



BAILIFFS IN MONTENEGRO



Kingdom of the Netherlands

The analysis was created within the project **"Towards effective justice system - improving the development of the profession in the function of the Montenegrin judiciary"**, which was financed by the Embassy of the Kingdom of the Netherlands.

BAILIFFS IN MONTENEGRO

Podgorica, 2017.

BAILIFFS IN MONTENEGRO

Publisher:

Centre for Monitoring and Research CeMI



Phone/Fax: +382 (0) 20 511 424

E-mail: info@cemi.org.me

www.cemi.org.me

Editor:

Zlatko Vujović

Circulation:

200



Kingdom of the Netherlands

The analysis was created within the project 'Towards effective justice system – improving the development of the profession in the function of the Montenegrin judiciary', which was financed by the Embassy of the Kingdom of the Netherlands, and implemented by the Human Rights Action HRA and Centre for Monitoring and Research CeMI.

The study was prepared by the Research Team of the Centre for Monitoring and Research CeMI.

The content of the document is the sole responsibility of the Centre for Monitoring and Research and does not necessarily reflect the official views of the Embassy of Kingdom of the Netherlands.

CONTENT:

1. INTRODUCTION	6
2. LEGAL AND INSTITUTIONAL FRAMEWORK	7
3. COMPARATIVE EXPERIENCES IN CREATING A LEGAL FRAMEWORK FOR THE ENFORCEMENT SYSTEMS IN THE WESTERN BALKANS AND EU COUNTRIES	11
4. PROBLEMS IN THE FUNCTIONING OF THE INSTITUTE OF BAILIFFS	16
5. NOVELTIES THAT THE LAW AMENDING THE LAW ON BAILIFFS INTRODUCES	25

1. INTRODUCTION

Within the framework of reform of Montenegro judicial system, with the aim of synchronising the work of judicial institutions with the values, standards and practice present in the European Union member states, a reform of the enforcement of the system of legally binding judgements was carried out. In this way, after several years of agreeing on and rewriting it, the work of bailiffs was legally regulated through the Law on Bailiffs, which was adopted in 2011 and came into effect in January 2014 (Official Gazette of Montenegro 61/11).

Besides that key law, the work of bailiffs is predominantly regulated by the Law on Enforcement and Securing of Claims, also adopted in 2011 (Official Gazette of Montenegro 36/2011). Both laws represent the legal basis for the public work of bailiffs in the system of judicial functions in Montenegro.

After its fairly blurred and not-so-successful initial activities regarding the establishment of the bailiff system (only 12 candidates applied for the first call to fill 32 positions), the first bailiffs started their work on 7 April 2014, performing “the function of bailiff as a public service, independently, professionally and as their only occupation”¹.

Initially, bailiffs’ offices started their work in the Basic Courts in Podgorica, Berane, Herceg Novi, Kotor, Pljevlja, Plav, Rozaje and Zabljak. Today, bailiffs also cover all the other regions in Montenegro, with the rule that jurisdiction in a particular territory is distributed in accordance with the principle that one bailiff should be appointed for every 25,000 citizens.

Hence, after initial problems regarding the distribution of bailiffs to all regions, the final list of cities where the function of bailiff exists was expanded, besides the abovementioned, to Niksic, Bijelo Polje, Danilovgrad, Cetinje, Ulcinj, Bar and Budva. With this, the system of bailiffs in Montenegro was both institutionally and territorially established.

In practice, however, in particular municipalities we still have cases where there are insufficient bailiffs compared to the numbers determined by law, which is mostly the consequence of the fact that a decrease in the number of applications for that function has been registered. In such cases, the function of bailiff is given to a bailiff of a neighbouring area.

However, besides these insufficiencies, since the beginning of the implementation of the Law on Bailiffs and the new Law on Enforcement and Securing of Claims, much of the process of realisation and functioning of the provided solutions in practice was followed by many controversies, regardless of whether it was to do with the implementation of legislative frameworks in legal life – through the practical action of bailiffs, all the way to the social, economic and legal consequences that came out as a result of their systemic or individual activities.

The entire set of problems that was created based on the shortcomings of the legal framework or the inconsistent or illegitimate practices of bailiffs, has become one of central social problems in previous years, and therefore was the focus of many social, private and public entities.

In the following pages of this study, we will try to make a certain summary of the situation this field currently is in, but also this study represents the contribution of civil society organisations in the field of preventing or stopping unlawful or criminal practices, as well as a contribution to overcoming problems in the functioning of enforcement and the finding of the best and most innovative solutions to improving legal and institutional fields.

¹ Law on Bailiffs (Official Gazette of Montenegro 61/11), Article 2.

2. LEGAL AND INSTITUTIONAL FRAMEWORK

As was mentioned in the introduction, the organisation and the work of the bailiff system are legally regulated through the Law on Bailiffs (Official Gazette of Montenegro 61/11) and the Law on Enforcement and Securing of Claims, which was also adopted in 2011 (Official Gazette of Montenegro 36/2011). Therefore, both laws represent the starting legal basis for the public activities of bailiffs in the system of judicial functions in Montenegro.

Besides the two key legal documents, the work of bailiffs is regulated by a series of bylaws:

- » The Rulebook on the Number of Seats and Official Headquarters of Bailiffs (Official Gazette of Montenegro 19/2012)
- » The Rulebook on the Form and Content of Official Legitimation of Bailiffs and Deputy Bailiffs (Official Gazette of Montenegro 16/2012 and 19/2012)
- » The Rulebook on the Programme and the Manner of Taking Examinations for Bailiffs (Official Gazette of Montenegro 51/2011)
- » The Rulebook on the Work of Bailiffs (Official Gazette of Montenegro 42/2012)
- » The Decree on the Tariff of Bailiffs (Official Gazette of Montenegro 28/2013). Fees for work and reimbursement for the costs of bailiffs' work are determined by the Decree on the Tariffs of Bailiffs (Official Gazette of Montenegro 3/2016 of 15 January 2016) which came into effect on 23 January 2016. The Decree defines the fees for the work of bailiffs, consisting of fees for the preparation of cases, actions taken and the enforcement that was carried out. The amount of this fee depends on the amount of the main claim, as detailed in the Decree itself in the table of the amount of the main claim. Hence the amount of the reward for the preparation of the case ranges from €25 to €150 (€25 is the minimum for a main claim amount of €1,000 to €2,000; while €150 is the maximum for amounts over €200,000). For the same range of the amount of the main claim, the percentage of the fee for the carried-out enforcement is 5% of the amount charged for the range from €1,000 to €2,000, while the percentage of the fee for the carried-out enforcement is 1% of the amount charged for a value of over €200,000. The reimbursement for the action taken is also tabulated in the text of the Decree itself, ranging from €0.50 for the cost of sending letters, up to €60 per case for a list of personal effects. It is important to note that if the debtor settles his debt before the solution on enforcement is submitted, the bailiff may only charge for preparation of the case and may only charge a fee for the undertaken actions, while the fee for carried-out enforcement cannot be claimed. The reimbursement refers to "administrative and legal fees, remuneration for items of custody, reimbursement of transport costs and other expenses incurred in connection with the carrying out of enforcement."²

Right at the beginning, the conditions that certain individuals have to fulfil for the purposes of carrying out the function of bailiff are: possession of Montenegrin citizenship, possession of general good health and a capacity for business, possession of a law degree, a minimum of five years of working experience in legal affairs, they must have passed the bar examination, have not been convicted of a criminal offence punishable by at least six months, that makes them unworthy of carrying out their bailiff activities, and that they do not have criminal proceedings for an offence *ex officio* being conducted against them.

Finally, a person applying for this function may not be an entrepreneur or part of a parent company over which bankruptcy proceedings are being conducted. If a person meets all of these requirements, they may apply for the position of a bailiff in a public contest published periodically by the Ministry of Justice, which is eventually authorised by the Minister of Justice. It is important to note that in order for a person to apply for a bailiff examination, they must have two years of work experience in legal affairs.

Upon approval of the appointment by the Minister, the bailiffs take the following oath: "I swear to perform the duties of a bailiff in a manner that is sound, fair and impartial in accordance with the Constitution and the laws of Montenegro."³ All the activities that follow upon entering this function must be performed and evidence submitted within two months of taking the oath: cessation of the work that has been performed up to that date, conclusion of the insurance contract, finding business premises and office equipment, opening of a special account at the bank, as well as providing a certified stamp of the official seal and certified signature.

² Decree on the Tariff of Bailiffs (Official Gazette of Montenegro 3/2016 of 15 January 2016), Article 11.

³ *Ibid*, Article 13.

After the completion of the procedure, the Minister determines and announces the starting date of the bailiff's work. The Minister makes the decision on both the appointment and relieving of the function, which can occur, as stipulated by the law, in the following situations:

- » If it is found that the person has not fulfilled the conditions at the moment of appointment
- » If the person performs another function, or is professionally engaged in another activity;
- » In case of disciplinary action
- » If the person is convicted of a felony that makes him/her unworthy of the function
- » In case of an illness that makes him/her unable to permanently perform this function

The mode of operation of the office, from the size of the premises and infrastructural rules, to the equipment and working hours and book keeping, is regulated by the Rulebook on the Work of Bailiffs of 27 July 2012, created by the Ministry of Justice.

All bailiffs and their deputies are members of the Chamber of Bailiffs of Montenegro (hereinafter: the Chamber), with its headquarters in Podgorica. The Chamber has the character of a legal entity and its organs are: the Assembly, Executive Board and the President. It functions on the basis of a statute, while the activities of bailiffs are covered in the Ethical Code of Bailiffs which regulates the principles of their professional activities.

All bailiffs are subject to disciplinary action, which may be launched by the Minister of Justice or the President of the Chamber, on the initiative of contending parties, their attorneys and appointees. In that process, the Disciplinary Commission decides on the possible violations whereby the bailiff may be suspended while the actual state of affairs is confirmed. The process lapses six months after the date of the report or a year after the violation was committed.

According to Article 64 of the Law on Bailiffs: a bailiff on whom the disciplinary action of a permanent ban on performing activity has been imposed shall be deleted from the Directory of Bailiffs. The disciplinary action relating to a warning and public warning shall be deleted from the Directory of Bailiffs after the expiration of one year from the day of the final decree; a pecuniary fine after the expiration of three years; and other disciplinary actions after a period of five years. If the final decree of the Disciplinary Commission imposes a ban on performing activities for a period of between three months and one year or it imposes a permanent ban, the Chamber shall announce the ruling in the "Official Gazette of Montenegro". The Chamber shall notify the Ministry of the imposed disciplinary actions.⁴

The process of yearly reporting on the performance functions in such a way that a bailiff creates and submits the report to the Chamber by 1 March of the current year for the previous year, after which the Chamber submits a joint report for all bailiffs to the Ministry by 31 March.

Only the Report on the Bailiffs' Performance for 2014 can be found on the website of the Ministry of Justice, while the website of the Chamber does not have any report for the previous year, which is its legal obligation: "The Chamber shall draw up a joint report on the bailiffs' performance, which includes information for all bailiffs from Paragraph 2 of this Article and shall submit it to the Ministry by 31 March of the current year for the previous year. The report from Paragraph 3 of this Article shall be published on the websites of the Ministry and of the Chamber and is available to the public until the data for the following year is published."⁵

Another regulation which is the main structure of the functioning of the bailiffs' performance system is, as already noted, the Law on Enforcement and Securing of Claims (Official Gazette of Montenegro 36/2011). This law regulates "the procedure of enforcement of debt-claims based on a local or foreign executive or credible document (hereinafter: enforcement procedure) and the securing of claims (hereinafter: securing procedure)..."⁶

A bailiff is qualified to make decisions during the enforcement procedure, as well as to implement enforcement and securing. They act based on the executive document of a court or body from the region for which they are authorised.

Executive documents are:

- 1) An executive judgement rendered by the court and judicial settlement;
- 2) A judgement or settlement that is prescribed by a special law as an executive document;
- 3) A mortgage deed, more precisely a mortgage bond drawn up pursuant to the regulations that regulate mortgages;
- 4) A notary act that represents an executive document in accordance with the law or a foreign notary act if it includes all elements necessary for the enforcement, in accordance with the law and is considered an executive document in the country of origin;

⁴ Ibid, Article 64.

⁵ Ibid, Article 72.

