

## A General Overview of Enforcement in Civil and Commercial Matters in Macedonia

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**Abstract** The paper discusses one of the currently most relevant topics in the area of civil law protection in the Republic of Macedonia. In 2005 Macedonia made a drastic step in reforming the system of civil enforcement: the previous court-oriented system of enforcement was replaced with the bailiff-oriented system. The enforcement procedure has ceased of being under the jurisdiction of the court and the enforcement was entrusted to enforcement agents - persons with public authorizations established by law, who conduct the enforcement. With the introduction of the new system of civil enforcement Macedonia strove to eliminate all dysfunctionalities of the system due to the slowness and the inefficiency of the enforcement procedure, which seriously affected the proper administration of justice. The paper gives a general overview regarding the Macedonian civil enforcement system with special emphasis on certain issues that are considered to be of major importance, such as the reforms that were implemented or being implemented regarding the system of civil enforcement, the legal basis of enforcement, the status and role of the enforcement agents in the legal system of the Republic Macedonia, the institutional framework, structure and order of the enforcement proceedings, the enforcement titles, as well as the issue regarding the means of enforcement and the distinction between enforcement and security measures.

**KEYWORDS:** • civil enforcement • enforcement agent • forcible execution • enforcement titles

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DOI 10.18690/18557147.8.29-49(2016), UDK: 346.546.5:347.45, JEL: K12, K21  
ISSN 1855-7147 Print / 1855-7155 On-line © 2015 LeXonomica (Maribor)  
Available on-line at <http://journals.lexonomica.press>.

## 1 Introductory remarks

In 2005 Macedonia made a drastic step in reforming the system of civil enforcement. Leaving behind a decade's long tradition of court-oriented system of civil enforcement, Macedonian legislator has opted for a completely different concept of enforcement from the previous one. Introducing the system of "private" enforcement by appointing enforcement agents, as legal professionals who perform public authorization determined by law and conduct the enforcement, Macedonia strove to eliminate all dysfunctionalities of the system due to the slowness and the inefficiency of the enforcement procedure, which seriously affected the proper administration of justice. Although private enforcement agents were absolutely unfamiliar in Macedonia (and in the region at that time), their introduction was consistent with the general tendencies of the national strategy for reform of the Macedonian judiciary. The enforcement agents were established as a separate legal profession with the highest standards in terms of legal and professional background. The aim of ensuring quality, efficiency and effectiveness of the civil justice system regarding the proper protection of subjective rights, in a certain way, was accomplished by the transfer of the enforcement from the courts to the enforcement agents. Taking enforcement out of the courts came as no surprise given that the "modern" concept of outsourcing public and more precisely judicial responsibilities had already been accepted in Macedonia years earlier with the introduction of the public notaries in 1996.

The functioning of the "new" concept of enforcement throughout the years has shown that Macedonia made a right decision with the introduction of the "private" enforcement system. Generally speaking, the practice has shown that the new system of civil enforcement is functional, efficient and delivering positive results.<sup>1</sup> Still, the implementation of the Enforcement Act<sup>2</sup> during the years has shown that some legal solutions provided with the EA are not precisely outlined, while some turned out to be dysfunctional, what caused different application and interpretation of certain provisions in the practice. That was the reason for several legislative amendments of the EA 2005 in the past years.<sup>3</sup> In terms of defining precise and firm legal rules and provisions regarding the performance of the enforcement agent while carrying out the enforcement, overcoming the problems regarding the different act of the enforcement agents identified in the practice, as well as specifying clear legal rules in order of effective conduct of the enforcement, in April 2016 the Macedonian legislator enacted a new Enforcement Act.<sup>4</sup>

## **2 Reform in the segment of civil enforcement – dejudicialization of enforcement as a perspective**

### **2.1 State of affairs in the civil enforcement system before 2005 and impulses for a reform**

After the dissolution of the former federal state of Yugoslavia, the Republic of Macedonia inherited a court-oriented system of civil enforcement, which was present in the former federal state for several decades, under the strong influence of Austrian law and practice. Certain period of time after the independence, the Republic of Macedonia had taken and applied the former federal Act on Enforcement Procedure of 1978, according to which civil enforcement was in exclusive jurisdiction of the courts. The courts had jurisdiction to allow and to conduct the enforcement of monetary and non-monetary claims. The responsibility for enforcement was entrusted to judges (executive judges), as it is considered that the interpretation of the contents of the court judgment in terms of its compulsory execution requires professional judicial knowledge<sup>5</sup>. Judicial officers (court clerks) were also included in the enforcement procedure performing major technical (but sometimes even essential) tasks within the proceedings.

The first Enforcement Procedure Act of independent Macedonia of 1997<sup>6</sup> basically retained the same solutions as the former federal Act of 1978 and that means - the same judicial enforcement proceedings. The redactors yet introduced many new and distinct solutions, thus EPA 1997 was named “reform act” (ЈАНЕВСКИ, 1997; Janevski, 1999). In almost eight years of application, the EPA 1997 was subjected to two amendments of different intensity (in 2000 and 2003) (Janevski, 2001; and Janevski, 2002: 26–40). The amendments of EPA 1997 were quite extensive and fundamentally changed certain institutes of the judicial enforcement proceedings<sup>7</sup>, in order to ensure effective implementation and faster completion of the enforcement proceedings. However, despite the new solutions, the general assessment was that this law is not an efficient instrument for achieving the objectives for which it existed in the legal system - to settle the creditors claims in shorter terms and with lower costs. It was considered that the court enforcement procedure is too slow, rigid and formalized, and as such was the reason practically to block the work of the courts, for cases that do not represent administration of justice (trial) *stricto sensu*. The official statistics showed a huge backlog of enforcement cases<sup>8</sup>.

Although the state of affairs in the civil enforcement was rather unsatisfactory, by 2003 there were almost no discussions about “outsourcing” any part of the enforcement system out of the state court apparatus.

For a long time in the Republic of Macedonia, the adjudication, as a method of civil law protection, was a major focus of the procedural doctrine, legislation and

practice. Everyone was dealing with the question: How to ensure the integrity, quality and efficiency of adjudication? Civil enforcement had secondary importance. Problems in enforcing court judgments were treated last - if there was any time left.

