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DRAFT ENFORCEMENT ACT

OF THE REPUBLIC OF SERBIA

COMMENTS
ON COMPATIBILITY WITH THE
REQUIREMENTS OF THE
EUROPEAN CONVENTION ON HUMAN RIGHTS

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I. METODOLOGY: TASK, OBJECTIVES, MISSION, LIMITATIONS

This evaluation of the Draft Enforcement Act of the Republic of Serbia (hereinafter: DEAS) has as objective to review the draft legislative proposal submitted to the Council of Europe for expertise by the Government of Serbia. The main task is to comment on the compatibility of the DEAS with the standards set in the judgments of the European Court of Human Rights (hereinafter: ECtHR).

In this document, it is intended to provide an analytical study of the issues that arise from the ECtHR case-law related to judgments against Serbia and some other countries of similar legal and cultural background where violations of Art. 6 of the European Human Rights Convention were found on the account of non-enforcement/non-execution of domestic court judgments. Since the request of the Government of Serbia relates to the text of the legislative draft, the main purpose of this document is to comment and evaluate the inter-relation between the proposed legislative changes and the impact that they might have on the improvement of overall effectiveness of enforcement and prevention of possible future findings of violation of Art. 6 against Serbia on that account.

The novelties that DEAS seek to introduce are twofold: on one hand, a number of procedural provisions regarding various issues (time-limits, legal remedies, jurisdiction etc.) are redrafted with a view to speed up the process of enforcement; on the other hand, a change in the organisation of enforcement is suggested by plans to introduce private bailiffs that would take a number of enforcement activities alongside with the public bailiffs. Since so far the enforcement structures in Serbia were very strongly court-oriented and uniformly based on public bodies and state-employed enforcement agents, this is a major change that shall be evaluated in particular. The comments will deal *inter alia* with the assessment of the competences of the private bailiffs, their relations with the court and the public bailiffs as well as with the prospects of their successful and harmonious introduction into the Serbian legal order.

Before going into concrete comments, several *caveats* need to be mentioned.

First, the history has showed that in most transition countries the great majority of difficulties regarding the full establishment of standards of rule of law is not the result of poor legislation, but of poor implementation of the present legislative framework.

Second, every major legislative change is in itself an undermining of the stability of the legal order, what brings along a number of challenges. Thus, one should refrain from making changes where they are not ultimately necessary.

Third, it is our firm belief that each and any legislative reform has to be accompanied by appropriate pre- and post-regulatory impact assessments. Such assessments are in many countries an important tool in both drafting new acts and regulations and evaluating the

need to change the present ones. However, in transition countries legislative changes often happen without appropriate evaluation studies which would produce coherent and trustworthy empirical support of the assumptions that are the basis for new legislative proposals. Far-reaching decisions are often made without previously set and agreed benchmarks, indicators and core statistical data. Without such material, every assessment has a certain element of impressionism; it is at best an educated guess.[1]

These *caveats* are also applicable to this expertise. It is based on the analysis of the ECtHR judgments and on the text of the DEAS (received in Serbian and English language). The expert has received little or no legislative background and was not supplied with empirical or statistical information about the functioning of the enforcement system of the Republic of Serbia. To our best knowledge, we doubt that a comprehensive regulatory impact assessment has ever been attempted at all in this area.

In such a situation, we are forced to rely mostly on some parallels with the developments in other countries, drawing inspiration from our earlier research and experience. In particular, when applying comparative methodology, it will be based on the premises of our earlier research of the privatization of the enforcement services in the region,[2] and on our experience of work on enforcement subjects within the Council of Europe.

The author of this document has participated in the work of the Council of Europe in two relevant capacities: as an expert who was engaged in the work of the bodies that have collected best practices and contributed to the formulation of standards of enforcement[3],

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1 See more on methodological issues in Uzelac, A., 'Public and Private Justice. The Challenges of Rational Assessment of Performance in the Contemporary Justice Systems', in Uzelac/van Rhee (eds.), *Public and Private Justice. Dispute Resolution in Modern Societies* (Intersentia:Antwerp/Oxford, 2007), p. 7-27.

2 See in particular Uzelac, A., 'Privatization of Enforcement Services – A Step forward for Countries in Transition', in: van Rhee/Uzelac, *Enforcement and Enforceability. Tradition and Reform*, (Intersentia:Antwerp/Oxford/Portland, 2010), p. 83-100.

3 In 2002, the author was a member of the drafting group that produced the draft later adopted as CoE Recommendation on Enforcement, Rec(2003)17. As a delegate of the CoE and the member of CJ-EJ, we were assigned with the task of presenting this draft to the UIHJ, see Uzelac, A., 'Etablissement des normes européennes communes d'execution: travaux récents du Conseil de l'Europe concernant les procédures d'exécution et les huissiers de justice', in: *Rencontres européennes de procedures: Signification, Notification, Exécution*, Paris Sorbonne (ENP), 2002, 8-23. Later, the author was the member of the Bureau of the CEPEJ (2003-2006) and the Chairman of the CEPEJ Working Group on the delays in judicial proceedings (TF-DEL).

and as an expert who actively participated in the international conferences[4] and the international missions that had a task to assist the reforms of the enforcement systems in several CoE countries.[5]

As the Serbian DEAS is still based on the common legislative and procedural heritage of Yugoslavia, some knowledge of the former Yugoslav system of enforcement and experience regarding its application in other former parts of the SFRY, in particular in Croatia, is also relevant for this expertise. It is particularly helpful for the understanding of the Serbian situation, even more because many of the recent Serbian legislative reforms are similar to those in course or already undertaken in expert's home country, Croatia. This certainly contributes to our understanding of the path of reforms in Serbia.

Finally, our teaching and writing on the issues of Art. 6 ECHR and the case-law of the ECtHR[6] will be a helpful guide in interpreting the requirements of the human rights protection in the context of slow or ineffective enforcement.

This expertise will start by presenting general human rights standards regarding enforcement, as derived from the case-law of the ECtHR. In that part, we will distinguish what is and what isn't required by the Art. 6/1 regarding the enforcement of judicial decisions and other enforceable documents. After that, we will analyse the leading Strasbourg cases in respect to non-enforcement or delayed enforcement in Serbia, and add a few comparative examples of similar cases from Croatia.

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4 *Inter alia,* see Uzelac, A., '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', *Proceedings from the multi-lateral seminar of the Council of Europe. The role, organisation, status and training of bailiffs*, Varna, 19-20.IX 2002., (Strasbourg: Coe, 2004), 6-17.

5 The author of this document participated as a Council of Europe expert in several missions, with a view to assist the reforms of the enforcement systems in Bulgaria, Russia and Georgia. For the EU and other organisations, we have worked on the enforcement reform issues in other countries, especially those of former Yugoslavia. See Uzelac, A., 'Uloga službenika za izvršenje u pravilnom i efikasnom funkcionisanju pravosudnog sistema - pregled sa posebnim osvrtom na pitanja sa kojima se susrijeću zemlje u tranziciji', in: *Evropski prostor pravde, Zbornik radova*, Tempus projekat Evropske Unije, Centar za obuku sudija Republike Crne Gore, Podgorica, 2006, 364-375.

6 The author teaches at the post-graduate level the courses 'Protection of Human Rights in Europe' and 'European Court of Human Rights' at the University of Zagreb (doctoral studies in law). Among other writings on these issues, see the most recent publications: Uzelac, A., 'Legal Remedies for the Violations of the Right to a Trial Within a Reasonable Time in Croatia: In the Quest for the Holy Grail of Effectiveness', *Revista de Processo* (RePro, Sao Paolo), 35:180/2010, pp. 159-193; Uzelac, A., 'Pravo na pravično suđenje u građanskim predmetima: nova praksa Europskog suda za ljudska prava i njen utjecaj na hrvatsko pravo i praksu', *Zbornik Pravnog fakulteta u Zagrebu*, 60:1/2010, 101-148.

On this background, we will analyse the DEAS. The analysis will comment the proposed legislative changes on two levels: as to the general changes related to enforcement proceedings, and as to the proposal of introducing a mixed system of enforcement – the one in which private bailiffs would work alongside with the public ones.

II. HUMAN RIGHTS STANDARDS AND NON-ENFORCEMENT OF JUDGMENTS

A. ARTICLE 6 AND NON-ENFORCEMENT: NEW APPROACH SINCE *HORNSBY* CASE

Art. 6 of the European Human Rights Convention (ECHR) provides *inter alia* the following

> In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Art. 6 apparently has a focus solely on the adjudicatory, 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 plain language, the guarantee to a fair trial would, interpreted from these words, end there where enforcement would typically only start, i.e. when the content of parties' rights has been established and one or more claims set forth in the process granted.

In 1997, however, the European Court of Human Rights, faced with growing inefficiencies in the implementation of the court decisions and the needs of the citizens of European countries that justice be done not only on paper, but also in reality, made a groundbreaking decision finding that '… enforcement proceedings form an integral part of the trial referred to in Article 6 § 1 of the Convention …'.[7] In *Hornsby v. Greece* the ECtHR held by seven votes to two that the Greek administrative authorities' failure to comply within a reasonable time with two judgments of the Supreme Administrative Court quashing the Minister of Education's refusal to grant the applicants authorisation to open a private school for the teaching of English was a violation of Article 6(1) ECHR. By refraining for more than five years from taking the necessary measures to comply with a final enforceable judicial decision the Greek authorities had deprived the provisions of Article 6(1) ECHR of all useful effect. In all subsequent cases, the ECtHR stressed that the rule of law principle can only be a reality if citizens can, in practice, assert their legal rights and challenge unlawful acts.

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7 *Hornsby v. Greece*, Application No. 18357/91, judgment of 19 March 1997, ECHR 1997-II.

The relevance of enforcement for the right to a fair trial was further explained and extended in some other ECHR cases. In a 1998 case *Estima Jorge v. Portugal*[8], the Court recognized that enforcement has an independent value, irrespective of the nature of the enforcement writ, and even irrespective of the prior existence of court proceedings. The *Estima Jorge* case dealt with the enforcement of a notarial deed received as a security for mortgage. The Court previously 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'. But, in 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. However, the Court found that 'conformity with the spirit of the Convention required that the word "contestation" (dispute) should not be construed too technically' – that it should be given a substantive rather than a formal meaning. Therefore, even in the absence of preceding trial, the Court found violation of the reasonable time provision under Article 6 § 1 of the Convention.

The lack of proper enforcement caused by administrative and legislative actions of the state that prevents enforcement can have even harsher consequences than excessive length of the proceedings. The *Immobiliare Saffi v. Italy*[9] case of 1999 was yet another case where there was no dispute - the only alleged violation was the impossibility to enforce an uncontested court order confirming termination of the lease and requiring the tenant to vacate the premises.[10] As established in *Immobiliare Saffi*, a governmental regulation that postponed assistance to enforcement to the owner of immovable property to repossess his apartment for some eleven years[11], amounted not (only) to violation of Article 6 with respect to the reasonableness of the time needed, but also to violation of the further aspect of the Art. 6 - the right of access to a court. Even further, the Court found that in *Immobiliare* 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 established also a violation of the right to protection of property from Article 1 of the Protocol No. 1 to the

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8 *Estima Jorge v. Portugal*, 16/1997/800/1003, judgment of 21 April 1998.

9 *Immobiliare Saffi v. Italy*, No. 22774/93, judgment of 28 July 1999.

10 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.'

11 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).

Convention, i.e. the right to the peaceful enjoyment of possessions. Thus, the failure to implement enforceable titles amounted not only to violation of procedural rights[12], but also to violation of substantive human rights.

Ever since *Hornsby, Estima Jorge and Immobiliare Saffi* judgments, the Court has frequently found violations of this right in respect of many Member States.[13]

B. WHAT IS AND WHAT IS NOT REQUIRED BY ART. 6 ECHR AND COE RECOMMENDATION 2003(17) IN THE CONTEXT OF ENFORCEMENT

Art. 6/1 ECHR is drafted in a general form, and encompasses a number of procedural rights, *inter alia* guaranteeing:

- access to courts;
- equality of arms;
- advice and legal aid;
- public hearing;
- public pronouncement of judgments;
- trial within a reasonable time;
- the right to be present at an adversarial hearing;
- the right to fair presentation of the evidence;
- the right to cross examine the witnesses;
- process before an impartial and independent tribunal;
- the right to a reasoned judgment;
- the right to appeal (in criminal matters).[14]

The analysis of the CoE jurisprudence can distinguish what elements of the right to a fair trial within a reasonable time were held to be applicable to enforcement proceedings and what were not considered as applicable. This distinction is important in particular for those countries that apply a court-based system of enforcement, since there is a likelihood of a 'spill-over' effect, i.e. of uncritical copying of the standards applicable to litigation to the standards of the enforcement proceedings. Such spill-over is not only unnecessary, but may

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12 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 ECtHR case-law since *Kudla v. Poland* (App. no. 30210/96, judgment of Oct. 26, 2000) often finds cumulative violations of Arts. 6 and 13.

13 See, among many other authorities, *Burdov v Russia*, No. 59498/00, judgment of 7 May 2002, *Prodan v Moldova*, No. 49806/99, ECHR 2004-IV (extracts); *Sharenok v Ukraine*, No. 35087/02, judgment of 22 February 2005; *Okyay and Others v Turkey*, No. 36220/97, judgment of 12 July 2005.

14 See Clayton/Tomlinson, *Fair trial rights,* Oxford: OUP, 2001, 88-89.

also contribute to the length, costs and ineffectiveness of the proceedings. In other words, improper understanding of the fair trial rights in the context of enforcement may contribute to the violations of the right to a fair trial.

The most essential part of all non-enforcement cases of the ECtHR is the rule that the non-enforcement or a significant delay in enforcement of judicial decisions could render the rights protected by Art. 6 inoperative and illusory. Insofar, the desired element in the system of enforcement of domestic decisions is its *effectiveness.* Consequently, the Strasbourg Court has often emphasised that the length of enforcement for the purposes of Art. 6 has to be taken as an integral part of the process. Therefore, the length of the enforcement proceedings, insofar it is within the control by the State, has to be reasonable as well.[15]

The unreasonable length of enforcement proceedings will have as a consequence the violation of the right to a trial within a reasonable time. The length of judicial proceedings has to be calculated integrally, from the commencement of the proceedings before court or other organ of the state, until the actual enforcement of the claims granted in the proceedings. Thus, it might happen that even if the length of enforcement would have been held appropriate had the trial been conducted speedily, it may result in violation if the overall speed of the preceding process was not satisfactory. However, ineffective enforcement can as such cause violation of the right to a trial within a reasonable time, despite the efficient and speedy trial which preceded the claim for enforcement.

