Enforcement of Judgments in SEE, CIS, Georgia and Mongolia

Challenges and Solutions

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Abstract

The article considers the results of the Assessment of enforcement systems for commercial cases, carried out by the European Bank for Reconstruction and Development (EBRD) in 2013-2014. In phase I the Assessment looked at the systems in thirteen countries, namely Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan ("CIS+ region"); and in phase II another eight countries were reviewed: Albania, Bosnia and Herzegovina, Croatia, FYR Macedonia, Kosovo, Montenegro, Serbia and Slovenia ("SEE region").

On the basis of the information gathered during the Assessment, the article compares the three forms of enforcement systems and their manifestation in the assessed regions: public (state), private and mixed (hybrid) systems. *Using examples from the reviewed jurisdictions, the article discusses the benefits and downsides of each form. There is no preferred form; however, each may borrow elements from the other to result in a stronger system.*

The Assessment attempted to provide a comprehensive overview of the enforcement frameworks and practices and to pinpoint areas that might need reform and attention in order to improve the quality of the service. It looked at the following elements of enforcement: resources and framework, supervision and integrity issues, searching for assets, seizure of assets, sale of assets, speed of enforcement, cost and fees.

The article discusses in detail the two areas of enforcement that emerged from the Assessment as most challenging: searching for debtors' assets and sale of seized assets. *Facilitated access to registers, wider use of electronic means of communications and clear process are identified among the contributors to better practice in searching for assets. Similarly, use of electronic platforms, establishing a fair price, ensuring sufficient flexibility in methods and process of sale would help improve the outcome of enforcement.*

The article further analyses another two components often overlooked by the regulatory bodies and policymakers, which permeate the enforcement system, significantly influencing the enforcement process. This refers to gathering of statistical data *about the results of enforcement and its effective use; as well as efficient* supervisory system *over enforcement agents. The article argues that gathering*

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data about, for example, enforcement timeline and percentage of recovered claims, and publicizing such data shall contribute to improved results. Furthermore, having an adequate complaints system will help build trust in the enforcement profession.

Keywords: enforcement, bailiffs, judgments, CIS, SEE.

A Introduction

Even the best judgment rendered by the most qualified judge in a commercial dispute becomes futile if it cannot be effectively enforced. The ongoing international debate on implementing rule of law, which has been happening in the context of the Sustainable Development Goal discussions for 2015, has brought to the forefront the importance of not just designing and adopting robust legal frameworks but also the responsibility and difficulty of implementing them. One of the main postulates of the rule of law is that when disputes do occur, parties have access to independent and transparent judiciaries and that the judgments and compensations are enforced.

Over the 20 years of legal transition, the legal framework for doing business in the EBRD region has improved substantially. However, the enforcement of contracts is often problematic, deterring investors from participation in countries' markets for fear that their legal rights will not be protected. Accordingly, the Legal Transition Programme (LTP) has recently devoted special attention to strengthening enforcement of contracts and justice sector capacity.

In 2013, LTP carried out an Assessment of enforcement systems for commercial cases in some of its countries of operations. In 2013, the Assessment looked at the systems in the Commonwealth of Independent States (CIS), Georgia and Mongolia[1] (hereinafter 'CIS+ region'). This was followed in 2014 by the second phase that reviewed the enforcement framework in eight countries in South East Europe (SEE), namely Albania, Bosnia and Herzegovina, Croatia, FYR Macedonia, Kosovo, Montenegro, Serbia and Slovenia (hereinafter 'SEE region').

The Assessment was an attempt to provide a comprehensive overview of the enforcement frameworks and practices and to pinpoint areas that might need reform and attention in order to improve the quality of the service.[2, 3] The Assess-

1 Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan.

2 The summary of the results of phase 1 of the Assessment are presented in the article "Enforcing Court Decisions in the Commonwealth of Independent States, Georgia and Mongolia: a comparative review," by Alan Colman and Veronica Bradautanu, May 2014 edition of the EBRD *Law in Transition*, and is available to the public at <www.ebrd.com/news/publications/newsletters>.

3 A comparative review of phases 1 and 2 of the Assessment is discussed in the article 'Enforcing Court Decisions the Role of Enforcement Agents', by Alan Colman and Marie-Anne Birken, *The World Bank Legal Review*, Volume 7, Financing and Implementing the Post-2015 Development Agenda, The Role of Law and Justice Systems, p. 241, and is available to the public at <https://openknowledge.worldbank.org/handle/10986/24997>.

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ment looked at the following elements of enforcement: resources and framework, supervision and integrity issues, searching for assets, seizure of assets, sale of assets, speed of enforcement, cost and fees. The information gathered for each country was analysed to identify common trends and developments in each focus area. For comparative purposes the country information was also scored for each dimension.