More than a decade ago, such treatment changed drastically, as the practice shown “a failure” of civil enforcement system. Civil judgments (and other enforceable instruments) were plugged by a worryingly low execution rate, seriously affecting the proper administration of justice. The length of enforcement procedure and increased backlogs of enforcement cases became the most concrete and most striking example of dysfunction of the judicial system. Reasons for this dysfunction could not be restricted solely to the inadequate legal framework of the enforcement procedure itself. They were significantly wider, more precisely systematic, and they included: unfavorable and unstable social and economic context (primarily due to the move from a hierarchically administered to market economy); problems in the payment system; almost catastrophic situation in the field of real estate records; the insufficient number of judges who had been entrusted to conduct enforcement procedure; their reluctance to take coercive measures for enforcing judgments; the insufficient training of court enforcement officers; inadequate means of their financing and accordingly poor incentives for efficient enforcement etc. The consequences of the slowness and inefficiency of the enforcement procedure were, as well, multiple: from individual dissatisfaction for failing to accomplish a certain right, to a general crisis of the legal system due to its inefficiency and malfunction. Additionally, very low execution rate was considered a major impediment towards creating confidence in judiciary. Overall, it was not difficult to summarize that the civil enforcement system in the Republic of Macedonia was in a very bad condition: excessive in formalities, high in bureaucratization, poor in financial means, and consequently, low in public esteem (Uzelac, 2010: 84). What used to work several decades ago was no longer as effective as before. It became evident that the existing public structures of enforcement were weak and unstable, and thus unable to respond to the increased demands for compulsory execution. Therefore, it was about a time for the civil enforcement system to top the list of legal and political priorities of the reform of Macedonian judicial system<sup>9</sup>.

Apart from this internal state of affairs, additional pressure for reforms has been made by the international community. First, it is the process of EU accession, which imposes a task on the Republic of Macedonia, as a candidate for membership, to reform the enforcement system, as a part of the criteria for human rights protection and rule of law<sup>10</sup>. Still, it should be noted that the EU law and documents do not impose, even do not contain, the recipe for the best model of reform. The activities of the EU in this field are mainly focused on cross-border situations and thus the execution of court judgment after it has been declared enforceable in another Member State remains entirely a matter of the national

law<sup>11</sup>. Hence, the impact of EU law was (and still is) rather on a more general level in terms of a demand for quality and efficiency of the enforcement system, than in concrete organizational patterns and legislative solutions.

Secondly, the crucial impetus for reform came from the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR). Since 1997, Art.6 of the ECHR began to apply on the enforcement procedure, as well, and the right of effective enforcement of court judgments became a separate segment of the right to a fair trial, more precisely of the right to a trial within a reasonable time, which derives from numerous decisions of the ECtHR.<sup>12,13</sup> The ECtHR took the clear position that the state is obligated to create such an enforcement procedure and generally an enforcement system which will provide for a speedy and efficient enforcement.

All the aforementioned have indicated an urgent need for comprehensive and radical reform.

## **2.2 A genuine reform in the civil enforcement system – the new Enforcement Act of 2005**

Taking into account the unenviable state of the civil enforcement system, an idea emerged that it is necessary to enact a new law that will radically change the former enforcement system, so that the rendered decision could be enforced as quickly and simply as possible. The Enforcement Act of 2005<sup>14</sup> was a result of a far-reaching reform of enforcement legislature. Contrary to the previous attempts for reforms which relied on improvements within the same system of execution, the working group established for drafting the new law had more comprehensive task - to completely “restructure” the enforcement system, both in institutional and functional sense.<sup>15</sup>

Based on the experiences of the Netherlands and the actual trends of dejudicialization of the enforcement procedure<sup>16</sup>, the EA 2005 introduced a new system of enforcement in the Republic of Macedonia: the previous court-oriented system of enforcement was replaced with the bailiff-oriented system. The enforcement procedure has ceased of being under the jurisdiction of the court and the enforcement was entrusted to enforcement agents - persons with public authorizations established by law, who conduct the enforcement.

Although the comparative studies show that it is not easy to identify, in terms of efficiencies and best practices, the absolute or relative advantages of public vs. private systems; of monolithic vs. pluralistic systems; of competitive vs. non-competitive systems (Andenas, Nazzini in Andenas, Hess, Oberhammer [eds.], 2005: 97–101), it seems that the contribution by the Dutch experts was crucial for promoting the new bailiff-oriented system as a future perspective for the Republic

of Macedonia. However, it should not be overlooked that the Dutch model of civil enforcement is fully in line with the contemporary tendencies in this area, which clearly indicate that the traditional approach to the execution as “re-adjudication upon the original request for legal protection” has been abandoned, and accordingly more countries nowadays have departed from the court-oriented system. It is clearly stated in one expertise that “Currently, very few European countries use courts and judges as the main organisational element of the enforcement structures”<sup>17</sup>. On the contrary, most of the countries nowadays incline toward bailiff-oriented system.<sup>18</sup>

Furthermore, the legitimacy of dejudicialization of enforcement and privatization of enforcement services was not disputed, regarding the constitutional underpinnings of enforcement and their international counterpart in the face of ECHR. The Macedonian Constitution does not contain the limitations in terms that the enforcement of court judgments and other enforceable documents belongs to the core functions of the courts and cannot be left to out-of-court structures. In addition, according to the relevant commentaries and doctrinal interpretations of the ECHR, the application of Art.6 of ECHR in regard to the enforcement is limited on the requirement to provide efficient and timely execution of the final and enforceable court judgment or decision of other authority, but it does not require or assume that it should be reserved only for jurisdiction of the courts. From this perspective, the transfer of the enforcement from courts to other enforcement agents, out of court, cannot be considered contrary to Art.6 of the ECHR, as long as the right of access to a court is not violated<sup>19</sup>.

### **3 The legal basis of enforcement**

There are three principal formal sources regulating the Macedonian enforcement law: the Constitution of the Republic of Macedonia, the Legislation and the international agreements ratified in compliance with the Constitution. Among them, the legislation is counted as the main legal source. In that regard, two legal acts are considered as the core legislation in the area of enforcement – the Enforcement Act and the Law on Security of Claims<sup>20</sup>. Both, the EA 2005 (as well as EA 2016) and the LSC are procedural legal acts that have particular specificity in a way that apart from the clearly procedural rules, they also stipulate large number of substantial provisions regarding certain substantial requirements and consequences related to the conduct of the enforcement proceeding and the proceedings for security of claims.