Very long period of non-enforcement of domestic court judgments or of other acts and instruments which are in their force equalized with the court judgments may result in the violation of the right to a court as well, since in such cases non-enforcement renders the court protection of the substantive rights ultimately ineffective.

As such violation of the right of access to a court may also mean the failure to protect the substantive right, it may also result in another human right violation (if the substantive right at stake is a part of the catalogue of substantive human rights). In such a way, the non-enforcement could trigger e.g. the violation of the right to peaceful enjoyment of one's property (Protocol 1-1), or violation of the right to family and private life (Art. 8 ECHR)[16].

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15 The Court has applied the same standards to the evaluation of the length of enforcement proceedings, stating that it has to be assessed in the light of the circumstances of the case and with reference to the established criteria, which relate to the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute. See *Sokolov v. Russia*, No. 3734/02, 22 September 2005.

16 See e.g. *Karadžić v. Croatia*, No. 35030/04, 15 December 2005 (unreasonable delay by the court and the subsequent inefficient enforcement proceedings regarding the return of the son to his mother causing violation of Art. 8).

In addition to principles of effectiveness and reasonable time, some other aspects of the conventional fair trial rights are also applicable to the enforcement process. So, e.g. the Court held that a duty to pay excessive 'preliminary expenses' of the enforcement proceedings may violate the right of access to courts.[17] In the same sense, there are no principled reasons why would the right to legal aid and advice be treated differently in the context of enforcement, if this is necessary for the effectiveness of the overall system of the protection of civil rights and obligations.

The Council of Europe Recommendation on enforcement Rec 2003(17) contains some of the same principles as the case-law of the Court, to which it expressly refers. Stating that enforcement procedures should be as effective and efficient as possible, the Recommendation outlines some ideas which might be followed by the states that wish to improve the effectiveness of enforcement procedures and practices. It is inter alia suggested that:

- enforcement should have a clear legal framework, and enforcement procedures should be clearly defined and easy to administer;
- enforcement legislation should be sufficiently detailed for reasons of certainty, transparency, foreseeability and efficiency;
- parties should have a duty to co-operate, and – in particular – that defendants should have an obligation to disclose their income, assets and other relevant data;
- misuses of the enforcement process should be prevented and postponement of the enforcement process should be discouraged;
- proper balance of interests should be struck, taking into account the interest of the parties and the third persons (e.g. children);
- certain debtors essential assets and income should be protected;
- service of documents should be organised by using the most effective and appropriate means;
- right of review of decisions made during the enforcement process should be prescribed where appropriate.

On the other hand, both under the case-law of the Strasbourg court, and under the Recommendation 2003(17), it is clear that the enforcement process should not be considered as re-adjudication of the case.[18]

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17 *Apostol v. Georgia*, No. 40765/02, 28 February 2007. It is stated that 'the imposition of the obligation to pay expenses in order to have that judgment enforced constitutes a restriction of a purely financial nature and therefore calls for particularly rigorous scrutiny from the point of view of the interests of justice'.

18 Rec(2003)17, at III.1.e.

Insofar, many core elements of the Art. 6 rights that are intrinsically linked to adjudication are not applicable to the enforcement process.

Regarding enforcement of the court judgments, there is no right to court proceedings, as there is no comparable requirement that the enforcement process be conducted and organised by the courts of law. The right to a process before an 'independent and impartial tribunal' has as its objective the integrity of adjudication, and has not been applied to the bodies that conduct the enforcement proceedings. Currently, very few European countries use courts and judges as the main organisational element of the enforcement structures.

As to the status of enforcement agents, it can be diverse.[19] Considering the status of enforcement agents, it can be public, private or mixed. In 2004, according to a CoE study, 26 countries used for the civil enforcement the enforcement agents which had a public status, 11 states had enforcement agents with a private status, and 9 states had a mixed system.[20] Irrespective of the status, it is emphasised that the enforcement agents need to be well-trained and professional. High moral standards and legal knowledge and training in relevant law and procedures are also considered to be of relevance. These qualities have a certain similarities with judicial qualities, but are defined in a different way. So, e.g. unlike strict judicial standards of independence and impartiality, for enforcement agents it is only important that they are 'unbiased in their dealings with the parties and subject to professional scrutiny and monitoring which may include judicial control'.[21]

The procedural guarantees are also significantly different in respect to the enforcement proceedings. In the enforcement proceedings, there is no right to a public hearing and the public pronouncement of judgments. The proceedings are not adversarial, and there is no right of cross examination. Any presentation of evidence is in principle not admissible, except in rather limited cases. The guiding principle of the proceedings is effectiveness, and not the equality of arms.

In the same sense, there is in principle no human rights obligation to produce reasoned judgments in the enforcement proceedings. The decisions in the enforcement proceedings should not be arbitrary, but the enforcement agents should also enjoy a broad discretion in pursuit of the methods of enforcement that will be most effective and appropriate. This

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19 In Rec(2003)17 it is expressly stated that the states should be free to determine the professional status of enforcement agents (at IV.2).

20 CEPEJ, *Enforcement of Court Decisions in Europe,* Report prepared by the University Nancy & Swiss Institute of Comparative Law, Strasbourg: CEPEJ Studies No. 8, 2008, 21.

21 Rec(2003)17, at IV.4.

approach should also be directive for the methods of control of the actions undertaken during the enforcement proceedings.

The right to appeal is not among the core human rights, at least not in civil matters. It is, however, broadly considered to be (within certain limits) important as an element of the due process when determination of civil rights and obligations is concerned. However, the requirement of effectiveness suggests the cautious use of legal remedies. Whilst control of the enforcement agents is generally necessary, it should not conflict with the need of speedy and effective enforcement. Therefore, legal remedies – in particular those before courts and higher tribunals – should not be open as an option of misuse of the enforcement process, aimed at postponements, delays and prevention of enforcement.[22]

All the above described requirements of human rights standards which are (or are not) applicable to enforcement will be relevant for the analysis of the DEAS. But, prior to entering into the analysis of the provisions of the draft law, we will give a short survey of some of the most typical non-enforcement cases from Serbia and its neighbours in which ECtHR found human rights violations.

III. SERBIAN CASES CONCERNING NON-ENFORCEMENT OF JUDICIAL DECISIONS

A. INTRODUCTION

Serbia and Montenegro became a Member State of the Council of Europe on 3 of April 2003 and ratified the Convention on Human Rights on March 3rd 2004. With effect from 3 June 2006, the Republic of Serbia continued the membership of the Council of Europe previously exercised by the Union of States of Serbia and Montenegro.[23] Serbia was a successor of Serbia and Montenegro in some cases before the ECtHR which had been lodged originally against the former state union of these two states. Insofar, we will take into account the cases against Serbia and Montenegro as well.[24]

Serbia is now a member of the Council of Europe for about eight years (out of that three years as a part of state union with Montenegro and less than five as a separate state). This is

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22 Compare Rec(2003)17, III.1.e and III.1.f.

23 See also para. 1.8.

24 For the summary of cases we rely on press releases by the ECtHR and on Uitdehaag, J., 'Enforcement in the Western Balkans and its Compatibility with the Human Rights Standards of the Council of Europe', in: van Rhee/Uzelac, *Enforcement and Enforceability. Tradition and Reform*, (Intersentia:Antwerp/Oxford/Portland, 2010), p. 63-81.

not a long period. Yet, there is already a sufficient corpus of ECtHR judgments against Serbia that relate to the non-enforcement of judicial decisions to draw at least some indicative conclusions. The cases against Serbia mostly relate to proceedings pursuant to the Enforcement Procedure Act 2000.[25] Meanwhile this regulation has been replaced by the Enforcement Procedure Act 2004,[26] but in accordance with Article 304 of the latter regulation all enforcement proceedings instituted prior to 23 February 2005 are to be concluded pursuant to the earlier legislation.

B. DESCRIPTION OF CASE-LAW IN NON-ENFORCEMENT CASES AGAINST SERBIA

1. EARLY CASES (CASES AGAINST SERBIA AND MONTENEGRO)

BIJELIĆ V. MONTENEGRO AND SERBIA

The case of *Bijelić v. Montenegro and Serbia*[27] is the ECtHR judgment which originated by an application launched in 2005. The facts of this case are essentially more linked to Montenegro, but the issues which occurred in this case can be equally indicative for the situation in Serbia and some other countries of Western Balkans.

The case regarded three applicants, a divorced woman and her two children. As first applicant, she was granted custody of the children (second and third applicant). In January 1994, she also obtained a decision from the court in Podgorica declaring her the sole holder of the tenancy on the family's flat. Her former husband ('the respondent') was ordered to vacate the flat within fifteen days. However, in July 1994 the first applicant bought the flat and became its owner. In October 1995 she gave the flat as a gift to the second and third applicants.

From July 1994 a number of attempts were made to evict the flat. On 26 October 1994 the bailiffs and the police failed to evict the respondent who kept threatening the first applicant in their presence and bore arms on his person. There also appeared to have been additional weapons, ammunition and even a bomb in the flat at the time. The police took the respondent to their station but released him shortly afterwards without pressing charges. In March 2004, another eviction was attempted but failed. In the presence of police officers,

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25 *Zakon o izvršnom postupku*, *Official Gazette of the Federal Republic of Yugoslavia* (OG FRY), Nos. 28/00, 73/00 and 71/01.

26 *Zakon o izvršnom postupku*, *Official Gazette of the Republic of Serbia* (OG RS), No. 125/04.

27 *Bijelić v. Montenegro and Serbia*, No. 11890/05, 28 April 2009.

fire fighters, paramedics, bailiffs and the enforcement judge herself, as well as his wife and their children, the respondent threatened to blow up the entire flat. His neighbours also seem to have opposed the eviction, some of them apparently going so far as to physically confront the police. Several further attempts also failed.

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

The ECtHR held that, in the context of Article 1 of Protocol No. 1, the State is required to take the measures necessary to protect the right of property.[28] It is the State's responsibility to make use of all available legal means at its disposal in order to enforce a final court decision, notwithstanding the fact that it has been issued against a private party, as well as to make sure that all relevant domestic procedures are duly complied with. As the Montenegrin authorities failed to fulfil their positive obligation there has, accordingly, been a violation of the Art 1 of Protocol No. 1. Among the reasons given for this decision, the Court pointed to the fact that the police officials themselves conceded that they were unable to fulfil their law-enforcement duties under the law.

2. CASES AGAINST SERBIA AFTER JUNE 2006

ILIĆ V. SERBIA

The facts of *Ilić v. Serbia*[29] case were the following:

The applicant, Aleksandar Ilić, was a Serbian national born in 1935, living in Belgrade. Mr Ilić inherited the legal title to a flat which had belonged to his father. He could not, however, use the flat because it was subjected to a government-controlled 'protected tenancy regime'

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28 See also *Broniowski v. Poland*, [GC], No. 31443/96, ECHR 2004-V, and *Öneryıldız v. Turkey* [GC], No. 48939/99, ECHR 2004-XII.

29 *Ilić v. Serbia*, No. 30132/04, 9 October 2007.

and was occupied. In 1992 a new Housing Act made it possible for owners of such flats to reclaim possession of their property. Following administrative proceedings brought by the applicant, on 17 August 1994 the Housing Department of the Palilula Municipality ordered the 'protected tenant' to be evicted from the flat in question by 31 December 1995. That deadline was later extended to 31 December 2000. Unable to repossess his flat, the applicant brought separate civil compensation proceedings against the Municipality. Ultimately, in June 2007 the First Municipal Court in Belgrade ruled partly in favour of the applicant and ordered that he be paid compensation for the market rent which he could have obtained had he been in a position to rent the flat. That court also held that the Municipality of Palilula had sufficient funds and flats available to provide the protected tenant with adequate alternative accommodation and was legally obliged to enforce the eviction order. It further noted that no legal means existed for the applicant to compel the Municipality to honour its eviction order. That judgment has not yet become final.

Relying on Article 1 of Protocol No. 1 (protection of property), Article 6 § 1 (right to a fair hearing within a reasonable time) and Article 13 (right to an effective remedy), Mr Ilić complained, in particular, about the authorities' failure to enforce the eviction order and the unfairness and length of the civil proceedings.

The Court noted that the eviction order had remained unenforced, within the period of the Court's jurisdiction, for three years and six months. It considered that the applicant's repossession claim was 'sufficiently established' and that, from 31 December 2000, when the deadline for eviction had expired, the authorities' 'interference' had clearly been in breach of the relevant domestic legislation, as indeed had been admitted in the judgment of June 2007. It therefore held unanimously that there had been a violation of Article 1 of Protocol No. 1. It further held unanimously that there had been a violation of Article 6 § 1 on account of the length, within the period of the Court's jurisdiction, of the civil proceedings which had lasted three years and six months and are apparently still pending. It also held unanimously that there had been a violation of Article 13 taken together with Article 6 § 1 concerning the absence of an effective domestic remedy for the delay in those civil proceedings. The Court held that Serbia should enforce the Housing Department's decision of 17 August 1994 and awarded Mr Ilić EUR 3,700 for non-pecuniary damage.

The Court's assessment of the case included the findings that:

- the final eviction order remained unenforced from August 1994 to March 2007;
- the municipality that has issued the order was not only under a legal obligation to enforce the order at issue but also had had sufficient funds and available flats in order to provide the applicant's protected tenant with adequate alternative accommodation
- the domestic courts noted themselves that there were no legal means by which the applicant could have compelled the Municipality to honour its own eviction order.

EVT COMPANY V. SERBIA

In the case of *EVT Company v. Serbia*[30] the applicant was a company which in 1996 was entitled to have a judgment enforced. As the original debtor was transformed into four different companies, the commercial court ruled that these companies together should pay the debt to the applicant. In January 2005 the applicant was informed by the President of the Commercial Court that the enforcement proceedings had been hindered by the debtors' employees as well as the police. The police refused to assist the bailiffs in their subsequent attempts to seize assets. The President stated that the proceedings would recommence as soon as the judge handling the case clarified the situation with the head of the local police, and concluded that the refusal of the police to assist the bailiffs in their duties was common in cases involving 'discontented workers' engaged in the obstruction of judicial enforcement proceedings. After declaring the case admissible, the ECtHR concluded that, irrespective of whether a debtor is a private or a State actor, it is up to the State to take all necessary steps to enforce a final court judgment as well as to, in so doing, ensure effective participation of its entire apparatus, including the police, failing which it will fall short of the requirements contained in Article 6(1) ECHR.[31] The Court underlined that the State is also responsible for securing the support of other bodies such as the land registry or a national bank.

