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**TRANSFER OF ENFORCEMENT TO  
THE COMPETENCE OF PUBLIC  
ENFORCEMENT OFFICERS**

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## INTRODUCTION OF THE INSTITUTE OF PUBLIC ENFORCEMENT OFFICERS

The provisions of the law relating to enforcement officers began to apply after one year from the date of entry into force of the Law on Enforcement and Security Interest ("Official Gazette of RS", No. 31/2011), in May 2012.

The Law on Enforcement and Security Interest stipulates that the public enforcement officer exercises the public powers entrusted to him/her by this or another law.

The enactment of the Law on Enforcement and Security Interest was explained by inappropriate normative solutions for fast and efficient implementation of the enforcement and security procedure contained in the Law on Enforcement Procedure from 2004, which preceded this Law. Namely, practice has shown that enforcement proceedings lasted unjustifiably long, even several years. Bearing in mind that one of the biggest problems in the enforcement proceedings was conducting the enforcement, the introduction of the enforcement officers into the legal system was justified by the need to take enforcement action in order to implement the decision on enforcement issued by the court. The explanation for passing this Law was that the parties could not effectively execute that decision after conducting long-term lawsuits after receiving a final court verdict, which violated the rights of the parties and created a state of legal uncertainty, which is a big problem for attracting investments in Serbia.

One of the reasons for the introduction of enforcement officers was the large number of constitutional complaints, as well as lawsuits to the European Court of Human Rights in Strasbourg, for violation of the right to a trial within a reasonable time prescribed in Article 6 of the European Convention on Human Rights. Namely, constitutional complaints and lawsuits were filed because the enforcement proceedings took a very long time.

The introduction of the enforcement officer - a new institute in the legal system was presented as necessary for more efficient collection of debts for communal services and relieving the courts in Serbia. The adoption of the Law was not accompanied by a wide public debate and the opinion of the expert public. Many representatives of the law profession and distinguished jurists considered that the introduction of the institute of enforcement officers was unconstitutional because it was not in accordance with the basic Constitutional principle of division of power into judicial, executive and legislative power and that it was unacceptable to interfere in judicial and executive power, i.e. deprivation of part of the jurisdiction and entrusting the enforcement officers.

The Anti-Corruption Council made its last report on the work of public enforcement officers in 2014 (Supplement to the Second Report on Judicial Reform) in which it made serious objections to the work of enforcement officers, especially in relation to performing work in which enormous systemic corruption was possible (immovable property as an instrument of enforcement), but also in the selection of enforcement officers by creditors of state institutions and economic entities that did not respect the procedure for public procurement, nor the natural order of enforcement officers in the assignment of cases.

## TRANSFER OF PUBLIC AUTHORIZATIONS TO ENFORCEMENT OFFICERS

In this report, the Council will try to explain its view of the transfer of public powers to public enforcement officers, i.e. tasks that were until then in the jurisdiction of the court, without entering into the opinions of those who believe that the law disturbs the clear division of power. The Council considers it very important to answer whether this transfer was carried out in accordance with the guarantees of Article 6 of the Convention guaranteeing citizens the right to a fair trial in public proceedings before an independent and impartial tribunal established by law.

1. One of the basic questions is whether public enforcement officers, to whom executions have been transferred, i.e. certain public authorities, can be considered, according to the manner of election and activities, an independent and impartial body for performing activities in which civil rights are decided. This question must be answered by applying the Convention and the standards adopted in practice in the Strasbourg court.

2. The public enforcement officer is not a body that can be considered an independent and impartial body, because it does not meet the standards of independence given in Article 6 of the Convention and in practice in the Strasbourg court. Public enforcement officers meet only one condition of independence, and that is that they are established by law. Therefore, it is true that public enforcement officers are established by law, however, when enforcement officers are not judges and perform the function of judges who make decisions on civil rights in enforcement, then they must be selected according to the principles relating to judges, which are principles guaranteeing the full independence and impartiality of judges. The independence and impartiality of the bodies is determined according to the provisions of the Convention, but also according to the standards from the Strasbourg court, and that is that independence arises from the manner of electing the decision-makers, from the duration of their mandate, that in their work there are guarantees against external influences and the impression of independence given

by the decision-making body. Public enforcement officers are elected by the executive power, they are accountable for their work to the Minister of Justice, they are accountable to the Minister for disciplinary offenses, the Ministry decides on their education, it dismisses them from performing these tasks. Therefore, according to the manner of election and accountability, public enforcement officers are not an independent, impartial and independent body, nor do they leave the impression of independence, nor are they a body for which there is a guarantee that the executive power will not influence their work and that there will be no corruption in their work. On the contrary, from the petitions received by the Council, whether oral or written, as well as from the cases addressed in the daily press, there is not a day that serious objections to the work of enforcement officers do not appear, especially objections to corruption resulting from their work in the enforcement of immovable property as an instrument of enforcement.