⁶ Law on Enforcement and Securing of Claims ("Official Gazette of Montenegro", 36/2011), Article 1.

5) Another document that is determined as an executive document by law.⁴⁷

On the other hand, a credible document in this law refers to the enforcement of a monetary claim and includes bills of exchange, bonds, invoices, bank guarantees, excerpts from business books for utilities, electricity, telephone and similar services, as well as calculations of interest and other proofs of monetary claims. Of course, there must be written evidence of the maturing of such a claim, if it is not included in the document.

In case of a suggestion for enforcement, a court or bailiff is obliged to reply within five days of the suggestion being submitted. In terms of the enforcement, the law prescribes enforcement regarding the collection of monetary claims and enforcement regarding non-monetary claims.

Enforcement regarding collection of monetary claims includes:

1. Enforcement of personal property, which is carried out by stock-taking and an assessment of personal property, after which sale occurs, as well as the settlement of the enforcement creditor;
2. Enforcement of the monetary claims of the judgment debtor, which is carried out by a ban and transfer of enforcement;
3. Enforcement of a claim for delivery of personal property or immovable property, which is carried out by "...banning the enforcement, its transfer to the creditor and the sale of personal property."⁴⁸
4. Enforcement of immovable property, which is carried out through the procedure of registration of a writ of execution and the Real Estate Cadastre, by determining its value and by its sale, after which the creditor's expenses are defrayed by the amount gained;
5. Enforcement of other property rights refers to, for example, enforcement of a patent, technical development or some other property right, through the ban on the exercising of that right and its redemption;
6. Special provisions on enforcement of legal entities' and entrepreneurs' property in order to redeem monetary claims, which includes enforcement of funds on legal entities' or entrepreneurs' bank accounts.

On the other hand, enforcement in order to realise non-monetary claims refers to the following cases:

1. Court penalties: a bailiff grants a decree on enforcement based on absolute decree;
2. Handing over of personal property: in cases where a judgment debtor does not want to hand over personal property that belongs to the other party based on a decree, as well as when personal property is not owned by a judgment debtor, in which case the debtor must pay compensation equal to the value of the personal property;
3. Vacating and selling immovable property: in that case the bailiff, with the required assistance of the Police Administration, shall empty out an immovable property and hand it over to the other party in a dispute;
4. An assumpsit for commission, omission or sufferance, that can be transferred from a judgment debtor to another entity in specific cases;
5. The division of property, at which all parties in the dispute are present;
6. Custody of a child lies within the jurisdiction of the court of that particular municipality;
7. Reinstatement of the employee to their post is within the jurisdiction of the court;
8. Registration of the right to immovable property at the Real Estate Cadastre is a process in which a bailiff shall make a decision, and the body competent for registration shall carry out these decisions.

Except for the enforcement process, the bailiff is competent for, as has already been noted, the process of securing. According to the law, a court shall rule on a judgement, while the bailiff or the court shall carry it out, depending on the type of dispute. "As a means of securing, the following can be determined: a mortgage based on an executive document, a mortgage and personal property based on a settlement between the parties, previous measures and provisional measures."⁴⁹ In this part, the preeminent jurisdiction of a bailiff refers to the sale of property, when the Court orders so, as well as to the satisfying of liabilities.

Besides these two laws that broadly regulate the work of bailiffs, there are a series of systemic laws that indirectly and directly refer to their procedural legal and institutional day-to-day activities, depending on the type of subject which is being dealt with. These laws and their provisions serve as indirect and direct legal sources or sources of information regarding the realisation of the procedure:

7 Ibid, Article 18.

8 Ibid, Article 145

9 Ibid, Article 254

- » The Law on Notaries (Official Gazette of the Republic of Montenegro, 68/2005 and Official Gazette of Montenegro, 49/2008)
- » The Law on Obligations (Official Gazette of Montenegro, 47/2008)
- » The Law on Civil Procedure (Official Gazette of the Republic of Montenegro, 22/2004 and 76/2006)
- » The Law on Misdemeanours (Official Gazette of Montenegro, 1/2011, 6/2011 and 39/2011)
- » The Law on Business Organisations (Official Gazette of the Republic of Montenegro, 6/2002 and Official Gazette of Montenegro, 17/2007, 80/2008 and 36/2011)
- » The Law on Bankruptcy (Official Gazette of Montenegro, 1/2011 of 11 January 2011)
- » The Law on Court Experts (Official Gazette of the Republic of Montenegro, 79/2004 of 23 December 2004)
- » The Law on Ownership and Property Relations (Official Gazette of Montenegro, 19/2009 of 13 March 2009)
- » The Law on Securities (Official Gazette of the Republic of Montenegro, 59/2000, 10/2001, 28/2006 and 6/2013)

The Law on Notaries regulates general notaries' affairs, work organisation and the conditions for establishing a notary office, as well as the basis for its termination. It includes the monitoring of notaries' work and their disciplinary responsibility.

The Law on Obligations refers to: the rights and obligations that are obtained on the basis of a contract; damage that is caused; acquisition without grounds; governance without a warrant; and a unilateral declaration of will. Obligations can include both individuals and legal entities.

The Law on Civil Procedure includes a set of rules that refer to the regulation of personal, domestic and labour relations, as well as property and other civil-law relations and individuals and legal entities. The court shall decide on all disputes in these issues, based on the law, if some of them are not explicitly included in other laws.

The Law on Misdemeanours regulates conditions for defining a misdemeanour and the sanctions, as well as tort liability and administrative proceedings. A misdemeanour is understood as a violation of a public order that is recognised in the law and for which a sanction is prescribed.

The Law on Business Organisations refers to the forms of the performance of corporate activities, and regulates the rules for their registration, whereby corporate activities can be performed by a business organisation or entrepreneur. It is also important, regardless of the forms of performing corporate activities, for there to be consent regarding performance of these activities given by the competent organ.

The Law on Bankruptcy defines the conditions and way of starting insolvency procedures, as well as their implementation. Insolvency refers to both bankruptcy and reorganisation. The former refers to bankruptcy in terms of refunding the creditor by selling the property of the bankrupt party or by selling the debtor in the case of a legal entity. The latter term, reorganisation, includes refunding the creditor through the implementation of debtor-creditor relations, by altering the legal position of the debtor, etc.

The Law on Court Experts regulates all legal issues regarding expertise, appointing of court experts and their dismissal. Additionally, it regulates the rights and obligations of court experts and other issues regarding their work.

The Law on Ownership and Property Relations regulates property rights, where the parties can be both individuals and legal entities. The scope of this law includes other property laws, as well as state management of personal and immovable property. Also, the law regulates the way of acquiring the title deed, the transfer, protection and termination of these rights.

The Law on Securities defines the types of securities, their issuing and trading. The scope of this law includes the rights and obligations of entities on the securities market and organisations.

All these legal documents have provided a legal basis for reforms in this field of the judiciary and a productive start to the implementation and actual work of bailiffs. However, although the given legal framework for regulating issues in the field of the judicial enforcement system is significant and extensive, there are still individual legal decrees and even whole rafts of unclear, ambivalent, imprecise or insufficient decrees in the legal regulations, that have left space for inefficiency, mistakes and abuses in the work of bailiffs in Montenegro.

This situation led to the necessary alterations to the legal framework that followed during the realisation of this study, in March 2017. We will highlight some of the irregularities in the period from 2014 to 2017 in this study, but we will also provide specific suggestions for the improvement of the public enforcement system in Montenegro.

3. COMPARATIVE EXPERIENCES IN CREATING A LEGAL FRAMEWORK FOR THE ENFORCEMENT SYSTEMS IN THE WESTERN BALKANS AND EU COUNTRIES

In accordance with our aim to analyse the effectiveness of legal solutions in Montenegro in a detailed manner regarding the functioning of the system for enforcing verdicts, we have concentrated on solutions that particular EU countries have had in this field, but also those of the countries of the region, taking into consideration the applicability of these solutions to our conditions.

CROATIA

Bearing in mind the different types of transpositions of legal and institutional solutions in different parts of the European integration process, we started our research of the neighbouring countries' legal systems in the Republic of Croatia. However, although Croatia's reforms in the field of enforcement started eight years ago, they have not yet been brought to an end, primarily for political reasons and reasons related to various interested groups in Croatian society and in the judiciary.

Namely, although the Croatian government, with the help of foreign experts and donations from international institutions, prepared new reform solutions in the form of the Law on Bailiffs (Official Gazette, 139/10 of 10 December 2010) and the Law on Enforcement Fees, which introduced the institute of bailiffs and which were supposed to be implemented from 1 January 2012, the Government of the Republic of Croatia made a sudden alteration to these legal solutions in September 2012 – it passed the Law on the Termination of Validity of the Law on Bailiffs and the Law on the Termination of Validity of the Law on Enforcement Fees, and it instead adopted the Enforcement Law.

Hence, the function of bailiff was terminated even before it started working, and those people who had been preparing to take up the posts were not compensated for the losses they suffered. The Enforcement Law prescribes that bailiffs' activities shall be under the courts' and notaries' jurisdiction. The Government of the Republic of Croatia was under attack from part of the public due to these solutions, and a series of public entities pointed to the possible impact of judicial, advocacy and notary lobbying, aimed at realising these political and legislative solutions.

SLOVENIA

On the other hand, Slovenia, another country in the region that is now a member state of the European Union, turned to modern trends in the field of enforcement. With the 1998 Law on Enforcement and Securing of Claims, the Republic of Slovenia introduced private bailiffs that were appointed by the minister of justice for the area of the circuit court, which means that the distribution of enforcement cases is carried out by the circuit court. This procedure predicted that creditors should not directly contact the bailiffs, but the bailiffs should directly undertake implementation of the enforcement after the court approves it.

A bailiff is allowed to perform activities over the whole territory of the Republic of Slovenia, independently, while their services are a public service. When it comes to the responsibilities of the bailiff, as is the case in other countries in the region and EU countries, they are responsible for damages resulting from the performing of the activities of enforcement and securing of claims due to activities, as well for the damages resulting from the failure to fulfil their obligations regarding the implementation of regulations, or during failures that have arisen as a consequence of inadequate indirect contempt of court. If it is a case of a more serious failure, bailiffs can be dismissed from office by the minister of justice.

According to the Slovenian model, unlike the previously mentioned countries, bailiffs are not required to have a degree in law, which points to the fact that private bailiffs replaced former court bailiffs, more precisely officers of the court that carried out enforcement directly. However, since a proposal for enforcement can be submitted directly by the creditor, proposals for enforcement are usually submitted through a lawyer who has the necessary knowledge of the law.

Bailiffs perform their obligations in Slovenia as officials, while the working methods and authorisation are regulated by the Rulebook on the Work of Bailiffs. Payment of bailiffs is determined by the Rulebook on Tariffs of Bailiffs' Work and Consideration Regarding their Work.

Bailiffs started their work in 2000, when the Ministry of Justice rewarded a concession for undertaking direct action for the enforcement and securing of claims. That would mean that the judgments rendered by the court, the verdicts issued during administrative procedures or the processing of violations would be carried out by force, as well as there being forceful enforcement of notary records with the intention of repayment of monetary and non-monetary claims.

In case of monetary and non-monetary claims, the procedure is as follows – when repayment of the monetary claims of the claimant is concerned, the bailiffs are authorised to confiscate the property of the debtor, and to sell the confiscated property based on the decree of a court or of the organs of another state agency, while the bailiffs collect non-monetary claims based on the court's decree or a decision by regulation, they suspend specific actions or permissions and they hand over the immovable property to the claimants.

As in Montenegro, the bailiffs are members of the Chamber of Bailiffs. The headquarters of the Chamber of Bailiffs of Slovenia is in Ljubljana.

FEDERAL REPUBLIC OF GERMANY

When it comes to Germany, the procedure of enforcement is carried out by a bailiff, an official of the court administration who is, by the defined hierarchy, responsible to the director of the circuit court. Also, the bailiff is independent in performing their function.

However, in the previous period, although the bailiff is responsible for the implementation of court decrees in civil matters, the focus was transferred from the aspect of the requirement of property to the aspect of debt. Here it is especially emphasised that the bailiff is authorised to enable the debtor to pay in instalments and is responsible to perform an enforcement procedure efficiently and on time. Also, one of specificities is that their task refers to providing a statement from the debtor, under oath, with a detailed record of the debtor's property.

