft Explanatory Memorandum, such a definition comprises “a wide variety of persons responsible for carrying out the enforcement process (e.g. bailiff, *huissier de justice*, enforcement judge etc.)”<sup>34</sup>

While formulating the recommendations on enforcement, the CoE wanted to preserve its neutrality with respect to various enforcement systems. Any general evaluation of benefits or disadvantages of a particular system of enforcement had to be avoided in order to escape the appearance of desiring to influence reform processes in member states. The Explanatory Memorandum therefore contains only descriptive statements such as an observation that “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”<sup>35</sup>. It was therefore noted that many states were presently re-examining their enforcement procedures and practices, but that the Recommendation emphasized the freedom of member states to determine the professional status of enforcement agents.<sup>36</sup> Irregardless of what status is chosen, it should be clearly prescribe by law the roles, responsibilities and powers of the enforcement agents “in order to bring as much certainty and transparency to the enforcement process as possible.”<sup>37</sup> Specifically, the powers and responsibilities of enforcements agents should be clearly distinguished from those of the judge.<sup>38</sup>

Some principles relating to enforcement agents were fully applicable in every enforcement system. The first is the need for professionals of high moral standards having legal knowledge and training in relevant law and procedures. Such objective requires objective criteria in the process of selection and recruitment of prospective enforcement agents. Thus, the requirement that candidates must pass examinations concerning their theoretical and practical knowledge of enforcement services is also contained in the Recommendation (e.g. the testing of their knowledge of civil procedural law, the practical examination and case-study assessments etc.)<sup>39</sup>

The need to maintain high standards of morality, professional ability and knowledge does not end with recruitment of enforcement agents. The Recommendation also provides that “the enforcement agents be honourable and competent in the performance of their duties and should act, at all times, according to recognised high professional and ethical standards.” Well-structured initial and ongoing training should also be available for enforcement agents.<sup>40</sup>

The relationship of enforcement agents and parties was a matter of extensive discussion. The role of enforcement agents is different from the role of judges, and therefore the requirements are also different. In many cases the enforcement agents will be perceived as those who act on behalf of claimants and in some systems they are, at least initially, paid by them. However, they must not be simply agents of either party involved in the proceedings and should not act exclusively in the interest of one party. Thus, the Recommendation provides that enforcement agents should be “unbiased in

their dealings with the parties and be subject to professional scrutiny and monitoring which may include judicial control”<sup>41</sup>.

The issue of responsibility was reiterated in the Recommendation in respect of every occurrence of abuses of the enforcement agents’ position. For such abuses, it is absolutely necessary to provide adequate and efficient disciplinary, civil and/or criminal sanctions,<sup>42</sup> as only effective prevention of abuses can create a strong, respected and well-esteemed profession.

Finally, enforcement process cannot proceed unless those who carry out enforcement have proper working conditions, adequate physical resources, and support staff. Although such “logistical” problems vary when enforcement agents are employed by the state rather than are self-employed bailiffs, their ratio is the same. Availability of appropriate candidates for enforcement services and their motivation is also dependent on their remuneration, especially if enforcement agents are working on a fixed salary paid by the state.<sup>43</sup>

## **IV. ENFORCEMENT IN THE TRANSITION COUNTRIES**

### ***1. Typology of Enforcement Systems***

Although enforcement systems appear with a great variety of divergent features, they may be analysed according to their prevailing characteristics. In this part, we present a typology of enforcement systems, aware that such a typology, when applied to a concrete system, may not be entirely appropriate. The following typology is elaborated as a collection of ideal-types, i.e. of pure systems that may exist in real life in a number of transitory forms and features. However, as with most ideal-types, we assume that this typology may be useful in analysing concrete situations.

According to the dominant features, with particular respect to the allocation of the main responsibility for enforcement, there exist three types of enforcement system:

- A. Court system of enforcement
- B. System of enforcement by the executive branch of government
- C. System of enforcement by private bailiffs

#### **A. Court system of enforcement**

In a court system the dominant responsibility for enforcement is given to judges. Normally, they are regarded as a typical (litigation) judge, although their status may be different. Sometimes, judges involved in enforcement cases discharge a part of their judicial tasks in litigation; but, sometimes, such judges are specialised and limit their activities to enforcement cases. Such “enforcement judges” are therefore take on a mixture of roles and functions: on one hand, they are regarded to be (more or less) full-fledged judges, associated with the judicial branch of government. As judges, they may enjoy most or all of the rights that are usually associated with judicial status (independence, impartiality, immovability etc.). On the other hand, the nature of their activities is not, strictly speaking, a judicial one, i.e. it does not pertain to determination of cases – resolution of disputed issues of facts and law. Such “enforcement judges” may be assisted by lower court officials that fulfil some essential or technical tasks in the enforcement process. These officials may, inter alia, include prospective candidates for the post of (enforcement) judge, but also include less educated technical staff (“court executors”) with very limited power and authority. Therefore, in this system, it is hard to speak about