The overall results may be presented in four bands, based on a possible total score of 100 points:

- Slovenia (80+)
- Albania, the Former Yugoslav Republic of Macedonia, Georgia, Moldova, Armenia, Kosovo, Montenegro, Russia (71-80)
- Belarus, Croatia, Ukraine, Kazakhstan, Serbia, Uzbekistan (65-70)
- Azerbaijan, Kyrgyz Republic, Mongolia, Tajikistan, Turkmenistan, Bosnia and Herzegovina (50-65).

The most difficult areas were *searching for assets* in the CIS+ region and *sale of assets* in the SEE region. At the same time searching for assets was only slightly better in SEE jurisdictions, and the sale of assets was the second worse dimension in the CIS+ region.

In summary, countries with better results exhibited:

- a well-established system (*e.g.* Slovenia);
- public trust and more optimistic public perception (*e.g.* Georgia, FYR Macedonia, Albania);
- fewer concerns about corruption (*e.g.* Slovenia, Georgia, FYR Macedonia, Moldova, Montenegro);
- efficient use of modern technologies (*e.g.* Armenia, Russia);
- adequate supervision and complaints mechanisms (Slovenia, FYR Macedonia, Russia, Georgia, Moldova, Montenegro, Kosovo);
- better transparency (Slovenia, FYR Macedonia, Russia, Georgia).

It is also noteworthy that of the countries with better results, five have a completely private enforcement system (Slovenia, FYR Macedonia, Moldova, Kosovo, Montenegro), two have a private component on a par with the state enforcement agents (Albania and Georgia), and only two are state systems (Russia and Armenia). The situation in the band of jurisdictions that showed less optimistic results is completely reversed, as these are state enforcement systems only. This may be indicative of the fact that it is more difficult to set up an efficient state system since its design and incentives mechanism require a more creative approach.

This article will discuss the choice of enforcement systems in the reviewed countries, the distribution of the types of systems in the region, their differences and most useful features. We will look more closely at the areas singled out by the Assessment as most problematic and bring to light solutions employed by the reviewed jurisdictions. The article will also address the issue of gathering and sharing of the information with the public about the results of the enforcement process, which policymakers often omit. Transparency on a par with the com-

plaints and supervision mechanisms contributes to building trust in the enforcement service.

B Different Enforcement Systems in the Region

Available forms of enforcement agents systems in international practice include:
- *Public (state) systems*, where the enforcement agents are employees of a state body, *i.e.* most often public officers.
- *Private systems*, where the enforcement agents are private entities entrusted by the state with public power to enforce a judgment, somewhat similar to private notaries. Private agents may still be supervised to a certain degree by a state body.
- *Mixed (hybrid) systems*, where the two aforementioned systems coexist and the delimitation of competence is based on various criteria; for example, in Georgia and Kazakhstan private agents may not take on enforcement cases against the state.

The Assessment revealed that six out of eight countries reviewed have a private element in the enforcement system, underlining the trend towards privatizing the system or some elements thereof. For example, Kosovo and Montenegro introduced a completely private enforcement system as recently as 2014 in the hope of dealing more effectively with the backlog of cases and to provide a more efficient service. The oldest private system in the region is in Slovenia, which has been in effect since 1998. Albania introduced private agents in 2009 alongside state bailiffs, and the private element is hailed for bringing better results. Serbia has been on a hybrid system as well, since 2012. However, the number of state agents significantly outweighs the private ones, and the quality of the service has not yet improved. The remaining state systems in Croatia and Bosnia and Herzegovina also toyed with the idea of introducing private agents or a private element, but under pressure from the public such initiatives collapsed.

The preference for private agents in the SEE region may be explained by the proximity to the countries with a long history of the private element in their systems, *e.g.* France, Germany and the UK. The availability of technical assistance might also have been a factor, as this would help with the resources necessary for such a significant overhaul of the enforcement framework. This is reflective of the European trend (noticed between 2006 and 2010) "in favour of reducing (state enforcement agents') existence, sometimes in favour of a mix of statuses (where private and state statuses coexist) but mainly in favour of a private status".[4]

4 Evaluation report of European judicial systems, 2014 (based on 2012 data), European Commission on the Efficiency of Justice (CEPEJ Report), 2006, p. 406, available at: <www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf>. At the date of the Report, in Europe there were 15 states or entities with private enforcement agents; in another 15 states or entities they had a public status, and there was a mix of statuses in 17 states or entities.

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In the CIS+ region, out of 13 reviewed countries only 3 have added a private element (Moldova, Georgia and Kazakhstan). Moldova switched to a completely private service in 2010. Georgia introduced private agents in 2009 alongside its state service; however, it must be noted that the state agents in Georgia are predominant providers of the service (covering about 80% of the caseload). Kazakhstan too has rolled out a private branch of the enforcement service opting for a hybrid system since 2011. The private agents are slowly gaining pace with a 5% share of caseload in 2013.