3. The question of independence is not the only question that arises when deciding whether enforcement officers can decide on civil rights independently, and these other questions on which it depends whether enforcement officers can make decisions on civil rights independently arise from Article 6 of the Convention, i.e. whether the law has transferred the competence in which the enforcement officers decide on civil or criminal rights; the scope of public powers delegated to public enforcement officers who decide independently in all delegated competencies (although they are not elected or organized as an independent and impartial tribunal); whether public enforcement officers have shown in practice, in the period from the application of the law in 2012 until today, that they are professional and capable of performing the work of enforcement officers in accordance with the laws; whether they give the impression of independence and impartiality in the performance of work without any or anyone's influence; whether they perform the work in public independently or hide themselves behind several of their personal bodyguards or other persons.

## CIVIL RIGHTS

a. In terms of Article 6 of the Convention, everyone has the right to have his or her civil rights and obligations decided by an independent and impartial tribunal constituted by law. This article guarantees the right to fair and public decision-making, which is very widely interpreted as a fundamental basis for the functioning of democracy and the rule of law in a society. There is no room for restrictive interpretation in the interpretation of Article 6 of the Convention (*Delcourt v. Belgium*). The breadth of interpretation is best seen from the court practice, because when interpreting what a civil right is, the position is that it is an autonomous right, which cannot be interpreted by referring to the laws of the domestic state (our domestic Law on Enforcement and Security Interest) because

determining what a civil right is starts only from the character of that right and it is considered that all rights and obligations of private persons fall within the scope of civil law, and these are contractual, commercial, tort, family, labor and any other property right. From the practice of the court in Strasbourg, it can be concluded that civil rights do not include only taxes, immigration issues, military service, the right to report to journalists and the right to public office. Therefore, enforcement rights are property rights that are always considered civil rights, which enjoy the guarantees of Article 6 of the Convention, i.e. the right to decide by an independent and impartial tribunal established by law.

b. The Court in Strasbourg took the view (*Albert I Le Compte v. Belgium*) that the guarantees in Article 6 of the Convention could not be interpreted as an obligation to decide on rights at all stages of the proceedings before an independent tribunal. The court in Strasbourg considers that a trial before an independent court is provided if, after a decision by another body (not a court), a stage of proceedings before a court is provided, this actually refers to situations when an appeal against the decisions of a non-judicial body is decided by a judicial body that includes the previous procedure. This means that the court has taken the position that the guarantees under Article 6 of the Convention do not relate to the court's obligation to decide on rights and obligations at all stages of the proceedings (it may have an assistant who does not work in court), but to consider the right to trial before an independent court if, after the decision of the non-judicial body, which technically assists the court, the trial phase before the court takes place, i.e. while assessing the rule of law, the procedure as a whole is taken into account (*Stran Stran v. Greece*). This position of the court in Strasbourg corresponds to our system, which was originally designed so that public enforcement officers are only technical assistance to the court, and when they make decisions on some civil rights, after the phase of their decision-making there comes the phase in which the court decides, because without that phase, the guarantee provided for in Article 6 of the Convention could not be considered as fulfilled, i.e. that the proceedings have been fully reviewed by a court.

c. According to the above provisions of the Convention and court practice, it follows that relations in enforcement proceedings fall under civil rights and that they enjoy the guarantees of Article 6 of the Convention, which means that everyone has the right to have their rights and obligations under civil law decided by an independent and impartial court established by law. The case law of the Strasbourg court provided an answer to the question whether the court must conduct the entire procedure independently or that other subsidiary bodies, which are not judicial bodies, may participate in some phases, by taking the position that the trial is considered to have been held before an independent court either if the court decides at the stage of the procedure after the decision is made by a body that does not belong to a judicial institution.

d. Domestic law regulates the transfer of judicial powers in execution to another non-judicial body, however, it does not regulate that the condition must be met when deciding; that there is always a stage of proceedings in which an independent court judges; that this

is a phase after decision by another non-judicial body and only if there is such a phase then it can be concluded that it was judged by an independent and impartial court. Fulfillment of this condition in our Law on Enforcement and Security Interest is very problematic, because when looking at the provisions on the jurisdiction of public enforcement officers, then it can be concluded that public enforcement officers are transferred exclusive competencies in which they make decisions without a court and without an effective remedy in terms of Article 13 of the Convention. From the text of the law as a whole, there is a tendency that in the enforcement proceedings, the debtor, as well as third parties, are given as few rights to legal remedies as possible in order to perform enforcement in a short time and end only with final decisions of public enforcement officers, i.e. public enforcement officers decide on many civil rights without the participation of the court. Limitation of legal remedies arises from Article 24 of the Law which regulates that the writ of the public enforcement officer can be challenged only if it is not provided that an objection or appeal is not allowed, such regulation is very problematic when one considers that the conclusion decides on many property rights, it even terminates the enforcement proceedings, which is the final decision on all property rights. Therefore, it clearly follows from the provision on legal remedies that enforcement has been removed from the jurisdiction and that this causes great dissatisfaction of citizens, because in this way they are deprived of even the right to an effective remedy under Article 13 of the Convention. Namely, when a legal remedy is decided by the body that made the decision that is challenged by the legal remedy, such a legal remedy cannot be considered effective.