“bailiffs” in any substantial sense (except to the extent to which enforcement judges would be considered to be bailiffs).<sup>44</sup>

### **B. System of enforcement by the executive branch of government**

A system of enforcement by the executive branch of government is a system in which the primary responsibility for the enforcement process is with one or more executive bodies. This system is characterised by hierarchical and (in some cases) centralised organisation. The main supervisory body is a state ministry (e.g. Ministry of Justice, Ministry of Finance or Ministry of Police) or other state body or institution (e.g. Enforcement Authority). Enforcement services would form a part of the organisational structure (e.g. department or institute) of a broader unit (e.g. Ministry) with or without the status of a separate legal person. In such a system enforcement agents act as public employees (employees of the state) receiving a fixed salary and liable to disciplinary and/or monetary repercussions for their activities. They also form a more or less closed professional group with clear organisation of sub- and super-ordination (similar in its nature to the offices of public prosecutors).<sup>45</sup>

### **C. System of enforcement by private bailiffs**

In this system, enforcement agents (bailiffs in the narrower sense) operate as private professionals (even private entrepreneurs) and have a direct financial interest in the success of the enforcement process. They are, in principle, independent and autonomous, although they may be subject to control and sanctions by the offices that have granted them permission to act as enforcement agents. In principle, private bailiffs have to fulfil a number of requirements such as level of legal and professional education and skills as prospective bailiffs. Candidates will also undergo a competitive process of selection. In spite of the required legal training, as private professionals, bailiffs can work more or less as privately practice employees. Balance between the legal and commercial parts of their activities may be different in different systems. If they are liberal professionals, controlled by professional organisations and public authorities, they may have stricter public and professional duties; they are, at least partly, "officers of the court". If they are conceived as private businessmen, they will operate with increased freedom and be more susceptible to market developments (i.e. the process of implementation of judicial decisions is viewed as a market place on which enforcement services are sold).<sup>46</sup>

## ***2. Advantages and disadvantages of particular types of enforcement systems***

It is very difficult to evaluate the various systems of enforcement on a general basis. The status of enforcement agents varies from country to country. As explained before, the proposed typology only provides pure models that are often combined in practice. For instance, in many systems in which the executive power is ultimately responsible for enforcement (as well as in the system of enforcement by private bailiffs), judicial impact is significant. In systems in which the judicial branch has the main power and authority to conduct enforcement, certain activities are sometimes undertaken by administrative officials, and some functions may be transferred to private bodies.

Moreover, the assessment of model systems has to take into account that the same systems may produce different results under different circumstances. There are instances of very successful enforcement systems that can be attributed to each of the categories explored; there are also instances of poor functioning in each of the classes. Therefore, there is no particular enforcement system that is ideal for all countries under all circumstances.

However, the difficulties of general evaluation do not prevent us from using the systems as theoretical models. Using the main features of each of the systems we can develop conclusions as to the strengths and weaknesses of each system. Identifying the advantages and disadvantages of each system is a useful exercise in that it heightens the awareness of the capacities of each model. By comparing the

features of each model with the enforcement system of a particular country (and social and economical circumstances in which judicial system functions), we seek to minimise the disadvantages as well as fully realise the potential of its advantages.

If the political and professional assessment of an existing enforcement system is negative, and there is political and professional willingness to change it, the evaluation of typical models may be helpful in making choices that would ultimately lead to a successful reform.

In the following table, we present a summary of the advantages and disadvantages of each model:

|                      | Court                      | Executive                           | Liberal Profession                 |
|----------------------|----------------------------|-------------------------------------|------------------------------------|
| <b>Advantages</b>    | quality                    | fast                                | rapid                              |
|                      | same standards             | flexible                            | efficient                          |
|                      | level of debtor protection | less expensive for the state budget | inexpensive for the state budget   |
|                      | inexpensive for consumers  |                                     | professional quality               |
| <b>Disadvantages</b> | expensive                  | lack of quality                     | expensive for consumers            |
|                      | slow                       | outside interventions               | difficult to change                |
|                      | rigid                      | corruption                          | interventions in selection process |
|                      | over-formalised            | bureaucratisation                   |                                    |

As evidenced in the table, the court system of enforcement could provide a high-quality decision-making since those principally responsible for enforcement are judges. As judges, they tend to be well educated and trained, enjoy high status and social privileges, and are protected by the guarantees of independence and impartiality. The principle of separation of powers minimises the potential for interference by the executive powers leading to decision makers having the responsibility for implementing their decisions. Thereby the same standards apply to the adjudication and enforcement of decisions. The holders of judicial offices tend to be cautious in procedural steps, and socially sensitive thereby, in such a system, a high level of debtor protection is achieved.