I Private Systems

The respondents to the Assessment indicated that the adoption of the private enforcement system is expected primarily to make the enforcement service more efficient in terms of speed, results of search and sale. This expectation is pinned on the effects of a much better incentives mechanisms and competition that the private element brings. The results of the Assessment appear to confirm such expectations. Overall, the benefits of the private system are perceived to be as follows:

- The private system if designed well should bring an element of competition among the agents allowing claimants to choose the most competent agent and refuse the services should the agent offer less qualitative service. It is important that the competition is not restrained by various jurisdictional and quota limitations. For example, in FYR Macedonia and Montenegro the private agents are attached to a certain territory or court and may work only within such jurisdiction. The same is true for Moldova. On the other hand, in Slovenia such territorial limitation was specifically removed after a few years as it was reducing the competition and efficiency of the agents. Now in Slovenia while agents may be attributed to the jurisdiction of a certain district court, they are free to accept cases anywhere in the country.
- Another important factor to promote competition is the availability of information about the agents and the results of their work. It should be in the interest of the agents to ensure that necessary information is available to the public. The Assessment revealed that few countries put necessary emphasis on the transparency of information.
- It is expected that better incentives in the form of fees paid to private agents and correlated with the results of their work will contribute to the quality of the enforcement service. Additionally, the fees may be structured in such a way as to better align the interests of the claimant with those of the agent. Hence in most reviewed countries with a private element there is a success fee as a percentage of the recovery or claim (proportional to the recovery). Interestingly, in Slovenia the fee is primarily related to various steps undertaken by the agents rather than the results, and the respondents pointed to the fact that the share of the success fee might need an increase.
- The framework for the candidates for private agents is usually more comprehensive as candidates must be licensed and pass an exam. There is often a dedicated code of ethics or rules of conduct. In a number of countries there is also a requirement for the initial and continuous education. Although some

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private jurisdictions require continuous education (Moldova, Kazakhstan, Kosovo, Serbia and Slovenia), only in two of these is it clearly mandatory. In both Kazakhstan and Slovenia enforcement agents must periodically extend their license on the basis of an exam or proof of continuous education (in Kazakhstan every three years; in Slovenia every four years). In other private jurisdictions it appears that the licence is issued for life. The need to renew the enforcement licence is an excellent tool for review, supervision and consolidation of the profession.

- In private systems there are usually specific requirements regarding the experience and prerequisite training of the candidates. The practical and theoretical organized training is beneficial as it provides the agents with common guidelines and rules for their work. Training produces a certain professional 'solidarity', giving a feeling of belonging to the profession and providing a basis for responsibility for the activities carried out by the enforcement agents. It also promotes uniformity of skills: it is then not only the prerequisite skills that should be taken into account, but also training and the final selection.[5] Furthermore, in almost all state and private systems in both regions there is a requirement for the candidates to have legal education and legal experience, often instead of theoretical and practical training. The exceptions are Armenia and Slovenia. This limits the pool of candidates and may be too restrictive.
- The private systems in the reviewed regions have a clear supervision mechanism with layers of supervising authorities. These include the Ministry of Justice and a national chamber of enforcement agents, and on a case-by-case basis the courts. In most jurisdictions the Ministry of Justice issues licences, organizes the examination of candidates, approves regulations for the agents, investigates the affairs of the agents and initiates disciplinary proceedings (*e.g.* FYROM, Albania, Slovenia, Moldova). The role of the chamber varies, as in some jurisdictions it is mostly a representative body for the agents with limited powers (*e.g.* Albania, Montenegro, Moldova, Kazakhstan). In others, the chamber has investigatory powers, and parties may complain about the agents (*e.g.* in Slovenia, FYROM, Serbia). The parties to the enforcement process may also complain to courts about the conduct of the enforcement agents in a certain case. Adequate supervision mechanism is very important for building public trust in the profession. Having both administrative and court overview of the profession ensures quality of the service.

II State Systems

The state systems continue to be preferred in most of the reviewed jurisdictions in the CIS+ region and two countries in the SEE region (Croatia and Bosnia and Herzegovina). This is because the state systems offer built-in public trust, a uniform system and often less expensive service. Another reason is that historically, the enforcement powers were with the state. The state system has its positive sides, which make it attractive to the policymakers.