FELBAB V. SERBIA

In the case *Felbab v. Serbia*,[32] a right to an effective domestic remedy for violations of the Convention in respect to enforcing decisions regarding contacts with children was at stake. The complaint regarded the non-enforcement of a final contact order in a pressing child-related matter. Under Article 13 ECHR,[33] the applicant complained that he had no effective domestic remedy in order to expedite the enforcement proceedings at issue. The Court considered that, at the relevant time, there was indeed no effective remedy under domestic law for the applicant's complaint about the non-enforcement in question. There had,

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30 *EVT company v. Serbia*, No. 3102/05, 21 June 2007.

31 See a similar statement in *Kačapor and others v. Serbia*, Nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, 15 January 2008; see also *Crnišanin and Others v. Serbia*, Nos. 35835/05, 43548/05, 43569/05 and 36986/06 (Sect. 2) (Eng), 13 January 2009; *Vlahović v. Serbia*, No. 42619/04, 16 December 2008; *Grišević and others v. Serbia*, Nos. 16909/06, 38989/06 and 39235/06, 21 July 2009.

32 *Felbab v. Serbia*, No. 14011/07, 14 April 2009.

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

accordingly, been a violation of Article 13 taken together with Articles 6(1) and 8 of the ECHR.[34]

In this case, the Court noted that the domestic court failed to act as required by law (which was to proceed *ex officio*). It was also noted that that the Municipal Court had failed to make use of any coercive measures despite the clearly uncooperative attitude expressed by the applicant's former wife. Insofar, the Serbian authorities did not take sufficient steps to execute the final access order of 6 June 2000, which remained unenforced until May 2008.

BULOVIĆ V. SERBIA

The excessive number of legal remedies in Serbian enforcement proceedings has also been a point of discussion. In the case *Bulović v. Serbia*[35] the applicant complained about the non-enforcement of a judgment issued in March 1994 by the Municipal Court in Sombor. Due to numerous appeals in the enforcement procedure, ill-scheduled hearings, suspension of the proceedings pending the outcome of other cases, the enforcement was continually delayed until, finally, in May 2007 the applicant withdrew her claim as the debtor had fully compensated her. On 23 May 2007 the President of the Municipal Court sent a letter to the applicant's lawyer, apologizing for the excessively long duration of his enforcement case.

The Serbian Government noted that the applicant had been 'fully compensated' by the debtor, arguing that she was therefore no longer a victim of human rights violations. The ECtHR recalled that a decision or a measure favourable to the applicant is not in principle sufficient to deprive him or her of the status of 'victim' unless the national authorities have acknowledged the undue delay, either expressly or in substance, and then afforded redress for the breach of the Convention complained of. Even assuming that the applicant has obtained a sufficiently unequivocal acknowledgement of the violation allegedly suffered, the Government failed to provide her with any compensation for the delay in question. The ECtHR therefore was of opinion that the applicant had retained her victim status and, while finding a violation of Article 6(1) ECHR, considered that in the absence of the said compensation 'the effects of a possible violation of the Convention' remained yet to be 'redressed' by the respondent State.

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34 See also *V.A.M. v. Serbia* and *Ilić v. Serbia* (cited and described *supra* and *infra*).

35 *Bulović v. Serbia*, No. 14145/04, 1 April 2008.

V.A.M. V. SERBIA

The application[36] concerned civil proceedings brought in February 1999 by Ms V.A.M. in which she sought to dissolve her marriage to her husband, D.M., to gain sole custody of her daughter, S.M., and to obtain child maintenance. The breakdown of Ms V.A.M.'s marriage and her husband denying all contact with her daughter occurred, it seemed, as a result of her having contracted HIV. Ultimately, a decision to grant Ms V.A.M. provisional custody of S.M. was quashed on appeal in November 2006. The separate civil claim against D.M. is, apparently, still ongoing. Despite an interim access order being made on 23 July 1999 to facilitate access twice a month to her daughter until adoption of a final decision, Ms V.A.M. has currently been unable to see her daughter for some eight years, the access order not having been formally served on D.M..

Ms V.A.M. complained about the length and fairness of the civil proceedings, so far lasting eight years, of which two years and 11 months were to be examined by the Court, and about having been unable to see her only child or exercise her parental rights. She relied on Article 6 § 1 (right to a fair hearing within a reasonable time), Article 13 (right to an effective remedy), Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination).

Given what was at stake to Ms V.A.M. and her child, especially with a view to Ms V.A.M.'s medical condition, the Court found that the domestic authorities, instead of showing exceptional diligence in expediting the proceedings, consistently failed to make use of the procedures to oblige D.M. to take part. The Court therefore held, unanimously, that there had been a violation of Article 6 § 1 and Article 8 as regards the length of the civil proceedings. Furthermore, having regard to the facts of the case, the passage of time and the best interests of S.M., the Court held that there had been a violation of Article 8 as regards the non-enforcement of the interim access order. It also held, unanimously, that there had been a violation of Article 13.

The Court awarded the applicant EUR 15,000 in respect of non-pecuniary damage and EUR 4,350 for costs and expenses.

TOMIĆ V. SERBIA

The applicant, Slađana Tomić, was a Serbian national born in 1973, living in Smederevo (Serbia). She was married until July 2001 to P.V., with whom she had a daughter, A.V., born in 1998.[37]

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36 *V.A.M. v. Serbia*, No. 39177/05, 13 March 2007.

37 *Tomić v. Serbia,* No. 25959/06, 26 June 2007.

The case concerned Ms Tomić's complaint that her ex-husband had refused to comply with a judgment of 25 February 2004 granting her custody of A.V. and child maintenance and that the authorities had failed to enforce that judgment. As a result, she had been denied all access and contact with her daughter for the past two years.

She relied on Article 6 § 1 (right to a fair hearing), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy).

Noting that, during certain periods in 2005 and from June 2006 to February 2007, no enforcement attempts had been made and that enforcement proceedings had been formally postponed until March 2007 when Ms Tomić lost custody of A.V., the Court considered that the Serbian authorities had not taken sufficient steps to execute the final judgment of February 2004. The Court therefore held unanimously that there had been a violation of Article 6 § 1. The Court further noted that the authorities had not sufficiently taken into account the long-term interest of Ms Tomić and her daughter in developing a bond together and had allowed P.V. to use the judicial system to his advantage to allow for the passage of time to reverse the applicant's custody rights. The Court therefore held unanimously that there had also been a violation of Article 8. The Court further held unanimously that there had been a violation of Article 13 on account of the lack of an effective remedy concerning the length of the enforcement proceedings.

MARČIĆ AND 16 OTHERS V. SERBIA

The case[38] concerned the complaint of 17 applicants, at the relevant time citizens of the State Union of Serbia and Montenegro, about the non-enforcement of a court decision of 27 December 1990 which ordered their former employer to make payment of salaries for work carried out on a project in Iraq.

The applicants relied on Article 1 of Protocol No. 1 (protection of property) and Article 6 § 1 (right to a fair hearing within a reasonable time) of the Convention.

The Court noted that the decision of 27 December 1990, following Serbia's ratification of Protocol No. 1 in March 2004, had not been enforced for more than three years and seven months and remained unexecuted. There had notably been nothing to suggest that the proceedings in question had been complex or that the applicants' right to have the decision enforced had become time-barred. Although the claims existed in respect of the companies that were subject to insolvency proceedings, there have been no attempts to enforce the Commercial Court's decision throughout the whole period between 1994 and 2007, and no evidence that the delay could be attributed to the debtor's lack of means which, had it

38 *Marčić and others v. Serbia,* No. 17556/05, 30 October 2007.

existed, should have resulted in the conclusion of the insolvency proceedings as well as the termination of the debtor as a legal entity.

The Court therefore found that Serbia had prevented the applicants from receiving money which they had legitimately expected to receive and held unanimously that there had been a violation of Article 1 of Protocol No. 1. Given that finding, the Court further held that it was not necessary to examine separately the complaint under Article 6 § 1. It held unanimously that Serbia had to enforce, by appropriate means, the decision of 27 December 1990.

POPOVIĆ V. SERBIA

This case[39] concerned the non-enforcement of a final decision by the Serbian authorities in the applicant's favour. She relied on Article 1 of Protocol No. 1 (protection of property), Article 13 (right to an effective remedy) and Article 6 § 1 (right to a fair hearing). The case was about the division of common property of former couple, consisting in as flat and a garage in Belgrade. Although the division of property by public auction was ordered in March 1987, no steps were undertaken until 1990. In 1996 the applicant offered to buy out the share of the former partners, which the enforcement court accepted. Upon appeal the case was remitted, and finally decided only in April 2002. In March 2004, however, the Supreme Court accepted an extraordinary legal remedy (*zahtev za zaštitu zakonitosti*) launched by the Chief Public Attorney and quashed the lower courts' decisions, remitting the case to the enforcement court for reconsideration. The case was still pending at the time when the ECtHR decided it. The Court found two violations: violation of Article 1 of Protocol No. 1, and violation of Article 13 taken together with Article 1 of Protocol No. 1. The Court considered that the applicant suffered non-pecuniary damage and awarded EUR 1,800 under this head. It was further noted that a judgment in which the Court finds a violation of the Convention or of its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found. The court expressly commended the Serbian authorities to secure, by appropriate means, the enforcement of the final decision of 30 March 1987.

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39 *Popović v. Serbia,* No. 33888/05, 24 November 2009.

R. KAČAPOR AND OTHERS V. SERBIA

In *Kačapor and others v. Serbia*[40], the applicants were six Serbian nationals who live in Novi Pazar (Serbia). The case concerned their complaints about the Serbian authorities' failure to enforce final judgments given in their favour. The Court held unanimously that there had been a violation of Article 6 § 1 (right to a fair hearing) and Article 1 of Protocol No. 1 (protection of property). It also held unanimously that Serbia shall, from its own funds, enforce those final judgments and pay the applicants a total sum of EUR 7,000 in respect of non-pecuniary damage and EUR 300 each for costs and expenses.

The case dealt with the claims raised by the former employees of the 'socially-owned company' (*društveno preduzeće*) which requested the payment of their social security contributions and monthly paid leave benefits. Their claims were finally accepted by the competent Municipal Court in 2003. The enforcement was ordered both by the court and by the Ministry of Finance, which was informed by the applicants about the failure to pay the contributions for social security. The court decision remained unenforced, as the respondent company was in the meantime using other bank accounts, in spite of the options provided by the Enforcement Act to seek such bank accounts, order *ex officio* their seizure and request the involvement of the Central Bank for such purpose.

However, in October 2005 the insolvency proceedings in respect of the debtor were opened. In 2007, the Commercial Court in charge of the insolvency rejected the applicants' claims in their entirety as dubious in view of their 'prior undertakings' (an agreement with the former employer who apparently agreed to pay them certain sum in exchange for their undertaking not to seek their monthly paid leave benefits). However, later the court changed its mind and accepted to reconsider the claims. Due to that fact, an already launched civil suit at the same court was suspended, pending the imminent re-examination of the applicants' claims within the insolvency proceedings. The Court observed that:

- the final judgments given in favour of the applicants remain unenforced in full or to large extent;
- the enforcement court was obliged to proceed ex officio with other means of enforcement, had any one of those proposed by the applicants already proved impossible;
- the relationship between the enforcement court and the Central Bank was an internal one, between two Government bodies, and, as such, beyond the scope of the applicants' influence who, in any event, did everything in their power to expedite the impugned proceedings;

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40 *Kačapor and others v. Serbia*, Nos. 2269/06, 3041/06, 3042/06, 3043/06, 3045/06 and 3046/06, 15 January 2008.

- while the Central Bank may not have had an obligation under domestic law to inform the enforcement court about the status of the bank transfer in question, it clearly could have requested the opening of the insolvency proceedings much earlier;
- there was no reason why the applicants should have requested updates from the Central Bank in respect of the said bank transfer merely in order to fill the communication void between two branches of Government;
- given the finding of State liability for the debts owed to the applicants in the present case, it is noted that the State cannot cite either the lack of its own funds or the indigence of the debtor as an excuse for the non-enforcement in question;
- the period of non-execution should not be limited to the enforcement stage only, but should also include the subsequent insolvency proceedings.

CRNIŠANIN AND OTHERS V. SERBIA

The applicants, Mukadesa Crnišanin, Arifa Hamidović, Milodarka Kostić and Faza Paljevac, are Serbian citizens who were born in 1953, 1957, 1951 and 1955, respectively, and currently live in Novi Pazar (Serbia).[41] Relying on Article 6 § 1 (right to a fair hearing) and Article 1 of Protocol No. 1 (protection of property), the applicants complained about the failure of the state to enforce final court judgments given in their favour concerning monthly paid benefits, insurance and social security contributions. The Court held unanimously that there had been a violation of Article 6 § 1 and Article 1 of Protocol No. 1. In respect of non-pecuniary damage, the Court awarded EUR 1,800 to Mukadesa Crnišanin and Arifa Hamidović, each, EUR 1,500 to Milodarka Kostić and EUR 1,300 to Faza Paljevac. For costs and expenses, the Court awarded each applicant EUR 300.

The facts in Crnišanin case have many similarities to *Kačapor and others* case cited *supra.* Again, the non-enforcement of the claim related to the order to pay various social benefits and duties from the system of social security to the employees. The enforcement debtor from domestic proceedings was again a company which comprised predominantly of socially-owned capital. Such companies were, according to the Court's assessment, closely controlled by the Privatisation Agency and the Government. Insofar, the Court concluded that the enforcement debtors, 'despite the fact that they [were] separate legal entities [did] not enjoy sufficient institutional and operational independence from the State which would absolve the latter from its responsibility under the Convention'.[42] Insofar, it was generally

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41 *Crnišanin and Others v. Serbia*, Nos. 35835/05, 43548/05, 43569/05 and 36986/06 (Sect. 2) (Eng), 13 January 2009.

42 Ibid., § 111.

concluded that the State is liable for the debts of all companies predominantly comprised of social capital.[43]

GRIŠEVIĆ AND OTHERS V. SERBIA

The applicants, Safa Grišević, Dragoš Vranić and Mladomirka Vučićević, were Serbian nationals who were born in 1962, 1954 and 1965 respectively and lived in Novi Pazar (Serbia).[44] Relying on Article 6 § 1 (right to a fair hearing) and Article 1 of Protocol No. 1 (protection of property), the applicants complained of the authorities' failure to enforce the final judgments rendered in their favour ordering their employer to pay them leave benefits for a period when they had been placed on compulsory paid leave in 1995 and 1998. The Court held unanimously that there had been a violation of Article 6 § 1 and Article 1 of Protocol No. 1 on account of the State's failure to enforce the final judgments in the applicants' favour in good time. In respect of non-pecuniary damage, the Court awarded EUR 2,100 each to Ms Grišević and Mr Vranić, and EUR 1,800 to Ms Vučićević. For costs and expenses, Mr Vranić and Ms Vučićević were each awarded EUR 300. This is yet another case with the 'pracically identical circumstances'[45] in which the applicants were the employees of the socially-owned companies, just as in *Kačapor* and *Crnišanin* cases.