The EA 2005 (as well as EA 2016) regulates the rules according to which the enforcement agents act in order to forcibly enforce: court decision for fulfillment of an obligation, unless otherwise stipulated by another law; decision passed in an administrative procedure for fulfillment of monetary obligation, unless otherwise stipulated by another law; and notarial titles and other enforcement titles stipulated

by law. The provisions of the EA 2005 (as well as of EA 2016) also apply regarding forcible enforcement of ship or aircraft.<sup>21</sup> On the other side, the Law on Security of Claims specifies the means of security of claims, the manner of their determination and the rules according to which the court, the enforcement agent and the notary public act regarding the security of claims.<sup>22</sup>

The Law on Civil Procedure is a subsidiary legal source of enforcement law. During the enforcement or the procedure for security of claims the provisions of the Law on Civil Procedure shall apply accordingly, unless otherwise provided by the EA 2005 (as well as EA 2016) the LSC or other law.<sup>23</sup> The conforming application of the provisions of the Law on Civil Procedure in the field of enforcement implies for a modified application of those provisions in accordance with the fundamental principles of the enforcement proceedings and the proceedings for security of claims.

Beside the legal acts that are considered as principal and core legislation of the enforcement procedure, there are many other procedural and substantial laws that are counted as legal sources regulating the enforcement. In that regard, we will mention only few of them: Law on Courts, Law on State Attorney, Law on Advocacy, Notary Public Act, Law on Administrative Procedure, Law on Insolvency Proceedings, Law on Obligations, Law on International Private Law, Law on Contractual Pledge, Law on Real Estate Cadaster and etc.

#### **4 Enforcement agent**

In Macedonia, the enforcement agent has the key and central role in the civil enforcement system.<sup>24</sup> Since the system of civil enforcement is an area that implies forcible realization of claims, in a situation where the enforcement is no longer a part of the court jurisdiction but it is entrusted to persons that do not belong to the judicial authorities, it is expected that the forcible enforcement is carried out by persons with public authorities due to the necessity of applying coercive measures against the debtor, similarly as it was the case with the courts in the previous system. In that regard, the Macedonian EA specifies the enforcement agent as a person who performs public authorizations determined by law.<sup>25</sup>

In Macedonian legal system the enforcement agents are appointed for the territory of a primary court. They enforce enforcement titles of the court or the body whose seat is located in territory for which they are appointed. The competence of the enforcement agent, however, is not restricted to the territory of the primary court for which he is appointed. During the performance of the enforcement the enforcement agent can take up actions on the whole territory of the Republic of Macedonia.<sup>26</sup>

As for the question regarding the access to the enforcement agents profession, the access to this legal profession<sup>27</sup> is not driven by market conditions (as is the case, for example, in the Netherlands after 2001<sup>28</sup>), but is restricted by determining the number of enforcement agents (numerus clausus system) in order to bring the number of enforcement agents in a certain territory into conformity with the number of potential enforcement cases.<sup>29</sup>

In Macedonia the enforcement agents are recognized as a separate legal profession with the highest standards in terms of legal and professional background and appropriate process of selection. The enforcement agents are appointed by the Ministry of Justice on the basis of a public competition. As for the professional qualifications of the Macedonian enforcement agents, like the Netherlands, the system provides highly qualified enforcement agents, which include a university law degree, a special enforcement agent exam and an appropriate working experience. According to EA 2005, the required conditions for appointment of an enforcement agent are as follows: 1) the person has to be a citizen of the Republic of Macedonia; 2) to have working capacity and be in good general health condition, which is ascertained by a certificate issued from a competent health institution in the field of occupational medicine; 3) to be graduated lawyer with completed four years of legal studies or a graduated lawyer with acquired 300 credits according to the European Credit Transfer System (ECTS); 4) to have at least five years of working experience in legal matters or three years in enforcement matters; 5) to have passed the enforcement agent exam according to the programme proscribed by the Minister of Justice; 6) to have active knowledge of the Macedonian language; 7) not to be convicted by final court decision to an unconditional sentence of over six months imprisonment, or not to be banned from practicing his profession as an enforcement agent; 8) to give a statement before a notary public that he/she will provide the equipment and the facilities required and appropriate for carrying out enforcement actions; and 9) to give a statement before a notary public about his/her property condition, with all the consequences for giving a false statement.<sup>30</sup>

As a person with public authorizations, the enforcement agent is competent to conduct the enforcement. Other than conducting the enforcement, the enforcement agent can perform other actions if so provided by the law.

Regarding the question of financing, the enforcement agents are financially independent from the state, as they are remunerated by fees, but they are efficiently sheltered against the market risks by the system of proportionate and also the system of fixed prices<sup>31</sup>.

In order to enforce the professional rules and standards, the enforcement agents are organized in their own professional organization - Chamber of Enforcement Agents. Overall, being members of a separate legal profession, the enforcement

agents have considerably high reputation, which is comparable to the reputation of public notaries, and even judges.

Although the enforcement agents are established as a separate legal profession with the highest standards in terms of legal and professional background and appropriate process of selection, at the very beginning there were numerous dilemmas and controversies regarding this radical reform. The scholars and practitioners were afraid that this “privatization” of the enforcement services would lead to uncontrolled activities of the enforcement agents, demolition of the dignity of the debtors and unfounded intrusion into their assets, especially due to the fact that the enforcement is conducted without previous allowance for enforcement given by the court. Additionally, many other questions were asked, as for example: Is the process of dejudicialization of the enforcement legitimate? Is the new model going to achieve the expected speed and efficiency of enforcement? Will the new model, which is obviously more profitable for the state, be more expensive for the parties? Etc. Those were dilemmas and questions that regularly follow the process of privatization of the enforcement function, especially because even the relevant European institutions try to preserve a neutral attitude towards the public/private controversy connected to enforcement, and the relevant European strategic documents do not contain a definitive answer to the key dilemma of the plans for reforms - public of private enforcement model (Uzelac in van Rhee, Uzelac, 2010: 85; Correa Delcasso in Andenas, Hess, Oberhammer [eds.], 2005: 47–51).