On the other hand, the court system of enforcement is rarely characterised by its efficiency. Firstly, the enforcement is quite different from adjudication and requires different skills. If judges work in enforcement departments, they are certainly not among the least remunerated state officials. The nature of their job is, in many cases technical, and requiring lesser skills than what is normally associated with typical judicial tasks. Creating a separate corps of judges for enforcement activities, may prove fairly expensive and if the same judges were to work on other judicial cases and deal with enforcement, they might be overwhelmed by the volume of work. In any case, judges acting as enforcement agents tend to emphasise formal process and not efficiency therefore, there exists a risk that enforcement will occur at a slower pace, occasionally with rigid adherence to process and

unnecessary formalities. Rigidity exists in this type of system as it is nearly impossible to employ or let go a large number of judicial enforcement agents (enforcement judges) concurrent to oscillations in case volume. Consequently, this could have a negative impact on the efficiency of the enforcement process as a whole.

Unlike the court system, the executive system of enforcement is able to work much faster. A typical feature of the executive branch is its results oriented approach thus enforcement routines are less formal and more flexible than those of court systems. Such a system is typically less expensive because officials in the executive branch tend to receive lower compensation than do judges. Flexibility of the executive system is greater as it is easier to assign officials to new tasks, or transfer them to other areas should work loads fluctuate.

On the other hand, enforcement agents in the executive branch usually do not enjoy equally high status and training as do judges and tend to be underpaid and overworked. These differences may lead to a lack of quality of the enforcement work. Additionally, executive officials are subject to hierarchical subordination and must obey the instructions of superior bodies. This creates a risk of intervention in the enforcement process, particularly by officials in the executive branch and by the government itself; if enforcement is to be performed for state assets (or assets of state agencies and officials). If such enforcement agents are not sufficiently compensated, the risk of corruption in the process will be high. A risk also exists in that bureaucratisation may adversely impact the efficiency of the process.

The system of bailiffs as members of a liberal profession also has its advantages and disadvantages. As professionals with special training and skills, personally and financially interested in efficient performance, private bailiffs can provide more rapid and efficient enforcement than public officials in the executive model of enforcement. If the benchmark for education and training is high, and specialist courses of continuing training and education are available, they may provide higher professional quality than enforcement judges in the court model of enforcement. An additional advantage exists with regard to cost in that the private model does not place a financial burden on the state as it does not require that staff, resources or other expenses be publicly funded. On the contrary, this system creates indirect revenues from taxes and employment in private sector.

With regards to the disadvantages of this model though the private system may be profitable for the state, it may prove more costly for consumers. As it is doubtful that the costs of enforcement will be subsidised by the state, the price of enforcement may rise, particularly if the pricing policy is not controlled. In particular, deposits required in advance from creditors and expenses of unsuccessful enforcement should be reasonable since their right to access to justice could otherwise be affected. Moreover, when a state grants concessions to the private sector to engage in enforcement, it will prove particularly difficult to reverse said decision. Finally, quality and efficiency of the private model depends greatly on the reliability of its selection process. While the danger of corruption and political interventions is certainly less likely with respect to particular enforcements, in the system of private bailiffs one should mostly fear such issues during the phase of selection. The combination of desirability of being a private bailiff and the system of concessions and limitations on the number of bailiff posts - there exists a latent risk that entry into profession will be affected by factors that do not have anything to do with the proven qualities and proficiencies of the candidates.

### ***3. Reforming enforcement laws of the transition countries***

There are two primary ways to address the deficiency of enforcement processes. One is to operate on a normative level with a revision of current enforcement laws; a favourite type of law reform, and the most popular type in transition countries. According to conventional wisdom without appropriate legislation, efficient practices can hardly be expected yet, if changes of law happens without the imminent connection to implementation, the desired effect may not be achieved. Although there are a

number of achievable improvements concerning the composition and organization of enforcement services (e.g. ensuring consistency, removing unnecessary formalities, streamlining of the procedures etc.), the main challenge in for transition countries is to connect normative ideals to implementation. Therefore, we will here concentrate on normative aspects only insofar as they are connected with the main problem of the enforcement practice – establishment of efficient and skilled enforcement services, with particular respect to the role, organization, status and training of the enforcement agents. In the following chapter we present the main questions that occur when dealing with these issues.