KRIVOŠEJ V. SERBIA

In this case[46], the applicant, Ana Krivošej, was a Serbian national of Russian origin who was born in 1969 and lives in Niš (Serbia). The case concerned Ms Krivošej's complaint about the domestic courts' non-enforcement of access rights to her son, born in 1994, and who had been put into the custody of his father in 2002. She relied in particular on Article 6 § 1 (right to a fair hearing), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the European Convention on Human Rights. The court found in that case violation of Article 6 § 1 (fairness), as well as violation of Article 8. It awarded a just satisfaction of 7,300 euros (EUR) for non-pecuniary damage.

The enforcement order in Krivošej case was issued in February 2003, and was not enforced until 2010. The procedural actions that caused the non-enforcement and the excessive length in this case included frequently changing decisions of the Social Care Centre, multiple appeals, several hearings, the loss of the case file, applications for reconstruction of the case

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43 Ibid., § 124.

44 *Grišević and others v. Serbia,* Nos. 16909/06, 38989/06 AND 39235/06, 21 July 2009.

45 Ibid., § 69.

46 *Krivošej v. Serbia*, No. 42559/08, 13 April 2010.

file, sudden finding and recovery of the missing case file that was found under the desk of the bailiff in charge of the applicants case (which was later dismissed from work), reluctance to enforce the imposed fines for non-compliance with the access order, problems in service of process caused by alleged changing addresses of the enforcement debtor etc.

The Court held that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life". This implies for parents a right that steps be taken to reunite them with their children and an obligation on the national authorities to facilitate such reunions. Whether that right is properly protected or not has to be decided in the light of whether the 'national authorities have taken all necessary steps to facilitate the execution of a child-related court decision as can reasonably be demanded in the specific circumstances of each case'.[47] The adequacy of these steps should be judged by the swiftness of their implementation, as the passage of time can have irremediable consequences for relations between the child and the parent who do not cohabit; the implementation of compulsory (coercive) measures, although in principle not desirable in this sensitive area, must not be ruled out in the event of unlawful behaviour by the parent with whom the children live. In this case, the legitimate interest of the applicant to develop and sustain a bond with her child and his own long-term interest to the same effect were thus not duly considered.

KOSTIĆ V. SERBIA

The applicants, Nedeljko Kostić, and his wife, Zorka Kostić, were Serbian nationals who were born in 1947 and lived in Belgrade.[48]

Relying on Article 1 of Protocol No. 1 (protection of property), the applicants complained about the non-enforcement of a demolition order awarded in their favour concerning a co-owned house. Noting in particular that the proceedings at issue had lasted more than four years and seven months, the Court held unanimously that there had been a violation of Article 1 of Protocol No. 1. The Court held that Serbia should ensure enforcement of the decisions in the applicants' favour and awarded them, jointly, EUR 4,000 in respect of non-pecuniary damage.

The non-enforcement in this case related to the order issued by the competent municipal inspectorate, granted on the basis that a third person (the co-owner of the applicants' house) started illegal reconstruction of his flat, which was not in line with the building permit and the relevant domestic legislation. The non-enforcement of the demolition order from

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47 Ibid., § 52.

48 *Kostić v. Serbia,* No. 41760/04, 25 November 2008.

1998 to 2008 was *inter alia* explained by the authorities by the fact that the municipality 'did not have the time' to proceed due to a large number of other illegally erected buildings.

The Court held that the right of property includes the right to enjoy one's property peacefully, and determined that the very existence of an unauthorised construction amounts to an interference with the applicants' property rights. The positive obligations of the state may require that it take the measures necessary to protect the right of property, particularly where there is a direct link between the measures which an applicant may legitimately expect the authorities to undertake and the effective enjoyment of his possessions. In the case at hand this positive obligation was not fulfilled.

KIN-STIB AND MAJKIĆ V. SERBIA (NO. 12312/05)

The applicants were Kin-Stib, a limited liability company based in the Democratic Republic of Congo, and Milorad Majkić, a national of the State Union of Serbia and Montenegro at the time the application was lodged with the Court.[49] The applicants complained about the partial non-enforcement of an arbitration award given in their favour in a dispute about a casino with the owners of the Hotel Continental Belgrade. They relied on Article 1 of Protocol No. 1 (protection of property), Article 6 § 1 (right to a fair hearing) and Article 13 (right to an effective remedy). The Court found in its judgment violation of Article 1 of Protocol No. 1

In its judgment, the Court also awarded just satisfaction. Serbia was ordered to pay to the applicants within three months of the day the judgment becomes final the sums awarded in the domestic judgments concerning the enforcement of the arbitration award in their favour and EUR 8,000 jointly (the amount of non-pecuniary damage), and to the applicant company EUR 30,000 (the amount of costs and expenses).

DAMNJANOVIĆ V. SERBIA

The *Damnjanović* and *Molnar Gabor* cases (both *cited infra*) are two rare cases in which the ECtHR finally did not find a human rights violation.

The applicant, Vesna Damnjanović[50], was a Serbian national who was born in 1967 and lived in Obrenovac (Serbia). She had two daughters, born in 1996 and 1998.

In April 2003 Ms Damnjanović filed a claim with Pirot Municipal Court seeking dissolution of her marriage, sole custody of her children and child maintenance. In August 2003 the

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49 *Kin-Stib and Majkić v. Serbia,* No. 12312/05, 20 April 2010.

50 *Damnjanović v. Serbia*, No. 5222/07, 18 November 2008.

children's father took them away to Pirot and subsequently remained uncooperative in the care proceedings. The applicant was granted interim custody in September 2003 and sole custody in March 2006. As the father refused to comply with the final custody judgment, the domestic courts twice imposed fines on him and, ultimately, in April 2008 ordered the physical transfer to the applicant of her daughters; however, following the children's protests, the applicant was unable to assume physical custody and requested that additional preparatory meetings be held first. In the meantime, the children's father, an army officer, was found guilty of parental child abduction and sentenced to six months' imprisonment, suspended for one year. That decision was upheld on appeal.

The case concerned the applicant's complaint that she has been prevented from exercising her parental rights in respect of her daughters due to the non-enforcement of the interim custody order and of the final custody judgment issued in her favour, in violation of Article 6 § 1 (right to a fair hearing) and Article 8 (right to respect for private and family life) of the Convention.

The Court noted, in particular, that:

- the children had been willing to spend time with their mother but had made it clear that they wanted to continue living with their father;
- the Social Care Centre, itself a State body, had played a constructive role in the proceedings;
- the domestic courts had attempted to secure the father's compliance with the custody judgment including the imposition of fines;
- most importantly, in April 2008 the applicant had ultimately been unable to physically assume custody of her daughters in the absence of their explicit consent.

While sympathising with the applicant's predicament, the Court concluded that the State had taken the necessary steps to enforce the final custody judgment in her favour and therefore held unanimously that there had been no violation of Article 6 § 1. Similarly, the Court found that the State had taken the necessary steps to enforce the interim custody order and the final custody judgment in the circumstances of the applicant's case and held unanimously that there had been no violation of Article 8.

MOLNAR GABOR V. SERBIA

The applicant, Istvan Molnar Gabor, was a Serbian national who was born in 1926 and lives in Subotica (Serbia).[51] Relying on Articles 6 § 1 (right to a fair hearing) and Article 1 of

[51] *Molnar Gabor v. Serbia,* No. 22762/05, 8 December 2009.

Protocol No. 1 (protection of property), he complained about the continuous refusal of the authorities to release to him all of his foreign currency savings deposited in a bank and, in particular, about the non-enforcement of a domestic judicial decision rendered on this question in his favour. In the judgment, the majority of the Court[52] held that, given the dire reality of the Serbian economy at the relevant time and the wide margin of appreciation afforded to States in respect of matters involving economic policy, the impugned legislation, providing for the gradual reimbursement of the funds here at issue struck a fair balance between the general interest of the community and the applicant's persisting legitimate claim to his original savings, as well as the property rights of all others in the same situation as him.

C. SOME CROATIAN NON-ENFORCEMENT CASES BEFORE THE ECTHR

The non-enforcement was also the cause of human rights violations in several Croatian cases, in particular those lodged with the Court concerning eviction of illegal tenants. In the case of *Majski* v *Croatia*,[53] after the applicant had instituted proceedings with a view to eviction, the courts acted rather expeditiously: it decided the case promptly and issued an eviction order in due time. Subsequently, however, it took the enforcement authorities three and a half years to make the first attempt to evict the tenants. This period was in the Court's view unacceptable under Article 6 § 1.

In a similar case, *Pibernik* v *Croatia*,[54] where the applicant instituted proceedings for disturbance of possession of her flat, the competent courts gave a final decision in her favour only three and a half years later, even though such proceedings under domestic law are to be considered urgent. Furthermore, the applicant obtained an eviction order ten months after having requested it due to what appears to have been the refusal of the presiding judge to endorse the court decision with a certificate of enforceability. Given that the subsequent enforcement of the eviction order lasted for another four years due to many appeals and requests for postponement on the part of the illegal occupants, but also by two

52 The Chamber of the Court made the decision by 4 votes to 3 (the judgment was accompanied by the joint dissenting opinion of judges Tulkens, Popović and Karakaš).

53 *Majski v. Croatia*, No. 33593/03, 1 June 2006.

54 *Pibernik v. Croatia*, No. 75139/01, 4 March 2004.

Ministries, the Court found a violation of the applicant's right to a hearing within a reasonable time and of the right to respect for her home.[55]

A somewhat unusual situation occurred in the case of *Buj* v *Croatia*,[56] which concerned the registration of the applicant's ownership in the land register as a form of implementation of the decision given in inheritance proceedings conducted after the death of his mother. The competent court that issued the decision gave an order to its land registry division to enter the change of ownership *ex officio* in the public register. In those circumstances the Court interpreted the land registry proceedings as a functional equivalent of enforcement and found Article 6 applicable to the case. Given that the decision acknowledging the applicant's ownership, which became final in 2002, had by the date of the adoption of the Court's judgment not been registered, the Court found a violation of the applicant's right to a hearing within a reasonable time.

The limits of the State's liability in enforcement cases, as rightly pointed out in the case of *Omerović* v *Croatia*,[57] would lay in a situation where the enforcement had finally become impossible due to the fact that a private person did not have the means to settle the debt. However, the State has the obligation to undertake all appropriate steps so as to ensure the prompt execution of final court judgments, irrespective of the subsequent outcome of those proceedings or the financial status of the parties involved.

D. EVALUATION OF THE CAUSES FOR NON-ENFORCEMENT IN THE ECtHR CASES

As showed by the above cited cases, enforcement cases are usually bringing a number of issues and their protraction is seldom caused by one factor. Often, the delay was not (only) caused by the imperfect legislative framework, but was (also) the consequence of a certain laxity of the authorities coupled with the unwillingness of the enforcement debtor to fulfil the obligation.[58]

The authorities have often argued that non-enforcement cases are the result of the objective difficulties, such as the lack of resources or the extensive scope of their work. In several cases, the Government of Serbia excused for the delays by pointing to the backlog of cases. The ECtHR did not accept such excuses, clearly stating that:

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55 Another example in this respect would be the case of Cvijetić v Croatia, No. 71549/01, judgment of 26 February 2004.

56 *Buj v. Croatia,* No. 24661/02, 1 June 2006.

57 *Omerović v Croatia,* No. 36071/03, 1 June 2006.

58 See Grgić, A., 'The Length of Civil Proceedings in Croatia. Main Causes of Delay', in Uzelac/van Rhee, *Public and Private Justice,* cit., at 164.

'[...] a chronic backlog of cases is not a valid explanation for excessive delay [...]. Moreover, Article 6(1) imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time [...]'.[59]

Grouping the reasons for non-enforcement in the cited cases and other cases which occurred before the ECtHR, we can distinguish the following groups of cases:

1. Post-war and transition cases: case of the reluctance to enforce enforceable titles

    - against particular social groups, where non-enforcement was occurring mainly as a result of threats or fear from violence, eventually also because enforcement was not considered to be 'fair' (see e.g. cases against former members of the military, or the cases of enforcement against discontented workers);
    - in specific types of cases, where state financial interests were at stake (e.g. the cases of 'old saving' which were a subject of the ECtHR proceedings regarding Serbia, Croatia and Bosnia and Herzegovina);
    - against the state and state-controlled agencies, as well as the cases comprising the socially-owned companies (overlapping with the preceding sort of cases, but important enough to be singled out as a separate point).[60]
    - caused by inappropriate legislative interventions and otherwise defective legal framework.[61]

2. The cases of ineffective procedural practices, where length of enforcement proceedings is caused by inappropriate procedural laws and routines, such as

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59 *Samardžić and AD Plastika v. Serbia*, No. 28443/05, 17 July 2007.

60 This problem, especially visible in Russian cases, exists also in the post-Yugoslav states. See CEPEJ, *Examination of problems related to the execution of decisions by national civil courts against the state and its entities in the Russian Federation*, CEPEJ(2005)8; CEPEJ, *Non-enforcement of court decisions against the state and its entities in the Russian Federation: remaining problems and solutions required*, CEPEJ (2006)11 – available at http://www.coe.int/cepej. As stated in the first report, 'at least 50% of the court decisions condemning the State to the payment of sums to the applicants are not executed or not executed in a reasonable time in the Russian Federation'.

61 See e.g. *Kačapor and others v. Serbia*, 13 January 2009; *Vlahović v. Serbia*, No. 42619/04, 16 December 2008; *Grišević and others v. Serbia*, Nos. 16909/06, 38989/06 and 39235/06, 21 July 2009; *Kutić v. Croatia,* No. 48778/99, ECHR 2002-II.

- complex and overly formalized enforcement procedures, in which a number of redundant or unnecessary steps had to be taken by the requesting parties, and a number of redundant or unnecessary formal decisions had to be issued in the process by the court or enforcement officers;
- tendency to emulate the court adjudicatory proceedings, e.g. by holding hearings, ordering expert witnesses;
- requests for postponement, which were widely available and generously tolerated;
- frequent orders to stay the proceedings until some preliminary issues are resolved in the other proceedings;
- availability of appeals which in practice have a suspensive effect (preventing the court orders from being enforced);
- circular and repetitive procedures, e.g. the availability of successive remittals of the decisions upon appeal or review;
- impossibility to terminate the proceedings when lack of funds or other reasons prevent enforcement for a longer time.

