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A HOLISTIC APPROACH TO EXTRA-JUDICIAL ENFORCEMENT AND PRIVATE DEBT COLLECTION

– A Comparative Account of Trends, Empirical Evidences, and the Connected Regulatory Challenges –

PART TWO

***Abstract:** The article is a comparative account of empirical evidences and regulatory responses on the practices and corollary problems of private debt collectors as compared to private bailiffs and repossession agents.*

Part Two of this article is an overview of related contemporary laws. Anglo-Saxon systems (United Kingdom and the United States), as possessing the most developed regulatory systems. European civil law jurisdictions, where besides a brief account of Danish, French and Italian laws, the focus is on Germany in which its 2008 Act on Extra Judicial Legal Services is ongoing. Central and Eastern European (post-socialist) systems, all having reformed their bailiff systems, but having failed to face the challenged the appearance of private debt collectors on their markets, will be covered, from Lithuania and Poland, to Croatia and Serbia.

Part One of the article has reflected on the importance of extra-judicial enforcement, clarified the terminology, and illustrated the corollary problems through two brief case studies from Hungary. One on the activities of private car-repossession companies, and the other on the aggressive collection practices of private debt collectors. These were then assessed under sector-specific laws of Australia and the United States as developed regulatory systems.

Key words: extra-judicial (out-of-court) enforcement, self-help repossession, private debt collection, factoring (sale of receivables), hard and soft regulation, self-regulation, secured transactions, leasing, law reforms, comparative law.

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4. THE VARYING REGULATORY APPROACHES TO PRIVATE DEBT COLLECTION

4.1. COMMON LAW SYSTEMS OF EUROPE AND BEYOND

4.1.1. The United Kingdom with Focus on English Law

As part of the common law (Anglo-Saxon) legal family, English law¹ has always looked favorably at self-help, including self-help repossession

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- 1 What is said about English law herein applies to a great extent also not just to Wales but also to Scotland, notwithstanding that the latter is a mixed jurisdiction. This is so because of, at least, three main reasons. First, much of the discussion herein concerns regulatory and not private or commercial law; the non-regulatory areas of law often significantly differing from each other (even on the level of terminology) exactly due to the differing origins. The various regulations within our purview here, however, are typically of more recent vintage and apply on UK level though often with special provisions applicable to Scotland or Northern Ireland. Let us mention, for example, the Consumer Credit Act 1974.

Court enforcement, however, is primarily regulated by separate, often significantly amended, Scottish legislation (e.g., the Debt Arrangement and Attachment (Scotland) Act 2002, the Debtors (Scotland) Act 1987) and “*much of common law remains intact and cases stretching back centuries are still authoritative in some contexts.*” See, including the quoted clause, Davidson, F., *et al.*, *Commercial Law in Scotland* (W. Green & Thomson Reuters, 5th ed., 2018, p. 286.

Second, notwithstanding the mixed nature of Scottish law, crucial legal instruments originating in England have gained foothold in Scotland even if not necessarily being neatly integrated into the system. To a limited extent this sometimes meant also the taking over of out-of-court enforcement methods by the otherwise court enforcement – inclined Scottish law, like that was the case with the integration of the floating charge, the famous English security device, traditionally enforced out-of-court by privately (i.e., extra-judicially) appointed administrators or receivers. For the problems and dilemmas surrounding the domestication of the floating charge in Scotland see Gretton, G. L., 2003, Reception without Integration? Floating Charges and Mixed Systems, *Tulane Law Review*, Vol. 78, No. 1–2, p. 307, or Macpherson, A.D.J., The Circle Squared? Floating Charges and Diligence after *MacMillan v T Leith Developments Ltd*, *Juridical Review*, 2018, No. 4, pp. 230–249.

(named also as retaking here) and private debt collection;² a suit that was essentially followed not just by Wales and Northern Ireland but to a great extent also by Scotland – as a mixed jurisdiction. Therefore, it is fair to say, that in Europe it is the UK which has one of the most developed and tested laws on private debt collection – even if fragmented and scattered over more branches of law, and the most important part actually being soft law today (at least, as far as the practices-targeting rules are concerned). As a result, contrary to the US, for example, the UK still does not have a comprehensive act specifically on debt collection. Rather, if one would like to learn about the rules that are aimed to guide the behavior of the industry, resort should be made to even such acts as the Bills of Sale Acts of 1878 and 1882 that might not be a priori self-explanatory. While the one from 1878 aimed to deal with the protection of third persons against the problem of ostensible ownership,³ the latter was a kind of early consumer protection piece of legislation “to protect needy borrowers who