## SCOPE OF TRANSFERRED AUTHORIZATIONS

a. The way in which the jurisdiction of public enforcement officers in deciding on the basis of credible documents is regulated does not give the impression of the stages of the proceedings in which the public enforcement officer decided as technical assistance to the court, nor the impression that the proceedings took place before an independent and impartial tribunal. On the contrary, the Law on Enforcement and Security Interest gives the impression that there is no participation of the court in deciding in these proceedings. This Law does not even clearly define competencies, because it is not clear what “related activities” are, which leaves the impression that the enforcement officers themselves determine what their competence is, that is, they decide on the scope of their competence without legally determining the elements on the basis of which it is a related activity.

b. Article 4 of the Law first regulates the exclusive jurisdiction of the court only for the joint sale of immovable property and movables, enforcement of enforceable

documents related to family relationships and reinstatement of an employee. Only for that is the exclusive jurisdiction of the court provided. Public enforcement officers have exclusive jurisdiction for the enforcement of other enforceable documents and for the enforcement of all instruments of enforcement, no instrument of enforcement is exempted, which means on immovable property (only the jurisdiction of the court is excluded for enforcement when it comes to joint sale of immovable property and movables). When the term “exclusive jurisdiction” is used, it follows that the enforcement officers themselves, completely, to the end, decide on the enforcement without any role of the court in any of the phases of the procedure. Such a determination creates the perception that the rights and obligations from civil rights, of which there are many in enforcement, are decided only by the enforcement officers and that there is no decision-making by an independent and impartial court formed on the basis of law. The Council considers that this perception, which derives from Article 4 of the Law that courts do not participate in enforcement proceedings, where there is exclusive jurisdiction of the enforcement officers, is not corrected by other provisions of the law.

c. The whole enforcement procedure gives the impression that the enforcement is completely transferred from the jurisdiction of the court to the enforcement officers, who have become powerful people who decide on the entire enforcement procedure, even decide on legal remedies (Article 24 of the Law), which means that the debtors are deprived of an effective remedy within the meaning of Article 13 of the Convention, because the court that alone can provide effective protection to the participants in the enforcement proceedings is bypassed. This causes great dissatisfaction because the rights are not decided by an independent and impartial court organized on the basis of law, but by the enforcement officers, who are the executive body fully connected to the Ministry of Justice, which trains, evaluates, elects, punishes and dismisses them. Such regulation creates helplessness and the impression of human rights violations under Article 6 of the Convention, the right to a fair trial, which causes very serious problems, even scandals, but also the possibility of violence in enforcement proceedings or death of people dissatisfied with their property sold for nothing, which they acquired all their lives. The Council considers that the word “exclusive” jurisdiction of public enforcement officers must be removed from the law and that in all situations in which a public enforcement officer makes decisions on civil or property rights of the parties, a legal remedy should be provided for, which is decided by the court in the form of a court decision in accordance with the provisions of the LCP (Law on Civil Procedure), without any decision by the public enforcement officer, nor the participation of the enforcement officer in the legal remedy procedure. If the purpose of the provisions of the law in relation to deciding on complaints and appeals was only to create the impression that the court decides on enforcement at some stage of the proceedings, this is not good, because as it is done, only the enforcement officer decides in enforcement proceedings, even on legal remedy, and this results in that the debtor is not entitled to an effective legal remedy in terms of Article 13 of the Convention.



d. Many institutes are regulated in the Law enforced by enforcement officers without a foreseen phase in which, after the decision of public enforcement officers, an independent court decides. The Council will not list all institutes in which the enforcement officer finally decides without the phase of the procedure in which the court decides, but will address the rights of third parties and enforcement on immovable property because the attitude towards enforcement to third parties and enforcement on immovable property have caused the greatest dissatisfaction of citizens.

## 1. THIRD PARTY RIGHTS

Rights of third parties, regulated in Article 108 of the Law, which stipulates that third parties have the right to object if they believe that they have some rights over the subject of enforcement, which prevents the enforcement (these are always mostly civil or real rights). The law stipulates that the objection of third parties is decided by the enforcement officers who made the decision on enforcement which is the subject of the objection. Article 6 of the Convention explicitly regulates that every person has the right to have his or her civil rights decided fairly and publicly, by an independent and impartial tribunal, but also regulates that anyone dissatisfied with the decision has the right to an effective remedy. Article 108 of the Law does not apply any of the above provisions of the Convention.

A big problem arises with the question of how third parties can find out about the enforcement of their belongings, because the delivery on notice of enforcement regulated by Article 36 makes it impossible to find out about the enforcement procedure, especially when renting out apartments where the enforcement officers, for the obligations of the tenants, collect debts from the funds obtained from the sale of third party property, which are located in the apartment where the debtor lives, without entering into questions of the debtor's ownership of those things or family relations. This problem affects the rights of third parties, because their right to how to react effectively and who is to decide on their objection to such enforcement depends on the possibility of finding out about the enforcement.