5 CEPEJ Study 2006, page 41.

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- The state is regarded as a more natural holder of the coercive powers as it has inherent authority. It has emerged during the Assessment that the public in many countries is more inclined to submit to the authority of a state employee rather than a private party. For example, in Armenia it was indicated that the enforcement service must improve within the existing framework (*i.e.* state one) since the public would not trust the private parties with such coercive powers. Similarly, in Croatia the initiative to introduce private enforcement agents has collapsed due to public opposition.
- The public officers would usually adhere to the rules and code of ethics designated for all public employees. In a few countries public employees also have to pass a pre-service exam. This assures the public of the adequate screening of the enforcement officers. The public enforcement agents often hold more powers than a private party would be allowed, such as carrying a firearm and authority to enter the debtor's premises without preliminary court order.
- There is uniformity in supervision and practice. The supervision of the enforcement agents in the state systems in the CIS+ region is centralized as in most jurisdictions they are the employees of the Ministry of Justice or its subdivision. In a few countries the agency or the bureau running the enforcement service has a very clear mandate and is more autonomous from the Ministry, as it supervises enforcement agents, resolves complaints and decides its internal rules and organization (*e.g.* Georgia, Russia, Armenia). The parties most often are able to file complaints with the Ministry/Agency and the court on a particular case.
- At the same time, in the SEE state systems the organization of agents is much more decentralized as the bailiffs are the employees of the courts and the enforcement is primarily judge led. This lends the system a degree of unpredictability as each court follows its internal rules on the organization of enforcement. The courts are also notoriously slow because they are overburdened with cases. In Croatia the policymakers attempted to unburden the courts and have divested some of the enforcement actions to other organizations, for example with regard to enforcement against bank accounts, to a state-owned Financial Agency (FINA).[6]
- A state system is perceived as more accessible for the parties and less expensive than the private system. Additionally, the state would absorb losses related to the enforcement in less lucrative cases.
- The fees for the state enforcement service vary. There are jurisdictions where the fee is covered by the state, *e.g.* Turkmenistan and Uzbekistan and the debtor/creditor does not need to pay. Otherwise, in all other CIS+ state jurisdictions there is a success fee calculated as a percentage from the claim or recovery. As this fee is not regressive, depending on the amount of the claim, it may amount to a significant amount. For example, in Kazakhstan, Kyrgyz Republic, Mongolia and Ukraine the fee is 10% of the recovery. The smallest success fee for the services of a state bailiff is in Albania, standing at 2% of the claim (reduced proportionally to the recovery). In other state systems the

6 FINA Enforcement Proceedings, available at: <www.fina.hr/Default.aspx?sec=1490>.

fee is from 5% to 7% of the claim/recovery. In Bosnia and Herzegovina and Croatia the court sets the fee for enforcement on the basis of court rules and is perceived by the public as reasonable.

- The state has the ability to invest in the necessary infrastructure in a centralized manner in order to improve the speed and quality of the enforcement service. For example, in Armenia the government has created a platform through which the state enforcement agents may instantly send out enquiries about the assets of the debtor to banks and various registers. In Russia there is a register of enforcement cases, which is open to the public and searchable by name of the debtor (individual or a company). However, the ability of the state to build such infrastructure depends on its resources and priorities. For example, in Turkmenistan one of the main issues causing significant inefficiencies in the enforcement service is lack of resources.

III Hybrid Systems

There are four countries with hybrid systems: Albania, Serbia (SEE region); and Georgia, Kazakhstan (CIS+ region). The mixed enforcement service may be organized in such a way as to benefit from the positive features of each system mentioned earlier. In the reviewed region one of the main reasons for introducing the hybrid system was to create competition between the two systems and among the private agents in order to improve the quality of the enforcement service. In addition, distinctive benefits of the hybrid systems include the overall better access to enforcement services; possibility to compare the systems in practice and choose the most appropriate for the country; harmonizing the two systems and injecting each with the best elements of the other.

- Hybrid systems offer an additional layer of competition. This is beneficial for the claimants, as they can choose the service that is best for each particular case. Georgia is a good example with a clear competition policy where the state even turned to Facebook to win the public over.
- It is important, however, that there are no great imbalances between the two systems in order to keep them in competition. For example, in Serbia the number of state agents is very high, and there may not be enough cases to occupy all the agents, private and state.
- In any jurisdiction there are cases that may be less lucrative and hence less attractive, in particular for a private enforcement agent. The difficulty of the case may be related to the remoteness of the assets, insignificance of the claim, inability of the creditor to pay the fees, high status of the parties involved, or any other factor. It is important that the state consider ways to ensure that claimants in such cases have access to enforcement service, and, consequently, access to justice. In a hybrid system the state may absorb some of such cases.
- Less lucrative cases, even if executed by the state, may still be funded by the private agents through a special fund and various levies on the agents. Although it did not appear that policymakers in the reviewed jurisdictions felt concerned about cases where claimants may not have sufficient funds to

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pay for the enforcement service, this is an important aspect of access to justice.
- The policymakers in some jurisdictions may prefer adopting both systems in order to choose the most suitable one for the country. This staged approach may help win over the public should the private system show better results. Again gathering data about the results of the enforcement service by both systems is crucial, as well as sharing it with the public. In Albania, Kazakhstan and Serbia, in the opinion of the respondents the private agents provide more efficient and effective service.
- Having both systems allows the policymakers to learn and borrow from each system its best features. This is important in order to harmonize and align the two branches of the enforcement service and to keep them competitive.
- For example, state system may introduce testing and training for its agents similar to the requirements for the private agents. The code of ethics for the private agents may build on the requirements for public officers applicable to the state agents.