Notwithstanding the beginning skepticism, from nowadays distance it could be noted that the Macedonian experience is a successful example of the process of privatization of the enforcement, taking into account the specific reports and analyzes on the results of the application of the new Enforcement Act 2005<sup>32</sup>. It has become clear that as long as the enforcement agents act with the highest standards of professionalism, and whenever the principle of formal legality is the fundamental principle of the enforcement procedure<sup>33</sup>, there is no concern that the functioning of the private enforcement agents will turn into the anecdotal “chasing ghosts”.

## 5 Enforcement titles

Ground for enforcement is the enforcement title.<sup>34</sup> Without existence of an enforcement title, no forcible enforcement can be carried out – *nulla executio sine titulo*. Due to the character of the enforcement proceedings and the coercive nature of the actions and activities that are carried out in order of realization of a particular monetary or non-monetary claim, the existence of the claim that should be collected in the proceedings for forcible execution must be determined by a certain qualified title. In that regard, the enforcement title (*titulus executionis*) is a public document that determines the existence of the claim, its due, and the

identification of the parties in the enforcement proceedings in an authoritative and certain manner. The enforcement title is regularly a result of a previously terminated cognitive procedure.

The EA 2005 (as well as EA 2016) sets a quite long list of documents that have the character of enforcement titles. There is no general definition for the enforcement title in the EA. The EA only determines the types of enforcement titles. In that regard, EA opts for a *numerus clausus* system – enforcement titles are only the titles that are determined by law.

Macedonian EA 2005 (as well as EA 2016) recognizes 6 different categories of enforcement titles. According to EA, enforcement titles are: 1) an enforceable court decision and court settlement; 2) an enforceable decision and settlement in an administrative procedure if designated for fulfillment of a monetary claim; 3) an enforceable notary public title; 4) a conclusion of the enforcement agent determining the enforcement costs; 5) a decision for issuing a notarial payment order; and 6) other title considered under the law as enforcement title.<sup>35</sup>

A court decision, as provided by the EA 2005 (as well as with EA 2016), shall be considered to be a judgement, decision, payment order or other order reached by the courts, the elected courts and the arbitrations, while a court settlement shall be considered to be the settlement concluded before these courts.<sup>36</sup> Along with the court decision of domestic courts and arbitrations, a decision of a foreign court, under certain conditions, has a character of an enforcement title as well. According to the EA 2005 (as well as EA 2016), an enforcement of a decision of a foreign court may be carried out in the Republic of Macedonia if the decision meets the requirements for recognition provided by law or international agreement ratified in accordance with the Constitution of the Republic of Macedonia.<sup>37</sup>

A decision in an administrative procedure, as provided by the EA 2005 (as well as with EA 2016), shall be considered to be a decision or conclusion reached by a state administration body or a legal entity in the course of performing their public authorizations determined by the law, whereas a settlement in an administrative procedure shall be considered to be a settlement concluded in accordance with the Law on Administrative Procedure.<sup>38</sup>

Regarding the notarial titles, the EA 2005 and EA 2016 as well, provide that the notary public title shall be enforceable title if it has become enforceable according to special provision that regulates the enforceability of such title.<sup>39</sup> The decision for issuing a notarial payment order becomes an enforcement title after the notary certifies it as final and enforceable.<sup>40</sup>

According to EA 2005 (as well as with EA 2016), the enforcement title is eligible for enforcement if the names of the debtor and the creditor, as well as the object,

the type, the scope and the time for the fulfillment of the obligation are specified therein.<sup>41</sup>

## 6 Means of enforcement

In the procedural theory the means of enforcement are defined as methods of forcible enforcement of the creditor's claim, as well as a sum of enforcement activities that are carried out in order to conduct an individual enforcement (Janevski, Zoroska Kamilovska, 2011: 59). The EA does not give a general definition on the means of enforcement as it is a case in some national systems.<sup>42</sup> Although there is a lack of general definition, the means of enforcement are recognized in the Macedonian EA as separate legal category with one particularity – the means of enforcement as a legal term solely refers to the forcible execution of monetary claims. When speaking of enforcement of non-monetary claims, the EA does not operate with the term means of enforcement, but directly regulates particular methods of enforcement depending on the type of the non-monetary claim that should be coercively enforced. But, that shouldn't lead us to wrong conclusion that the means of enforcement are only related to the enforcement of monetary claims. On the contrary, the forcible collection of claims in general, regardless the nature of the claim (monetary or non-monetary), assumes undertaking number of enforcement actions that are perceived as “means of enforcement” in their entirety. The enforcement agent decides upon the method of enforcement regarding the collection of monetary claims, and priority is given to methods that are less inconvenient and costly for the debtor.

Regarding the forcible collection of monetary claims, the EA 2005 (as well as EA 2016) regulates several means of enforcement: 1) sale of movable objects; 2) sale of immovable objects; 3) sale of shares and stakes in companies; 4) transfer of monetary claim; 5) conversion into cash of other property rights; and 6) transfer of funds from account at the payment operations organization, in accordance with the regulations that govern the payment operations.<sup>43</sup> The list of the means of enforcement is strictly defined – the enforcement can be carried out only through the means of enforcement that are provided with the EA.

As for the means of enforcement for realization of non-monetary claims, the EA 2005 (as well as EA 2016) regulates this matter in a separate section named *Enforcement for Collection of a Non-Monetary Claim*.<sup>44</sup> The specific means of enforcement for collection of non-monetary claims are adjusted to the nature of a particular non-monetary claim. Namely, the EA 2005 provides for different methods of forcible collection of non-monetary claims. Their structure and instrumental nature depend on the type of the obligation that is determined with the enforcement title. The EA 2005 regulates the methods for forcible collection of the following non-monetary claims: 1) handing over and delivery of movable objects; 2) vacating and handing over immovable property; 3) obligation for

action, enduring and non-acting; 4) reinstatement of employee to work; 5) registration of rights in public registries; 6) selling of objects which cannot be physically divided; and 7) obtaining statement of will.<sup>45</sup>

## **7 Institutional framework, structure and order of enforcement proceedings**

Comparative studies show that there are different positions about the legal nature of civil enforcement, both in procedural doctrine and legislation. The different treatment of execution, as prevailing judicial or administrative method of legal protection, led to the situation that nowadays the modern legal systems offer different conceptions of execution which oscillate between concepts similar to adjudication, on the one hand, and purely administrative methods, on the other hand, with several different transient or combined models among them. Undoubtedly, these positions are reflected to the adequate organizational structures, and hence “at the European level at least four different systems must be distinguished: court-oriented systems, bailiff-oriented systems, mixed systems and administrative systems” (Hess, in Andenas, Hess, Oberhammer [eds.], 2005: 34–36).