According to the provisions of Article 108 of the Law, third party objections are decided by enforcement officers, although these are objections in relation to civil rights that public enforcement officers should not decide on, because these are rights that must be decided only by an independent and impartial court that has the right to evaluate the submitted evidence and to make a legally valid decision on the legal remedy on the basis of them. Namely, the objection must be decided only by the court, because it is a phase of the procedure that comes after the actions of the public enforcement officer and it

must be within the jurisdiction of the court, and not the public enforcement officer. A public enforcement officer cannot decide on a remedy, because if the remedy is decided by the same body that made the decision, then such a remedy is not effective in terms of Article 13 of the Convention. Third parties must have the right to an effective remedy, which is decided only by an independent and impartial court, and not by the enforcement officer and by urgent procedure. It is true that a third party, in terms of Article 24, paragraph 4 of the Law, against the decision by which the enforcement officer rejected the third party's objection, has the right to an objection decided by the court as well as a lawsuit for unauthorized enforcement, but it is a long court procedure that is completely unnecessary and can be avoided if the court decides on the objection to the decision on enforcement immediately, and not the enforcement officer decides first, so if he/she rejects the objection and a third party appeals the decision, only then does the court decide on the objection. Given the above-mentioned objection procedure, which gives the impression that only the public enforcement officer decides on the objection, it follows not only that there is no effective remedy for third parties, but also that due to the lack of suspensive effect, enforcement will end without court participation and third parties lose their property rights over the things that are the subject of enforcement by the decisions of the enforcement officers.

## **2. INSTRUMENTS OF ENFORCEMENT ON IMMOVABLE PROPERTY**

The largest number of petitions refers to the instruments of enforcement, namely to the following issues: the authority of the enforcement officer to change the instruments of enforcement; enforcement on mortgage immovable property; immovable property appraisals and sales; proportionality between debt and immovable property as an instrument of enforcement.

### **A. AUTHORIZATION OF THE ENFORCEMENT OFFICER TO CHANGE THE INSTRUMENT OF ENFORCEMENT**

The provisions of Article 58 of the Law show the broad powers of public enforcement officers who, at the proposal of creditors and debtors, may change the instruments and subject of execution. The Council considers that the proposal of the enforcement officers to give the enforcement officers the right to independently, ex officio, determine the means of execution cannot be accepted, because the proposal for

the permission of enforcement and the proposal of the instruments for conducting the enforcement must remain within the competence of the parties and there is no official duty of the enforcement officer to decide on the instruments on which to carry out the enforcement, without the parties. If the enforcement officer's proposal is adopted that the enforcement officers themselves, *ex officio*, decide on changing the instruments of enforcement without the will of the parties, we come to the conclusion that the enforcement officers go beyond the initial documents that must be given by the parties, namely the enforcement creditor and enforcement debtor. It is clear from this proposal of the enforcement officers that the enforcement officers find possibilities for faster enforcement, but this cannot be done by changing the role of the enforcement officers in the procedure and giving the authority to enforcement officers that they independently, without parties, *ex officio*, determine the means of execution. *Ex officio*, the enforcement officer acts according to the initial documents of the parties and has no right to decide on changing the initial documents of the parties, because these are not his documents, but the documents of the parties that the enforcement officer has no right to change.

## **B. ENFORCEMENT ON MORTGAGE IMMOVABLE PROPERTY**

In the analysis of citizens' complaints, a great ignorance of the mortgage as an instrument of security was noticed, which is very worrying, because it is the basic institute of how claims are secured and what are the consequences when enforcement is done on security interest. First of all, it has been noticed that it is not clear to many enforcement officers that a mortgage is a real legal instrument of security, which means that securing a claim is related to real estate and not to the owner of the real estate, which is why it is not at all controversial issue what happens if a mortgage property is sold and someone else becomes the owner of the mortgage property. The real estate on which the mortgage is registered can be sold, like any other real estate, and it does not matter that the owner of the mortgage real estate changes, the mortgage is registered as a burden related to the real estate, not the owner and that burden binds all subsequent property owners. It has been noticed that there is interference of the parties in the enforcement proceedings in the way that the enforcement debtor is equated with the mortgage debtor, which is completely wrong. The enforcement creditor and the enforcement debtor are those persons who are listed in the enforceable document, the mortgage creditor and the mortgage debtor are the persons listed in the mortgage document, i.e. in the real estate registry in which the mortgage is obligatorily entered. A mortgage document is a document by which the mortgage debtor guarantees that the debtor will settle his obligation only up to the amount of the value of the mortgage real estate while the enforcement debtor is liable in the enforcement proceedings with all his funds, while the mortgage debtor is liable only up to the value of the mortgage real estate and is not liable

for the obligations of the enforcement debtor by any other instruments. Therefore, there is no dilemma whether the enforcement officers can collect the debtor's debt from all the mortgage debtor's funds, of course they cannot, the enforcement officers can only collect from the sale of the mortgage real estate (regardless of who the owner is), and if that sale is not settled by the amount of the enforcement creditor's claim, the enforcement officer collects the difference from all the debtor's funds, and not the mortgage debtor's. Because it is not known that a mortgage is a real security interest related only to the object and no other instruments, and that there is a clear distinction between the enforcement debtor and the mortgage debtor, enforcement officers completely misinterpret Article 25 of the Mortgage Law consider and propose that the mortgage debtor is liable with all his property, and not only with the real estate on which the mortgage is registered. The Council opposes such a proposal because it goes beyond the essence of securing mortgage claims as a real instrument of security interest and is transferred to some other frameworks imposed by the enforcement officers in order to satisfy the creditors' requests.