Various strong features of the available enforcement systems should be considered by the policymakers when reforming the existing system or choosing to convert to another one.

C Most Difficult Areas – Search and Sale of Assets

In the course of the Assessment, the following areas emerged as most challenging in the region: searching for assets (in the CIS+ region) and sale of assets (in the SEE region). These are complicated areas, which bring into the picture external factors, such as condition of the market or other bodies, such as register holders. These activities also require a large spectre of skills: a bit of detective work; marketing and advertising; sales; economic analysis and evaluation, legal knowledge.

I Searching for Assets

Among the issues uncovered by the Assessment that make searching for assets complicated are the following:
- Agents have *restricted access to the information* in various registers (*e.g.* pledge registry, cadastre registry, vehicles registry, etc.).
  - This may be the case when there is no obligation on the register holders to provide information to the enforcement agents, and the agents have to follow the ordinary procedure for gaining access to information, including the required paperwork, waiting times, etc. (*e.g.* Mongolia, Kyrgyzstan).
  - The information is not in the electronic format or may not be requested electronically, or is not searchable online. Under any of such circumstances gathering information is slow, allowing the debtor room for manoeuvre.

  - The information in the registers is incomplete or overlapping, causing delays or, in the worst case scenario, requiring legal proceedings to establish ownership over the property. For example, in Bosnia and Herzegovina information in the land registers is often missing or incorrect.
- The first call for enforcement agents is usually *debtors' bank accounts*, and such information is not always easy to access. Most commonly, the banks invoke privacy laws in order to avoid providing information to the enforcement agents. For example, in Kyrgyz Republic, a court must specifically order a bank to disclose information about a debtor's accounts; otherwise, banking confidentiality laws will apply. This entails separate court proceedings, resulting in delays.
- Another culprit is the multitude of banks where the debtor may have the accounts, forcing the agent to contact all the banks in search of the debtor's funds. This again is a slow and laborious task.
- It is more difficult to obtain *information from the third parties other than those already mentioned and the debtor*. Concealment of assets either with the third parties or abroad is a common practice among the debtors. The law is usually not very clear on the rights of the agents vis-a-vis third parties and any obligations the third parties may have to disclose information to the agents. With regard to debtors there is usually an obligation to disclose information but little practice in enforcing such obligation. The penalties and sanctions for the third parties and debtor failing to disclose information are usually not effective owing to lack of implementation. The above is true for almost all countries reviewed in the Assessment.
- In a number of SEE countries the primary responsibility to identify assets for enforcement is on the claimant, as the claimant when submitting to the court the request for enforcement must indicate the assets against which the enforcement should be effected and their location (BiH, Croatia). In Slovenia and Serbia, claimants may also indicate to the court the assets against which to enforce, but it is not a mandatory practice. This may make enforcement rather difficult as the claimant does not always have the resources and powers to search for the debtor's assets.

  However, owing to this close involvement of the claimant in the SEE region the service is clearly owed to the claimant, whereas in the CEE+ region this is often not the case. In many CIS jurisdictions the enforcement service is perceived as a state service rather than for the benefit of the claimant. For example, in Belarus it got to such an extreme that the agents are prohibited from speaking freely to the claimants and must designate a day per week when the claimants may submit their queries in person to the agent.

The Assessment was instrumental in gathering information about various practices employed in the reviewed jurisdictions to overcome the challenges of the searching process. In most countries in both jurisdictions, holders of registers and databases have an obligation to provide information to the enforcement agents. In Belarus, Kazakhstan and Slovenia such information is provided free of charge.

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One of the most potent solutions for speeding up the search is to allow the enforcement agents direct access to the registers. This is not an issue where the registers are truly public and may be searched online by any member of the public. Otherwise, agents may have a subscription to various registers for access. In Ukraine enforcement agents have direct access to the Register of vehicles and the Register of immovable property. Similarly, in Slovenia the agents have direct access to the land register and equity holders register.

A very effective instrument was built in Armenia, where there is a specifically designed system to send out information requests to an extensive number of registers' and database holders, as well as banks. According to the respondents, the system in Armenia is a one-stop electronic program that allows enforcement agents to send queries about assets and property of the debtor to multiple sources simultaneously. Using the same system, Armenian agents can send out seizure orders on debtors' assets.

With regard to the information on bank accounts, the SEE region appears to be better equipped as in most countries there is a dedicated system for tracking and seizing debtor bank accounts through a Central Bank (BiH, Montenegro, Serbia) or special agency (Croatia, Slovenia). The claimant or enforcement agent submits a request to the Central Bank or the agency, and the debtor's account is blocked for enforcement. In Croatia the enforcement against bank accounts is completely divested to a state-owned Financial Agency (FINA) that has access and holds a register of all bank accounts of businesses and individuals in Croatian banks and is able to order directly withdrawal of necessary amounts.[7] The claimant may submit the request for enforcement directly to the agency and pay a fee for the service.