As mentioned previously, regarding the Macedonian civil enforcement system, the strong Dutch and partly French influence and the prevailing trend of privatization of judicial tasks at that time, resulted in opting for a radically different system of civil enforcement from the previous one. As of 2005, Macedonian civil enforcement system is counted as bailiff-oriented one. Regarding the organization of enforcement organs and procedures, our enforcement system is considered as centralized one. Macedonian enforcement system has centralized structure, where the enforcement is comprehensively carried out by enforcement agents.<sup>46</sup>

The introduction of the new institutional framework of enforcement has had the implications on the structure of the enforcement proceedings. Until 2005, due to the traditional solutions of the civil enforcement in the former Yugoslavia, the court enforcement procedure which existed in Macedonia had two stages: the stage of determining the enforcement (also known as permit (allowance) for enforcement, writ of enforcement or warrant of execution) and the stage of implementation of enforcement in terms of taking physical actions of enforcement.<sup>47</sup>

Numerous analyzes have suggested that this structure of the judicial enforcement is one of the main reasons for its slow pace and considerable delays. The necessity to decide on the allowance of execution<sup>48</sup> (in partly adversarial proceedings), and in particular the possibility to raise legal remedies against the warrant of execution have regularly brought up to two instances in the decision-making process of the enforcement. Furthermore, in the number of cases, the parties were referred to

litigation again as the execution court had no powers to decide upon the disputed substantial issues which had arisen during the enforcement. Thus, the structure of enforcement procedure became another crucial segment of the reform.<sup>49</sup>

With the Enforcement Act of 2005, the enforcement procedure was too simplified – the whole procedure was reduced to only one stage – conducting of the enforcement. It means that the Macedonian enforcement procedure does not comprise the stage of warrant of execution: there is no need to allow the enforcement, either by court or by enforcement agent. The creditor has a right to submit a motion (request) for enforcement directly to the enforcement agent (without having to seek for allowance of enforcement from the court or any other authority). According to the EA 2005 (as well as EA 2016), the enforcement commences on the request of the creditor.<sup>50</sup> The creditor himself chooses the enforcement agent who will enforce the particular enforceable document, being restricted only with the fact that the enforcement agent must be appointed for the territory of the primary court whose title is being executed. The enforcement agent directly decides upon the actions that have to be undertaken within his authorizations, in order to carry out the enforcement title.<sup>51</sup>

The enforcement agent, who has been requested to conduct the enforcement procedure of the enforcement title rendered by a court or a body whose seat is in the area in which the enforcement agent is appointed, is obligated to conduct the enforcement. The enforcement agent cannot refuse to conduct the enforcement, except in the case where the conditions for his recusal from the enforcement are fulfilled, or if he is aware that the same enforcement title is enforced by other enforcement agent.<sup>52</sup>

While conducting the enforcement, the enforcement agent undertakes particular actions – enforcement actions – for realization of the claims of the creditor. The conducting of the enforcement is commenced with the undertaking of the first enforcement action, and is terminated with the full settlement of the creditor's claims. After the creditor commences the enforcement procedure, the enforcement agent will conduct the enforcement *ex officio*. Which enforcement actions will be taken by the enforcement agent while conducting the enforcement, depends on the particular enforcement procedure, on the type of claim (monetary or non - monetary), and the particular means and objects of enforcement.<sup>53</sup> Certain formal prerequisites are also required for both the commencement of proceedings and for the enforcement agent's actions. Additionally, the law has defined the limits and maximum extent of impingement on debtor rights and assets and also has provided the enforcement agent with sufficient guidelines for assessment in order to ensure the proportionality of proceedings and protection of the fundamental rights of the parties.<sup>54</sup>

As for the question of existence of different types of enforcement procedures, it should be noted that certain enforcement procedures (for example, the procedure for handing the child) remain settled with other acts (Family Act), due to the specificities of the object of the enforcement. The conduct of this enforcement procedure remains in the jurisdiction of the court which decides upon the proposal for enforcement and conducts the enforcement in collaboration with the Center for Social Works.

## **8 Division between enforcement and security measures**

The procedure for security of claims is a procedure that exists within the system of civil enforcement. It is considered as a particular system of legal protection within the enforcement procedure. As mentioned previously, the forcible enforcement is a procedure where the claims are collected after being previously determined with an enforcement title, which existence justifies the application of coercive methods in order of final settlement of the creditor's claim. On the other hand, the procedure for security of claims is a system of legal protection where the main objective is to prevent the appearance of certain circumstances that could jeopardize or hinder the future settlement of the creditor's claim. Both, the enforcement procedure and the procedure for security suppose application of coercive measures against the debtor. While in the procedure for forcible enforcement the coercive measures are applied in order of final settlement of the creditor's claim, in the procedure for security of claims the coercive measures that are applied have provisional (temporary) character. Their aim is to provide for conditions regarding the future realization of the creditor's claim (Janevski & Zoroska Kamilovska, 2011: 183).

In the Macedonian legal system, the forcible enforcement and the procedure for security of claims are regulated with separate laws. Until 2005 these procedures were regulated with the same law – the Enforcement Procedure Act. With the enactment of the EA 2005 which focused solely to the regulation of the procedure for forcible execution, the procedure for security of claims was kept to be regulated with separate law. In that regard, 2 years later the law governing the matter of security was enacted - the Law on Security of Claims was passed in 2007.

In Macedonia, the procedure for security of claims is in the competence of the court. The court has the jurisdiction to decide upon the security measures to be applied and to carry out the procedure for security of claims. The actions that imply direct conduct of the security are performed by judicial officers (court clerks). Unlike the forcible enforcement, the procedure for security of claims consists of two stages: the stage of determining the means of security and the stage of implementation of security in terms of carrying out physical actions in order to secure the creditor's claim.