3. The weakness of the enforcement structures, in particular

- the difficulties to find appropriate ways to accelerate proceedings in 'priority' cases, in particular in cases concerning children (e.g. contact orders, return of the child) and some other family law matters;
- passive behaviour by the court and other authorities (periods of inactivity lasting for months and years)
- the lacking options to locate debtor's assets and income efficiently;
- the fragmented jurisdiction of the enforcement courts and organs, leading to problems in particular regarding the enforcement on movable property;
- the lacking incentives and means by the enforcement agents;
- the enforcement agents' insufficient authorities, the need to turn back to court for instructions regarding every major step in the process;
- the weaknesses regarding the system of service of documents.

In the light of this evaluation of causes for non-enforcement of domestic enforceable decisions, we will proceed with our comments on the DEAS.

IV. DRAFT ENFORCEMENT ACT: EVALUATION

A. GENERAL ISSUES: THE STRUCTURE AND CONCEPT OF THE DEAS

The DEAS is a long and complex document. In spite of a number of changes, in its approach and architecture it is still to a large extent based on the former Yugoslav Enforcement Act (*Zakon o izvršnom postupku*) of 1978.[62] This is, on one hand, beneficial, because it secures certain stability and the ability to rely on the well-settled routines and practices. However, it also implies that some of the deficiencies of the 'old' Enforcement Act may continue to play a certain role in the practice.

As pointed out *supra,* the international standards require a clear legal framework of enforcement, which also means that enforcement procedures should be clearly defined and easy to administer. It is also required that enforcement legislation be sufficiently detailed for reasons of certainty, transparency, foreseeability and efficiency.

Sufficiency of details does not necessarily involve excessive length in regulation of the enforcement matters. For the reasons of clarity and easier application, a number of issues have to be left for implementing regulations.[63] Insofar, it seems that the DEAS may profit from further reduction of the text, which would contribute to the ease of its use. As a matter of comparison, a similar approach in the Croatian Enforcement Act was pointedly described by the experts of the European Union as 'far too extensive, so it takes a great deal of attention and comprehension, interpretation and application'.[64]

Apparently for historic reasons, the DEAS does not only regulate enforcement. As visible from its title, it also contains provisions on 'security', i.e. the whole area of interim, preliminary, provisional and other temporary measures as well as some other issues of court and out-of-court methods of securing transactions (Arts. 268-311). The DEAS also deals not

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62 *Zakon o izvršnom postupku,* Off. Gaz. SFRY No. 20/78, 6/82, 74/87, 57/89, 20/90, 27/90 etc. Serbia had in the meantime passed two separate laws on enforcement (in 2000 and 2004), but they also had its roots in the Yugoslav ZIP.

63 E.g. the rules such as the one on the number of copies that have to be submitted (Art. 35 para 6) are not appropriate for a statute of this rank (irrespective of the level of formality, which seems to be excessive).

64 IPA Programme of the EU, *Study on the Enforcement of Court Decisions in Croatia,* April 2009, 18.

only with the enforcement of judicial decisions and other enforceable documents, but also regulates the procedure on the basis of so-called 'authentic documents' (*verodostojna isprava*, see Art. 18), which is essentially a type of payment order procedure aimed at certification of uncontested debt. Although various temporary measures, methods of securing transactions and the certification of uncontested debt are in some parts related to enforcement proceedings, they have emancipated in the separate bodies of law (which is, *inter alia,* visible from the architecture of the EU procedural regulations and directives, where separate instruments regulate payment orders and enforcement orders). Consequently, the DEAS is, just as its predecessors, a kind of an 'omnibus act', which does not contribute to the ease of its use.[65]

A new element in the architecture of the DEAS is insertion of a separate part on the enforcement officers (Arts. 312-357). This part is rather voluminous, containing six chapters and 45 articles. It could easily have been enacted as a separate act (e.g. as the Act on Bailiffs), just as was the case with the recent plans to amend the enforcement system in Croatia, where a separate act is envisaged.[66] This might be a technical matter, and depends also on other considerations (e.g. in Croatia it was considered that laws on procedure have to be separated from the organisational laws regulating particular professions). However, it can also make the use of the DEAS more difficult, as it operates on different levels – rules relevant for the users, such as the rules of enforcement procedure, are combined with the internally relevant organisational rules, e.g. on appointment, professional organisation, bodies, discipline and internal practices of the bailiffs. Further issue is the automatic application of the rules appropriate for courts and judges on bailiffs as well (including the provisions of the Code of Civil Procedure) which might be overly formalistic. The provisions of Part Seven (Enforcement Officers) will be more extensively commented *infra* at C.

Another consequence of the remaining 'old' approach to regulation of enforcement is a considerable number of provisions that regulate court activities. Although one of the intention of the DEAS might have been the 'outsourcing' of the enforcement cases out of the system of the regular courts, it is questionable to which extent has this been achieved. If the courts are still required to undertake a number of actions in the enforcement proceedings, and still have a large number of opportunities to intervene in this process, the effect on reducing the workload and delays in the courts cannot be great. Admittedly, a number of

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65 At a certain point in the future, one might consider whether the provisions on 'security' and the provisions on 'authentic instruments' could be left out of the enforcement legislation, and be regulated in separate pieces of legislation. This would result in a more user-friendly act, and also bring further benefits (also in respect of better regulation of temporary measures and the collection of uncontested debt, which are among the issues very important to the efficiency of legal protection).

66 See *Konačni prijedlog Zakona o javnim izvršiteljima,* P.Z.E. br. 581, www.sabor.hr.

provisions have sought to prevent frequent turning to the court, by reducing chances for some of the most visible abuses experienced in the past. Yet, there are still many open issues which are also going to be reflected under C.

As to some elements of the new approach which are present in the DEAS, one could emphasise the policy to reduce chances to address certain issues in the enforcement proceedings and diminish the options of raising objections, oppositions and/or legal remedies in the process. This approach can be in principle evaluated positively. Reduction of options to oppose the enforcement may be taken as a straightforward conclusion from the ECtHR cases. In particular regarding the countries of Western Balkans, in the eyes of the citizens the process of enforcement is almost equalized with the process of adjudication. Following the universally accepted recommendations that enforcement should not be treated as re-adjudication of the case, narrowing the chances to object could significantly functionalize the enforcement proceedings. All fears that such narrowing of chances to discuss and decide certain issues will lead to increase in litigation and the processes of 'counter-enforcement' should be taken with great reservations, as the practice (and the case-law of the ECtHR) demonstrates that such options were much more often used for tactical, and not substantive reasons.

B. PROCEDURAL AMENDMENTS – NOVELTIES IN THE PROCEDURE OF ENFORCEMENT

1. URGENCY, TIME-LIMITS, DEADLINES

The principle of urgency was always embedded in the laws regulating enforcement in the region, at least on the declaratory level. It is also provided in Art. 6 of the DEAS, which stipulates that the 'enforcement proceedings ... are urgent' and that there should be 'no delay unless expressly provided by law'.

Yet, the case-law of the ECtHR has demonstrated that the rules on urgency are not always observed. Some delays in the enforcement proceedings have lasted for months and years. Whilst useful as a directive, a blanket norm on urgency cannot bring much unless it is underpinned by more concrete provisions and tools.

Faced with the ineffectiveness of the system of enforcement, the drafters of the DEAS have decided to provide short time-limits for the actions in the enforcement proceedings. Under Art. 7, a court should rule on a motion to enforce within three days from the date of its filing, and communicate its decisions to the parties within three days from the date of its delivery. All other actions of the court should in principle also not exceed three days.

Such deadlines are, in our opinion, rather unrealistic. We do not have precise information on the current case-flow and we have not received any data on actual average or median duration of particular steps in the enforcement process, but it may safely be estimated that

they are many times longer than the prescribed periods. It can also be foreseen with certainty that such deadlines are not going to be observed, or even that they are going to be fully ignored, especially since no concrete consequences for their non-observance are provided. These deadlines are therefore a political wish, and not a rational plan of acceleration of the proceedings. Although it is undisputable that the courts should rule in enforcement matters speedily, the time-limits set by the legislation should not be stipulated in a set-it-and-forget-it manner. Unless concrete tools for monitoring of the deadlines are in place, and concrete actions are being taken when the deadlines are not observed, no deadlines are better than ignored deadlines.[67]

A general and blanket 'three days formula' also blurs the opportunity to address the needs of the particular case. It also diminishes the possibility to prioritize cases in a sensitive manner. Under the ECtHR jurisprudence, priority cases (e.g. those related to family law issues, but also other types cases with urgent needs) were always singled out as those where the notion of 'reasonable time' has a particularly strict meaning. It was also suggested that 'in general, flexibility seems to be the key concept for calculating enforcement timeframes', as 'the concept of deadline for enforcement now seems outdated – its use should be exceptional and reserved for specific procedures'.[68]

The short deadlines have a different meaning when they are provided regarding the parties; we will reflect on that more when commenting the proposed regulation of legal remedies.

In any case, we consider that, unless further actions are taken to assure observance of the deadlines for court actions, many other provisions of the DEAS have better chances to have a decisive impact on shortening of the actual timeframes than the described ones.

2. POSTPONEMENTS

One of the reasons of excessive length of enforcement proceedings in Serbian and other cases were frequent postponements. Such postponements are among the remnants of the Socialist tradition which was otherwise rather tolerant towards the debtors and unwilling to enforce strict discipline regarding fulfilment of private obligations.[69]

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67 See also what the *CEPEJ Time management checklist* recommends as good strategies of proper judicial time management.

68 CEPEJ, *Enforcement of Court Decisions in Europe,* cit., at 62. This statement is related to setting deadlines for the overall duration of the enforcement, but is partly applicable to strict deadlines for particular enforcement actions as well.

69 See more in Uzelac, *Privatization of Enforcement Services,* cit., 84-87.

The DEAS has reacted to the problem of postponements by deleting the chapter on postponements from the draft Act (previous Chapter V., Arts. 86-91). Consequently, one could conclude that formal requests for postponements are no more available.

This change is in principle a move in the right direction. Yet, from the case-law of the ECtHR we may see that postponements (as in *Bijelić* case) were happening on the factual basis that is rather different from the legal requirements for postponement. Also, by deleting the provisions on postponement, we may assume that postponements as such will not be fully eliminated – they will inevitably happen from time to time as a factual stance in the process of enforcement, caused by various circumstances.

In any case, comparative research shows that the best regulation of this matter is the one which allows sufficient flexibility (but also responsibility) to qualified enforcement agents, who may in appropriate cases, and not too often, postpone their actions in order to maximize the overall effectiveness and efficiency of the process. The court should in such matters retain its controlling functions and be restricted or fully excluded from the immediate decision-making.

Under such assumptions, we would support this change, or, alternatively, suggest insertion of a new provision on postponements which would be different from the earlier law, and reflect the outlined best practices.

3. HEARINGS, EVIDENCE

The DEAS has discontinued with the earlier regulation which enabled, under certain conditions, holding of the hearings, i.e. inviting the parties to reflect orally on some issues. Now, under Art. 28, 'in enforcement proceedings a court or an enforcement officer shall act solely on the basis of submissions and other documents'.

The intention of this provision is certainly good. As enforcement proceedings should not be taken as an opportunity to re-adjudicate the case, no trials should take place during that stage. As holding hearings is combined with a number of issues, e.g. with notices, failures to appear, requests for postponements, introducing or presenting evidence etc., this may have an adverse impact on the length of proceedings.[70] Therefore, the exclusion of formal hearings may be supported from the viewpoint of effectiveness of the proceedings.

Though, the draft text of Art 28 may in its literal form lead to false conclusions. The harsh and inflexible formula, according to which the basis for procedural actions shall be 'solely' (*isključivo*) written submissions and other documents infers that enforcement is in its essence a formal, paper-based process. It also suggests that no actions whatsoever should

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70 See also *supra* at III.D.

be taken orally, and that no oral statements of the participants in the proceedings would be attributed any significance. This is, in our opinion, not what was intended. Had this been intended, it could again have a negative impact on the effectiveness of the enforcement process.

As the comparison of well-established systems of enforcement in Western Europe shows, one of the essential differences between the bailiffs and the other liberal professions (e.g. notaries) is in the fact that bailiffs conduct their operations in a more informal and flexible way, whereby their actions are governed by the need to optimize benefits for all participants in the process. Their work includes (in particular in its core area of enforcement on movables) a lot of field work, negotiations with the parties and third persons, fast decision-making and significant oral skills. In a rather deformalised way, the orality and the principle of immediacy play a significant role which ensures speed and efficiency. In some areas (e.g. in the area of family law) it may be indispensable to assess the facts in a direct and oral manner.

Therefore, we would suggest that Art. 28 be redrafted in the manner which would eliminate the possibility of wrong conclusions (e.g. by limiting its scope to formal court hearings only).

The DEAS has also eliminated the options of seeking expert opinions in enforcement proceedings (Art. 30 para 4). This change is consistent with the moving away from the 'quasi-adjudicatory' concept of the enforcement proceedings and with abolition of formal hearings and evidence-taking in the enforcement proceedings. Apparently, this is also a reaction to the practice of some courts that frequently asked expert opinions regarding the assessment of value of the seized property. As reconfirmed in the judgments of the Strasbourg court, the use of experts often causes delays, and may be listed among the main reasons for the length of civil proceedings.[71]

In the context of enforcement, we agree with the proposed change. Well-trained and knowledgeable enforcement officers need to posses sufficient skills that would qualify them to make themselves a number of expert assessments. If additional information is required, they may obtain it in an informal way, from all available resources, whereby special authority to access certain databases may also be helpful. Insofar, the provision that authorises the enforcement agent to make a valuation based on the supplied information may be sufficient and appropriate (see Art. 93. para 3).

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71 See Calvez, Francoise, *Length of court proceedings in the member states of the Council of Europe based on the case-law of the European Court of Human Rights*, CEPEJ-TF-DEL (2006) 3, p. 34.

4. ENFORCEABLE DOCUMENTS

The CEPEJ Guidelines note that 'national legislative framework should contain a clear definition of what is considered an enforceable title and the conditions of its enforceability'.[72]

The DEAS contains rules on enforceable titles in Arts. 13 to 15. These rules are again in their style and wording leaning on the old Yugoslav ZIP. It secures continuity, but also brings certain problems. *Inter alia*, the DEAS continues to require that court decisions which constitute enforceable documents be 'final' (*pravosnažne, res iudicata*). It is also required that the enforceable document be accompanied by the 'finality clause' (*klauzula pravosnažnosti,* see Art. 35 para 4). This is another relic of the philosophy of former ZIP and, more generally, procedural legislation of the SFRY. Socialist legislation in principle did not allow enforcement of non-final decisions. At the same time, no decision could in principle become binding before the appeal options were exhausted. This has been in itself a guarantee of ineffectiveness of the process, as an appeal option was universally granted, and every appeal has automatically made the court decision unenforceable.