#### ***4. Establishing capable professions of enforcement agents – their role, organization, status and training***

##### **A Role of enforcement agents (bailiffs)**

- How extensive should the role of the bailiff be?

The role and duties of bailiffs vary according to the system of which they are a part. In some systems, they are the main "players" for compulsory enforcement. In other systems, they act only as assistants to staff and their participation is limited to rather technical tasks. Therefore, the strategic choice that is made in every system is whether to limit the role of bailiffs to **full control of the enforcement process** or limit it to **implementation only** of substantive decisions made elsewhere (e.g. by enforcement judges, by parties or by some other agencies).

- What should regulate and motivate enforcement activities?

Another question concerning the role of bailiffs relates to the logic and rules of operation. It is generally agreed that enforcement should be regulated by law in a transparent and sufficiently precise fashion however, there can be different views with respect to the strictness of regulation. The actions of bailiffs in enforcement may be motivated by the **strict principle of legality** (there should either be a detailed legal provision, or court order), or they may be given **discretionary powers**. An related question concerns the source of arguments involved in strategic decision-making - whether they are drawn from **law** or from **economics** (i.e. whether bailiffs should follow only **legal** or **commercial logic**) too - especially when the liquidation of debtor's assets is concerned (auction etc.).

- At what point in time are bailiffs engaged?

An additional question about the role of bailiff is when he should be engaged. Bailiffs may be engaged either **immediately** after the completion of the process of adjudication, at the point when the court judgement becomes final and binding, or **at a later stage**, i.e. after certain number of formal and/or substantive decisions have been made. For example, after judgement there may be a process of certification required to make said judgement enforceable; it may be required that the judge or other official issues a writ of execution. Required conditions and time may vary considerably.

- What are the functions of bailiffs in the enforcement process?

The preceding questions depend on the role played by bailiffs in the enforcement process. The principal issue here is related to the scope of authority given to bailiffs. One of the principal dilemmas relates to the extent of discretion bailiffs should have, with particular respect to determining the means, scope and time of execution. This discretion is reflected in the active or passive role that bailiffs have with respect to collecting information relevant to the enforcement process, in particular respect to assets owned by the debtor. The bailiffs' role could be limited to the role of **executors only** (i.e. persons that act upon information obtained by the court or the parties) or could extend to the role of active **collector of information**. In the latter case, bailiffs must have sufficient authority and means, in particular in relation to various public registers (company register, registers of immovable property; registers of motor vehicles; IP registers; registers of addresses and bank accounts etc.). They may also have public authority with respect to private persons (companies and/or individuals). With respect to collecting information, authority might need to be tempered by respect for human rights - e.g. ensuring

that the right to examine bank accounts is compatible with the privacy rights and protection of sensitive information. Bailiffs and/or other agents (judges, public officials) may also have the right to request from the debtor/defendant a declaration of the assets owned.

## **B Organisation of enforcement services**

- With which agencies should bailiffs be associated? For what territory?

Bailiffs may be organised in various levels and maintain loose or less loose relations with various bodies. This part of organisation depends largely on the role given to bailiffs - e.g. whether enforcement agents are conceived as **officers of the court** or as **private entrepreneurs**. Consequently, bailiffs may or may not have close organisational relations with courts, public authorities, governmental agencies and other professions engaged in the justice system (lawyers, notaries, *Rechtspfleger*). Organisation also depends on the **level of localisation** - i.e. to the issue whether enforcement agents have access to and authority in the whole territory of the national jurisdiction, or whether they are bound to stay within certain court districts or other territorial units of a particular state.

- What is the internal organisation of the profession?

Even within the bailiff profession, types of internal organisation can differ. On one hand, bailiffs may work more or less as **individuals, sole practitioners**; on the other, they act as **collective bodies** (services, departments, partnerships). Within these bodies, there may be a different level of mutual sub- and super-ordination. In certain jurisdictions, bailiffs may work only as **individuals**, in others, bailiffs (or law) might enforcement agencies with **legal personalities**. This decision is connected to the issue of **professional liability**, e.g. whether it should be limited or unlimited, and who will guarantee damage caused by wrongful enforcement (individual/collective liability).

- What role should professional organisations play?

Irrespective of whether they work individually or collectively, bailiffs may wish to establish professional organisations as they may play an important role to the development of enforcement practices. However, the role of said organisations may vary - from a forum for an **exchange of views** on professional issues to having considerable **jurisdiction over the members** of the organisation. Additional issues include whether such organisations ("bars") are **established by law**, or by free **agreement** of their members, there should exist **one** or **several** professional organisations, there should be **compulsory** or **voluntary membership** and if the organisation should have authority to issue or participate in rules of professional ethics, common standards and discipline. Finally, such organisations may or may not have public jurisdiction (e.g. with respect to the process of selecting and licensing the new members of the profession etc).