## 9 Concluding remarks

From today's perspective, a decade after the implementation of the new system of civil enforcement, we can say that Macedonian experience is positive and for sure a successful example of the process of outsourcing certain judicial tasks in aim of achieving a greater goal – providing an overall efficiency of the enforcement. The practice has shown that the Macedonian concept of bailiff-oriented system is functional, efficient and delivering positive results. All the analysis and reports regarding the achieved results of private enforcement for the past years indicate that we have created solid and firm civil enforcement system. Still, all those affirmative evaluations shouldn't give the wrong impression that Macedonia has a flawless system of civil enforcement. In that regard, the detection of certain dysfunctions in the practical implementation of EA, mostly in the area of different interpretation and application of particular legal provision, is a clear indicator that there is room and need for improvement.

### Notes

<sup>1</sup> According to the Annual Report for the Work of the Chamber of Enforcement Agents for 2015, for the past 10 years, nearly 900.000 (895.224) requests for enforcement were filed which resulted in settlement of 291.858 requests (32.60% of realization) and collection of more than 830.000.000 Euros (830.104.344). The Report is available at [www.kirm.mk](http://www.kirm.mk) (accessed 13.05.2016).

<sup>2</sup> Official gazette of RM, No. 35/2005 - hereinafter EA 2005.

<sup>3</sup> To be precise, the EA 2005 was amended 9 times: in 2006 (Official gazette of RM, No 50/06, 129/06), 2008 (Official gazette of RM, No 8/08), 2009 (Official gazette of RM, No 83/09), 2010 (Official gazette of RM, No 50/10, 83/10, 88/10,171/10) and 2011 (Official gazette of RM, No 148/11).

<sup>4</sup> Official gazette of RM, No. 72/2016 - hereinafter EA 2016.

<sup>5</sup> This was a result of the dominant doctrine of non - separability of judicial cognizance from judicial coercion, which understood the enforcement as a natural continuation of adjudication (see Kerameus in Cappelletti [chief ed.], 2002: 8).

<sup>6</sup> Official gazette of RM, No. 53/97 - hereinafter EPA 1997.

<sup>7</sup> Here, we would mention: delivery, grounds for allowing enforcement, the introduction of evidence statement and evidence inventory of assets, the system of legal remedies in the enforcement procedure, referral to trial, introduction of security by transferring the ownership of objects and transfer of rights etc.

<sup>8</sup> According to official statistics, the backlog of enforcement cases until 31.12.2004 was 291.700 cases.

<sup>9</sup> Reform of the civil enforcement was very high positioned in the National Strategy for the Reform of the Justice System, adopted by the Government of the Republic of Macedonia in November 2004.

<sup>10</sup> See the European Union membership criteria defined in the Treaty of Maastricht (1992) and the Copenhagen Declaration of June 1993.

<sup>11</sup> For more details see: Green paper on improving the efficiency of the enforcement of judgments in the European Union: The attachment of bank accounts, Brussels, 24.10.2006, COM (2006) 618 final.

<sup>12</sup> See the key decision of the ECtHR in the case *Hornsby v. Greece*, Application No. 18357/91, Judgment of 19 March 1997, Reports of Judgments and Decisions, 1997- II, para. 40: “the right of access to a court or tribunal “would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party... Execution of a judgment given by any court must therefore be regarded as an integral part of the “trial” for the purposes of Article 6”.

<sup>13</sup> The position of the Republic of Macedonia before the ECtHR was rather critical. The delays in conducting enforcement proceedings became one of the most common violations of the reasonable time standard and the Republic of Macedonia has increasingly become responsible for non-enforcement or inefficient enforcement of civil judgments. See for e.g. *Atanasović and others v. the former Yugoslav Republic of Macedonia*, Application No.13886/02, Judgment of 22 December 2005; *Nikolov v. the former Yugoslav Republic of Macedonia*, Application No.13904/02, Judgment of 23 October 2008; *Nesevski v. the former Yugoslav Republic of Macedonia*, Application No.14438/03, Judgment of 24 April 2008 etc.

<sup>14</sup> Official gazette of RM, No. 35/2005, hereinafter referred to as EA of 2005.

<sup>15</sup> The whole activity was within the framework of two projects: USAID-funded Macedonian Court Modernization Project and the Judicial Reform Implementation Project. The working group was assisted by two experts from the Netherlands: Prof. A.W. (Ton) Jongbloed (University of Utrecht) and Jos Uitdehaag (legal drafting expert at the Balkan Enforcement Reform Project (BERP)).

<sup>16</sup> For this issue, see the study of Andenas, Hess, Oberhammer [eds.], 2005.

<sup>17</sup> Draft Enforcement Act of the Republic of Serbia, Comments on the Compatibility with the Requirements of the European Convention on Human Rights, by Prof. Dr. Alan Uzelac, University of Zagreb, December 2010, p.11. Work commissioned by the Council of Europe, DG-HL/CG/GM/EKO/nka, PO No. 312883, available at [http://alanuzelac.from.hr/pubs/E17Comments\\_uzelac\\_draft%201.6rev.pdf](http://alanuzelac.from.hr/pubs/E17Comments_uzelac_draft%201.6rev.pdf).

<sup>18</sup> As a matter of fact, the dejudicialization of enforcement came as no surprise having in mind that the “modern” concept of outsourcing public and more precisely judicial responsibilities has already been accepted in the Republic of Macedonia. The process of “unburdening” the courts from undisputed cases has started in 1996 with the introduction of the notary as a service which took over a large number of former court non-contentious matters. Hence, although the private enforcement agents were absolutely unfamiliar in the Republic of Macedonia (and in the region), their introduction was in consistency with the general tendencies of the National Strategy for reform of the Macedonian judiciary.

<sup>19</sup> In this regard see the explanation for extra-judicial enforcement proceedings given by Kodek in Andenas, Hess, Oberhammer [eds.], 2005: 324.

<sup>20</sup> Official gazette of RM, No. 87/2007 - hereinafter LSC.