### **c. APPRAISAL OF THE IMMOVABLE PROPERTY**

The public enforcement officer may decide to appraise the immovable property on the basis of a written notice of the price obtained from the relevant organizations, institutions, or legal and natural persons with appropriate expertise. (Article 165). The Council considers that the rights of enforcement officers to assess real estate should be also taken from natural persons enable a very large amount of corruption in the deals between the enforcement officers and the natural persons who give the assessment. We suggest that the Law should be changed so that elements and criteria are given from which it will be determined that the appraisals of a natural person accepted by the enforcement officer is correct. The Council has had several cases on appraisals, but it will list only two from which it follows that enforcement officers accept those appraisals on the basis of which they can more easily sell real estate, without going into the actual or market value of real estate. In the first case, the enforcement officer had his appraisal obtained from the appraiser, while the creditor had a completely different view and appraisal of the same real estate. Namely, the cadastral parcel belonged to the enforcement debtor and the enforcement creditor, and it was sold according to different appraisals at the same time. The enforcement creditor sold his part, half of the lot as construction land, while the enforcement officer sold the other part of the lot as a fourth class field, which means that the same lot was sold at different prices and on different criteria. Although the enforcement officer was warned, he remained with the price for the fourth class of land and half of the lot was sold by the enforcement officer for four times lower price. The consequences of such behavior are inconceivable damage for the

debtor, because the debtor with the price realized by the enforcement officer could not pay his debt and the enforcement procedure was continued.

The second case concerns the appraisal and sale of an apartment for which incorrect data were given. Incorrect data on the apartment referred to the important characteristics of the apartment, first of all it is the fact that it was an uninhabitable apartment, although in the first sale it had been stated that the apartment was habitable, but in the second sale it had been stated that it was an uninhabitable apartment. The enforcement officer did not state the basis on which he determined that it was an uninhabitable apartment. If the uninhabitability is considered to be that the executive debtor lives in the apartment, it is completely wrong, because it cannot be considered as an uninhabitable apartment because it is obvious that the data on the apartment have been given only to bring down the price of the apartment. In this same case, a difference in the description of the apartment was noticed between the description and the sketch of the apartment, as well as that the apartment was marked as an apartment without central heating, although the debtor claimed to have central heating. Due to the lack of the right to an objection to be decided by the court, the debtor, in the enforcement procedure, could not put his objections to the stated inaccuracies in the written procedure, but submitted criminal charges to the prosecutor's office. While the debtor is trying to prove what kind of apartment it is about, two-room apartment of 50m<sup>2</sup> in Belgrade, for which the expert claims that it is well maintained, has been sold for a price of 2,635,000.00 dinars and to the creditor.

Enforcement officers are not interested in what kind of land it is really about, what kind of apartment it is about, nor are they interested to establish the market starting price of real estate, but they are only interested in selling the real estate at any price and to charge their costs. This is completely wrong doing of enforcement officers, because in conducting the enforcement, there are two equal parties and as much as it is important to charge in favor of the creditor, it is equally important to protect the interests of a debtor in this process, and the basis of these interests is that the sale be made at market prices and not at land classes or at lower prices due to inaccurate data on the apartment.

Precisely during the real estate appraisal, the Council addressed the Public Enforcement Officers' Chamber on May 24, 2018, asking them to inform us whether the Law on Real Estate Value Appraisers was being enforced (Official Gazette of RS, No. 108/2016). In its response of 13 June 2018, code 72 07-5648 / 2018, the Chamber informed us of the following : “Pursuant to Article 165 of the Law on Enforcement and Security Interest (Official Gazette of the RS No. 106/15, 106/16-authentic interpretation and 113/17-authentic interpretation) immovable property is appraised according to the market price on the date of appraisal, and the public enforcement officer may decide to appraise the immovable property on the basis of a written notice of the price obtained from the relevant organizations, institutions, or legal and natural persons with appropriate expertise. Having in mind the cited legal provision, we are of the opinion

that the Law on Enforcement and Security Interest does not prescribe the obligation of public enforcement officers to hire certified appraisers when appraising the value of real estate, but that they can certainly do so if the need arises in each specific case”.

There is a great possibility of corruption when the enforcement officer is authorized to accept the appraisal of an expert natural person, the biggest corruption arises from the deals between the enforcement officer and the appraiser, because there are no firm completely defined criteria and norms for determining the value of real estate, whether it is the market price that must be adjusted for the condition of the real estate (ruined, neglected or well maintained, etc.) or the price is determined freely, approximately, which most often happens.

The general impression is that the greatest possibility of corruption occurs in the appraisal and sale of real estate and that therefore the jurisdiction to enforce this instrument of enforcement should be returned to the jurisdiction of the court or the debtor must be given the right to hire a real estate appraiser and that this appraisal should be treated equally with other appraisals, as well as that the dissatisfied parties must be given the right to a legal remedy in relation to all decisions made by the enforcement officer in enforcement proceedings on real estate, which should be decided by the court and not the enforcement officer.