Third, private debt collection as one of the enforcement methods and a business form at the same time and the corollary problems are shared in the UK and are not specific only to English law. The Scottish Law Commission’s ‘Discussion Paper No. 151 on Movable Transactions’ (2011) is a proper proof of the points made. See, e.g., point 14.38. in the document stating that “*It is common for companies to sell their financial claims against their customers especially where the customer is, or is allegedly, in default. The buyers are debt collection companies. In practice it is not always clear whether the latter is seeking to collect simply as agent for the creditor, or whether there has been a transfer, so it is collecting in its own name. [...]*”; (http://www.scotlawcom.gov.uk/download_file/view/710/102/, 8 April 2013). The same could be stated also related to Northern Ireland.

- 2 Truth be told and depending on how far one would like to venture back in history, until the end of the 13th century, self-help was something prohibited in England. The later centuries changed the stance from hostile to friendly and capitalism could have already fully benefited from the efficiency emanating from out-of-court enforcement. See McCall, J. R., 1973, *The Past as Prologue: A History of the Right to Repossess*, *Southern California Law Review*, Vol. 47, No. 1, p. 67. Though as one commentator put it in 1973 “[t]he present tolerance of self-help remedies by the courts of England would have surprised a jurist of 200 years ago.” *Ibid.*, p. 68.

Another point that would require further study from the point of comparative law is that the acceptance of self-help presumes a different societal attitude – which does not necessarily exist in other countries unaccustomed to enforcement by taking the tools into one’s hands. The ‘quiet self-help’ became possible – as Pollock and Maitland phrased it – because the English legal system “has mastered the sort of self-help that is lawless.” *Ibid.*, p. 68, note 44 referring to Pollock, F., Maitland, F., 1923, *The History of English Law*, 2nd ed. 52–53, 169, p. 574.

- 3 As put by Adams and MacQueen: “*Under the Act of 1878, a sale of goods that is evidenced in writing, and under which the seller remains in possession, is void against trustees in bankruptcy and persons seizing goods in judicial execution, unless the sale is made by a written instrument called a bill of sale and registered in accordance with the Act.*” See Adams, J. N., MacQueen, H., 2010, *Atiyah’s Sales of Goods*, 12th ed.,

*gave charges over household possession and such like in the late Victorian period, often on terribly harsh terms.*⁴ These acts, however, do not play a major role in modern times anymore.

The genuine volte face ensued with the advent of movements for the protection of the rights of consumers somewhere by the end of the 1960s and beginning of the 1970s – similarly to the US. In the UK, the recognition that efficient consumer protection requires an additional, sector-specific layer of laws resulted in a few fundamental legislative acts, in particular the Fair Trading Act 1973 and the comprehensive Consumer Credit Act 1974. Prior to the enactment of these Acts, the legislation was very fragmented and focused on some specific industries only.⁵ Truth be told, to the outside observer, the level of the fragmentation of UK consumer protection law – admittedly partially caused by the hardly transparent EU law – has hardly disappeared by the second decade of the 21st century. Moreover, the mixing of “classical” consumer protection law with protection of consumer-investors in the capital markets – in the UK materialized by the Financial Services and Markets Act 2000⁶ – has not eased the task of finding the law either.

The 2006 Consumer Credit Act – primarily meant to amend the 1974 Act – introduced novelties with the ultimate aim to provide more efficient protection to consumers. The three most important novelties included, first, bringing consumer agreements above £25,000 as well as SMEs⁷ under the system. Secondly, the act increased the powers of the Office of Fair Trading (OFT) with respect to licensing of service providers⁸ to include

Pearson), p. 48. As such, the 1878 Act could be looked upon as belonging to secured transactions rather than consumer protection law.

4 *Ibid.*, p. 48.

5 The sector-specific acts repealed by the 1974 Consumer Credit Act were the Hire-Purchase Act of 1965 and the connected Advertisement (Hire-Purchase) Act 1967, the Moneylenders Act 1900 and the Moneylenders Act 1927, as well as two acts regulating the pawnshop industry, the Pawnbrokers Act 1872 and the Pawnbrokers Act 1960. While the act did not step into force in toto at the same time, it influenced the lawmaking in the EU (1979 Directive on Consumer Credit) and was looked upon by the Americans and other Commonwealth nations.