Other tasks include: confiscation of personal and immovable property, denial of objections from the debtor for the transactions that they should accept, possession of documents required for the enforcement process, the carrying out of forceful enforcement of decrees and prohibitions (except for issues that are under the jurisdiction of the Court), and the implementation of warrants.

Decisions on applications for implementation mostly refer to the circuit court as being the executive court, therefore legal representation is not mandatory. In cases related to the right to payment of a specific amount, in Germany the creditor will generally directly ask the bailiff to provide payment.

When it comes to property, if the bailiff has not received the full amount from the realisation, the debtor is required to provide a detailed description of their property to the bailiff under oath. In that case, the bailiff will charge a €30 fee for taking a statement.

Enforcement against the debtor's immovable property takes the form of a mortgage, in cases where it serves as a security for charging the creditor or when the enforcement implies the sale of the mentioned bankruptcy property at an auction.

BOSNIA AND HERZEGOVINA

When it comes to Bosnia and Herzegovina, except for the Law on Enforcement Procedure, there are no other legal acts that regulate the enforcement system. The function of bailiff has not yet been established, while there is still no initiative for the improvement of the enforcement procedure in the country, aimed at harmonisation with EU regulations.

The act of enforcement, like all other activities connected with it, are under the jurisdiction of the competent court, and judges still perform enforcement activities. The Law on Enforcement Procedure has quite tentative provisions which can lead to a series of confusions in different elements of the enforcement procedure, therefore the issue of the effectiveness of the enforcement procedure can arise.

SERBIA

Bearing in mind Serbia's position in the process of European integration, where this country is in second place behind Montenegro according to the number of opened chapters in the negotiation process with the European Union, and the similarities in the judicial system and legal legacy, as well as the series of judicial reforms that are

occurring in both countries along relatively similar timetables, in this part of the study we will compare specific elements of the legal frameworks in both countries regarding regulation of the enforcement system of judicial decisions.

In Serbia, the work of bailiffs is legally regulated through the Law on Enforcement and Securing of Claims, where Chapter 7 (VII) refers to the authority and obligations of bailiffs, while the legal framework does not yet include a special Law on Bailiffs. There are currently 236 registered bailiffs in Serbia, of which 74 are in Belgrade, out of the 308 stipulated.

When it comes to the territory of Serbia, each bailiff is appointed for the territory of one high court and one commercial court. Bailiffs in Serbia perform their activities in the form of an entrepreneurship, and there are also four registered partnerships. As in Montenegro, there is one bailiff for every 25,000 citizens.

In Serbia, for the appointment of a bailiff, the applicant – besides having citizenship of the Republic of Serbia, a business capacity, a degree in law, having passed the bar examination, and that bankruptcy procedures may not be being carried out against a partnership where they are a partner – need fewer years of working experience, only two. Besides that, it is necessary that the person has not been convicted of a criminal offence punishable by at least six months imprisonment, or which would render them unworthy of carrying out their activities as a bailiff.

In Serbia, as in Montenegro, if a person meets all these requirements, they may apply for the position of a bailiff in a public contest published periodically by the Ministry of Justice, and are eventually appointed by the Minister of Justice. It is important to emphasise that in Montenegro, in order for a person to apply for the bailiff examination, they must have two years of previous working experience in legal positions, while the requirement in Serbia is three years of working experience in legal positions, or two years of experience in the position of enforcement.

When it comes to commencing their duty, in Montenegro, all activities that follow upon commencing their function must be performed and all proofs must be submitted within a period of two months of taking the oath, and after the procedure is completed, the Minister determines and announces the starting date of the bailiff's work.

On the other hand, in Serbia, after taking the oath, a bailiff is required to: deliver a contract on insurance for the damages that they might cause to a third party by performing their activities, as well as on securing the premises and objects received as a deposit in case of their being damaged, destroyed or of vanishing; provide an office and the equipment necessary for implementation of the enforcement; have an official seal and stamp made; deliver a written statement that they meet all requirements for the position; deliver a written statement regarding the address of the business headquarters, with proof that they have provided premises for the performance of activities.

A bailiff in Serbia, as in Montenegro, has a seal that contains the name and coat of arms of the Republic of Serbia, the first name and surname of the bailiff, the label "Bailiff" and the head office of the bailiff. However, in Serbia, for example if the head office of the bailiff is in the territory of the local government unit where the language and script of a national minority are in official use, on the board the word "bailiff" shall also be written in that national minority's language.

When speaking about legitimation, in both Montenegro and Serbia, bailiffs have a legitimation that is issued by the Ministry, while the appearance and content of the bailiff's legitimation is regulated by an act of the Minister. The bailiff can use the seal, stamp and legitimation only for official activities which they are performing within the limits of their legal authority.

The authorisations and obligations of bailiffs in Montenegro are regulated by the Law on Bailiffs, while in Serbia they are regulated by the Law on the Enforcement and Securing of Claims, as follows:

1. The bailiff (hereinafter: they) shall comply with a proposal for the implementation of the enforcement and determine the manner of the enforcement, if the creditor has not determined the manner of the enforcement;
2. They shall comply with a proposal for the enforcement based on a credible document in order to realise monetary claims based on performed communal and similar services;
3. They shall deliver their acts, as well as submissions and court judgments based on the authorisation of the court;
4. They shall determine the identity of the parties and participants in the enforcement procedure;
5. They shall collect data on the property in the enforcement procedure;
6. They shall make conclusions, draw up minutes, requests and official notes in accordance with the authorisations based on this law;
7. They shall carry out an inventory, an evaluation of property, distraintment and sale of personal and immovable property;

8. They shall entrust the sale of property to third parties at their own expense and on their own responsibility;
9. They shall receive and take care of the listed or secured property of the debtor, order the transporting of property and perform distribution of the property and of the funds gained from its sale;
10. They shall carry out evictions and other enforcement activities necessary in order to implement the execution, in accordance with the law and other regulations;
11. At the request of the debtor or the creditor, they shall mediate in order to achieve a peaceful settlement;
12. They shall receive and transfer funds, in accordance with this law; and
13. They shall perform other activities in accordance with this law.

In both countries, the state authorities, banks, employers, and other legal entities are required to provide, at the bailiff's request, access to data on a specific debtor, necessary for the activities of enforcement and securing of claims.

Regarding the rules that regulate dismissal of the bailiff, in comparison with Montenegro (see the section titled 'Legal and Institutional Framework'), Serbia defines the process of a bailiff's dismissal more precisely. Hence, bailiffs, in accordance with the legal regulations, can be dismissed from their function in the following cases:

- If it is determined that they do not meet the requirements for performing the activities of a bailiff any more;
- If they accept any public function, or an administrative or supervisory function in a business organisations, or if they perform the activities of a notary public or a lawyer, or other activities that are not complement with a bailiff's activities;
- ***If it is determined that the data on the property of the bailiff in the report is significantly different from the true state of property;***
- If disciplinary action of a permanent ban on performing the activities of a bailiff has been imposed;
- If they are legally sentenced for a felony to an effective prison term of at least six months or for a punishable offence that makes them unworthy of carrying out their activities as a bailiff; and
- ***If they do not meet the requirement of professional training in accordance with the Chamber's act.***

The Chamber of Bailiffs, in both countries, is required, after giving notice of the existence of a reason from Paragraph 1 of this Article, to notify the Minister. Also, in both countries, the decision on dismissal is made by the Minister and that represents a final administrative act against which an administrative dispute can be conducted.

One of specificities in Serbia is that a bailiff is required to attend regular vocational training, and the Chamber of Bailiffs keeps a record of attendance of seminars and other forms of professional development attended by the bailiff and notifies the Ministry of the collected data. If this requirement is not met by the bailiff, dismissal from their function can occur. The vocational development programme is determined by the Chamber.

All bailiffs, in both Montenegro and Serbia, are subject to disciplinary action, whereby the Minister of Justice or the President of the Chamber can initiate a procedure, based on a proposal from contending parties, their attorneys or appointees. In this process, the Disciplinary Commission decides on possible violations, whereby the bailiff may be suspended while evidence is being sought.

An application upon a complaint and at the initiative of the parties can be submitted by the President of the Court for whose regional unit the bailiff is appointed. Members of the Disciplinary Commission, in both countries, are appointed for a period of four years with the possibility of reappointment.

In Montenegro, bailiffs are deemed to be committing a disciplinary violation, according to the initial Law on Bailiffs if:

1. They deliberately cover up the existence of legal obstacles to the appointment;
2. They do not keep the law while performing their official activities;
3. They calculate or ask for a higher or lower fee contrary to the Tariff on Fees and Reimbursements for Bailiffs' Work;
4. They fail to keep financial records as regulated by this law or they fail to keep them regularly;
5. They purchase for themselves or for their relatives a property that is on sale, or buy claims or other rights during the auction or other procedure which they have carried out as bailiffs;
6. They illegally use funds from an account;
7. They perform a function while a restriction on their performance is still in force;
8. They refuse to take on a case without justified reasons;

9. They fail to perform the activities of a bailiff until a new bailiff is appointed;
10. They fail to act in accordance with the decisions of the competent authorities;
11. They fail to keep business secrets;
12. They act indecently in a public place or disrupt the public order and peace;
13. They contact parties in a form that is inappropriate for the performance of the activities of a bailiff (under the influence of narcotics, alcohol, etc.);
14. They exceed the powers granted by law;
15. They fail to pay their membership fee to the Chamber in accordance with the Chamber's act.

Responsibility for a felony or violation does not exclude the bailiff from disciplinary responsibilities. While practice has shown that this level of defining disciplinary responsibility is not sufficient to cover all the forms that the implementation of the enforcement system has introduced in the new Law Amending the Law on Bailiffs, more serious alterations have been carried out that have significantly improved this field, and these alterations will be explained in the second part of the analysis.

In Serbia, similar to Montenegro, disciplinary violations of the bailiff include:

1. The deliberate covering up of legal obstacles that are a precondition for the appointment;
2. Performing activities that are incompatible with the reputation, honour and independence of the bailiff;
3. Repetition of disciplinary violations before imposed measures have been removed from the record;
4. Performing activities in a procedure even when no reasons exist for exclusion;
5. Violation of the duty to keep official secrets;
6. Abuse of the power conferred by the law;
7. Charging higher fees and reimbursements than are regulated;
8. Offering services;
9. Irregular keeping of books and records;
10. Conducting proceedings in a language that is not in official use;
11. Dealing with objects and funds in a way that is contrary to the law or the authorisation of the parties;
12. Refusal of the duties of temporary deputy appointed by the Chamber, without justified reasons;
13. Public disclosure of the personal, domestic and material circumstances of parties gained while performing the activities of a bailiff;
14. Non-payment of contributions to the Chamber for three months in a row or for six months intermittently during a calendar year;
15. Refusal of vocational training without justified reasons; and
16. Violation of duties determined by other regulations.

Disciplinary measures in Serbia and Montenegro include:

- » A warning
- » A public warning
- » A fine of between €500 and €5,000 (in Montenegro), or RSD50,000 to RSD500,000 (in Serbia)
- » Prohibition from performing activities for a period of between three months and one year
- » Permanent prohibition from performing activities as a bailiff

Fines shall be paid to the bank account of the Budget of Montenegro, or the bank account of the public revenue of the Republic of Serbia.

In Montenegro, according to the initial Law on Bailiffs, the disciplinary procedure for the determination of the disciplinary responsibility of a bailiff is implemented and imposed by the Disciplinary Commission, in accordance with the law. The Disciplinary Commission has three members appointed by the Minister. The president and members of the Disciplinary Commission have deputies.

The new legal solutions in Montenegro have significantly altered this field, which will be also explained in the second part of the study.

In Serbia, the Disciplinary Commission consists of five members appointed by the Minister: two from among the bailiffs, suggested by the Chamber, one from among judges with experience in enforcement procedures, suggested by the High Judicial Council and two from among the civil servants in the Ministry.

The association of bailiffs is carried out in a similar way in both Montenegro and Serbia, through the system of the Chamber, but while the Chamber in Montenegro is a legal entity, in Serbia it operates as a non-profit association. Its organs, in the Montenegrin system are: the Assembly, the Executive Board and the President, while in Serbia there is also a three-member Supervisory Committee that supervises the legality of the performance and financial operations of the Chamber. The Chamber functions in these countries based on a statute, while the performance of bailiffs is included in the Ethical Code of Bailiffs, which regulates the principles of their professional performance.