In the CIS+ region the central banks do not get involved in the enforcement activities, and agents must seek other ways to gather information about debtor bank accounts. As already mentioned, in Armenia the agents use an electronic platform to send out queries to all banks at the same time together with the seizure orders. In Russia agents' access to banking information is quite efficient owing to cooperation with the tax authorities, which at the agent's request provides information about the financial assets of the debtor.

For countries that are part of the EU, tracking debtors' funds abroad may become more efficient in the near future owing to The Regulation (EU) No. 655/2014 of the European Parliament and Council dated 15 May 2014 establishing a European Account Preservation Order procedure to facilitate a cross-border debt recovery in civil and commercial matters.[8] The Regulation will be in force from January 2017.

7 *Ibid.*

8 Regulation (EU) No. 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014R0655>.

II Sale of Assets

The respondents to the Assessment reported that it is most difficult for the agents to obtain good results when selling seized assets. In all of the reviewed jurisdictions the respondents were asked, "How often do agents obtain good value for seized assets?" the offered choices of answers were 'usually', 'often', 'sometimes' or 'rarely'. In all countries, with no exception, the respondents indicated: 'sometimes' or 'rarely'.

Sale of assets is a complex part of the enforcement process, requiring many elements to come together: valuation, advertising and property rights transfer. It is also essential that the process is perceived as honest and that it results in fair distribution. This requires adequate checks and balances in the relevant regulations. Also, the framework must be sufficiently flexible to allow the agents to achieve best value. The Assessment revealed a number of issues contributing to the difficulties in the sale process, as well as practices used in various jurisdictions to overcome such hurdles.

- The *method of sale* of seized assets is a determinant of many of the processes that follow. The sale may be by auction, direct sale, through specialized shops or through various electronic platforms. It is difficult for the law to envisage all possible circumstances of a sale in order to ensure the most suitable method for an asset; additionally, the market conditions and technology develop rapidly, leaving the regulatory provisions behind. In the SEE region the agents appear to be more or less free to choose the most appropriate method of sale. However, the auction is preferred for immovable property, where the expense for organizing the auction is justified by the higher value of the asset. In the CIS+ region the approach is more rigid as the default method of sale is an auction, and for some assets a consignment shop.

  While a flexible approach is preferred, it is important to have sufficient checks to ensure the fairness of the sale process. The transparency of the process to the parties, as well as to the regulatory bodies, will help ensure that there is no aberrant behaviour.
- In most countries *evaluation of assets* for sale is by the enforcement agents, although the evaluation by an expert and independent evaluator is available at the request of the parties or the agent. As a matter of practice, agents request the professional evaluation of the immovable and other valuable property. This degree of discretion is welcome, as it reduces the time frame and expense, but necessary checks and balances should be in place. For example, the law may provide some guidance with regard to setting the price by the agents or at least the principle of obtaining good value, against which the regulators will be able to monitor the agents' activity. On the other hand, the guidance should still be flexible to avoid stifling the process, as for example in Montenegro, where it was revealed that the criteria used for valuation are too restrictive and do not allow establishing real value of the assets. This is on top of the requirement that the valuation must be either by an independent valuator or based on appraisal reports obtained from state authorities.
- Connected to the evaluation of assets is the concept of the *reserve price* that marks the price below which the asset may not be sold at the first and next

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stages of the sale process. In most countries already at the first stage of the sale the price may drop to 80-75% of the evaluation price. This allows for a more efficient sale. In most countries in the SEE region already at the second attempt to sell the assets the reserve price drops to 30%. In the CIS+ region the reserve price drops by 10% only at each step. To avoid additional expense and to speed up the sale process it is best to allow a more significant drop at the second attempt.

- A wide *notice of sale* is conducive to a more effective sale. An extensive number of jurisdictions in the CIS+ region have modernized their legislation to reflect technological advances and require sale announcements to be published online (*e.g.* Armenia, Belarus, Georgia, Kazakhstan, Russia and Ukraine). In the SEE region, only in Serbia and Slovenia must the agents advertise the sale on the court websites. In Croatia advertising immovable property online on a special platform became a requirement from 2015. In other countries either the notice must be published in paper format media or there is no such requirement at all.

  The legal requirement for a well-publicized sale is helpful. On the other hand, if enforcement agents have good incentives and professional ethics they will strive to publicize the sale by the most suitable means and attempt to achieve the best price, irrespective of the minimum requirements of the law. In the CIS+ region a number of governments, for example in Armenia, Georgia and Russia, have sought to improve the sale process by creating integrated online platforms for auctioning seized assets.
- Different enforcement systems entail differences in the *incentives* for the enforcement agents to achieve effective sales. In the state systems in the CIS + region the most common is the bonus mechanism linked either to each sale and paid directly to the agent (*e.g.* Tajikistan, Mongolia and Ukraine) or to the overall performance of the enforcement department and distributed equitably (*e.g.* Armenia). However, according to the respondents such schemes have a weak effect on the ability of the agents to obtain a good sale price. In many state systems in both regions there are no incentive mechanisms.