6 The best example is the already mentioned consolidated jurisdiction of the Financial Ombudsman Service. As already stated, the FOS was constituted by the FSMA 2000 and its consumer credit jurisdiction was introduced by the Consumer Credit Act 2006.

7 This was achieved through expansion of the definition of ‘individual’ in section 1 of the Act, which now includes (amending section 189(1) of the 1974 Act) as well “[...] (a) a partnership consisting of two or three persons not all of whom are bodies corporate; and (b) an unincorporated body of persons which does not consist entirely of bodies corporate and is not a partnership.”

8 As formulated by the Explanatory Notes to the Act, the amendments “*make provision in relation to the licensing of providers of consumer credit and consumer hire and*

the power to investigate applicants, to impose conditions for acquisition of such licenses⁹ and to take measures against applicants breaching the rules. Thirdly, the act gave the option to consumers to turn to the Financial Ombudsman Service even if other dispute resolution methods had been agreed upon and notwithstanding the consent of the lender.¹⁰ With the last one, the system seems to have managed to find a panacea also against abusive channeling of disputes with collection agencies towards arbitration – a phenomenon causing headaches on the other side of the Atlantic. Importantly, this possibility applies to disputes with private collection agencies.¹¹

Private debt collectors (known also as doorstep collectors or field agents) became subject to consumer protection regulation first by the 1974 Act; the later acts have further refined and restrained the freedom of this business sector. While heavy reliance on self-regulation by industries was one of the key characteristics of the system roughly until the 1990s,¹² debt collection gradually became subject to regulation by

ancillary credit services and the functions and powers of OFT in relation to licensing [...].” See section 28 et seq. of the 2006 Act.

- 9 See section 30 of the 2006 Act (adding a new section 25A to the 1974 Act) that entrusted the OFT with making a ‘Guidance on fitness test’ as well as section 38 (adding a new section 33A to the 1974 Act) on further powers of the OFT to impose requirements on licensees.
- 10 The Financial Ombudsman Service was introduced in the UK in 2001 based on the Financial Services and Markets Act 2000 exactly for resolving disputes between consumers and various UK-based businesses that provide financial services (i.e., banks, insurance and investment companies, building societies, financial advisers and finance companies). Its official website is at <http://www.financial-ombudsman.org.uk/>. Last visited on 20 Nov. 2019.

Note, however, that the definition of the key category of ‘consumer’ is broader than as it used to be earlier and as defined in other jurisdictions. The broader definition means coverage not just of consumers as individuals but also “[...] *companies and persons entering into transactions in a business capacity [as well as] persons who derive rights from persons who are consumers.*” See MacNeil, I., 2007, *Consumer Dispute Resolution in the UK Financial Sector: the Experience of the Financial Ombudsman Service*, *Law and Financial Markets Review*, Vol. 1, No. 6 (Nov.), p. 515.

As claimed by MacNeil, the FOS – replacing eight different ombudsman schemes of UK – is now “*the world’s largest financial ombudsman as measure by cases opened.*” *Ibid.*, p. 516.

- 11 See section 59 of the Act adding new section 226A to the 1974 Act point (f) of subsection (3) of which extends also to “*a business so far as it comprises or relates to debt-collecting.*”
- 12 The self-regulation-favoring policy is attributable primarily to the Fair Trading Act 1973 that naively believed that consumers can be properly protected if the formulation of codes of conduct as well as the monitoring and enforcement of these rules is left to the respective trade organizations. This philosophy and the regime was aban-

legislation.¹³ Such ‘light touch-type’ regulation remains characteristic of the system up until today, though the bodies entrusted with regulating and supervising private debt collection have changed more times. Today, it is the FCA Handbook, Chapter 7 titled ‘Arrears, Default and Recovery (Including Repossessions)’¹⁴ is the main source of law on what private debt collectors can and cannot do. If departing from the problematic practices of the Hungarian debt collectors in the above-sketched case study, the FCA Handbook, for example, in Rule 7.7.2. foresees that the debt collector must not claim the costs of debt recovery from the customer if that is not foreseen by the underlying contract. Or, Rule 7.4.1. proclaims that the collector must provide the debtor with information on the amount of any arrears and the balance of the debt. Contrary to the US FDCPA, which applies to repossession companies exceptionally, repossessions are one of the directly focused upon debt collection-related technics by the UK Handbook.¹⁵

Another peculiarity of the British system – compared to the unitary and functional regime of UCC Article 9¹⁶ – is its continued bipolarization: i.e., division of the world of consumer financial contracts to two main types: to wit, ‘consumer credit agreements’¹⁷ and ‘consumer

done in 2001. See Woodroffe, G., Lowe, R., 2010, *Woodroffe & Lowe’s Consumer Law and Practice*, Sweet & Maxwell, p. 10.04 et seq.