However, even under former Yugoslav law some modest exceptions where appeal did not suspend the enforcement were recognized. In doctrine, it is also indisputable that the quality needed for enforcement of court decisions is not finality (*pravosnažnost, pravomoćnost*) but enforceability (*izvršnost, ovršnost*).[73] The DEAS also states in Art. 15 para 5 that enforcement may be ordered on the basis of non-final acts if the law provides that appeal does not stay enforcement. If effectiveness of the overall enforcement system is sought, this may in the future become a more regular case, and the basis for that could be not only the law, but also the court decision rendered on the basis of law.

Some novelties on the list of enforceable documents are welcome. So, e.g. a decision certified as European Enforcement order is an enforceable document if it is 'enforceable' (not final!).[74] Some other novelties seem to be rather casuistic, e.g. Art. 13 para 1(3) and (4) which define as enforceable titles the excerpts from the registers of liens on movable assets and of financial leasing as well as certain mortgage contracts.[75]

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72 CEPEJ, *Guidelines for a Better Implementation Of The Existing Council Of Europe's Recommendation On Enforcement,* doc. CEPEJ(2009)11REV2, Strasbourg, 17 December 2009, at 24.

73 See in this context the provisions of Croatian Enforcement Act (Art. 21) that requires enforceability, and not finality of court decisions.

74 Art. 13 para 1(6). This is a good sign of in-advance-acceptance of EU law.

75 Such level of detailness of the provision is in contrast with the other, more generally phrased rules on enforceable documents. It also seems to be overlapping with either sec. 1 or 2. as an excerpt could be

Similarly casuistic and incomplete is the provision defining court decisions and court settlements as those 'concluded before a court or an arbitration tribunal or the Court of Honour of the Chamber of Commerce'. The definition is awkward and brings about memories of the 'old' understanding of arbitral tribunals as the 'self-governed tribunals of associated labour' (*samoupravni sudovi*). The reference to the Court of Honour (*Sud časti*) is also antiquated, especially since it singles out one institution which operates within a (para-statal? monopolistic?) environment of the national Chamber of Commerce.[76] It seems that the law would profit from generalization of this provision, and replacement of this reference by a reference to consistently and clearly defined types of decisions and settlements, including (qualified) settlements concluded in the mediation proceedings.

A rather helpful improvement in the DEAS is the removal of the condition that the court judgments be certified by a clause confirming their finality and enforceability issued by the court that had decided the case. The need to certify enforceability twice, once by the litigation tribunal ('enforceability clause', *potvrda izvršnosti*), and the second time by the enforcement court ('enforcement order', *rešenje o izvršenju*) is a good example of duplication and the redundant steps that have been identified before among the grounds for delays and ineffectiveness of the enforcement proceedings. Instead, the DEAS provides that the enforcement court will have to consider itself incidentally whether the decision is enforceable (and 'final').

In our view, this is the right choice. One could envisage even a further step, according to which the enforcement court would consider the issues of (non)expiry of the time limit for voluntary compliance[77] or of eventual non-finality of the decision only upon objections of the enforcement debtor, what could further contribute to the effectiveness of the enforcement process.[78]

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taken as either court or administrative decision. If this is not the case, the status of the 'excerpts' is rather questionable. It is to be expected that such rules be the object of special legislation (what is possible under Art. 13 para 1(7). It also seems that by introduction of notaries such provisions might become unnecessary.

76 For a similar (slightly more general, but equally problematic) provision see Art. 21/1(5) of the Croatian EA.

77 The importance of time limit for voluntary compliance was overstated in the former Yugoslav legislation. Such a time limit is usually short (15 or 8 days) and thus is almost irrelevant compared with the overall length of the enforcement proceedings.

78 The enforcement debtor is, unlike the enforcement court, in good position to prove some of the relevant facts, e.g. that he has timely submitted an appeal (if such appeal suspends enforcement).

5. SERVICE OF DOCUMENTS

The ineffective system of serving documents in the process is among the major causes of delays in judicial proceedings in Western Balkan countries. Therefore, the DEAS rules regarding service have to be analysed as well.

The DEAS has no exhaustive rules on service of documents. Service of documents is so far regulated in more detail in other acts, such as Code of Civil Procedure. There are, however, some special rules on service in the enforcement proceedings regarding service on enforcement debtors (Art. 29), service of enforcement rulings (Art. 38), service of notification of inventory (Art. 84) etc.

The special rules on service of documents are adjusted to the need to prevent delays and abuses of the process. Insofar, some options of the fictitious service have been provided, i.e. service on the court notice-board for the cases where service could not be effected by conventional means (see Art. 29 para 3).

It is certainly true that the equality of arms principle (*načelo saslušanja stranaka*) does not apply in the same way in the enforcement proceedings. Insofar, *ex parte* enforcement in principle does not violate the requirements of the European Human Rights Convention. Still, we consider that fictions in the process of service have to be used very sparingly and only as the last resort. It is much more important to secure that the court and the enforcement officer have taken reasonable efforts to contact and inform the enforcement debtor, than to fulfil formal conditions (e.g. service at the officially registered address which can evidently be inaccurate). In spite of the lowered standards for notice in the enforcement process, the unfair actions can still produce problems, which could also have an adverse impact on the effectiveness of the enforcement.

Another issue with the rules on service in the DEAS lies in the fact that the provided rules still rely largely – with the said exceptions – on the rules of the CCP which are appropriate when the service is generally effected by post (regular mail). It seems that the DEAS has paid very little attention to the potential structural changes which inevitably happen if the other channels of service are used. So, e.g. the law does authorize the private bailiffs to perform service of their own acts, 'as well as briefs and court decisions under the authority of the court'.[79] Formulated in such a way, these rules suggest that the private bailiffs will be charged with the judicial and extrajudicial service only incidentally and on the very small scale, whereby in such cases bailiffs will use standard (and traditionally inefficient) methods of service. If this is the case, the capacity to significantly improve the effectiveness of the service of documents (both in litigation and in enforcement proceedings) may be put in

[79] See Art. 325 para 1(3).

question. Further analysis of the authorities of bailiffs and comparative experiences with their use regarding service of documents will be discussed *infra* at C.2.

6. GROUNDS FOR OBJECTIONS

The DEAS has reduced the number of issues that may be raised as reasons for opposing the enforcement. Currently, the exhaustive list of five reasons for refusal of enforcement is provided in Art. 42. They are the following:

> (1) If the obligation specified in the enforcement ruling has been fulfilled;
>
> (2) If the decision on the basis of which the enforcement was ordered has been reversed, revoked, modified, rendered of no force and effect, is absolutely null and void, without legal effect or lacks the status of an enforceable document;
>
> (3) If the settlement on the basis of which the enforcement was ordered has been revoked;
>
> (4) If the time limit for fulfilling the obligation has not expired or if the condition specified in the enforceable document has not occurred;
>
> (5) If the statutory time limit for making a motion for enforcement has expired.

This list has shortened the much more extensive list of 10-15 reasons from the 'old' legislation.

From the perspective of the requirements of effectiveness, the shortening of the list of reasons to most typical reasons can in principle be supported. Many options for raising legal remedies in the process of enforcement have been so far identified as one of the main causes of lengthy and ineffective enforcement proceedings.

On the other hand, leaving out some of the previously provided reasons could lead to situations in which new proceedings would have to be conducted in cases of errors. We consider, however, that this is a risk that may be worth taking. Currently, there are no ECtHR cases which would demonstrate human rights violations on this account. Insofar, the reduction of the circle of reasons for refusal of enforcement is a legitimate move which, if serious problems occur in the future, may be softened in the future, when effectiveness of enforcement will cease to be the main issue.

7. LEGAL REMEDIES

The DEAS also envisages a reform of the system of legal remedies that may be launched in the enforcement proceedings. The regular appeal (*žalba*) is not admissible any more, and the

only remedy against the enforcement rulings is the objection (*prigovor*).[80] The objection does not suspend the enforcement.

The enforcement creditor may raise an objection against the ruling only if his request was dismissed or rejected, or only insofar the objection concerns the costs of enforcement (Art. 40 para 2 and 3).[81]

The objection is decided by the same court that has issued the enforcement ruling, this time by a panel of three judges.

No special remedies (e.g a review – *revizija* or reopening – *ponavljanje*) are allowed against enforcement rulings.

The deadlines for filing the objections and deciding on the filed objections are rather short – three days for filing or deciding, respectively (Art. 39 para 3 and 4). It is also provided that 'a failure to act on the part of a judge in pursuance of an objection shall be considered dereliction of judicial duty' (Art. 39 para 5).

We agree in principle with the intention of the draft to limit the available legal remedies and accelerate the procedure in case of their filing. The enforcement proceedings should not be construed as re-adjudication proceedings, and thus they should not emulate the same methods of control which are available in the judicial proceedings. The removal of an appeal option is also in place, in particular because the availability of appeals was frequently used in the enforcement proceedings conducted in the countries of Western Balkans to unduly delay the process, often rather successfully.[82] The exclusion of other legal remedies is *a fortiori* also legitimate.[83]

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80 See Art. 39.

81 The rules on legal interest (*pravni interes*) would prevent creditors to object to decisions made in their favour anyway. On the other side, the enforcement creditor may discontinue the proceedings under Art. 35 para 8. In our view, the creditors (and the enforcement officers) have to be in position to use the enforcement rulings in a flexible manner, which includes their right to abandon or postpone the enforcement if an agreement on a different way of satisfying the creditor's claims has been reached. It seems that this flexibility is partly lacking.

82 The fact that 'ceaseless re-examination of some cases', as a systemic procedural deficiency that Is intrinsically related to certain national legislation (in particular in Eastern and South Eastern Europe), causes major delays was recognized in Calvez, F., *Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights,* CEPEJ Study, Strasbourg: CoE, 2007, 58.

83 However, the DEAS still contains the reference to special ('extraordinary') remedies (*vanredni pravni lekovi*) in Art. 3 para 1, whereby it is not clear where such remedies would still be available.

One may, however, be sceptical regarding the future observance of the exceptionally short time-limits for deciding on objections (see also our general scepticism *supra* at IV.B.1). It seems that the three-days deadline is applicable to both the summary ('first instance') review of the acting judge (see Art. 44 para 1) and the 'second instance' review by the panel of three judges. Taking into account the customary practices and the large number of enforcement cases, it is hard to believe that this sort of deadline is going to be observed. A lot more would be achieved by the establishment of a comprehensive system of case administration and time-management monitoring which would periodically review the case-flow and ensure intervention when unacceptable delays in deciding objections would occur. Also, the idea of 'second instance' review by a collective panel of judges (irrespective of the fact that they are the judges of the same court) shows that the concept of 'appeal' has not been fully abandoned. If ambitious three-days concept wishes to be really put in place, one should consider abandoning altogether the multiple-judge panels, and/or the idea of 'second instance' review as such.

On the other hand, retaining the 'old' architecture of the Enforcement Act has led to the continued focusing on the judicial decisions and objections against them, while the regulation of the decisions of the enforcement officers and the objections against them seems to have been neglected. In our view, the system of enforcement by private bailiffs has a chance to be effective only if the decision-making powers are in the most enforcement matters transferred to private bailiffs, whereby the court retains only the limited right to interfere when this is ultimately needed to preserve the integrity and fairness of the enforcement proceedings (see more on the necessary shift of powers to the private bailiffs *infra* at C.).

C. THE ROLE OF PRIVATE BAILIFFS IN THE PROPOSED 'MIXED' SYSTEM

1. PRIVATE BAILIFFS: MAIN ROLE AND STATUS

The new DEAS for the first time envisages establishment of a new, private profession of bailiffs in Serbia. The enforcement by private bailiffs is not the only and exclusive type of enforcement; most of the bailiffs' functions would continue to be undertaken by the courts of general jurisdiction and the commercial courts, i.e. by the 'public' enforcement officers who act under the supervision of these courts.[84] Insofar, the DEAS provides a 'mixed' system of enforcement, where, mainly depending on the choice of the users, either professionals

84 See Art. 2 para 2 ('Enforcement and security shall be ordered by a court, unless otherwise provided for by this Law, and carried out by a court or an enforcement officer.')

employed by the state (judges and public bailiffs) or professionals who are self-employed and act as a separate legal profession (private bailiffs) carry out enforcement.

Private bailiffs are either acting as solo practitioners (in which case they are individual entrepreneurs – *preduzetnici*), or as partners in a firm (Art. 312 para 2). They are appointed by the Justice Minister for a particular territory, among the candidates who fulfil a number of conditions (see Art. 313), most prominently a degree in law[85], Serbian citizenship[86], two years of work experience in carrying out enforcement or three years of experience in 'legal work'[87], moral dignity, and a special examination for enforcement officers.[88]

The access to the profession of private bailiffs is not dictated by the market needs, but is highly regulated – the overall number of private bailiffs is fixed (so-called *numerus clausus*), and is determined by the criterion of population[89] and court jurisdiction[90].

In spite of the public contest that has to be called for 'vacant' private bailiffs places, it seems that the Minister has a broad discretion both regarding the determination of the number of bailiffs[91] and regarding the qualification[92], appointment of bailiffs[93] and their discipline[94] and dismissal.[95]

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85 It is not expressly stated whether it is a bachelor or master degree. As the law studies in Serbia currently have a four-year 'basic' (undergraduate) study of law, after which a one-year of master (specialist, graduate) studies which results in a diploma, it is to be assumed that a precondition for a profession of a private bailiff is a master degree.

86 This condition is, of course, antiquated and, in case of accession to the EU, would have to be eliminated as discriminatory.

87 It is curious that enforcement experience (for which so far no legal education was necessary) is privileged over lawyer's experience. It also seems that the law in this article does not consider carrying out enforcement to be 'legal work' (what is contradictory to the high requirements on legal knowledge of future private bailiffs).

88 The exam is arranged and conducted according to the acts and under the auspices of the Ministry of Justice.

89 One private bailiff per each 30.000 inhabitants (Art. 315 para 2).

90 Each bailiff is appointed for the jurisdiction of a lower court of general jurisdiction or of a commercial court, see. Art. 312 para 2.