  In the private systems it is presumed that the success fee charged by the agents is a sufficient and straightforward incentive to achieve a good sale price. This belief is backed up by the intricacies of the enforcement fees in the SEE region, where the success fee most often is calculated as a percentage of the claim or recovery set on the regressive scale. In Albania, FYR Macedonia, Kosovo, Montenegro and Serbia there is a success fee payable to private agents, which slides from about 9% to 1.2% depending on the amount of claim or recovery. In the three private systems in the CIS+ region the success fee is set at 10% of the recovery in Kazakhstan and 7% of the claim in Georgia. The only sliding scale in the region is in Moldova, from 10% to 3% of the recovery.

  It must be noted, though, that there are other factors at play to reduce the agents' motivation. The agent may prefer a quick sale to a more profitable one, choosing to sell at a lower price but quickly, rather than wait for a better price. Similarly, in cases when the value of the asset is higher than the claim,

the agent has little incentive to go for a much higher price and instead opts for a quicker sale for an amount that covers the claim. These shortcomings of the private incentive arrangement are best dealt with through transparent statistical data about the results achieved by the agents and adequately enforced professional standards. Targeted training for the agents aimed at helping them with the sale technics and methods may be of assistance.

- Adequate *checks and balances* play an important role in the results of sales and the perception by the public of the effectiveness of the agents. Transparency of the process and results of sale to the parties, availability of statistical data about the overall results of sale to the public, as well as monitoring of the affairs of the enforcement agents by the supervisory authority all contribute to better performance by the agents. The respondents from the CIS+ region often raised concerns about corruption. One of the possible schemes connected to sale was revealed, for example, in Ukraine, where a small group of evaluation firms has assumed a quasi-monopoly with regard to evaluation of immovable property. It was said that in 2012 only four firms were approved for formal evaluation of such property and that they charged up to 15% of the property price for their advice. Greater competition is needed in this field.

  In the SEE region the respondents were less concerned about the corruption issues. Overall, in the private systems the perception is that there are fewer concerns about corruption. However, there are other factors that affect enforcement agents' efficiency, such as lack of competition, procrastination and lack of data about the work results. Monitoring and transparency should help reduce the effect of such factors.

D Importance of Transparency and Supervision

I Statistical Data and Transparency

One function of enforcement that is underused in both regions as an instrument for prompting efficiency of the enforcement service is gathering and dissemination of statistical data about the results of the enforcement process. Only in a few countries in each region does the regulator gather sufficient information, and even fewer make such information available to the public in an easily accessible manner. In the CIS+ region limited information is available online in Armenia, Georgia, Russia and Ukraine. In a few countries limited data is published on an annual basis in the mass media (*e.g.* Kazakhstan, Kyrgyzstan, Mongolia). The data most often includes the number of agents and the number of cases entering the system each year and the number of cases resolved; occasionally it may include data on complaints against the agents, but very rarely the amount of recovered claims.

In the SEE region only in FYR Macedonia and Slovenia do the regulators provide clear and detailed information to the public. Such information is usually published on the website of the Ministry (Slovenia) or the Chamber of Enforcement

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Agents (FYR Macedonia).[9] In other reviewed jurisdictions, for example Albania, BiH, Croatia and Serbia, little information is available to the public, which is not surprising since the regulators do not appear to gather enough information. In Kosovo and Montenegro the law requires ample information gathering and publishing, but the practice is still to be put in place.

The types of information that may be helpful if gathered include number of cases (arranged by stages of implementation), clearance rate, case time span, success rates (in terms of recovery, positive actions, etc.), enforcement costs and number of complaints. As it turns out, the regulators in all jurisdictions gather, apart from number of cases and clearance rates, very little other information. Gathering such data and making it widely available helps build public trust and promotes the enforcement service. Such statistical data may also be used for monitoring and periodical review of the activity of the agents by the supervising authority.

In a number of countries in the CIS+ region, there is an online register of enforcement proceedings identifying legal entities and individuals against which there are enforcement proceedings (*e.g.* Russia, Kazakhstan). The debtor is able to pay its debt through various available payment services directly on the site. Although caution is needed in relation to privacy concerns, this is a laudable effort to raise transparency, as well as facilitate the payment of debt. Data of this kind is of particular interest to credit rating agencies. Accordingly, the new system generates an additional pressure point for recalcitrant debtors by raising the prospect of their non-compliance affecting their credit rating.