13 See, for example, section 24A (4)(f) of the Consumer Credit Act 2006, which foresees the possibility of issuance of a standard license for debt collection businesses.

14 The FCA Handbook (<https://www.handbook.fca.org.uk>, 4 Apr. 2020) and Text of Chapter 7 of FCA Handbook (<https://www.handbook.fca.org.uk/handbook/CONC/7.pdf>, 4 Apr. 2020).

15 The FCA Handbook Section 7.3: Treatment of customers in default or arrears (**including repossessions**): lenders, owners and debt collectors. [Emphasis added].

16 UCC Article 9’s functional approach resulted in a so-called unitary ‘security interest’ – a consensual lien (*iura in re aliena*) that extends to all types of transactions that use some form of personal property (movables and intangibles like receivables, rights, claims) notwithstanding the designation used. As a consequence, it is not only a possessory pledge or a chattel mortgage that creates a security interest but also most contracts that are based on retained title (e.g., conditional sales or leasing). Such unitary systems have been introduced subsequently by most Canadian provinces, New Zealand and in 2011 by Australia.

England remains an isolated common law jurisdiction in this respect as due to industrial opposition (mainly the City of London) the reform of the English personal property security system along the lines of the UCC Article 9 – which would bring contracts with retained title (acquisition finance) under the same regime with pledges and chattel mortgages – remains only wishful thinking of some scholars. See, e.g., McCormack, G., Pressured by the Paradigm – the Law Commission and Company Security Interests, in: Lacy, J. de, 2010, *The Reform of UK Personal Property Security Law*, Routledge-Cavendish, p. 83.

17 The criteria of the definition of ‘consumer credit agreement’ in section 8(2) (as amended) are satisfied by the following types of contracts: 1/ hire-purchase, 2/ conditional

hire agreements.¹⁸ Even though the consumer legislation catches both of them, on some issues different rules apply to them and additional protection is granted in consumer hire cases for the case of out-of-court repossessions.¹⁹ The inclusion of hire agreements was criticized.²⁰

The UK bailiff system underwent a major revamping in 2014 led by the consideration of “*providing protection to debtors from the aggressive pursuit of their debt from enforcement agents, whilst balancing this against the need for effective enforcement and the rights of creditors.*”²¹ The costs-related rules of the pre-2014 system, additionally, were complex, unclear and confusing, allowing bailiffs to exploit that by making misrepresentations.²² The 2007 Tribunals, Courts and Enforcement Act of 2007 not only changed their designation to ‘enforcement agents,’ but introduced more categories of bailiffs, the status and powers of which resemble those of other countries within the purview of this paper.

For us the civil enforcement agents (around 2,500 in the country) are the most interesting as they are actually the private bailiffs, which opposed to county court enforcement officers are not employees of the Crown and thus do charge fees.²³ Schedule 12 titled ‘Taking Control of Goods’

sale, 3/ credit sale, 4/ personal loan, 5/ overdraft, 6/ loan secured by land mortgage, 7/ credit card, 8/ pledges, and 9/ store cards. See Woodroffe & Lowe, at 19.03.

18 This category contains just one type of agreement satisfying the Act’s definition of consumer hire, which contains the following six elements: 1/ a bailment of goods, 2/ by one person (the owner), 3/ to an individual (the hirer), provided that, 4/ it is not hire-purchase, 5/ it is capable of lasting for more than three months, and 6/ it does not require the hirer to make payments in excess of £25,000. See Woodroffe, G., Lowe, R., 2010, para. 19.08.

19 Thus, section 132 provides that in such cases the hirer (debtor) may turn to a court and ask for an order according to which “(a) *the whole or part of any sum paid by the hirer to the owner in respect of the goods [are to] be repaid, [or] (b) the obligation to pay the whole or part of any sum owed by the hirer to the owner in respect of the goods [...] cease.*”

20 Hire contracts have been added under the coverage of the Act only because the abuses by owners justified this – otherwise hire contracts do not involve credit and could be looked upon only as some kinds of ‘surrogates of credit.’ This is an eloquent example of the functional approach of the drafters. The Crowther Committee relied on the case *Galbraith v. Mitchenall Estates Ltd.* ([1965] 2 Q.B. 473.) in which the hirer of the chattel (a caravan) did not realize that he could not acquire ownership based on the underlying contract. For criticism of the solution see Palmer, N., Yates, D., 1979, *The Application of the Consumer Credit Act to Consumer Hire*, *Cambridge Law Journal*, 38(1), (Apr.), p. 180.