Performance reporting by the bailiff is carried out through the process of yearly performance reports. A bailiff creates and submits a report to the Chamber, once a year, while in Montenegro a particular date is specified – 1 March of the current year for the previous year, after which the Chamber submits a joint report for all the bailiffs to the Ministry no later than 31 March.

In both countries the process is the same – data from the yearly report of bailiffs is published on the websites of the Ministry and of the Chamber and are available to the public until the data for the next year is published. The yearly report must include the following data:

- » The total number of on-going cases
- » The total number of resolved cases
- » The total number of unresolved cases at the end of the year
- » The relationship between the total amount of the means realised through enforcement activities and the total amount of the claims

When we are talking about the supervision carried out by the ministries in both countries, within the supervision of the legality of bailiffs' performance an authorised official of the Ministry can order measures for the rectification of shortcomings in the bailiffs' performance and can determine the deadline for acting according to these measures, and can also submit a proposal for initiating disciplinary procedures.

4. PROBLEMS IN THE FUNCTIONING OF THE INSTITUTE OF BAILIFFS

As is the case of the implementation of most legal projects in the field of judicial reforms, a significant number of problems cropped up during realisation of the Law on Bailiffs and of the accompanying range of systemic solutions regarding the law.

The types, fields, categories, manifestations and consequences of the problems that occurred at the start of realisation of the Law on Bailiffs are various and range from general and systematic ones to singular and individual ones.

Starting from doubts regarding the various forms of violation of legal procedures by bailiffs and the failure to respect deadlines and decrees regarding court decrees, through ignorance of the elementary judicial procedures regarding subjects that are the area of work of a bailiff: the blocking of overall incomes and blocking of accounts, disclosure of personal data and irrational and incorrect charging, different forms of abuse of position and serious crimes with elements of criminal association and organised crime – all the aforementioned and other irregularities have become an issue of wider public interest, and that of domestic and foreign circles, as well as of state organs at various levels of the judicial, legislative and executive branches.

In order to perceive the scope and structure of the situation more successfully, it is necessary to create a specific classification. However, that would require more detailed analysis of a series of individual cases, bearing in mind the fact that the elements of the problems are intertwined and attached to many areas of the enforcement system.

Due to that connectedness and the cause–effect connection between individual segments of activities within the enforcement system and the problems that occur, it is hard to precisely separate those problems that occur as a consequence of a lack of the personal capacities of bailiffs or as part of the systemic shortcomings regarding horizontal and vertical communication between institutions within the enforcement system; or where the cause

of problems is related to the non-following of procedures and the legal framework, or where the cause is a lack of professionalism and a deliberate orientation towards violating the law.

Such a situation was the motivation for us to decide on an approach that includes analysis of individual solutions from the legal framework, whereby we included specific problems that are occurring or could occur in the practical work of bailiffs.

Without any ambition for this methodology to be final and structurally complete, we will endeavour to provide a general insight into the range of mentioned problematic situations, as well as to give an overview of the framework of possible solutions for the detected problems.

Right at the beginning, as in every legal system and its parts, the roots of the problems that occurred and of the functioning of a specific legal structure should be sought in the legal regulative that regulates the field.

The Law on Bailiffs contained particular controversies and vagueness in the provisions from the very beginning, which would later, in the period of full implementation, cause in its direct and indirect action a whole series of significant dysfunctions and systemic problems significant for the work of bailiffs, but also of a series of other segments of the judicial system and other social institutions, with consequences for individuals, groups and society as a whole.

In order to highlight these problematic areas more precisely, it would be useful to divide them into the units and subjects they regulate. With that aim, we can speak about the following areas:

- » Appointment, dismissal and education
- » Regulation of disciplinary responsibility
- » Supervision and control of the work of bailiffs and the connectedness of those institutions that determine and forward data on the possible responsibilities of bailiffs
- » The status of bailiffs
- » Tariffs and forms of payment
- » How informed citizens are regarding the procedures and their rights in the enforcement process

PROBLEMS REGARDING APPOINTMENT, DISMISSAL AND EDUCATION

The aforementioned Law on Bailiffs stipulates that candidates for the function of bailiff must meet a certain number of general requirements in order to be chosen for the function, such as having Montenegrin citizenship and a general business capacity, and having a law degree and a minimum of five years of work experience in the legal sector.

However, the option whereby a candidate must have passed either the bailiff examination or the bar examination left the possibility of a number of individuals qualifying for the position of bailiff without having adequate experience in the judiciary and without knowing other areas of legal theory and practice besides those directly related to the bailiff examination, and sometimes applicants' knowledge of those legal bases that are directly connected to the field of enforcement is questionable.

A consequence of that is the existence of certain number of bailiffs whose working activity has shown a larger number of elementary mistakes that come from a lack of knowledge of various legal acts that are directly or indirectly related to the field of enforcement. Of course, this has also caused violations of the rights of recipients of their services, whether this relates to a lesser extent to creditors, or to a larger extent to debtors.

Inadequate legal knowledge and a lack of knowledge of the details of judicial practice in practical use by certain bailiffs, is recognised as a problem by the public institutions responsible for implementation of this law, first of all the Ministry of Justice.

Namely, in the Analysis of the Efficiency of the Functioning of the Enforcement System of December 2015¹⁰, the following is noted: "While deciding on a proposal for enforcement, the resolution does not always state all the means and cases of enforcement that are proposed; in most cases, an alteration of the means and cases of enforcement does not occur; in specific cases, there has been unequal implementation of the Decree on the Tariff of Bailiffs; while submitting the case documents to the court for a decision upon appeal, there are cases of legal deadlines being exceeded and

¹⁰"Analysis of the Effectiveness of the Functioning of the Enforcement System", Ministry of Justice of the Government of Montenegro, December 2015.

the irregular and incomplete keeping of documents. Certain shortcomings that are determined in the work of some bailiffs are of an administrative-technical nature (incomplete keeping of the register, the entering of incomplete data on delivery notes, an incomplete list of documents, etc.). Bailiffs are not issuing a receipt and confirmation of the fees charged for the enforcement procedure, which is regulated by the Law on Bailiffs.”

Although additional analysis and also the sequence of events from December 2015 until today have shown that a number of these mistakes and violations occurs due to the *male fides*¹¹ of certain bailiffs who do not perform their duties properly, or due to their intention to openly and on purpose abuse their duty and activities, a significant number of noticed mistakes have been the result of insufficient knowledge of judicial procedures and practices, but also of a lack of an adequate amount of legal knowledge (according to one of the interviewed actors, the division is between “those who do not know and those who do not want to know”).

With the aim of overcoming these problems, the Ministry of Justice has initiated specific steps towards the organisation of additional training of bailiffs, but also towards providing various types of help in the realisation of the activities of bailiffs.

The Minister of Justice set up the Working Team for Providing Vocational Assistance for Bailiffs which is composed of executive judges of the Commercial Court of Montenegro in Podgorica, representatives of the Ministry of Justice and representatives of bailiffs. This working team has held meetings, considered disputes and assumed unique attitudes regarding these disputes.

Besides that, “the Ministry of Justice, in cooperation with the OSCE, has organised 10 briefings for the training of bailiffs regarding the implementation of the Law on Enforcement and Securing of Claims and it has continuously provided vocational assistance and support with the aim of strengthening bailiffs’ activities and of strengthening the organs of the Chamber of Bailiffs.”¹²

In the end, the adequate Handbook for Bailiffs was made and distributed, with all the forms that follow the enforcement procedure, aiming to provide uniformity of implementation of the Law on Enforcement and Securing of Claims.

However, other actors in the enforcement process, starting from creditors, through debtors, to judges, lawyers and other public and private entities, still have various types of complaints on deviations from the professional norms that bailiffs should be respecting, whether these are a consequence of a lack of knowledge or a consequence of bad intent that is presented as a lack of knowledge.

This systemic omission, connected to the personal capacities and selection of adequate and quality individuals as bailiffs, will be partly solved in the new Law Amending the Law on Bailiffs, by abolishing the choice between the different qualifications linked with the bailiff examination and the bar examination. The new solution requires possession of both certificates.

In this way, the Ministry of Justice, as the initiator of amendments, bearing in mind the specific significance that the bar examination has in terms of knowledge and experience, wanted to secure full support for attaining a particular level of knowledge for all bailiffs, including those who are already active and those who would like to work in that field.

On the other hand, bailiffs themselves are already reporting constitutional complaints regarding such legal solutions, because they feel that these are debatable from multiple angles. Namely, as an argument for such a disagreement, bailiffs state that the new solution affects their acquired rights and, related to that, they refer to different practices and legal documents in international frameworks. Also, bailiffs underline that, bearing in mind the number of obligations and regular business obligations that bailiffs have, a year is too short a period for them to fulfil the obligation of taking the bar exam, and that this may delay the execution of their enforcement activities.

The Ministry of Justice sees these arguments as unfounded and believes that the new legal solutions and amendments are completely adequate for the nature, requirements and obligations that the duty of bailiffs carries, and that the timeframe that remains for bailiffs to take the bar or bailiff examination is entirely appropriate to the content and scope of the prescribed examination procedure.

11 Lat. = bad intentions.

12 Ibid.

PROBLEMS REGARDING THE DISCIPLINARY RESPONSIBILITY OF BAILIFFS

As the next problem of the legislative framework, we have the imprecision and incompleteness of the provisions regarding the disciplinary responsibility of bailiffs, as well as supervision of their work, horizontal and vertical communication between the institutions of the enforcement system, including institutions that would be competent to process criminal proceedings that derive from any abuse of official position or from the criminal activities of bailiffs.

Thus, a series of legal provisions, such as Articles 54 and 55, have remained obscure in several elements. Specifically, Article 54 states that a bailiff has disciplinary responsibility for disciplinary violations committed during the performance of his or her enforcement activities, but it does not prescribe a detailed classification of disciplinary violations or their specific seriousness (no division into less serious, more serious and most serious).

Also, no detailed punishment is prescribed in this respect, but in Articles 55 and 56 a range of punishments is noted, without precisely detailing them or linking them to a particular type of disciplinary offence. Therefore, it has been necessary to create a classification of penalties and their precise determination or sanctioning in other ways.

However, a significant part of this problem will be regulated by the amendments in the new Law Amending the Law on Bailiffs in the form of the categorisation of offences and their related sanctions.

Thus, Article 9 of the new Law Amending the Law on Bailiffs, which refers to the issue of the dismissal of the bailiff (Article 34, paragraph 1, item 3), stresses that a bailiff shall be dismissed if they have “committed the most serious disciplinary violation under Article 54, paragraph 5 of this Law”

This is now possible, as Article 13 of the Law Amending the Law on Bailiffs defines the clear categorisation, grouping and grading of the majority of possible offences that are subject to disciplinary sanctions. So, Article 54 of the Law on Bailiffs now categorises disciplinary violations into less serious, more serious and the most serious.

Disciplinary violations are less serious if bailiffs do not keep the records referred to in Article 9 as prescribed (which is a surprise, because this provision should be among the more serious violations due to frequent and possible machinations and abuses that exist as a result of irregular documentation by bailiffs), if they are absent from Chamber meetings, if they behave improperly at work, towards their colleagues, clients or in a public place, or if, while conducting public activities (public events, etc.), they damage the reputation of the Chamber and of the profession of bailiff.

More serious disciplinary violations occur: if a bailiff takes action in a case from which they should be exempted; if they advertise their work by means of public information (this is questionable, especially if it is compared to the less serious violation of irregular documentation); if they obviously or grossly abuse or exceed their legal authority; if they do not act in accordance with the decisions of the competent authorities; if they disable supervision over their own activities; if they present confidential information from the case that they have collected while carrying out enforcement activities (here it is necessary to specify the presenting of the personal data of debtors, such as identity numbers or personal identification numbers); if they do not respect the scope of Article 5; if they are under the influence of alcohol or opiates at work; if they repeat a less serious disciplinary violation during a one-year period; if they keep the financial books, registers or other records irregularly by improperly displaying or omitting to display information that is required by law or other regulations; if they refuse to take a case without justification; if they fail to perform the duties of bailiff until the appointment of another bailiff; if they do not pay the membership fee to the Chamber in accordance with the Chamber Act; if they do not participate in compulsory vocational training organised by the Chamber and the Training Centre in the Judiciary and the State Prosecutor’s Office without a justified reason; and if they fail to submit reports or if they submit irregular reports at the request of the competent authorities.