- Free access to the bailiff profession or *numerus clausus*?

An important question with respect to the organisation of the bailiff profession is whether there should be (or very loose) **limitations with respect to the number of bailiffs** in any one jurisdiction, or whether the number of bailiffs should be strictly determined (*numerus clausus*) so that new bailiffs may only be appointed after a vacancy occurs following a retirement or the inability to perform, or by legislative changes opening new posts. In this respect, issues are similar to those of some other legal professions (e.g. the notaries public). Limitations are sometimes justified by the desire to ensure high standards and a closer control of enforcement agents. Those advocating a lack of limitations, on the contrary, invoke the right of young lawyers to freely choose their profession and express a view that the market is better at regulating social needs than state authorities.

### C. Status of enforcement agents

- Private or public model?

The institutional and organisational status of bailiffs varies from country to country. As described in the typology of enforcement systems, bailiffs may work as either **public officials**, associated with judicial or executive branches, or as **private (liberal) professional**; within this range, there may exist a number of intermediary positions. However, in any system, it is essential that bailiffs have proper working conditions and access to resources necessary to efficiently carry out the enforcement process.

- Who should exercise control and discipline over bailiffs?

Irrespective of the individual status of bailiffs, it is undisputable that their activities must be monitored and controlled. Various violations could occur in the enforcement process such as – violation of the rights and interests of creditors, debtors, third parties, or the public as a whole. Uncontrolled enforcement could distort the quality of adjudication and violate rule of law if the same or similar decisions are enforced (or not enforced) under different standards and practices and instances of misuse of the authority given to bailiffs can arise. The danger for corruption to arise may also be considerable. For all these reasons, an efficient system of control should be in place. Who governs such system - the **state**, enforcement or other **court, professional organisations**, or a **mixture** of all three, depends on the particular system. In any case, it must be provided that all claimants (creditors), defendants (debtors) and affected third parties have **adequate opportunities to challenge improper acts**, and that the bodies entrusted with control of the process **regularly review the enforcement process**, punishing abuses of the bailiff power.

- Who should regulate tariffs, fees and compensation in the enforcement process?

In order to minimise the risks of inefficiency, low quality work, and corruption, enforcement agents should be **adequately compensated**. At the same time the **costs of enforcement should be kept within reasonable limits**, and some of the collateral expenses of the system must be paid. One of the essential questions with respect to the status of bailiffs concerns the authority to regulate tariffs, fees and remuneration in the process of enforcement. Possibilities are, naturally, different, ranging from the strict statutory regulation, administrative decrees, *ad-hoc* determination by a body in the process (court, ministry), self-regulation by bailiff organisation and/or free agreement between the parties and enforcement agents. No matter what system is used, it is essential that it incorporate adequate incentives for effective enforcement, and that the costs are reasonable and evenly distributed.

### D. Training of enforcement agents (bailiffs)

- What are the initial conditions for entry into profession?

The type and level of education required for prospective bailiffs may be poles apart. Some systems require only a **low-level grade** of any type of education (e.g. any secondary education) while other systems, require a **university degree**, though not necessarily of a specific type. Other systems require candidates to have a **law degree**, and sometimes additional degrees pertaining to **specialised professional education** in combination with a certain period of training. It is also possible to impose a required grade point average and/or the requirement of passing additional **professional exams** prior to obtaining a bailiff license..

- Is there an obligation to engage in continuing education and training?

After having obtained the license to carry out enforcement, bailiffs may consider their education and training finished. However, this is often not the case. Laws may change, and with them practices and procedures in the enforcement process. New environments may require new knowledge therefore it is always desirable to **continue education and training** even after the initiation of professional activities. There are many different types of continuing education with varied intensity, complexity



and sophistication. Distinction should be made between **obligatory and voluntary** courses, as well as between programs that end with evaluation and those that only require (active) participation.

- Who should be responsible for the programmes of education and training?

The organisation of educational programmes and professional training can be arranged under the auspices of different bodies and agencies. These might include **courts, state ministries, professional organisations ("bars"), educational institutions** (e.g. law schools), **special professional schools** etc. In any case, good education and training may be vital for the overall efficiency and effectiveness of the enforcement process.