II Complaints Mechanism and Supervision

Another factor that helps build public trust in the enforcement service is the supervision of the agents and ability of the parties to file complaints against agents' conduct and actions. In all the countries reviewed the parties are able to file a complaint against the enforcement agent to the court in any particular case. This is, however, a slow and expensive route. Consequently, it is used less frequently and is not a very effective disciplining tool. However, this path offers a clear redress to the complaining parties, and in many countries this is the preferred complaints mechanism, as for example in Ukraine, Moldova, Serbia and Croatia.

In most of the reviewed countries the administrative complaints must be filed with the Ministry of Justice. This includes countries with a private system where there is a Chamber of enforcement agents. Although in a number of countries the complaints may be filed with both the Ministry and the Chamber (*e.g.* FYR Macedonia, Kosovo, Slovenia), the disciplinary action is still by the Ministry. In countries where only the courts monitor the agents, the availability of the administrative mechanism is less clear (*e.g.* BiH, Croatia, Tajikistan, Turkmenistan).

The administrative mechanism is a good disciplining system for the profession in combination with a code of ethics and professional standards available to

9 *See* the relevant reports for FYR Macedonia at: <http://kirm.mk/?page_id=2411>.

the public. The court complaints mechanism should also be always available as a backup option. In contrast to the existing practice, the regulator should gather data about the complaints against the agents filed by any means, be it in court or with another body, not just the main regulator.

An important overall disciplining tool that the reviewed jurisdictions should consider is issuing the licence to the private enforcement agents for a limited period. Of all reviewed countries only in Slovenia and Kazakhstan is the licence limited to four and three years, respectively. The requirement for periodical renewal of the licence allows consolidating the profession, as non-active agents would most probably not apply for a renewal. Also, various requirements may be introduced to prolong the licence, as for example a number of hours of training.

C Conclusions

Understanding the impact of weak court decision implementation, the lawmakers in the region clearly make an effort to improve the enforcement system in their jurisdiction. For many, the first step is to choose the most appropriate system: state, private or hybrid and to endow it with the features that will help improve the service.

Countries with a private element in their enforcement system should concentrate on promoting competition, such as removing strict territorial attachment of enforcement agents; making available to the public and claimants all relevant information to allow them an informed choice of the agent. Limiting the period for which the licence is issued, also, may help with improving the overall quality of the profession by attaching various requirements to the renewal of the licence.

State systems continue to work on improving efficiency via modern technologies and better accountability. More effective transparency as well as training of enforcement agents may help with the corruption issues.

While in most countries there is a clear pricing policy for the service, the other aspects connected to the fees such as incentives for agents to obtain good value from the sale of assets and access to justice appear less prominent. Access to justice is particularly important in cases where there is a need to make advance payment or the claimant has insufficient funds or the case is not lucrative. The CE Guidelines recommend that "in order to guarantee access to justice, legal aid schemes, or alternative funding schemes, should be available to claimants who are unable to pay enforcement fees (*i.e.* by means of state funding or by remitting the fees). Where legal aid is granted, the state may, if considered just, avail itself with mechanisms allowing it to recover its outlay from the proceeds of enforcement".[10]

10 European Commission on the Efficiency of Justice (CEPEJ) Guidelines for a better implementation of the existing Council of Europe's Recommendation on Enforcement; adopted by the CEPEJ at its 14th plenary meeting in Strasbourg, 9-10 December 2009, Chapter IV, Section 2.6, point 6, available at: <https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2009)11&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6>.

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Sale and searching for assets would benefit from better use of modern technologies, training and cooperation with the information holders. In addition, organizing online auctions and advertising online items for sale might yield better results. Furthermore, searching for assets will significantly improve when there is electronic access to registers or electronic tools to send requests and results. Another key necessity is a well-developed process for evaluation of assets in order to set a reasonable and credible price. Third parties should be encouraged to assist enforcement officers, by means of a public awareness campaign, or otherwise by stiffer penalties for failure to provide assistance. Debtors must also be investigated and punished for actively hiding assets or obstructing actions of the enforcement agent.

Statistical data about the enforcement process is an important tool to be used for guidance in the reforming process, as it helps uncover problematic areas. This information should also be made available to the public. Easy to access and to compare statistical data about the ratio of resolved cases per year, ratio of recovered claims and upheld complaints will lend further credibility to the service.

Finally, it is important to note that the need for enforcement of court judgments should ultimately be the exception rather than the rule. Enforcement of judgments would not be such a problem if more judgment debtors voluntarily complied with court decisions. Policy must seek to instill a compliance culture in the population at large. For this to occur, however, there must be a credible threat of effective enforcement as well as adverse financial consequences for those who do not obey the rules.

Implementing necessary reforms might require expenditure of some financial resources and, understandably, not all jurisdictions may deem this possible. However, governments should bear in mind that an inadequate enforcement system will be a drain on the effectiveness of any justice system, no matter how good it is, and on the economy as a whole.