The most serious disciplinary violations are: if a bailiff erroneously calculates their services or asks for a larger or smaller fee; if they buy for themselves or for their relatives an item that is at an auction or if they purchase claims or other rights in a case they are conducting; if they perform an enforcement activity improperly and unconscientiously; if they represent a party or professionally carry out another activity that is incompatible with the performance of the job of bailiff; if the activities of a bailiff are carried out while they have been temporarily dismissed; and if they unlawfully withdraw funds from an account linked to the enforcement process.

As a further improvement, we must state the somewhat clearer definition of quantified criteria for the improper and malicious execution of enforcement activities. Thus, the new Law Amending the Law on Bailiffs stipulates that a bailiff is performing their duty unconscientiously and unprofessionally if, in a given year, for no justified reason

they fail to issue a decision on enforcement in 10% of their cases or fail to comply with legal deadlines, or if at least 20% of their rescinded orders are issued on the basis of a document, or at least 40% of the rescinded orders are issued on the basis of a credible document, and have at least 30% of cases in which the request for the removal of irregularities in the enforcement procedure was adopted.

Regarding the abovementioned problems, a significant improvement is also the clear definition of disciplinary measures that are now being amended in Article 55 of the Law on Bailiffs (Article 14 of the new Law Amending the Law on Bailiffs), so that the division and categorisation of disciplinary measures is into less serious, more serious and the most serious violations. Thus, the type of responsibility and the severity of the disciplinary punishment that is determined, from financially less severe and more severe, to disciplinary measures for the most serious disciplinary violations is now specified. It is also emphasised that in cases in which a bailiff has made property gain by committing a disciplinary offence, they are obliged to repay the amount of the gains they earned.

Furthermore, in accordance with the abovementioned problems, Article 54 of the original Law on Bailiffs states only that the criminal responsibility of a bailiff does not exclude the disciplinary responsibility determined by the Chamber, but it does not state any specific institutional solution for the transmission of data and initiatives on serious offences with elements of criminal offences to the state bodies responsible for conducting criminal investigations and proceedings.

Although the arguments of the Ministry of Justice are related to the existence of general legal principles and the obligation to report criminal offences, if the subject is aware of the perpetration of a criminal offence, it appears necessary to define an internal, external or mixed solution that would formulate a precise mechanism for horizontal and vertical communication between the institutions of the system, when it comes to determining disciplinary responsibility, which also includes a well-founded suspicion or evidence of the perpetration of criminal offences.

This set of problems that relate to horizontal and vertical communication regarding the responsibility of bailiffs that may have elements of a criminal offence, but that relate also to institutional communication and coordination when it comes to work and supervision of work in the enforcement system, can be fixed to a significant extent through the new Article 15 of the Law Amending the Law on Bailiffs, amending Article 57 of the Law on Bailiffs, thus changing the composition of the first-instance Disciplinary Commission.

According to the new solution, the first-instance Disciplinary Commission now has three members appointed by the Minister, one representative each from the following: the Basic Court (suggested by the Judicial Council), the Public Prosecution Office (suggested by the Prosecutorial Council) and the Bailiffs (suggested by the Chamber).

The composition of the second-instance Disciplinary Commission for Bailiffs, with Article 17 of the Law Amending the Law on Bailiffs amending Article 61 of the Law on Bailiffs, is similar, so that the composition of the second-instance Commission is now composed of three members appointed by the Minister, as follows: one member from among representatives of the Supreme Court of Montenegro, one member from among representatives of the Special State Prosecutor's Office and one member from the bailiffs. The President of the second-instance Disciplinary Commission is the member of the Commission representing the Supreme Court, while for the first-instance Commission the president is the Basic Court judge.

In this way, coordination between judicial institutions was carried out and direct communication achieved between these institutions, as well as between these institutions and the Chamber of Bailiffs, on both a horizontal and vertical level.

This also reduces the possibility of manipulation in processes related to defining the responsibility of bailiffs, but this also directly enables intervention against those bailiffs whose violations of office include elements of criminal responsibility.

However, although this solution has a solid foundation on paper, it remains to be seen what concrete results will be produced in practice in the years ahead. This solution, as it is, provides a significant opportunity to establish a very effective system of control and to establish a system of responsibilities in the enforcement system.

PROBLEMS REGARDING CONTROL AND SUPERVISION OVER THE WORK OF BAILIFFS

The issues and problem related to the abovementioned field of disciplinary responsibility are important from the aspect of the confusion caused by the previous Law on Bailiffs in the domain of control by the Ministry of Justice, which was authorised under this initial law to supervise the legality of the work of bailiffs and the Chamber of Bailiffs, without specifying the extent and type of supervision being carried out.

This confusion was also noted in the Analysis of the Efficiency of Functioning in the Enforcement System, issued by the Ministry of Justice in 2015, which states that: "Bearing in mind the fact that the courts decide on parties' objections, which is solely within their competence and essentially in this way they exercise control over the legality of the work of bailiffs, the issue of the extent of the authority of the Ministry of Justice in relation to the supervision of the legality of the work of bailiffs arises. For these reasons, we appreciate the need to review the provisions of the Law on Bailiffs in relation to the conducting of supervision by the Ministry of Justice and the need to consider the possibility of their modification for the purpose of a more precise definition of supervision."

The presented observations, the ideas related to them and the tasks set out in this Analysis have not been completely implemented within the scope of the mentioned amendments, and therefore in the Law on Bailiffs there are provisions regarding the control of the work of bailiffs and the supervision of bailiffs' work, carried out by the Ministry. These provisions should be elaborated, amended, supplemented and refined in order to avoid those situations that were detected in the previous period.

Namely, in Article 52 of the initial Law on Bailiffs, there are still imprecise and vague rules pertaining to the control of the bailiffs conducted by the Chamber. What is particularly problematic is that a more detailed definition of the control methodology is left to the Chamber's Assembly to determine.

If we take into account that we are talking about the Assembly of the Chamber, which has so far twice appointed a president and given credence to individuals who had extremely questionable public credentials and who were subsequently prosecuted by the police and the prosecutor's office under charges of serious criminal offences¹³, the question arises regarding the motives of the Chamber's Assembly and its members, the bailiffs, as to whether they can put in place a control system that would be efficient and reliable.

For this reason, but also because of the need to strengthen the public credentials, efficiency and reliability of the enforcement profession itself, and bearing in mind the overall corpus of events related to the work of bailiffs, an opinion is needed on whether an amendment of Article 52 and the creation of a particular independent body of an external or mixed type (made up of representatives of judicial institutions or made up of them and representatives of the Chamber), which would independently execute control according to predefined statutory provisions, by an amended Article 52 or by a new addition to the Law on Bailiffs are needed.

Besides these dilemmas regarding Article 52, it is necessary to carry out a revision and supplementation of Article 73, which defines supervision of the legality of the work of bailiffs and the Chamber of Bailiffs. Namely, this article defines that supervision is implemented by the Ministry, by the legal duty or at the suggestion of the President of the Court over whose region the bailiff has been appointed, of the president of the Chamber, or at the initiative of the parties and participants in the proceedings.

Article 73, within the implementation of supervision over the legality of the work of bailiffs and the Chamber, defines that the authorised person from the Ministry has the right to review the documents and minutes in the case, defined in Article 39 of the Law on Bailiffs, as well as other documentation regarding the performance of enforcement activities.

13 The Presidents of the Chamber of Bailiffs, Aleksandar Zloković and Siniša Mugoša, were prosecuted by the police and the prosecutor's office and arrested, and are currently being prosecuted for committing serious criminal offences in the performance of the duties of bailiffs. In some of the newspaper articles on the aforementioned Chamber presidents more details can be found regarding the criminal offences they committed: 8 July 2016, Informer – "He withdrew €263,000 from state account", 8 July 2016, Pobjeda – "Five complaints against Zloković, only one warning", 9 July 2016, Informer, newsflash – "Main state prosecutor's office forms case against bailiff from Podgorica Aleksandar Konstantin Zloković", 9 July 2016, Pobjeda – "Attempts to 'lighten' EPCG of €706,000" – The text introduces new details regarding the "business dealings" of Aleksandar Zlokovic and his fellow bailiff Aleksandar Miškošković. "Podgorica bailiff Aleksandar Konstantin Zlokovic and his colleague from Nikšić, Aleksandar Mijuskovic, tried to unlawfully "withdraw" €706,000 from the Electric Company's account in April of this year, it was announced by the company. On 10 May, EPCG filed criminal charges against both of them to the Supreme State Prosecutor's Office. 11 July 2016, Informer – "They wanted to steal €706,000 from EPCG" – The text deals with the same theme as the previous one. 12 July 2016, Pobjeda – "Zlokovic banned from work, Mijušković temporarily removed".

However, neither Article 39 nor Article 73 addresses the issue of supervision of the legality and regularity of financial documentation, which should be regulated and clearly defined by new legal norms. Within the new article it would be necessary to define the institution, form and timetable for auditing the financial documentation.

Taking into account the complexity of the work and the importance of regular financial business dealings of every bailiff for the sake of the credibility of this profession and its importance in society, and given the abovementioned aspects of control of their work and financial control, it is necessary to conclude that there is a need to merge the control of work and financial control that would be performed by a common external or by a mixed body, consisting of both representatives of judicial institutions and representatives of the Chamber, alongside representatives of the institutions in charge of financial controls.

This would be necessary in order to increase the effectiveness of the auditing, the accuracy of its findings and the gaining of insight into the performance of a bailiff. This would increase the effectiveness of the controls, but would also shorten the timetable for its implementation, as well as the time for inter-institutional communication with regard to audit findings.

Also, within the legal provisions governing the carrying out of supervision of the legality of the work of bailiffs and the Chamber, the authorised official from the Ministry may order measures to remedy shortcomings in the work of a bailiff and set a deadline for implementing these measures, but the deadline and form of mandatory notification of the competent organs in the case of detecting elements of a criminal offence are not specified.

Therefore, it would be desirable to further amend this part of the legal provisions on the work of bailiffs and to further refine and supplement the provisions regarding the methodology of supervision carried out by the Ministry.

PROBLEMS REGARDING THE EFFICIENCY OF WORK AND EQUAL DISTRIBUTION OF CASES

As one of the major problems in the functioning of the enforcement system, the Ministry of Justice defined in its Analysis of the Efficiency of the Functioning of the Enforcement System “a large difference in the number of enforced cases of bailiffs particularly in Podgorica, Niksic, Berane and Herceg Novi”.

This difference arose as a result of the practice of executive creditors, who are legal entities in the form of companies, to submit proposals for enforcement to certain bailiffs without evenly distributing them. This has put a certain number of bailiffs in an unequal position, but in some cases it has also led to the overburdening of a certain number of bailiffs, resulting in inefficiency and a lack of timeliness in executing the enforcement.

The overcoming of this problem is envisioned by a new solution within the Law Amending the Law on Bailiffs, where Article 5a, entitled “Equitable Representation”, introduces an even distribution of cases where creditors appear as “state organs, state administration bodies, local government bodies, institutions or other legal entities exercising public authority or companies in which the state is the majority owner of the capital”.

According to this Decision, an equal representation of bailiffs is provided by the Chamber, to which an executive creditor submits a request to determine the bailiff who will decide in the enforcement procedure and execute the enforcement upon the proposal for enforcement of that executive creditor.

The subsequent procedure involves the Chamber receiving such requests daily and sorting them in alphabetical order of the personal name of the bailiff from the same official area.

According to the initiator of the amendments, the Ministry of Justice of Montenegro, this solution has sought to contribute to the transparency of work of both public companies and bailiffs, and to prevent the creation of a potential focus of corruption.

On the other hand, some bailiffs, who had the opportunity to present their views on this phenomenon in interviews related to this study, stressed that an equal distribution of cases of public companies to all bailiffs from one area would undermine the rules of free competition.

Also, as it is clear that there are evident differences in the quality of work between individual bailiffs’ offices, the question arises of whether additional criteria for the distribution of cases in which the executive creditor is a public institution or a company are a possibility.