#### **D. PROPORTIONALITY**

The Council thinks that special attention should be paid to the principle of proportionality between the amount of the debtor's obligation and the instruments and value of the subject of enforcement. It is necessary to emphasize the importance of this principle because the absence and disrespect of proportion allows for great embezzlement, and thus corruption. The proportion should be taken into account, especially after the judgment of the European Court of Human Rights in Strasbourg in the Vaskrsic case, when the European Court of Human Rights in Strasbourg ordered Slovenia to pay 85,000 euros in compensation to Zoran Vaskrsic for selling his house for water debt of 124 euros. Vaskrsic's family house was sold after the court decided that it was the best way to repay the communal debt to the state. The European Court in Strasbourg ruled that a Slovenian court violated the European Convention on Human Rights by interfering in the “peaceful enjoyment” of its own property, but also by failing to see a “fair balance” between the general interest of the community and the fundamental rights of individuals.<sup>1</sup>

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<sup>1</sup> (Blic, April 26, 2017: “It can happen to you too, a Slovenian owed 124 euros for water, and the state took away his house”).



Given all the above, it is clear that according to the Law according to which the jurisdiction of the court was transferred to public enforcement officers, public enforcement officers are not only technical assistance to the court, but they make independent decisions on civil rights, they sell, assess real estate through natural persons, do not apply the Law on Real Estate Value Appraisers, often sell in a bad time (December 30), they decide on everything independently without the participation of the court, which gives them a great opportunity for corruption in the enforcement procedure, so the Council believes that this procedure should be returned to the jurisdiction of the court.

The law on the transfer of competencies was passed by urgent procedure, as are almost all laws that were not accompanied by an effective public expert hearing. A public debate would determine whether we are a democratic country where there is no poverty, no corruption and where the rule of law exists, or whether we are a country where almost all enforcements can be transferred to public enforcement officers with the belief that they will not use their position, regardless of how they come to it, for their own benefit and for the benefit of creditors, but will work for the benefit of all participants in the enforcement proceedings. Since all this is important in relation to the transfer of jurisdiction in deciding on civil rights from the court to public enforcement officers, and none of that has been determined, it follows that the decision to transfer jurisdiction to public enforcement officers was hasty, problematic, which has created and will create very unfavorable impression of the work of enforcement officers who, in their work, showed a lot of incompetence and problems that would have not existed if the job was done in court.

### 3. TRANSPARENCY OF THE PROCEEDINGS

From the petitions of non-governmental organizations, the Council determined that the perpetrators often conduct the procedure secretly, without the presence of the public, with the presence of a large number of private bodyguards in security. Secret procedures are not allowed, which means that even the enforcement officers do not have the right to prohibit and prevent access to interested persons, but to enable their presence. It is true that the Law, in general provisions, does not explicitly mention the publicity as one of the principles of enforcement procedure, however, the publicity of the procedure is explicitly provided by the right to fair and public decision-making, as one of the basic human rights. The public is regulated by the Civil Procedure Law in Article 321, which accordingly applies to enforcement proceedings in terms of Article 39 of the Law on Enforcement and Security Interest. Therefore, the enforcement procedure must be public, because the public is a type of public control over the work of persons

to whom public authorizations have been transferred, which means that it also refers to enforcement officers to whom public authorizations have been transferred. The procedure may be secret if a decision is made on the secrecy of the procedure, which must be explained and made public, which means that the enforcement officer must state the reasons for the exclusion of the public. The decision to exclude the public cannot be made because the enforcement officer is frightened, but when the measures for maintaining order could not ensure the unhindered maintenance of the implementation of enforcement. Non-governmental organizations representing civil society, which are scientifically and publicly engaged in enforcement, have the right to request their own presence even when the public is excluded in accordance with Article 322 of the Civil Procedure Law.

## 4. RESPONSIBILITY

### - DISCIPLINARY ACCOUNTABILITY

The law determines disciplinary accountability for violation of the law and other regulations, failure to meet the obligations provided by the Statute or other acts of the Chamber or for violation of the reputation of public enforcement officers. The Council has analyzed the decisions of the disciplinary commission and determined that there were numerous irregularities and exceeding of authority.

From the decisions of the Disciplinary Commission on the disciplinary measures imposed on public enforcement officers, the Council concluded that the irregularities and exceeding of authority reflected in the fact that with the funds they acted contrary to the law and the authority of the parties; they unreasonably charged the amounts contrary to the provisions of the Schedule of Fees of Public Enforcement Officers; then they charged higher reimbursement of expenses, as well as remuneration fee than prescribed; they concluded contracts for the sale of real estate, although the conditions were not met; they conducted procedures in order to obtain more proceedings. Out of a total of 49 decisions of the Disciplinary Commission, only four public enforcement officers were given a disciplinary measure - a permanent ban on practicing the activity of a public enforcement officer. The most numerous disciplinary measures are: fines (17 decisions) and reprimands (16 decisions). From the mentioned decisions, the Council determined that a disciplinary measure was imposed on certain public enforcement officers several times, however, in addition to that, they still work, because it is obvious that the Commission considers that repeated violations are not a reason for a serious disciplinary measure.