### ***5. Social context of the enforcement system reforms in the countries in transition***

The enforcement of court decisions and other enforceable acts does not happen in a social and political vacuum. It is heavily affected by all types of problems encountered in the legal systems of any society. Some problems are typical of unstable systems undergoing significant change such as those found in transitioning countries and can be viewed in a narrower or broader perspective.

With a narrow perspective, it should be pointed out that every type of legal process in the transitioning countries might suffer from a lack of efficiency - not only enforcement, but also other parts of the legal process (litigation, administrative proceedings, criminal procedure etc.). Typical symptoms of such inefficiency are case overload and the lengthy timeframe for any type of legal action. This creates an atmosphere that creates a profoundly negative impact on enforcement procedures.

Other problems encountered deal with the lack of legal certainty, transparency and prediction of the legal process. The collateral facts here are the lack of experience and reliability in the appropriate institutions, as well as outside interference and/or corruption. If all these factors lead to poor judicial decisions, a desire to ensure swift implementation of such decisions may be reduced.

More specific to enforcement is the strategic problem of achieving adequate balance between various interests (e.g. interests of creditors and interests of debtors). While this can also depend on lobbyists and other external political factors, it should be emphasised that a problem often encountered relates to the exaggerated swings in either direction. The reforms of transition countries are often characterised by the **pendulum approach**, e.g. by oscillations between extremes that cannot find a middle ground of balanced and reasonable solutions. This is often caused by the pragmatic necessity of quick responses which results from a lack of adequate planning. Therefore, the results of the reforms are often very different from initial expectations.

The broader social perspective of problems that - directly or indirectly - also lead to inefficient and improper enforcement include *inter alia* the general problem of social order, i.e. in the social disorder that results from the lack of confidence in any state institutions, particularly with regard to the courts and the system of justice. If in many areas the state institutions cannot find adequate responses to burning social problems, it should be no surprise to learn that it is also difficult to develop adequate responses e.g. methods of avoiding implementation of court decisions. In the post-socialist countries, this is often followed by the idea that everything "public", i.e. everything that is being done for the benefit of society as such, is bad and evil, and that the only real solution to any problem must be found in the "private" sphere. Such unusual concepts of (over) privatisation also contribute to the inefficiency of weak public institutions as well as movement of justice matters to the "private" hands of individuals (and to activities of uncontrolled "private" enforcement gangs/firms). Even in the case of controlled and legal privatisation some deficiencies and anomalies can occur on both sides: either the state exercises overly rigid and inappropriate control or the dominance of "private" interests leads to the creation of "guilds" - to the involvement of closed sets of elites that act solely in their own interests, beyond any reasonable public control.

Finally, it should be noted that a significant change happens only if it is both needed and desired. However, since any change unavoidably creates distress, it is not always desired by all or even by the majority. The change from an ineffective to an effective system of enforcement also has its winners and losers, therefore, change often encounters strong resistance, especially from those who would lose their privileges - those who were previously regarded as immune to state action. Only a sincere, persistent and strong wish to change can achieve real progress - and such a wish may not be always present in any given country in transition.

## **V. FINAL REMARKS**

A proper and efficient system of justice is not imaginable without effective enforcement of acts that are legally recognized as enforceable. The case law of the European Court of Human Rights and the activities of the Council of Europe have contributed to the efforts to develop and strengthen the national systems of enforcement in European countries. However, the problem of quality, efficiency and speed of the enforcement process remains high on the agenda of many states, in particular in the transition countries.

## **V. Annex: Recommendation on Enforcement of the 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 and credibility of the legal system;

Recalling 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, 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 carrying into effect of judicial decisions, as well as of 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 procedure**

- 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 (e.g. 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 of defendants making 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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21. Triva/Belajec/Dika, *Sudsko izvršno pravo*, Zagreb, 1984.
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23. Uzelac, Alan, *The role played by bailiffs in the proper and efficient functioning of the judicial system – an overview with special consideration of the issues faced by countries in transition*, in: Varna 2002, pp. 6-17
24. Walterson, Frank, *Enforcement of court decisions in Sweden*, in: *Enforcement 2000*, pp. 90-93

## ENDNOTES

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<sup>1</sup> As a devastating, but a fairly typical example one could note the assessment of judicial reform in Bulgaria made by the CEELI: “If the execution process works at all, it takes many years. All of the acts of the foreclosure judge [...] are governed by inflexible rules. At the very least, the system creates opportunities for corruption; many say those opportunities are eagerly seized.” *Judicial Reform Index for Bulgaria*, July 2002, p. 10.

<sup>2</sup> On the notion of “determination of civil rights and obligations” and “dispute” (contestation) under Art. 6(1) according to older Strasbourg jurisprudence see Harris/O’Boyle/Warbrick (1995), pp. 174-192.