Namely, as an opportunity to resolve this disagreement in terms of this problem, but also as a method for the overall assessment of the performance of bailiffs, it has been proposed by some bailiffs to introduce a competitive model

where public companies and institutions could choose a certain number of bailiffs based on competitive selections based on the following criteria:

- » The number of completed cases as a percentage
- » The existence of imposed disciplinary measures
- » The number of terminated enforcement orders as a percentage
- » The number of charged orders as a percentage of the total number of cases (the current order includes only the total amount of money claimed)

PROBLEMS REGARDING THE STATUS OF BAILIFFS

Since the commencement of the work of bailiffs, there has been a dilemma among the professional public, as well as at the institutional level, regarding the legal status of bailiffs, i.e. whether they should be treated as private entities conducting enforcement or as entities with the status of public officials in the enforcement system.

Namely, bailiffs were characterised as public officials by the Commission for the Prevention of Conflict of Interests and were asked to hand over property cards, which the bailiffs refused to do and submitted an appeal to the Administrative Court.

The Administrative Court found that under the Anti-Corruption Law bailiffs are not listed as public officials and therefore cannot be treated as such and are not subject to the obligation to report their property and submit property cards.

However, in the Anti-Corruption Law, bailiffs are not decisively listed or defined as public officials, regardless of the fact that the nature of their activities, the way of appointment and the position enjoyed in the judiciary system are strong indicators that their status may be subordinated to the category of public officials.

Such a gap has been recognised by the Ministry of Justice, and amendments and supplements to the Anti-Corruption Law have been announced, so that bailiffs would definitely have the status of public officials. Accordingly, the new Action Plan aims to anticipate the necessary amendments to the Anti-Corruption Law regarding the final definition of the status of bailiffs as public officials.

In addition, it is necessary to make modifications to all the other accompanying legal and regulatory documents, in order to ensure the effective implementation of all the rules and obligations deriving from the status of public officials.

PROBLEMS REGARDING TARIFFS AND COLLECTION METHODS

Regarding the tariff-setting of bailiffs and the expense reimbursements they receive in the enforcement process, the Law on Bailiffs stipulates that a bailiff is entitled to compensation for their work and the reimbursement of expenses according to the Tariff of Fees issued by the Government of Montenegro on the basis of the opinion of the Chamber. Also, a bailiff is entitled to demand payment in advance from the executive creditor and is not required to act if the requested advance is not paid, and the payment of the reward can be requested immediately upon completion of the job.

However, tariff-setting and charging by the bailiff has been problematic right from the beginning, so the lack of clarity in the charging has been used to disadvantage the debtor or the creditor. The Ministry of Justice highlights these issues of different or inadequate charging for bailiffs' services in the Analysis of the Efficiency of the Functioning of the Enforcement System (of December 2015¹⁴) which states that "in some cases there were uneven applications of the Regulation on the Tariffs of Bailiffs". It has also been stated that "bailiffs are not issuing an invoice or a receipt for the charged costs of the enforcement, as prescribed by the Law on Bailiffs".

The non-issuing of invoices and receipts in the process of charging has also been complained about by parties in the enforcement process, as noted in certain media publications, based on the statements of participants in the enforcement.

The tariff issue was discussed by the High Court, whose legal position, among other things, removed and abolished

¹⁴ "Analysis of the Efficiency of Functioning of the Enforcement System", Ministry of Justice of the Government of Montenegro, December 2015.

the illegal practice whereby the executive debtor was charged €5 for every writ sent by mail, although the actual postal costs were several times lower.¹⁵

By defining wrong tariff-setting as a disciplinary violation, it is expected that such occurrences will be significantly reduced, but it is certainly within the jurisdiction of the state institutions, primarily the Ministry of Justice, to make regular audits in order to contribute to the complete elimination of the occurrence of inadequate tariff-setting.

In addition to tariff-setting, as one of the most common examples of offences relating to the collection and financial aspects of the enforcement process, the blocking of all the executive debtor's benefits in their entirety is mentioned, although the law requires the blocking of a maximum of a half of their personal income.¹⁶

Such collection practices of "removing" all the funds from the debtor's account, without taking into account the provisions of the Law on the Enforcement and Securing of Claims, which clearly prescribe the percentage and the exceptions to compulsory collection, must be solved systematically and in co-operation with all the relevant institutions. The new Action Plan requires the summarisation of the implementation of amendments to the legislative process regarding the collection of claims from the debtor's bank account, due to the widespread practice of non-selective removal of funds from the debtor's account, without taking into account the statutory limitations on fees, pensions and other personal income.

Furthermore, it is necessary to clarify the legal obligations of the banks and bailiffs that would enable the respecting of the existing legal obligations in this field. When defining new legal solutions, the existing good practices of particular bailiffs who perform the collection of the claims in communication with the employer of the debtor or with the Pension Fund should be taking into consideration, where only the legally prescribed part is deducted from personal income.

PROBLEMS REGARDING THE PUBLISHING OF PERSONAL DATA

Article 30 of the Law on Bailiffs obliges bailiffs to keep the data they collect during their work as a business secret, and they are additionally warned that this data may not be used in order to obtain any advantage for themselves or for other entities.

However, ever since the beginning of the implementation of the Law on Bailiffs and the commencement of concrete enforcement activities, including the publication of public advertisements for the sale of property, or other information related to the enforcement process, there was a practice whereby the data of public debtors would appear in the public media in the form of their identity numbers or the numbers of their identity cards, addresses and so on.

This practice clearly and unambiguously violates the Law on Personal Data Protection, and such a practice must be subject to sanctions by the competent institutions.

Unfortunately, these events were not recognised as being important by the Personal Data Protection Agency, nor by the Ministry of Justice, but only certain non-governmental organisations reacted to these breaches of the law, while bailiffs continued with this unlawful practice.

We believe that the competent institutions, primarily the Personal Data Protection Agency and the Ministry of Justice, must take urgent action to discontinue the practice of publishing personal data in the media or in other public ways, in the process of enforcement, primarily cessation of the publication of the identity numbers of citizens who are in the process of enforcement, and that such practices must be included in the disciplinary violations by bailiffs, and consequently they must be subject to disciplinary measures as well.

PROBLEMS REGARDING THE INFORMEDNESS OF CITIZENS REGARDING PROCEDURES AND THEIR RIGHTS IN THE ENFORCEMENT SYSTEM

From the very beginning of the implementation of the Law on Bailiffs there was a discussion among the Montenegrin public of the need for and the importance, methods, legal and practical frameworks of the enforcement system.

However, this discussion mostly included inaccurate, partial, superficial, or sometimes inaccurate interpretations of the normative and practical framework of the enforcement system, which most often appeared in the form of sensationalist media presentation of the various situations and consequences that enforcement activities carry with them.

¹⁵ Legal position, Supreme Court of Montenegro, Su. I No. 206-1/15, Podgorica, 2 October 2015.

¹⁶ This phenomenon is witnessed by a large number of newspaper articles in 2015 and 2016, in all daily issues.

Such tendencies, but unfortunately also, above all, the fraudulent and criminal activities of several bailiffs that have received enormous negative publicity, have created a significantly negative picture of the enforcement system in its entirety, without the necessary essential and rational analysis and that which is based on the legal and realistic scope of the enforcement practice.

All this was accompanied by a large degree of ignorance of their own rights and obligations in the enforcement system, to a lesser extent by executive creditors, but to a larger extent by executive debtors, and so conflicting situations or conflicting interpretations of enforcement activities has become a part of everyday life, both in the media and among the citizens themselves.

Such a situation is commonly known in the public, but one of the formal confirmations of such a condition was a recent study conducted by CeMI on a representative sample that showed that one-fifth of citizens who had been in contact with the enforcement process did not know that they had the right to appeal or believed that they could not change anything in the process.

This is just one of the indicators of the low or inadequate level of informedness of a significant number of citizens about their rights and obligations in the enforcement process, so it is necessary to take urgent measures to conduct an informative campaign on informing citizens about their rights and obligations regarding the enforcement process.

All aspects of informational and promotional campaigns related to this issue should be coordinated by the Chamber of Bailiffs and the Ministry of Justice, and the coordination and participation of civil society representatives dealing with this area of judicial reform is also recommended.

PROBLEMS REGARDING STATISTICAL DATA RELATED TO THE ENFORCEMENT SYSTEM

One of the most significant problems in the overall spectrum of actions of bailiffs is the inadequate monitoring of the efficiency of bailiffs' performance due to the lack of an adequate system for recording and processing statistical data on the processes and activities in the enforcement process.

Although it was already mentioned in Guideline 2.6.8 of the Action Plan for the Implementation of the Judicial Reform 2014–2018, the obligation to establish a reliable statistical system in accordance with the CEPEJ guidelines, which in the field of enforcement should be able to measure the fee collection rate and the duration of the enforcement process, this significant work has not yet been done. Although its implementation is under way, various stakeholders have already raised issues regarding the quality and reliability of the data entered and the operational and realistic capabilities of the system that was created.

Thus, although a detailed overview of the enforcement system data can be found in various analysis reports, due to questions regarding the accuracy of the statistical data and the lack of a relevant database on the work of bailiffs and the work of the courts in the enforcement system, all the data obtained is questionable and can only be considered a starting point for a general orientation regarding the results achieved in the system of enforcement during the period 2014–2015.

These reservations about the statistical data are a result of the lack of a central system and a common database that would represent a reliable tool in the execution of the enforcement process, as well as the basis for comparing and managing accurate statistics on all bailiffs individually. Such a database would also serve as a desirable basis for conducting comparisons between institutions at the collective level, primarily bailiffs within the collective whole, and judicial institutions, but it would also serve as a tool to increase the efficiency of inter-institutional cooperation.

Also, the relative uncertainty and inaccuracy of the data is a consequence of the status reported by the Ministry of Justice in the Analysis of the Efficiency of the Enforcement System 2014–2015, where it is noted that “the bailiffs’ offices use different programs for data entry and processing, due to which the data is being reported in an unequal way, which results in an unreliable compilation”.

Therefore, we come to a situation where the database, now relatively finalised, is filled with data that has a different view of the previous processing in individual enforcement systems.

The creation of this database is ongoing, as is the data entry (unofficially, about 80% of the data has been entered into the database), but there are already doubts about the reliability and accuracy of the data entered, as well as the adequacy of the database itself, in terms of its relevance, ability and readiness to respond to various statistical and processing needs in the enforcement system.

Because of all of this, it is necessary to take all required measures as soon as possible to complete the activities to establish databases with information on the work of bailiffs, as well as the coordination of this data with the data of the judiciary (PRIS) regarding the efficiency of the work of all segments of the enforcement system.

Data entry and its control and processing must be subject to constant monitoring and improvement, and in connection with this, it is necessary to carry out the essential regulations and rules of work for each of the entities in the enforcement system. Some of the interviewed bailiffs have suggested that inadequate, improper or incorrect entry of electronic data or inadequate archiving should be included among the more serious disciplinary offences.

Also, constant communication and consultation between the authorities and institutions of the enforcement system, the database supplier and the accompanying information system, aimed at the system's improvement, adaptation and an increase in its efficiency in the coming years, is necessary.

5. NOVELTIES THAT THE LAW AMENDING THE LAW ON BAILIFFS INTRODUCES

The set of noticed problems in the overall enforcement system has become the subject of lively public discourse, but also the object of analysis by individuals, organisations and private and public institutions involved in these processes in a direct or indirect way.

In this regard, the Ministry of Justice of Montenegro has initiated and carried out an activity to draw up amendments to the existing Law on Bailiffs. Thus, a set of amendments was formally adopted by the Assembly of Montenegro on 28 March 2017, in the form of a new Law Amending the Law on Bailiffs.

This law adopted a set of significant changes in relation to the previous legal solution, which, inter alia, predominantly relates to:

- » Conditions for performing the function of bailiff
- » A distribution system (for equal distribution) of cases to bailiffs
- » Provisions on disciplinary responsibility and disciplinary measures, in case rights are infringed by bailiffs (previously perceived by the most problematic area of the Law on Bailiffs)

One of the most significant novelties concerns the *conditions for performing the function of bailiff*. Namely, in contrast to the previous option, which leaves open the possibility for a bailiff to have passed either a bailiff examination or a bar examination, the new legal order has emphasised the necessity for a person who wants to become a bailiff to have fulfilled both legal conditions – passing both the bar examination and the bailiff examination.

Now, the new law defines the passing of the bar examination as a prerequisite for taking the bailiff examination. Bailiffs who do not meet this criterion have been granted a statutory deadline for taking the necessary bar examination of one year from the date of this requirement entering into force. Also, public executives who have passed the bar examination but not the bailiff examination, will be required to pass it by the same legal deadline.