<sup>21</sup> See Art. 1 EA 2005 (Art. 1 EA 2016).

<sup>22</sup> See Art. 1 LSC.

<sup>23</sup> See Art. 10 EA 2005 (Art. 10 EA 2016) and Art. 7 LSC.

<sup>24</sup> Beside the enforcement agent, the court and the “auxiliary bodies” have certain roles in the civil enforcement as well. The jurisdiction of the court in the enforcement procedure is concretized by the EA. The most important is the authority of the court to decide upon the objection against the irregularities during the enforcement, but the court has many more authorities and duties. The auxiliary bodies, within their competences, help the enforcement agents to carry out the enforcement or they secure the carrying out of the enforcement. Auxiliary body can be: bank, payment operations organization, keeper of movable property, commissioner, police, notary public, employer, the Center for Social

Work, the Treasury at the Ministry of Finance, as well as bodies that run public records and registers in which certain entries are made in the enforcement proceedings or from which certain information is obtained (Janevski, Zoroska Kamilovska, 2011: 39–41).

<sup>25</sup> See Art. 31 para 1 EA (Art. 32 para 1 EA 2016).

<sup>26</sup> See Art. 31 para 2 EA (Art. 32 para 1 EA 2016).

<sup>27</sup> According to the law, the duty of enforcement agent is incompatible with the performance of other activities and functions. The enforcement agent cannot perform public functions or managerial, supervisory and administrative functions in trade companies, state institutes, collection services, trade activities, intermediary, public notary or attorney activities. Furthermore, the enforcement agents can not be employed by a religious community or religious group. These restrictions do not refer to performing scientific, artistic and educational activities, the work of a court interpreter, as well as performing activities in the Chamber and International associations of enforcement agents. With the EA 2016, the list of incompatible activities and functions is extended for two additional restrictions: inability of performing functions in political parties and state funds. See Art. 39 EA 2016.

<sup>28</sup> See Hess in Andenas, Hess, Oberhammer [eds.], 2005: 34.

<sup>29</sup> The number of enforcement agents for the territory of a primary court is determined by the Minister of Justice, on the basis of previously obtained opinion from the president of the primary court on the number of final and enforceable decisions of the primary court, and from the Government of the Republic of Macedonia on data of the final administrative decisions for monetary claims that could be object of enforcement, as well as upon the opinion from the Chamber of Enforcement Agents (Art. 31 para 4 EA 2005). The EA 2016 provides that the number of enforcement agents for the territory of a primary court is determined by the Minister of Justice on the basis of previously obtained consent from the Government of the Republic of Macedonia. The number of seats is determined on the basis of an opinion from the president of the primary court on the number of final and enforceable decisions of the primary court, from the Notary Public Chamber of the Republic of Macedonia on data of the number of enforceable notarial titles, as well as upon obtained opinion from the Chamber of Enforcement Agents (Art. 32 para 4 EA 2016). In this way, a compliance of the number of enforcement agents in a certain territory with the number of potential enforcement cases is ensured. According to the latest published Annual Report of the Chamber of Enforcement Agents for 2015, as of 31.12.2015, 75% of available enforcement agent's positions are filled (from 135 available positions, 99 are filled).

<sup>30</sup> See Art. 32 para 1 EA 2005. With the EA 2016, the conditions for appointing an enforcement agent are more demanding and slightly different compared with the present ones. In that regard, according to Art. 33 EA 2016, the candidate needs to fulfill the following conditions: 1) to be a citizen of the Republic of Macedonia; 2) to have working capacity and be in good general health condition, which is ascertained by a certificate issued from a competent health institution in the field of occupational medicine; 3) to be graduated lawyer with completed four years of legal studies or a graduated lawyer with acquired 300 credits according to the European Credit Transfer System (ECTS); 4) to have passed bar exam; 5) to have passed qualification exam, ranking exam for the particular competition, psychological test and test for integrity; 6) to have working experience on legal matters at least two years after passing the bar exam; 7) to have active knowledge of the Macedonian language; 8) to possess internationally acknowledged certificate for proficiency in at least one of the three usually spoken languages of the European Union (English, French, German), issued by an official European tester, member of the ALTE

Association of Language Testers in Europe; 9) not to be convicted by final court decision to an unconditional sentence of over six months imprisonment, or not to be banned from practicing his profession as an enforcement agent; 10) to give a statement before a notary public that he/she will provide the equipment and the facilities required and appropriate for carrying out enforcement actions; and 11) to give a statement before a notary public about his/her property condition, with all the consequences for giving a false statement.

<sup>31</sup> For the enforcement actions taken, the enforcement agent is entitled to compensation and reimbursement for expenses in accordance with the Tariff of fees and reimbursement of other expenses of the enforcement agents. Tariff is adopted by the Minister of Justice upon prior opinion of the Chamber of Enforcement Agents.

<sup>32</sup> See Izveštaj za primenata na Zakonot za izvršuvanje za 2008 godina [Report on the implementation of the Enforcement Act for 2008], at <http://www.pravda.gov.mk/resursi.asp?lang=mak&id=10>. The data show that the percentage of completed enforcements by the enforcement agents is almost double than the percentage of judicial enforcements. According to the Survey for the period 2006-2009 conducted by the World Bank and USAID - BES, the state in the area of enforcement in Macedonia has been significantly improved since the enforcement takes 370 days, which is significantly shorter in comparison with the other countries in the region. For the last two years, the Doing Business Reports indicate that the enforcement of judgements takes 127 days. See Doing Business 2015 and Doing Business 2016, Economy Profile for Macedonia, at [www.doingbusiness.org](http://www.doingbusiness.org) (accessed 13.05.2016) Furthermore, regarding the question whether the private enforcement system ensures protection and realization of the creditors' claims within a reasonable time, the Annual Reports for the work of the Chamber of Enforcement Agents for 2014 and 2015 show that most of the enforcement titles that are taken into work are settled in a period exceeding 1 year from the moment the request for enforcement was filed. The referent data for 2014 shows that from the total number of 49.452 realized enforcement titles, 18.236 are realized within a period of 3 months, 5.726 are realized within a period of 3-6 months, 7.037 are realized within a period of 6-12 months and 18.453 are realized within a period exceeding 1 year. As for 2015, the referent data shows that from the total number of 52.457 realized enforcement titles, 16.729 are realized within a period of 3 months, 5.521 are realized within a period of 3-6 months, 7.290 are realized within a period of 6-12 months and 22.899 are realized within a period exceeding 1 year.