The Council considers that these are very serious disciplinary infractions and that the Commission's penal policy is not, nor can it be effective, because fines and reprimands are not adequate to the significance of the violations because all the public enforcement officers were responsible for is cheating the parties in public enforcement proceedings for which there must be a stricter accountability. Namely, the state must regulate disciplinary accountability much better in order to create an atmosphere of trust in the work of public enforcement officers, because at this moment, public enforcement officers do not have the trust of citizens, and with a good reason.

**- REQUEST FOR THE ELIMINATION OF IRREGULARITIES**

Article 148 of the Law on Enforcement and Security Interest stipulates that in case of irregularities in the proceedings, a party and a participant in the implementation of enforcement may request elimination of irregularities by submitting a request for elimination of irregularities to the court or public enforcement officer (depending on who is implementing the enforcement), who is obliged to rule on it within five days, without delay of enforcement. If the request is not decided within five days from the day of receipt of the request, or the request is dismissed or rejected, an appeal is allowed.

When the request for elimination of irregularities is founded, the court, i.e. the public enforcement officer determines that the irregularity was committed., repeals the actions taken or undertakes or instruct the elimination of irregularities made during and at the occasion of enforcement implementation, i.e. makes a decision or undertakes or instructs undertaking the missed action and informs the Ministry of Justice and the Public Enforcement Officers' Chamber that it was established that the public enforcement officer committed the irregularity in the implementation of enforcement. (Article 149)

This clearly shows that the request for elimination of irregularities is submitted to the public enforcement officer, if the public enforcement officer implemented the enforcement. The public enforcement officer shall make a decision on that request within five days and if no decision is made within five days, or the request is dismissed or rejected, an appeal is allowed. Further procedure on the appeal is not regulated because it is not explicitly stated that it is submitted to the court and that the court decides on it, the text again states that the court, i.e. the public enforcement officer decides, which indicates that the public enforcement officer decides on the appeal again.

This avoidance of prescribing the jurisdiction of the court to decide on the legal remedy of an objection to the decision of the public enforcement officer indicates that the participation of the court was excluded from the entire enforcement procedure, that the enforcement procedure is no longer a court procedure, although in that procedure the property rights of the parties are decided and that the parties no longer have the right

to an effective legal remedy even in situations where the elimination of irregularities in the work of the enforcement officers is required.

## 5. ENFORCEMENT EXPENSES

In terms of Article 502 and Article 503 of the Law, public enforcement officers are obliged to submit an annual report on operations, which must contain records on financial operations. The manner of keeping records shall be prescribed in detail by the Minister of Justice.

The Council tried to determine whether the public enforcement officers were fulfilling the obligations from the mentioned articles, but it was unsuccessful. The media also wrote about the non-transparency of financial reports, so the representatives of the Public Enforcement Officers' Chamber gave statements that they did not have reports and that they did not analyze them because they did not deal with it. However, it is not clear why they did not deal with it, the public enforcement officers claimed that no internal act had been made to further regulate the content of the records, apparently referring to the fact that the Minister of Justice did not regulate in detail what the records should look like.

The Council does not go into the reasons why data on financial operations on the income of public enforcement officers cannot be found anywhere, but believes that citizens have the right to know how they operate financially, because they perform state work transferred to them by the state as a public authority, the citizens have the right because they participate in the enforcement proceedings.

From the data that public enforcement officers earn the amount of 900,000.00 euros per year which was published in the media<sup>2</sup>, the Council believes that this is the amount due to which the Schedule of Fees of the Public Enforcement Officers prescribed by the Minister of Justice must be considered and it has to be seen how it is possible for someone in the country on the brink of poverty to legally validly earn so much money.

The Schedule of Fees envisages three types of fees, namely: fees for preparation, management and archiving of cases; reimbursement of expenses for undertaking individual actions and remuneration fee for the success of the enforcement procedure.

When a fee is provided for the preparation and conduct of the case and it is not stated which actions are included in the preparation and which in the conduct of the procedure, then it represents a lump sum payment and when the payment of individual

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<sup>2</sup> (Danas, February 5, 2019: "The law protects the interests of strong creditors, debts fall on the poorest")

actions that always relate to the preparation and conduct of the procedure is envisaged, then it follows that double reimbursement of expenses is provided for the same actions. When looking at individual actions, it is not clear what the fee for “determining that the statement was given” means, what “successful personal delivery” means when a special fee for success in the implementation of enforcement is provided, it is not clear what “mail delivery” means when it is known that the mail is never delivered individually, but a larger number of items, whether a separate fee is charged for each item.