In addition, being exclusively a Montenegrin citizen is not a precondition for the possibility of performing the function of bailiff, but this possibility also extends to citizens of EU member states, from the day of Montenegro's accession to the European Union.

With regard to the *system of functioning of bailiffs* and their territorial distribution and jurisdiction, the division into territorial jurisdictions still exists as the primary principle, but provisions are also added according to which the principle of equal representation must be respected. In practice, respect for this principle will be the jurisdiction of the Chamber, which will assign cases according to requests by executive creditors in alphabetical order of the names of all the bailiffs competent in one official area.

The set of amendments concerning disciplinary measures against bailiffs is complex.

Firstly, the classification of disciplinary measures has been amended and the number of actions that may trigger a disciplinary procedure has been increased. Under the new law, disciplinary measures may be less severe, more severe and the most severe. Less severe measures include violations of one of the aspects of office functioning,

misconduct in working with colleagues or parties, a lack of continuity in attending Chamber meetings, etc. More severe disciplinary violations include a series of actions, from improper bookkeeping, through advertising and non-payment of membership fees, to violations regarding failures in reporting. The most severe disciplinary violations are related to the sale of property based on family relationships or acquaintances, taking a lower or higher tariff than the prescribed one, the unprofessional performance of enforcement activity, working despite a ban and the illegal allocation of funds.

Secondly, depending on the level of the disciplinary offence, different punishment measures may also be imposed. For less serious disciplinary violations, these are a warning and a fine of one month's average salary for a judge of the Basic Court. For more serious disciplinary violations, fines of up to 24 average monthly salaries for a judge of the Basic Court are imposed. For the most serious disciplinary violations, dismissal is the disciplinary measure. Also, if the bailiff has acquired the property by actions for which a disciplinary measure has been imposed, they are obliged to repay the amount of the property gained.

Thirdly, the amendments in the domain of disciplinary responsibility also apply to the Disciplinary Commission – according to the new law, there is a first-instance and a second-instance Disciplinary Commission. The first-instance Disciplinary Commission decides on the less serious and more serious disciplinary violations and it consists of three members nominated by the Minister as follows: “one member from the representatives of the Basic Court proposed by the Judicial Council, one member from the representatives of the State Prosecution proposed by the Prosecutorial Council and one member from the bailiffs proposed by the Chamber.”¹⁷ This decision also solves the issue of communication and co-ordination between state institutions in relation to possible more serious offences, which also reduces the bailiff's criminal responsibility. A significant alteration has also been made to the composition of the second-instance Disciplinary Commission, which decides on objections to decisions of the first-instance Disciplinary Commission, while an appeal against the decision of the second-instance Commission may be initiated by an administrative dispute which is urgent. Also, the second-instance Disciplinary Commission decides on the most serious disciplinary violations and prepares a proposal for the dismissal of the bailiff, which is submitted to the Minister. It consists of three members appointed by the Minister as follows: “one member from the representatives of the Supreme Court of Montenegro nominated by the Judicial Council, one member of the representative of the Special State Prosecutor's Office nominated by the Prosecutorial Council and one member of the Bailiffs' Office proposed by the Chamber.” Members of both commissions, as well as their deputies, are appointed for a two-year term of office, and are entitled to compensation and may be reappointed.

Fourthly, the deadlines for the expiration of the case as well as the possibility of submitting cases have been redefined. Now the deadline for initiating a procedure for less serious disciplinary violations is one year from the day the violation was committed, while the deadline for more serious and the most serious violations is three years from the day the violation was committed. In addition, the process of disciplinary proceedings lapses only after twice as much time has passed as the deadline prescribed by the law as the deadline for initiation of disciplinary proceedings. On the other hand, the deadline for execution of the disciplinary measure imposed is one year from the day when that measure was imposed by an absolute decree.

Fifthly, the law now defines in a separate article that the provisions on disciplinary responsibility that refer to the bailiff now refer also to the deputy bailiffs, which was not the case before. This solution eliminated another legal dilemma and increased the responsibility of the enforcement teams in the enforcement process.

All these changes represent a significant step forward to solving a number of problems that have been noticed ever since the beginning of the work of bailiffs and it remains to be seen how and to what extent some of these innovative solutions will be implemented in practice.

However, in spite of the entire raft of modifications that have removed a large number of the legal and practical confusions in the enforcement system, the amendments have not succeeded in encompassing all the necessary interventions, which will have to reach the agenda of the relevant structures in a relatively short period of time, if there is indeed the political and institutional will for the reform initiatives in the enforcement system to be fully realised in a successful manner.

17 aw Amending the Law on Bailiffs, Article 15.

CONCLUSIONS

In order to harmonise the work of the judicial institutions with the values, standards and practice of the member states of the European Union, and within the overall reform of the judicial system of Montenegro, a reform of the enforcement system of valid judicial judgments was carried out.

After several years of preparatory activities, the work of bailiffs was legally regulated by the Law on Bailiffs, which was adopted in 2011 (it began to be applied from January 2014, “Official Gazette of MNE”, 61/11). In addition to this key law, the work of bailiffs is predominantly regulated by the Law on the Enforcement and Securing of Claims, which was also adopted in 2011 (“Official Gazette of Montenegro”, 36/2011).

Although implementation of these legal solutions has taken quite a long time, it has been confirmed that the mentioned laws represent a solid legal basis for the public work of bailiffs in the system of judicial functions in Montenegro in the period from 2014 to date.

However, right from the beginning of its implementation, there have been several systemic, realistic, subjective and objective problems in the realisation and functioning of the foreseen solutions.

This has resulted in changes to the legal framework and the imposition of additional obligations for entities throughout the enforcement system. The new Law Amending the Law on Bailiffs and the Law Amending the Law on Enforcement and Securing of Claims, adopted in March 2017, carried out a powerful and effective intervention to a significant part of the problematic areas of previous legal solutions.

However, despite the efforts of the initiators of change, the Ministry of Justice, to intervene as much as possible on the emerging issues, there is still significant room for intervention and further changes of the legislative framework, and also for the development of existing practices and the introduction of new ones into the enforcement system that would eliminate all existing or potential disadvantages in the best way.

This systemic issue is further hampered by the implementation in practice, which has been accompanied by a series of controversies, whether in the application of legislative frameworks in legal life, in the practical performance of bailiffs (which sometimes had the character of criminal activities by certain prominent bailiffs), or in the social, economic and legal consequences that arise as a result of their systemic or individual activities.

When it comes to the complete realisation of the activities that the state institutions foresaw in the period under consideration of this study, we can focus primarily on the “Action Plan for the Implementation of the Judicial Reform Strategy for 2014–2018”.

Namely, the first area covered by this document which pertains to the position of bailiffs is Guideline 2.1.3, whereby the basics and the way of rationalisation of the judicial network and the misdemeanour system is determined. Within this guideline, a measure for the monitoring of the results of the performance of bailiffs regarding the taking over of cases by the court is envisioned. The activity through which this measure is met is the production and publication of reports on the work of bailiffs with conclusions on the impact of unburdening the system. This report was prepared within the “Analysis of the Efficiency of the Enforcement System” for the period until the end of 2015, and the new report for 2016 has not yet been realised. However, although a rather comprehensive overview of the enforcement system data can be found in this analysis, due to questions regarding the accuracy of the statistical data and the lack of a relevant database on the performance of bailiffs and the work of the courts in the enforcement system, all the data obtained is questionable and can only be considered a starting point for general orientation regarding the results achieved in the enforcement system for the period 2014–2015.

The second area of the Action Plan pertaining to bailiffs is set out in Guideline 2.2.3, which monitors the compliance of civil legislation with international standards and the law of the EU. Within this guideline, a measure to ensure compliance with the legislative framework is envisaged through activities related to bailiffs. More specifically, it was envisaged to amend the Law on Enforcement and Securing of Claims, which was carried out with a large success rate in the adoption of new solutions, in March 2017.

The third part, devoted to monitoring the efficiency of the new enforcement system, is set out in Guideline 2.2.5 and provides a measure for continuous monitoring of the work of bailiffs through the activities of conducting analysis of the work of bailiffs, publishing work reports on the website, holding regular meetings of the Working Group on Professional Assistance to Bailiffs, drafting a Monitoring Plan for the Work of Bailiffs and Supervising the Work. This measure was only partially fulfilled, as the report was only prepared for 2014 and 2015 and the supervision was conducted unsystematically and has not yet been standardised in a way that would imply a clear and coherent methodology of supervision, including the structure and content of the minutes, which are not

uniform or standardised and are therefore not sufficiently clear and precise in relation to the subject of supervision and the actions that were the subject of supervision.

In the section covered by Guideline 2.3.7 – regulation of the appointment of bailiffs in order to accelerate the procedure, strengthen legal discipline and reduce the number of cases – provision is made for a continuous filling of all the bailiff positions provided for in the Rulebook, and these activities are: to issue a call for the appointment of bailiffs to fill the vacancies, to make decisions on appointing bailiffs, to determine whether the requirements are met for the work of newly appointed bailiffs, to issue a decision on the beginning of the performance of the enforcement activities, to carry out supervision of the work of the bailiffs, and to make an analysis of the efficiency of the functioning of the enforcement system, including the work of bailiffs and the impact of the reform on court productivity after commencement of the work of bailiffs. This measure has been largely met (29 out of 32 bailiffs have been appointed, but three have already left their function, either through dismissal or resignation). However, the greatest problem is still in all the activities that include measuring of the performance of bailiffs, because there is a lack of reliable databases from which reliable performance analysis can be made, including their impact on court productivity.

One of the most problematic areas that remain is related to Guideline 2.6.8 – establishment of a reliable statistical system in accordance with CEPEJ guidelines, which should be able to measure the fee reimbursement rate and the duration of the enforcement process. This measure has not yet been implemented, but its realisation is under way, although at this stage the issues of data input and the operational and realistic possibilities of the system that has been created arise. What is also questionable is the implementation of the activities of defining and introducing standardised forms of statistical reports in accordance with CEPEJ guidelines.

Strategic guidelines for the work of bailiffs are contained in section 5.5.3, which is entirely devoted to them.

The first of these guidelines, 5.5.3.1, is dedicated to the appointment of bailiffs, which we have already commented on and which has been largely met, but is not without its problems, especially in 2014 when, for example, only 16 individuals applied for the vacancies, and it was necessary to fill 32 bailiff positions.

Guideline 5.5.3.2, which includes continuous monitoring of the performance of bailiffs, implies a whole range of activities, most of which are only partially fulfilled. Thus, the abovementioned report on the work of bailiffs, which contained data on: the number of cases in the work of bailiffs, the burden on each bailiff individually, the quality of the work of the bailiff and the number of the enforcement cases in the courts, was made only for 2014 and 2015. On the other hand, the activities regarding the raising of public awareness of the work of bailiffs through promotional materials have had very little effect, and among the public there is still a high degree of ignorance of the rights and obligations of citizens. One thing that is particularly problematic is the absence of continuous training of bailiffs for the purpose of better performing their activities, as this activity has only been partially implemented (10 seminars with the OSCE) and there is no Continuous Education Plan and Programme, nor a plan for potential occasional assessment of knowledge.

Guideline 5.5.3.3, covering the establishment of a single software system for conducting cases, has already been commented on among bailiffs and has not been implemented yet, although its fulfilment is being worked on.

In the last section of this document pertaining to bailiffs, Guideline 5.5.3.4 is dedicated to providing access to databases of state bodies and state administration bodies necessary for implementation of enforcement. This guideline has been largely met, so today's bailiffs have access to all the data relevant to their work.

Taking into account all the established and stated systemic, legislative and practical concerns and problems that arise in the enforcement system, it can be concluded that additional interventions are needed in the area of the clarification of rights and obligations in the sphere of:

- » The disciplinary responsibility of bailiffs
- » Their appointment and dismissal
- » Additional training of bailiffs and related institutions
- » Control and supervision
- » The status of bailiffs as public officials
- » Tariffs and the claims-charging system
- » Informedness of citizens regarding rights and obligations in the enforcement system
- » Statistics and databases on the work of bailiffs.