<sup>33</sup> According to this principle, the enforcement agent does not settle substantive legal issues when conducting the enforcement proceedings, but follows the enforcement title. Certain formal prerequisites are also required for both the commencement of proceedings and for the enforcement agent's actions.

<sup>34</sup> Art. 2 para 1 EA 2005 (Art. 2 para 1 EA 2016).

<sup>35</sup> Art. 12 para 1 EA 2005 (Art. 12 para 1 EA 2016).

<sup>36</sup> Art. 13 para 1 EA 2005 (Art. 13 para 1 EA 2016).

<sup>37</sup> Art. 8 EA 2005 (Art. 8 EA 2016).

<sup>38</sup> Art. 13 para 2 EA 2005 (Art. 13 para 2 EA 2016).

<sup>39</sup> Art. 16 para 1 EA 2005 (Art. 16 para 1 EA 2016).

<sup>40</sup> Art. 16 para 2 EA 2005 (Art. 16 para 2 EA 2016).

<sup>41</sup> If the time limit for voluntary fulfillment of the obligation is not specified in the enforcement title, the enforcement agent shall summon the debtor to fulfill the obligation determined in the enforcement title within eight day from the day of delivery of the summon. See Art. 17 EA 2005 (Art. 17 EA 2016).

<sup>42</sup> See Art. 4 para 1 of the Croatian EA, where the means of enforcement are defined as enforcement actions or sum of actions used for forcible enforcement of claims in accordance with law. The same definition is also provided in the Serbian Law on Enforcement and Security (Art. 19 para 1).

<sup>43</sup> See Art. 23 EA (Art. 24 EA 2016).

<sup>44</sup> As we mentioned previously, The EA does not recognize the particular means of enforcement for realization of non-monetary claims as “means of enforcement”, as it is case with the naming of the means of enforcement for collection of monetary claims. Instead, they are regulated as separate enforcement methods depending on the type of the non-monetary claim that should be collected.

<sup>45</sup> With the EA 2016, the method of enforcement regarding the registration of right in public registries is no longer regulated. Also, there is certain modification regarding the provisions related to the selling of objects which cannot be physically divided. Namely, the new EA 2016 sets provision that regulate the method for enforcement regarding the physical division of objects in general, instead of regulating only the selling of objects which cannot be physically divided, as it is case with the present EA 2005.

<sup>46</sup> As it is provided with the EA, the enforcement agent shall carry out the enforcement. See Art. 3 EA 2005 (Art. 3 EA 2016).

<sup>47</sup> These two stages, as a rule, were in the competence of the same court. In the first stage, the court has decided on the motion for enforcement, issuing the decision for allowing the enforcement (warrant of execution) or rejecting the motion. In the second stage, the court undertook the enforcement actions in order to accomplish the claims, by means of enforcement and accordingly the debtor assets which are determined in the warrant of execution.

<sup>48</sup> According to Uzelac “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”. See Draft Enforcement Act of the Republic of Serbia, Comments on the Compatibility with the Requirements of the European Convention on Human Rights p. 38.

<sup>49</sup> Starting point for reforming this segment were the guidelines set in Recommendation Rec(2003)17 of the Committee of Ministers to member states on enforcement, which clearly indicates that enforcement proceedings should neither be exaggerated complex and formalized, nor burdened with unnecessary steps or series of decisions that must be made by the competent authorities/bodies during the proceedings. The Recommendation Rec(2003)17 on enforcement recommends a simple legal framework for the structure of the enforcement, which means that the procedure for the performance should be clearly legally defined and simple, though, and easy to implement.

<sup>50</sup> Art. 2 para 3 EA (Art. 2 para 2 EA 2016).

<sup>51</sup> The actions taken by the enforcement agent during the conducting of the enforcement are numerous and diverse. These actions are grouped by the EA in the following manner: a) receives written and oral requests for enforcement; b) performs delivery of court writs; c) performs delivery of orders, minutes, conclusions and other documents that are related to his work; d) conducts personal identification of the parties and the participants in the enforcement; e) gathers data on the property condition of the debtor for the purpose of the enforcement; f) enacts orders and conclusions, creates minutes, requests and official notes in accordance with the provisions of the EA; g) performs inventory, evaluation, seizure and sell of movable objects, rights and real estate, receives assets from the debtor, transfers into

possession, allocates assets; h) performs blocking of movable and immovable objects in order to disable their usage or disposal, by placing an enforcement agent seal; i) performs evictions and other enforcement actions necessary to carry out the enforcement, which are regulated with law and sub-regulations; j) performs the announcing in the media; k) files requests for appointing guardians to the Center for Social Work, for special cases when the address of the debtor is unknown or he/she does not have a representative; l) submits a request to retrieve data for having a bank transaction account to the legal entity that runs register of transaction accounts in connection with the subject of the enforcement; m) submits an application to announce a search for a motor vehicle that is subject to enforcement by the state administration in the area of internal affairs and n) carries out other activities stipulated by law. See Art. 40 EA 2005 (Art. 40 EA 2016).

<sup>52</sup> See Art. 3 para 2 EA 2005 (Art. 3 para 2 EA 2016). In order to prevent multiple exercise of the same claim by initiating an enforcement procedure with more enforcement agents, it is a rule that the enforcement of the same enforcement title can be conducted by only one enforcement agent.

<sup>53</sup> For details, see Janevski, Zoroska Kamilovska, 2011: 95 et seq.

<sup>54</sup> The selected Macedonian model of direct enforcement, without the warrant of execution, is less represented in the legal systems of European countries. Therefore, at the very beginning after EA 2005 was enacted, there were doubts that the new enforcement system will further complicate and slow down the already slow enforcement proceedings. It was considered as much better solution, if, after the issuance of a warrant of execution by the court, the enforcement procedure is conducted by the enforcement agent (mixed system) . In the meanwhile, the effectiveness of the new enforcement procedure suppressed such doubts, so that nowadays no one is re-considering the opportunity to introduce the warrant of execution stage.

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