91 See Art. 315 para 3 (the Minister can 'depending on the assessment of needs' increase the number of bailiffs).

The private bailiffs are organised in a professional organisation – Chamber, which is also organised at the national level, pursuant to mandatory provisions of law. Seemingly, the public bailiffs are outside of this system (there are no special provisions on their collective organisation). The Chamber of (Private) Bailiffs has relatively weak authorities: it organises seminars, keeps record of their attendance and issues the programme for the bailiffs' professional training,[96] issues rules of professional ethics, acts in collective negotiations on behalf of bailiffs, keeps various directories and registers,[97] and participates in supervision of bailiffs (but short of taking any concrete disciplinary sanctions, which are within the competence of the special disciplinary committee which consists mainly of those appointed or controlled by the Ministry).[98]

2. POWERS, LIABILITY, COMPETENCES AND JURISDICTION OF BAILIFFS

The powers of private bailiffs are defined in the following way:

> '(1) Acting as required in a motion to enforce and determining methods of enforcement if the enforcement creditor has failed to do so in his or her motion;
>
> (2) Acting as required in a motion to enforce based on an authentic document for the purpose of satisfying a pecuniary claim in respect of utilities, water supply, heating, refuse disposal and similar services;
>
> (3) Submitting his or her own act, as well as briefs and court decisions under the authority of the court;
>
> (4) Determining the identity of the parties and participants in the enforcement procedure;
>
> (5) Collecting information about the assets of the enforcement debtor;
>
> (6) Issuing conclusions, compiling records, requests and official notes in accordance with the powers granted by this Law;

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92 The organisation and program of the examination for bailiffs is prescribed by the Minister (see Art. 315 para 7); the Minister appoints the Examination Commission (Art. 313 para 3) and the Commision which conducts the public competition (Art. 315 para 4).

93 The Minister appoints the bailiffs from the lists compiled by the Commission appointed by him/her (Art. 315 para 6). Apparently, the Minister is free to choose whatever candidate on the list.

94 See Art. 346.

95 See Art. 322.

96 See Art. 324.

97 See Art. 329.

98 Art. 347 in connection with Arts. 346, 349-356.

(7) Conducting inventories, property evaluations, the seizure and sale of movable assets, rights and immovable assets;

(8) Entrusting the sale of property to third parties at his or her own cost and liability;

(9) Receiving and safekeeping inventoried or secured assets from the enforcement debtor, ordering the transfer of ownership of property and performing the division of assets and the proceeds of their sale;

(10) Performing evictions and other enforcement actions necessary to carry out enforcement that are regulated under the law and other regulations;

(11) Intervening in order to achieve a negotiated solution at the request of the enforcement debtor or creditor;

(12) Receiving and transferring funds in accordance with this law;

(13) Taking other actions provided for by this Law.'[99]

As visible from the preceding list, the private bailiffs are entrusted with a number of authorities. Most of them belong to the field of enforcement (e.g. identifying the parties, collecting information about the assets, seizure and sale of movable and immovable property, performing evictions, receiving money and transferring it for the purposes of satisfaction of claims). However, the bailiffs are also given the powers to undertake other actions, such as those of securing claims ('security', *obezbjeđenje*), service of documents (*dostava*), and certification and collection of uncontested monetary claims (claims for utilities – *komunalne usluge,* issuing specific payment orders – *rešenje na osnovu verodostojne isprave*).

While some of these authorities may harmoniously be integrated in the profile of bailiff's work, some other may be problematic. E.g. the use of bailiffs for the core methods of securing claims (such as issuing or carrying out preliminary or provisional measures) could be rather limited. The use of bailiffs for issuing payment orders for uncontested debt, although attempted in some other transition countries, is contrary to the best practices in the region and Europe.[100]

In any case, even if it may be natural for the bailiffs to be engaged in some external activities, such as service of documents, it should be noted that in the DEAS neither of these activities are regulated in detail. The impression is that all 'externalities' (all activities of

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99 Art. 325.

100 The atomization and decentralization of payment orders prevents the introduction of highly efficient, fast and automated central systems of application-processing, such as Austrian *Mahnverfahren* or Slovenian procedure before *COVL.* It is also making monitoring and planning very difficult, and the price for the end user and the state is several times higher.

bailiffs that do not belong to enforcement) are mentioned only *obiter dicta,* with the minimum of regulatory content. Whilst this may be regarded as normal (the DEAS is, after all, an act regulating enforcement), without a full and consistent legislative package that would regulate all essential rights and duties of the enforcement officers at the same level of detail, some confusion and the resulting decrease of efficiency is almost inevitable.[101]

The regulation of authorities of bailiffs regarding enforcement of claims also contains certain *lacunas*. The law does not mention at all the eventual possibility for bailiffs to be engaged in the out-of-court debt enforcement. Without prejudging the outcome, taking into account the fact that the bailiffs' offices are organised as undertakings, it would be rather beneficial to remove any doubt as to their right to engage in more business-like practices of debt-enforcement, whereby the basis would not be a court decision or the other enforceable document, but an informal engagement of the enforcement creditor.

On the other hand, the provision which authorizes bailiffs to intervene as mediators at the request of either debtor or creditor, in order to achieve a negotiated solution, has to be praised. The power to enter into substantive examination of the conditions which led to the failure to enforce an enforceable document voluntarily is vital for the effectiveness of enforcement. The authority to intervene and offer a mid-way solution could have been even further extended, giving the bailiff the right to intervene and mediate between the interests of both parties *ex officio,* trying to find the solution which would maximize the effectiveness and the benefits for all stakeholders in the enforcement process. Such mediation could explicitly also encompass the right to suggest methods of satisfaction of creditor's claim, agreements on payment in instalments etc.

The liability of private bailiffs for damages caused by irregular enforcement actions (or by the failure to enforce), is regulated in a standard way. Under Art. 326, 'an enforcement officer shall be personally liable, with his or her entire assets, for any damage caused through his or her fault in the course of an enforcement procedure.' The bailiffs also have to be insured against liability to third parties (Art. 318, para 1(1)).

The bailiffs are appointed for the territory of the particular courts (basic courts or commercial courts). Their jurisdiction is also limited, but not territorially – the bailiffs can carry out enforcement also outside of the territory of the court for which they were appointed, or, if they find it more appropriately, may use the services of the bailiffs from that territory.[102] However, the bailiffs are limited by the source of the enforcement orders:

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101 Regarding the critique of the architecture of this regulation see *supra* at IV.A.

102 Art. 4 para 1.

they may in principle carry out enforcement only based on the rulings of the court for whose territory they were appointed.

From the viewpoint of effectiveness, this distribution of jurisdiction has some advantages. So far, in the enforcement proceedings of Western Balkan countries one of the circumstances that made enforcement less effective was the limitation of enforcement officers to the local territory, which meant that – in particular regarding movables – the transfer of property to the territory of another court could dramatically prolong and impede carrying out the enforcement. Under this proposal, it would be up to the discretion of the bailiff to continue enforcing the order no matter where the search and seizure has to be effected, which is much more effective regulation.

The limitation of bailiffs to enforcement of orders of the particular court is, on the other side, not so effective. The courts have in principle the jurisdiction determined by the residence or seat of the enforcement debtors, whereas the enforcement debtors may have property all over the country (and beyond). In general, the regulation under which several courts have to issue enforcement orders for one debtor and one claim does not seem to be very efficient (see *infra* under 3). In such cases, seemingly, more bailiffs would have to be engaged as well. Also, if there are only a few (or even only one) bailiff appointed for the one court, the selection of the bailiff best suited for the case and the competition among the bailiffs to provide the most effective services may become virtually impossible.

While it is understandable that the drafters of the DEAS wanted to ensure that newly appointed bailiffs have a more or less evenly distributed caseload (and revenues), from the perspective of the users this is a less appropriate solution. The European trends therefore go in the direction of softening and/or abandoning of any forms of territorial monopolies, enabling the users to freely choose the service providers which can assure the best quality of their services. In the context of private bailiffs, it could also imply the need to give more flexibility to the users in choosing the bailiff for the enforcement of their claims, but also the need to revisit the policy of *numerus clausus.* It may be a distant future for Serbia (in particular because this is a process which is advancing slowly even in the well-developed Western European countries), but from the perspective of best policies in ensuring effective enforcement and the need to move towards full compliance with the human rights standards regarding access to fast, affordable and effective legal protection, these are the options that would be worth discussing.

3. THE INTERPLAY BETWEEN THE PUBLIC AND PRIVATE ENFORCEMENT STRUCTURES

The intention of the DEAS was not to replace and dismantle the previously existing enforcement structures, but to introduce the new species of enforcement officers alongside with the currently available ones. So, although the introduction of private bailiffs was

announced as the most important innovation of the new draft law, the drafters of the new law emphasised that the 'old' system of court enforcement will not be abolished. Instead, a 'parallel system' of carrying out enforcement by courts and by private bailiffs will be established.[103]

The division of labour between the public structure (courts) and the private structure (private bailiffs)[104] is defined in Art. 2 para 2 of the DEAS, according to which ordering enforcement is in the exclusive jurisdiction of the court, whereas carrying out enforcement is within the competence of both courts and the (private) enforcement officers.

There are a very few exceptions to this scheme. So, e.g. the courts have 'sole jurisdiction for carrying out the enforcement of decisions concerning family relations and enforcement with the aim of reinstating employees' (Art. 3 para 2).

In all other matters, the choice between the court and the private bailiff is given to the enforcement creditor, which is obliged to specify the method of enforcement (i.e. 'public' or 'private') in the motion to enforce (Art. 35 para 6). The specification of the used enforcement structure is also among the mandatory points in the enforcement ruling, at least when the enforcement by a private bailiff is being requested (Art. 37 para 3).

The system of competition between public enforcement structures (the court) and the private enforcement structures (the enforcement officers) is not unique. Such 'mixed' enforcement systems[105] exist in some other member states in the Council of Europe, partly as a result of history (e.g. in Belgium, France, Greece, Spain, Ireland), partly in the recent reforms (e.g. in Bulgaria).

The 'mixed' system has its advantages – it can combine the advantages of both public and private system.[106] In some states, the public and private enforcement agents have a clearly delineated competences, usually divided according to the nature of debt to be recovered. However, there are also systems which, like the Serbian one, use both private and public structures for the same types of cases. This is mostly motivated by the wish to test the

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103 See Spasić, Slobodan, *Pregled novina u Zakonu o izvršenju i obezbeđenju,* http://www.mpravde.gov.rs/cr/news/vesti/zakon-o-izvrsenju.html (December 2010).

104 More on efnrocement structures see in Hess, Burkhart, 'Different Enforcement Structures', in: van Rhee/Uzelac, *Enforcement and Enforceability,* cit., 41-61.

105 The notion of 'mixed' status of enforcement agents is defined as ' the situation in member states in which enforcement agents with a public status co-exist with others with a private status.' See *Enforcement of Court Decisions in Europe,* cit., 25.

106 Ibid. at 26.

effectiveness of the new structures, and the possibility to, if needed, revert easily to the previous regime should the new one prove to be ineffective. In some cases, the coexistence of the public and private structures is the result of a transition period that aims to ensure a smooth change from one system to another. One may also plan to maintain two parallel systems in the longer run, e.g. to secure an even share of the caseload and relieve partly the public sector, or to stimulate better services by encouraging the 'competition' between the public and private enforcement structures.

In any case, the decision of the Serbian drafters to opt for a 'mixed' system can be legitimised by a number of comparative examples. No system of enforcement can be in advance described as effective or ineffective. Ultimately, the effectiveness of the system depends on the success in shaping a well-designed and balanced normative framework, as well as in the prospects for its successful implementation. The devil is often in the details, and therefore one should evaluate and comment the concrete solutions of the DEAS.

The first individual comment that may be made is related to the need to specify the requested enforcement structure in the motion to enforce. The need to avoid duplication and simultaneous engagement of both types of structures in the same case is perfectly understandable.[107] But, the overlapping can be avoided by other means. If the users (enforcement creditors) have the right to choose the structures, methods and means of enforcement, this is more effectively realised if they are not forced to apply to the court for the re-issuance of the enforcement order each time when they wish to amend any of these. Therefore, we would suggest to consider reducing the mandatory content of both motions and orders, and introduction of the rules which would enable their reusing and further circulation.

Analysing the architecture of the DEAS in more detail, it may come as a surprise that the draft – with the exception of the already cited provisions – does not pay much attention to the interplay between the 'public' and 'private' systems and harmonisation of their approach to enforcement. On the contrary, the new set of rules applicable to the private bailiffs is simply inserted among the other provisions of the law, whereas the rules for 'court enforcement' remained by and large unchanged. It may be consistent with the intention to offer parallel tracks of two concurrent schemes, the 'old' one and the 'new' one, but may also bring along some difficulties, caused by the essential differences in the logic and functioning of both schemes.

Starting with the subjects of both schemes, it has to be noted that the 'public' scheme of court enforcement roots on the collaboration of two bodies, the court (i.e. the professional

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107 See Art. 4 para 3: 'An enforcement officer and a court shall not simultaneously carry out enforcement based on the same enforcement ruling'.

judge) and the (public) enforcement agents. The duty of the enforcement judges is dual: they should not only order enforcement, but they also have to carry out enforcement themselves, assisted by the public enforcement officers. Thus, in Serbia – as in some other post-Yugoslav countries (as well as in some other, like Spain), the 'enforcement agent' in the sense of the CoE Recommendation on enforcement is effectively the judge, and not any other public employee.

The parallelism between 'public' and 'private' bailiffs under the DEAS is therefore flawed. This is best visible from the definitions of 'court enforcement officer' (*sudski izvršitelj*) and the 'enforcement officer' (*izvršitelj*). The former is defined as an ancillary factor, as the helper who mechanically assists the real enforcement agent – the enforcement judge;[108] the latter is defined as an enforcement agent in his or her full right.[109] While the status of private bailiffs ('enforcement officers') is exhaustively described in the DEAS, there is virtually nothing about the status of the public bailiffs ('court enforcement officers'). The private bailiffs need to have special legal knowledge and experience (which may surpass even the requirements for judicial offices), while the requirements for public bailiffs are non-specified (however, it is supposed that they hardly surpass the high school degree).

Yet, not only that the terminology used for public and private bailiffs is misleadingly similar (*sudski izvršitelj i izvršitelj),* but also the law itself contains at least 10-15 provisions where the same authorities in the enforcement proceedings is attributed to both of them.[110]

This imperfect parallelism may create a significant misbalance in the mutual relations of enforcement judges, court enforcement officers and private enforcement officers. Obviously, if 'public' and 'private' bailiffs are equalised in powers, it can happen either as a lowest common denominator (which is, in the case of public bailiffs, an underestimation of their potential for initiative and autonomy), or as a system that surpasses the point of individual competences (in the case of public bailiffs). In either of these cases, this is a waste of resources.

The Serbian DEAS is closer to the 'lowest common denominator' system. In other words, it seems that, in spite of the high legal and professional skills of the future private bailiffs, they will still not be empowered (just like their 'public' siblings) to take in their hands all or most

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108 See Art. 11 para 1(7), defining the 'court enforcement agent' as 'a court employee who directly undertakes specific enforcement or security actions as ordered or instructed by a judge.'

109 See Art. 11 para 1(8), defining the 'enforcement agent' as 'an individual appointed by the Minister of Justice to carry out, in an official capacity, enforcement in accordance with enforcement rulings and to discharge other powers vested in him or her by this Law'.