Finally, when we consider all the shortcomings and problems encountered in the enforcement system, and also all the successes and positive effects that the new enforcement system has brought with it, it can be said that for now

the project of introducing a system of bailiffs can be assessed as a successful example of the implementation of judicial reforms in Montenegro, with the reservation that additional efforts must be made to come up with systemic solutions in the coming years to overcome the existing problems and shortcomings.

RECOMMENDATIONS

1. The new Action Plan for the Implementation of the Judicial Reform Strategy should provide for the development of a **plan and programme for the continuing education and professional development** of bailiffs in connection with the legal framework and practice of the enforcement system, but also for other elements of the legal system, which are necessary to remedy the problems in the work of bailiffs and to further improve the efficiency of their work. The Plan and Programme of Education must be harmonised and created by the Chamber and the Ministry of Justice, and must include:
 - » The timeframe and frequency of the education
 - » The methodology and a detailed description of the educational activities
 - » The institutions that are included in the educational activities
 - » Mandatory educational programmes
 - » Other information necessary for the successful realisation of educational programmes
2. **The new Action Plan for the Implementation of the Judicial Reform Strategy** should envisage the adoption of new amendments to the Law on Bailiffs and the Law on Enforcement and Securing of Claims, as well as the accompanying regulations and documents related to the issues and problems outlined in Recommendations 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14 that are defined and explained in this analysis.
3. It is necessary to **revise and amend Article 73 defining** the supervision of the legality of the work of bailiffs and of the Chamber of Bailiffs for the purpose of further refining and amending the provisions on the methodology of supervision carried out by the Ministry. Within these amendments, special attention should be paid to specifying the deadline and form of obligation to notify the competent authorities in case of detecting elements of a criminal offence.
4. Also, regarding Article 73 and Article 39, since they do not address the issue of supervision of the legality and regularity of financial documentation, it would be necessary, within a new article or an amendment to the existing articles, to define the institution, form, methodology and deadlines for the control of bailiffs' financial documentation.
5. With regard to auditing of the work of the bailiffs, which is in the jurisdiction of the Chamber of Bailiffs, bearing in mind the total corpus of events related to the work of bailiffs and the series of problems and concerns which may arise from such "self-regulation", and taking into account the need to strengthen the public credibility, efficiency and reliability of the bailiff profession itself, there is a need to amend **Article 52 and to create a particular independent external or mixed-type body** (either from the representatives of the judicial institutions or from them and the Chamber's representatives), which would exercise control independently by pre-defined statutory provisions, by amending Article 52 or by a new additional article to the Law on Bailiffs. It is necessary for such a system of control to be additionally regulated by a **Rulebook** that would regulate:
 - » The timeframe of the control
 - » The content of the control
 - » The procedure of the control
 - » Communication of members of control body with other competent institutions
 - » Publication and distribution of the control findings
6. With regard to Recommendations 3 and 4, the **merging of work control and financial control** should be considered, which would be carried out by a common external or mixed body, which would be made up of

representatives of the judicial institutions and representatives of the Chamber, as well as of representatives of the institutions in charge of financial controls.

7. In relation to Recommendations 1, 3 and 4, it is necessary to, among other things, link **the issue of additional training and the frequency of controls with some bailiffs, to the criteria of efficiency of work, disciplinary responsibility and imposed disciplinary measures**. Specifically, the frequency of education, work control and financial control must be higher among those bailiffs who show lower efficiency in their work, whose work is burdened with different types of problems, which result in disciplinary action being initiated, as well as disciplinary measures being imposed.
8. With regard to the equitable distribution of cases, where executive creditors are public companies or institutions, to all bailiffs from one area, and with the aim of preserving the principle of free competition, it is recommended to **consider the introduction of a competitive model of case distribution** where public companies and institutions can choose a certain number of bailiffs based on competitive selection, based on the following criteria:
 - » The number of completed cases as a percentage
 - » The existence of imposed disciplinary measures
 - » The number of terminated enforcement orders as a percentage
 - » The number of charged orders as a percentage of the total number of cases (the current order includes only the total amount of claimed money)
9. The new Action Plan needs to anticipate the necessary amendments in the Law on Prevention of Corruption, regarding the final definition of the **status of bailiffs as public officials**. In this regard, it is necessary to make changes to all the other accompanying legal and regulatory documents, in order to ensure the effective implementation of all the rules and obligations deriving from the status of public officials.
10. It is necessary to **clarify the legal provisions concerning the meaning and content of the term “credible document”** in the part relating to invoices with delivery, where the modification must refer to the precise stipulation that the **shipment must be signed** by the customer to whom the service was provided or to whom the goods were delivered.
11. It is necessary to **extend the deadline for filing an appeal to the executive order**, because the significant majority of parties (up to 80.3%) who were in the position of debtor in the enforcement process stated that five days is an extremely short period and is insufficient for the timely filing of the appeal. Such a suggestion becomes more significant when taking into account the widespread practice of bailiffs whereby executive decisions are sent at the end of the working week, so that the deadline is shortened by the weekends and the day of delivery, which is a total of three out of the legally prescribed five days. It is therefore suggested that the deadline for submission should be extended to **a minimum of seven and a maximum of 10 working days** in order to provide a reasonable and just deadline for lodging an appeal by the executive debtor.
12. It is necessary to increase the **control over the issuance of receipts** by bailiffs for executed actions in the enforcement process as there is an evident trend among bailiffs of not issuing receipts. In connection with this, it is necessary to amend the legal framework for disciplinary responsibility and **to review the existing article with an amendment to the harsher disciplinary responsibility** for the bailiff in the case of failing to issue a receipt. Confirmation for such billing trends can be found in reports by the Ministry of Justice, but also in a public opinion poll conducted by CeMI, where as many as 35.5% of those who paid for the costs of enforcement stated that they did not receive an appropriate receipt or confirmation of the payment made by the bailiff.
13. It is necessary to **re-examine the delivery system of executive solutions as well as checks regarding the carrying out of the delivery**, in relation to the frequent complaints by executive debtors about the unreasonable or irregular delivery of the decision, and about the denial of the possibility to appeal again the given solution. In a survey conducted by CeMI on a representative sample of citizens, 16.4% of respondents who were in the enforcement process stated that an executive decision was not delivered to them.
14. Urgent measures are needed for carrying out **an informative campaign on informing citizens of their**

rights and obligations regarding the enforcement process, as a significant number of citizens have been identified as having a low or inadequate level of information about the protection of their rights in the enforcement process – the CeMI survey shows that one-fifth of the total number of citizens who have had contact with the enforcement process do not know that they have the right to appeal or they believe that nothing can be changed in the procedure. All aspects of the informational and promotional campaigns related to this issue should be coordinated by the Chamber of Bailiffs and the Ministry of Justice, and the coordination and participation of civil society representatives dealing with this area of judicial reform is also recommended.

15. With the new Action Plan, it is necessary to foresee the implementation of **legislative amendments to the collection of claims from the bank account of the debtor** due to the widespread practice of the non-selective removal of funds from the account of the debtor, without paying due regard to the legal limitations on fees, pensions and other personal income. In this regard, it is necessary to **clarify the legal obligations of banks and bailiffs** to enable them to respect the existing legal obligations in this area. When defining new legal solutions, account should be taken of the existing good practices of individual bailiffs who charge claims in communication with the employer of the debtor or with the PIO Fund, where only the legally prescribed part is deducted from personal income.
16. It is necessary to undertake all measures as soon as possible to **complete the activities to establish a database** with information on the work of bailiffs, as well as the coordination of this data with the data from the judiciary (PRIS) regarding the efficiency of the work of all segments of the enforcement system. Data entry and its control and processing must be **the subject of constant monitoring and improvement**, and in connection with this, it is necessary to create the necessary regulations and rules on work for each of the subjects from the enforcement system. In order to establish as accurate and reliable data as possible, but also for adequate control of the performance of the bailiffs individually, it is necessary to **include inadequate, improper or incorrect entry of electronic data or inadequate archiving among the more serious disciplinary offences**. Also, there is a need for **constant communication and consultation between the organs of the institutions of the enforcement system and the supplier of the database** and the accompanying information system in order to improve, adapt and increase its efficiency in the coming years.

LITERATURE

1. Rulebook on the Number of Places and Offices of Bailiffs (“Official Gazette of Montenegro”, No. 19/2012),
2. Rulebook on the form and content of the official identity of the bailiffs and the deputy bailiff (“Official Gazette of Montenegro”, No. 16/2012 and 19/2012),
3. Rulebook on the Program and Method of Passing Exam for Bailiffs (“Official Gazette of Montenegro”, No. 51/2011),
4. Rulebook on the work of Bailiffs (“Official Gazette of Montenegro”, No. 42/2012) and
5. Decree on the Tariff of Bailiffs (“Official Gazette of Montenegro”, No. 28/2013).
6. Analysis of the system of bailiffs in relation to the court execution system from the aspect of efficiency and costs of the official procedure, Ministry of Justice, Montenegro, link: <file:///C:/Users/User/Downloads/Analiza%20sistema%20javnih%20izvrstielja%20u%20odnosu%20na%20sistem%20sudskog%20izvrjenja%20-%20kona-na%20verzija.pdf>
7. Enforcement of judgements – Slovenia, European Judicial Network in civil and commercial matters, link: http://ec.europa.eu/civiljustice/enforce_judgement/enforce_judgement_sln_en.htm
8. Code of Ethics of Bailiffs of Serbia, link: <http://www.izvrstielji.rs/zakoni-i-propisi/Eticki%20kodeks%20javnih%20izvrstielja.pdf>
9. Lessons of enforcement in the Netherlands for new EU members, drs. Pavle Crnogorac, link: http://pravosudje.ba/vstv/faces/pdfservlet?p_id_doc=20848
10. Website of the Executive Chamber of Montenegro <https://www.javni-izvrstielji.me>

11. WWebsite of the Executives Chamber of the Republic of Serbia, <http://www.komoraizvrstelja.rs>
12. Website of the Ministry of Justice of Bosnia and Herzegovina, <http://www.mpr.gov.ba>
13. Website of the Ministry of Justice of Montenegro, <http://www.pravda.gov.me/ministarstvo>
14. Website of the Ministry of Justice of the Republic of Serbia, <http://www.mpravde.gov.rs>
15. Law on Enforcement and Insurance, Republic of Slovenia, link <http://www.lem-computers.net/ZazeniIzvrstelji2009.html>
16. Law on Enforcement and Security of the Republic of Serbia, link <http://www.izvrstelji.rs/zakoni-i-propisi/zakon-o-izvršenju-i-obežbedjenju/Zakon%20o%20izvršenju%20i%20obežbedjenju%202015.pdf>
17. Law on Enforcement and Security, Montenegro, link https://www.javni-izvrstelji.me/images/propisi/Zakon_o_izvršenju_i_obežbedjenju.pdf
18. Law on Execution Procedure of Bosnia and Herzegovina, link http://www.oss.ba/dokumenti/Zakon_o_izvršnom_postupku_FBIH.pdf
19. Law on Public Executors “Official Gazette of Montenegro, No. 61/2011”, link: <http://www.sluzbenilist.me/PravniAktDetalji.aspx?tag=%7BAD896602-2C6E-4AEB-A61E-E88E614CC837%7D>
20. www.usud.hr
21. http://narodne-novine.nn.hr/clanci/sluzbeni/2013_05_58_1210.html
22. http://narodne-novine.nn.hr/clanci/sluzbeni/2010_12_139_3529.html
23. <http://javni-ovrsitelji.hr/o-udruzi/?lang=hr>
24. <http://www.iusinfo.hr/DailyContent/Topical.aspx?id=14913>
25. <http://www.jutarnji.hr/vijesti/hrvatska/ministar-pravosuda-orsat-miljenic-hrvatskoj-ne-trebaju-javni-ovrsitelji/1645875/>
26. <http://www.novilist.hr/Vijesti/Hrvatska/Javni-ovrsitelji-traze-izravnu-naplatu-od-drzave-zbog-ukidanja-te-sluzbe?articlesrclink=related>
27. http://ec.europa.eu/civiljustice/enforce_judgement/enforce_judgement_aus_en.htm
28. Legal position of the Supreme Court of Montenegro, Su.I no.271-1 / 16, on the tariffs of bailiffs

CIP - Каталогизација у публикацији
Национална библиотека Црне Горе, Цетиње

ISBN 978-86-85547-57-7
COBISS.CG-ID 33506320

ISBN 978-86-85547-57-7



9 788685 547577 >