<sup>3</sup> *Hornsby v. Greece*, 107/1995/613/701, judgment of 19 March 1997.

<sup>4</sup> *Estima Jorge v. Portugal*, 16/1997/800/1003, judgment of 21 April 1998.

<sup>5</sup> *Immobiliare Saffi v. Italy*, 22774/93, judgment of 28 July 1999.

<sup>6</sup> In this case the Court reiterated 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.”

<sup>7</sup> Compare similar effects of governmental actions that suspend enforcement with actions suspending the course of legal proceedings in *Kutić v. Croatia* case, 48778/99, judgment of March 1, 2002 (dealing with legislation that suspended proceedings under the law on state liability for terrorist acts for more than 6 years).

<sup>8</sup> Among the procedural rights that might be violated by the lack of enforcement, in addition to right to a fair trial, there is also a possible right to effective legal remedy from Article 13 of the Convention. The recent case law of the ECHR, since *Kudla v. Poland* case (App. no. 30210/96, judgment of Oct. 26, 2000) often finds cumulative violations of Arts. 6 and 13.

<sup>9</sup> See *inter alia* Explanatory Memorandum on Rec(2003)17, CJ-EJ(2002)12 (hereinafter: Rec(2003)17-expl.mem.), p. 4.

<sup>10</sup> 24th Conference of European Ministers of Justice, Moscow, 4-5 October 2001, Report of the Secretary General, CM(2001)168 and Addendum revised, CDCJ (2001)34, para 5.

<sup>11</sup> The latter was part of the mandate of another working body, the Project Group on Administrative Law (CJ-DA).

<sup>12</sup> Austria, Croatia, Cyprus, France, Germany, Hungary, Ireland, Lithuania, Netherlands, Norway, Portugal, Switzerland and UK.



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<sup>13</sup> See <http://www.coe.int/> under Legal cooperation – Operation of justice (Enforcement of judgments). This recommendation is hereinafter cited as Recommendation(2003)16.

<sup>14</sup> See [http://www.coe.int/T/E/Legal\\_Affairs/About\\_us/Activities/DG-I\(2003\)1E.asp](http://www.coe.int/T/E/Legal_Affairs/About_us/Activities/DG-I(2003)1E.asp), doc. DG-I(2003)1E.pdf (the main results of the activities carried out by DG – I in 2002).

<sup>15</sup> Res(2002)12, resolution adopted by the Committee of Ministers at the 808th meeting of the Ministers' Deputies.

<sup>16</sup> Article 1 of the Statute of the CEPEJ (hereinafter: CEPEJ Statute).

<sup>17</sup> See Appendix 2 to Res(2002)12 - Non-exhaustive list of relevant CoE recommendations.

<sup>18</sup> Res(2002)12, at II.4.

<sup>19</sup> *Ibid.*, at III.i. and IV.i.

<sup>20</sup> Rec(2003)17, 3.1.1.

<sup>21</sup> See also Explanatory Memorandum on Rec(2003)17, CJ-EJ(2002)12 (hereinafter: Rec(2003)17-expl.mem.), at 7.

<sup>22</sup> *Ibid.*

<sup>23</sup> See also Rec(2003)17-expl.mem., p. 16. Transparent and uncomplicated rules could also enable parties to understand their rights and obligations and comply with their responsibilities.

<sup>24</sup> The Rec(2003)17-expl.mem. states with reference to this principle that it “highlights 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.” Further refining of requirements for enforcement procedures is contained under 5.1.9.

<sup>25</sup> As stated in the Rec(2003)17, parties should co-operate “appropriately”. This ideal is not absolute - the purpose of the co-operation is to facilitate voluntary enforcement and/or the appropriate choice of means of fulfilment of creditor’s claims. See Rec(2003)17, p 19: 19., stating that “[t]he reference, in Principle III.1.c., to the duty of the parties to co-operate 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). Enforcement agents can therefore play a key role in facilitating such co-operation.”

<sup>26</sup> Defendants should not only avoid misuses, but also be obliged to assist enforcement process by providing information needed for the enforcement process, e.g. issue a solemn declaration of assets, including the data on bank accounts etc. At the same time, defendants’ right to privacy and data protection standards should be observed, according to the principle of proportionality.

<sup>27</sup> One of the obstacles to effective enforcement that was encountered in the practice of some countries originated from the inclination to re-initiate discussion on the merits of the dispute during the enforcement process. The enforcement, as a rule, roots on a final findings of a *res iudicata* - it is *causa finita*. Therefore, there should be no re-adjudication in the course of enforcement.