The Council considers that the Schedule of Fees, in relation to the remuneration fee for the success of the work performed, is copied from the consulting contracts, where a special remuneration fee for the success of the work is always provided. Enforcement officers get jobs from the state in the form of delegated public authority, which is always a monopoly state job, they do not work for either the creditor or the debtor, just as consultants work for those who hired them and from whom they can contractually determine any rewards and fees for success in the work done. Public enforcement officers are *sui generis* civil servants, because they perform tasks within the state jurisdiction and do not work for anyone, creditors or debtors, and cannot agree with either of them to collect any special fees for successfully performed tasks. They must perform state jobs successfully just as doctors, judges and professors must perform their jobs successfully and none of them is entitled to special rewards for successful work. If a doctor, judge or professor took such an award, it would be considered a corrupt act, and the enforcement officers believe that they have the right to receive an award for successfully completed work, which in this way could be a bribe they receive from creditors to force their collection of receivables. The law allows such behavior of enforcement officers, which is why the Council considers that the dissatisfaction of citizens due to enormous salaries of enforcement officers is justified and that the state must immediately react and determine the balance between the work of enforcement officers and the collection of remuneration and reimbursement fees and expenses. The state, through the Ministry of Justice, must determine how the enforcement officers earn so much, because if one judge, doctor, professor and others who perform delegated public powers, i.e. state work, cannot earn more than 2,000 euros a month by doing the same, even much harder jobs, then the state must react and bring the remuneration and reimbursement fees and expenses for state affairs to the allowed level, balance and proportionality and cannot allow any special rewards for successfully done work because it is a kind of corruption.

The Council cannot reliably determine how successful or socially useful the work of the enforcement officers is, but it will leave it to the public to reach a conclusion based on the data published on the website of the Public Enforcement Officers’ Chamber.

On the website of the Public Enforcement Officers’ Chamber, according to the data from the Annual Reports on Public Enforcement Officers for 2017, the total amount of claims for settlement in 2017 for all years of receipt of cases is 555.7 billion dinars or 4.6 billion euros, while the amount of claims realized by enforcement on the

basis of a credible document in 2017 for all years of receipt of the cases is 282.8 million dinars or 2.3 million euros. The Council did not receive data from the Chamber on what is the fate of the claims that make the difference between reported and enforced claims in the amount of 555.4 billion dinars.

## CONCLUSIONS AND RECOMMENDATIONS

Enforcement proceedings are not administrative or record-keeping, they are proceedings in which decisions are made on the property rights of participants in enforcement.

Decisions in enforcement proceedings that must be fair and public are made by an independent and impartial court in terms of Article 6 of the Convention. The court may have assistants in the enforcement procedure, and these are enforcement officers who can carry out enforcement actions. Enforcement officers can make decisions in the enforcement procedure that must be clearly regulated and enumerated in order to avoid confusion between judicial jurisdiction and the jurisdiction of the enforcement bodies to which the enforcement officers belong.

The participants in the procedure have the right to declare an effective legal remedy in terms of Article 13 of the Convention on all decisions of the enforcement officers, which are decided in court proceedings.

Until 2012, executive laws protected debtors, and since 2012, laws have been protecting creditors, by transferring competencies to enforcement officers, the state has not found a fair balance and proportionality between the interests of creditors and debtors.

This balance can be established in several ways:

- a. The state should carry out the final reform of the judiciary and return the procedure to the jurisdiction of a court that is independent and impartial and that is a body with the authority of the judiciary, which the enforcement officers do not have;
- b. A balance can be established if it is regulated that the enforcement officers are the technical assistance to the court, that they can make certain decisions to which all participants in the procedure have the right to an effective legal remedy which is decided in the court phase of the procedure.
- c. If the above proposals are rejected, then: due to extremely high dissatisfaction of citizens with the procedures carried out by the enforcement officers; because of the poverty line in which we are; for the protection of the right to home and family;

due to the serious incompetence of the enforcement officers, especially in relation to real rights, it should be accepted to incorporate into the law the following:

- Provisions on the publicity of enforcement proceedings;
  - Provisions on the proceedings in which the executors cannot in any way change the initial acts given by the participants in the procedure;
  - Detailed provisions on enforcement on mortgage immovable property;
  - Provisions on the elements and criteria for the assessment of the property;
  - In relation to immovable property, there should be excluded that the assessment can be performed by natural persons, however, if it remains that the assessment can be performed by natural persons, then it must be provided that the debtor has the right to hire an expert or experts to do the assessment of their immovable property, which has the same importance as other appraisers' assessment, and has the right to have his/her appraiser attend the sale;
  - Provisions that provide criteria and elements for how to ensure the ratio between debt and the value of assets sold for debt settlement;
  - Provisions that protect the social position of debtors and creditors in order to protect the peaceful enjoyment of home and family;
  - Provisions on accountability with stricter penal policy towards enforcement officers.
- d. The Ministry of Justice must duly request:
- that enforcement officers submit their reports on work, and especially their reports on financial operations;
  - that the enforcement officers must submit a specified invoice to the debtor and the creditor by which they calculate the reimbursement expenses and remuneration fee for work, and that each dissatisfied party has the right to appeal, which is decided by the court;
  - that the award for successfully implemented enforcement be removed from the Schedule of Fees;
  - that the Schedule of Fees should envisage giving a certain percentage of the public enforcement officer's salary to the state budget, as given by public notaries (30%) and all those who perform the given monopoly public powers, as well as those who use the country's natural resources.

VICE-PRESIDENT  
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