110 See e.g. Art. 72 para 1 and 3; Art. 74 para 5; Art. 88 para 4 etc.

of the essential decisions and actions in the enforcement proceedings. Just like in the past, the court intervention will be possible or even necessary in many situations from the commencement to the end of the enforcement proceedings. This might significantly reduce the planned increase in effectiveness of the new system. Optimally, if the highly qualified enforcement officers are available, the court intervention in the enforcement process should be marginal or even reduced to zero. This seems not to be the case with the DEAS – it is much closer to the hybrid system where intensive involvement of both judges and private bailiffs is needed. Such a system has already showed its weaknesses e.g. in Slovenia.

The double function of the enforcement judges can also be the cause of problems. Instead of two or three partly conflicting roles, they now have four or five. They are ordering enforcement (issuing enforcement rulings); they are carrying out enforcement of their own rulings; they are instructing and supervising the court bailiffs (who are their subordinates); they are supervising actions and decisions of the private bailiffs (who are, at least by status, their peers); they are deciding objections and legal remedies against, inter alia, decisions of the enforcement judges.

Due to that, it can be predicted that the introduction of the private bailiffs will not decisively reduce the involvement of courts and judges in the enforcement process, thereby reducing the potential that it might otherwise have on increasing the effectiveness of the enforcement proceedings. In addition, perplexing manifold powers and duties of particular actors in the system may cause a certain level of confusion.

V. CONCLUSIONS: TO WHICH EXTENT CAN THE DEAS REMEDY THE HUMAN RIGHTS VIOLATIONS?

A. ISSUES COVERED BY THE DRAFT ENFORCEMENT ACT

In conclusion, it may be asked whether and to which extent the DEAS has covered the points suggested by the Council of Europe human rights standard. They are, on the positive side, defined in the Recommendation 2003(17) – *see supra* at II.B. On the negative side, they are defined by the case-law of the European Court of Human Rights – *see supra* at III (especially III.D).

The DEAS has certainly attempted a major step forward in establishing a legal framework that would foster efficiency and effectiveness of the enforcement proceedings. The drafted legal framework is sufficiently detailed, in some areas even excessively detailed. The law also continues to cover a significantly broader area than enforcement proper (security, uncontested debt, payment orders, delivery etc. are also covered) and regulates both procedural and organisational issues. This makes the overview of the essential rules and the use of the new act a bit more difficult. So far it is not possible to estimate precisely to which extent the enforcement procedures envisaged by the new act will be easy to administer. The

act is still by and large a combination of the 'old' court-based enforcement system, and the 'new' system of private enforcement agents, and – as a number of provisions are shared between both systems – it remains to be clarified how this mixture is going to work in practice. The process of legislative reforms is going at a considerable speed, which is perhaps a reason why little systematic pre-legislative impact assessment is done, and why no comprehensive studies accompanied by indicators and benchmarks are compiled (at least to our best knowledge). Thus, in spite of detailness, the transparency, foreseeability and efficiency of the new enforcement scheme would still need to be tested. Yet, all in all we may still cautiously conclude that the DEAS is an improvement in the process of establishing a clear and effective legal framework.

Starting from the assumption that the interests of the enforcement creditors were not sufficiently protected, the DEAS emphasises more strongly the obligations of the enforcement debtors to disclose their income and assets. The tools for prevention of procedural misuses are strengthened, and the options for postponements of the enforcement process are very significantly reduced, whereby the current rules on deadlines in the decisions-making process are so strict that it is quite likely that they will not be followed in the practice. Assuming that the whole process in practice suffers from the pro-debtor oriented bias, the balance of interests is shifted in the right direction (on paper it now seems to have a slight bias towards the interests of enforcement creditors, which might be compensated by the reflexes of the old attitudes in the conduct of enforcement). Some essential assets and income of the debtors continues to be protected (see Art. 82; Art. 115; Arts. 147-149 etc.).

The rules on service of documents are also amended, with a view to increase their effectiveness. Whilst there are some doubts whether the changes are most appropriate (see *supra* at IV.B.5), the drafters were obviously trying to cover this point as well.

The preceding Serbian enforcement legislation was very generous in providing the right to review the decisions made during the enforcement process. The excessive appeal options in the enforcement proceedings were a source of many delays. Therefore, the significant limitation of appeal options seems to be appropriate. The remaining means of reviewing the decisions (objection) may be sufficient, and in some ways may still represent more than what is imminently needed (see *supra* at IV.B.7).

Finally, the general issue of effectiveness was in the new draft addressed by the novelty that was introduced as the 'most important new element', the establishment of the service of enforcement officers as a new liberal profession. This new feature of the Serbian enforcement system is indeed most significant, as it changes the whole landscape of available enforcement mechanisms. It is not disputable that private bailiffs may contribute to the increase in efficiency of the enforcement process. They are quite well accepted and effective component of the enforcement system of many countries. However, the experiences from the region have showed that the introduction of private bailiffs is not by

itself a guarantee for the better and faster enforcement. For that, a well-balanced system of powers and incentives has to be provided. In particular, such bailiffs need to have a considerable autonomy and independence. Their qualifications and professional skills should enable them to assume independently most of the functions that are in other systems exercised by others (in particular by judges). At the same time, they should be adequately and appropriately controlled (both internally and by public authorities), but in a way that does not have an adverse effect on the speed and efficiency of enforcement. The incentives for effectiveness of enforcement should also be provided, essentially in two ways: by opening a space for competition, and by providing a well-designed system of fees which, while paying attention to social elements, also stimulate effective enforcement. In all of these elements, it seems that the Serbian DEAS is still at the beginning. The model adopted by the law roots on old schemes of a protected, monopolised profession that enjoys privileges granted by the state, but with little space for functioning of the market, underdeveloped system of user protection, and still unknown model of fees. Insofar, it is still early to predict whether the introduction of private bailiffs would bring gains in respect to effectiveness of enforcement. In any case, we would suggest further development of legislation, regulation and practices to cover the points raised in this expertise.

B. ISSUES NOT COVERED BY THE DRAFT ENFORCEMENT ACT

The enactment of new legislation may be a powerful tool for boosting effectiveness of legal protections. It is, however, not an omnipotent one. In fact, the Serbian cases before the Strasbourg court often did not relate to the lack of legislative means for effective enforcement, but to the reluctance and unwillingness of the enforcement organs to proceed swiftly and effectively with the enforcement process. In several cases, the non-enforcement was also caused by non-observance of the legislative provisions on enforcement. The courts often had powers that they did not use, e.g. the power to proceed *ex officio* with other means of enforcement. Therefore, it cannot be expected that the sheer change in legislation will be a guarantee for a decisive change in the effectiveness of enforcement, as the new obligations and powers of the organs of enforcement may again be disregarded.

The analysis of the ECtHR case-law regarding Serbian non-enforcement cases also showed that several types of cases finding human rights violations may be distinguished. A rather big and important group of cases, described *supra* as ‘post-war and transition cases’, consisted mainly of the cases in which the non-enforcement was the result of reluctance to implement the enforcement titles in cases that are either politically or financially sensitive. Specific sub-groups of these cases are the cases of enforcement against the socially-owned enterprise (especially numerous regarding Serbia) and the ‘old savings’ cases (spread across the region). The DEAS, while targeting the general increase in efficiency, does not contain any specific preventive tools for speeding the enforcement in such cases. On the contrary, it seems that the DEAS does not derogate a number of provisions of special laws and regulations which enable enforcement to be suspended or aborted when it deals with the companies owned

by the State (or the companies in the process of privatization, which are also under the strong patronage of the State).

In all countries of Western Balkans, the cases against the State or the State-owned or State-controlled agencies or companies, make a large share of all judicial cases (in some courts they were assessed at 25% of all pending cases). In some Eastern European countries such as Russia, the problem of non-enforcement of decisions against the State was identified as one of the main systemic problems of the judicial system.[111] The State should also be a leader in compliance with the judicial orders, showing by its own example the wish to have the enforcement proceed effectively. Without solving this problem, the integrity and effectiveness of the whole enforcement process may be significantly compromised.

Another larger group of non-enforcement cases concerned enforcement of decisions in family matters (in particular the access orders which should ensure the right to contacts between a parent and a child; orders to deliver children to their custodians; enforcement in cases of child abduction by a parent etc.). In the survey of novelties in the DEAS, the drafters emphasised that 'the proceedings in family matters were completely changed'. However, the changes in this area may be assessed as the least significant. Above all, the family law field is the one of the two areas which will be excluded from the jurisdiction of private bailiffs, where the courts will continue to have exclusive jurisdiction (Art. 3 para 2). The methods of enforcement in child-related cases have not changed significantly – it continues to be the court enforcement, whereby compliance with the orders should be secured by coercive measures (forceful removal of the child, fines, imprisonment). The involvement of guardianship authorities (social workers) that may engage a psychologist, is also provided, but solely in order to submit an opinion on the most suitable means of enforcement. Although the expert support is welcome in the process (but depends on the resources and availability), it does not seem that the new rules depart much from the previous regulation. In particular, they rely solely on the coercive means which, while sometimes necessary, do not resolve a bulk of the problem, in particular the problems caused by the negative influence of the adversarial environment and the pressure exercised by parents on their children. Recent studies show that the other methods, like mandatory counselling, and mediation with parents and children, prove to be more effective for ensuring cooperation of all parties in the proceedings, including the children.[112]

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111 See CEPEJ, *Examination of problems related to the execution of decisions by national civil courts against the state and its entities in the Russian Federation*, CEPEJ(2005)8; CEPEJ, *Non-enforcement of court decisions against the state and its entities in the Russian Federation: remaining problems and solutions required*, CEPEJ (2006)11.

112 See Rešetar, Branka, *Pravna zaštita prava na susrete i druženje,* Zagreb, 2009 (doctoral dissertation).

Another issue that is not extensively covered by the DEAS are the fees and expenses of the enforcement proceedings (see Art. 34), in particular with respect to the new service of public bailiffs. The schedule of fees (private bailiffs' tariff) is left for the implementing regulations enacted by the Minister of Justice (Art. 330), which has not been a part of the reform package at this moment.

Whilst it may be legitimate to leave the details of fees and tariffs for later regarding some other matters, in the context of enforcement these are the essential elements, both for the effectiveness and for the accessibility of the enforcement proceedings. In particular, it is important for the services of private bailiffs, be it enforcement or be it the service of documents. Only with the appropriate pricing policy, which would combine the incentives for successful enforcement with the fees accessible to the users could the new profession of private bailiffs develop its full potential for increasing effectiveness of the enforcement. The level of fees and other expenses in the enforcement proceedings is, as elaborated *supra,* also relevant from the human rights perspective, as it has an impact to the users access to justice. Therefore, the fees should not be excessive, and the right to legal aid and assistance should also be provided if needed. The appropriate bonuses in case of success in the enforcement of creditors claims (payable from the sums recovered) may, on the other hand, be provided as a useful stimulus for effective work. We consider that the accessibility of the fees of private enforcement agents should be secured no matter whether the citizens have a parallel and less expensive system of court enforcement on their disposal. The past experience has demonstrated that the effectiveness of court enforcement cannot be guaranteed, at least not in some types of cases, and therefore the users need to have a free choice between the public and private enforcement system irrespective of their financial status. The different system would lead to establishment of two tracks of enforcement, the effective and expensive ‘fast-track’ private enforcement for the richer part of the population, and the inexpensive, but slow and less effective ‘regular’ track for the poor. Such a system would again be problematic from the perspective of anti-discrimination rules and the human right to equality before the law.

C. SUMMARY OF THE FINDINGS

The DEAS is certainly a step forward in the long way to establishing a fair and effective enforcement system. In spite of some internal criticisms, we consider that the eventual deficiencies of the draft proposal are less caused by the solutions that go too far, and more by the solutions that do not go far enough. The DEAS is still based largely on the past models, and the new layer of reform solutions has only been pasted as another layer on the old surface. The draft has to be praised for the attempts to depart from the accustomed practice of court-based enforcement; the problem is, however, that this has not been done fully and consequently. In the light of the case-law of the European Court of Human Rights, the core of the problems in Serbian cases was non-enforcement due to a mix of complex procedures, excessive formalism, repetitive procedural structures, over-abundance of legal remedies, reluctance of the competent

bodies to carry out enforcement effectively, the privileged position of the State and its interests, and the intensive judicial involvement which led to the concept of enforcement as a duplication of the trial procedures and practices ('re-adjudicative understanding of enforcement'). While some of the noted issues have been properly addressed in the DEAS, the others are still present. Above all, the whole structure of the enforcement process, in spite of the possible introduction of the private enforcement officers, still seems to be very much court-centred. The court is still the body that both decides on the enforcement, in most of cases determines the methods of enforcement, and also carries out enforcement in concurrence with the private bailiffs. This fusion of authorities and duties could continue to produce problems, even more because the sketched institutional framework for private enforcement officers has not been fully developed. To the extent that it has been developed, it may be difficult to reconcile with the overarching formal logic of the DEAS. The probability of difficulties is amplified because the draft has construed the private bailiffs in a way which is largely similar to the office of the notaries public – they are conceived as an over-protected, territorially limited and monopolized private profession. Its motives for effectiveness and business-like behaviour are much reduced, just as its autonomy, internal ethical and moral rules and responsibility to the public. We therefore hope that, in order to secure full compatibility of the DEAS with the standards set in the judgments of the ECtHR, the reforms will be continued by further reduction of the elements of re-adjudication in the enforcement process, by limiting the court involvement to the controlling role for the most pressing cases, by strengthening the position of the private bailiffs (who should be entrusted with powers to make decisions previously taken by judges in the enforcement process, and with broader territorial jurisdiction), and by imposing adequate mechanisms of bailiffs' liability for non-enforcement and slow enforcement, accompanied by proper incentives for the successful enforcement. At the same time, there should be more flexibility in the enforcement process, which would include elements of mediation between the interests of the creditors and debtors, as well as between them and third persons participating in the process (e.g. children in family cases). Rules on service of process and delivery of documents could profit in a better way from the introduction of a new private profession. But, the regulation of delivery could be done by a separate piece of legislation, just as it might be more appropriate to extract and separately regulate some large and important areas that are not embraced in the notion of enforcement (i.e. security of claims, payment orders/collection of uncontested debt, organisational rules of liberal profession). The State has to be consistently treated equally as all other enforcement debtors, and – if differences need to exist – they should only consist in more diligent self-enforcement of the due claims.

But, all in all, the reforms are proceeding, and they should be continued, based on the systematic research and comparative experiences, developed benchmarks and indicators and the political will to finally succeed in establishment of a well-balanced, fair and effective enforcement system.

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