<sup>28</sup> This principle in particular addresses the practice in some countries that enables defendants to stall the proceedings by launching vexatious appeals and objections to the actions of enforcement agents etc. Such unnecessary postponement of enforcement should be prevented by effective legislation and by possibility to challenge the decisions on postponement in a court of law. See Rec(2003)17, p. 24.

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<sup>29</sup> This rule is related to the principle of proportionality. The aim of enforcement is not to promote interests of any party or third person. Enforcement should serve to the objectives of justice, i.e. to the final implementation of the enforceable titles that emerged, in principle, as a result of a fair judicial proceedings, while also maintaining the human right to respect for private and family life. Therefore, the legitimate needs of fulfilment of claimant's claims should not evolve into unnecessary pain caused to those defendants that may often be in a precarious and vulnerable position. See Rec(2003)17, p.

<sup>30</sup> Such assets mentioned in the Recommendations are e.g. as basic household goods, basic social allowances, monies for essential medical needs and necessary working tools.

<sup>31</sup> See Rec(2003)17 5.1.9.

<sup>32</sup> See Rec(2003)17 5.2 to 5.6.

<sup>33</sup> Rec(2003)17, at 3.1.2.

<sup>34</sup> Rec(2003)17-expl.mem., para 9.

<sup>35</sup> *Ibid.*, para 10.

<sup>36</sup> Rec(2003)17, at 6.2. This position is reiterated in the Rec(2003)17-expl.mem., para. 43, stating that “no formal position is taken on the professional and institutional status of enforcement agents”.

<sup>37</sup> Rec(2003)17, at 6.2.

<sup>38</sup> Rec(2003)17, at 6.5.

<sup>39</sup> *Ibid.*, at 6.3.

<sup>40</sup> *Ibid.*, at 6.8.

<sup>41</sup> *Ibid.*, at 6.4.

<sup>42</sup> See *ibid* at 6.6.

<sup>43</sup> *Ibid.* at 6.8. The need for proper remuneration was in particular noted in the countries in transition. Therefore, the conclusions of a regional seminar held in Varna, Bulgaria on 19 and 20 September 2002 provide a more detailed phrasing on remuneration: “10. In affirming their political commitment to developing and strengthening the enforcement process, States should ensure that there is adequate financing of their enforcement services. To this end, enforcement agents should be adequately remunerated through a system of tariffs and fees and have the proper working conditions and resources (e.g. premises, vehicles, telephones etc) necessary to carry out the enforcement process as efficiently as possible. See Varna 202,

<sup>44</sup> As examples of this model, one may use e.g. Austria, but also a number of transition countries (e.g. Croatia and some other countries that have emerged out of former Yugoslavia). There are, however, some variations – e.g. in Bulgaria, although enforcement agents are called “enforcement judges”, they are viewed as a part of the executive branch. In Germany, enforcement is, as in Austria, in the control of “enforcement courts” (*Vollstreckungsgericht*), but the role of the bailiffs as civil servants (*Rechtspfleger*) is more dominant in the process. For Austrian system see Angst, 2000; Rechberger/Oberehammer, 1999; for Croatia, see Triva/Belajec/Dika, *Sudsko izvršno pravo*, 1984; *Novo ovršno i stečajno pravo*, 1996; for Germany, Koch/Diedrich, 1998, pp. 125.127; Jauernig, 1996.

<sup>45</sup> As examples of this model, one may refer to the Scandinavian countries, e.g. Sweden. In these countries, the principal role in enforcement is played by the tax authorities. Enforcement by executive is also dominant in Russia and other countries of former Soviet block, where bailiffs form a strong armed forces, similar to those of police authorities, but under auspices of the Ministry of Justice. In many other countries, there are civil servants

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with more or less authorities that assist the enforcement, either in courts or outside of them. Among such countries are Germany, Spain, Italy and Portugal. On enforcement in Sweden, see Walterson, 2000; on Russia, see Snyders, 1997. See also references in Kennet, 2000 on respective countries.

<sup>46</sup> A controlled liberal profession of bailiffs is best known in France, where enforcement agents form a highly reputed and well-paid self-employed *huissiers de justice*. On the other hand, a more entrepreneurial (market-oriented) private professions of bailiffs exist in England (*sheriff's officers, bailiffs*). Private profession of enforcement agents is also present in Belgium, the Netherlands, Greece, Switzerland and Luxembourg. Several transition countries have moved towards a private profession of bailiffs, such as Poland, Hungary, Slovenia, Slovakia, Czech Republic and Estonia. See Chardon, 2000; Kennet, 2000; Rijavec, 2003; Marston, 2000; de Leval, 2000.