21 Ministry of Justice (UK), *Review of the 2014 Enforcement Agent Reforms Introduced by the Tribunals Courts and Enforcement Act 2007* (2018/19), preface, at 3. [Hereinafter: 2019 Review].

22 *Ibid.*, p. 5.

23 *Ibid.*, executive summary, p. 4.

regulates in detail the powers and the steps to be followed by the bailiff, including right of entry with or without warrants (para. 14). While the latest review found that positive developments have undoubtedly ensued (for example, a more transparent remuneration structure), “*debt advisors and debtors still perceived some enforcement agents to be acting aggressively and in some cases not acting within the regulations.*”²⁴ These recent data from the UK, a system having ample experiences with enforcement should suggest to such countries as Hungary or Serbia, having recently privatized their bailiff regimes, that the problems they have already faced by now are far from being of temporary nature; they are not a sort of teething problems. Rather, eternal vigilance should be planned for until private enforcement will be in place.

4.1.2. The United States

Not without reason, the US has one of the most developed private debt collection industries in the world. Its distinguishing feature is the existence also of a (private) repossession segment normally lacking in civil law systems. This comes on top of court enforcement regulated on the level of the various States.²⁵ Court bailiffs, named as sheriffs or otherwise, have entitlements similar to their kin in Europe as far as enforcement of judgments is concerned. In other words, self-help repossession and private debt collection have not come into existence because of the impotency or inefficiency of the court enforcement avenue. Rather, each segment of the spectrum fulfils useful functions, sometimes supplementing-, other times competing with each other. In Florida, for example, the sheriffs’ department will not locate the asset of the debtor upon which levy and execution is to be conducted. Hence, for these services the creditor must resort to private service-providers. UCC Article 9, containing the major part of secured transactions law (i.e., the law on security interests on personal property, or as known in Europe on movables and intangible property), explicitly proclaims that the enforcement avenues are cumulative.²⁶

The primary protection of consumer-debtors against the abuses of private debt collection agencies in the US is the federal Fair Debt Collection Practices Act (FDCPA)²⁷ entrusting the Federal Trade Commission

24 *Ibid.*, p. 6.

25 See, for example, the synopsis of the steps taken as part of court enforcement in Florida on the website of the Florida Department of States (<https://dos.myflorida.com/sunbiz/forms/judgment-lien/collect-judgment/>, 4 Apr. 2020).

26 See section 9–601(c).

27 Text downloadable from the website of the FTC (<http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre27.pdf>, 20 Nov. 2019).

with the task of its implementation. Besides this, most States have their enacted statutes called colloquially as mini-FDCPAs,²⁸ to a considerable extent mirroring the federal one yet also providing for some additional protections to consumer-debtors against abuses and overreaches of debt collectors like, for example, licensing. While the various industries being involved in debt collection also have self-regulatory instruments, codes of ethics and similar industry-forged sources of law,²⁹ these play a much less important role in disciplining debt collectors and protecting consumer-debtors than in the UK. The UK could for this reason be referred to as representing the so-called 'soft touch' regulatory approach as opposed to the US being rather characterized by reliance on hard laws.

Notwithstanding the detailed regulation, the powerful enforcement agencies and the availability of private actions, abuses and overreached committed by the industry, or emergence of such new collection patterns that generate novel types of concerns requiring constant vigilance and attention, have not subsided. The most important lesson from the US, in other words, is that no simple solution, free from drawbacks, has neither been developed by the American regulators over time, nor has one organically evolved either.

The other corollary of US-style regulations to pay close attention to is the prohibitive level of litigation emanating from the application of these laws.³⁰ These to certain extent ought to be ascribed to such idiosyncratic factors of the US as the litigiousness of the American society through the existence of such idiosyncratic procedural devices as contingency fees coupled with punitive damages. The latter essentially still not existing in much of Europe.

Yet, as more recently noted, such novel debt collection-related problems have also emerged in the US that might be replicated also on the Old Continent, even if in not exactly in the same acute forms. That may be the case when resolution of debt collection-, or collateral-repossession-related disputes by arbitration is imposed on consumer debtors, moreover before such arbitral tribunals or arbitrators the neutrality and impartiality of which might legitimately be doubted because of links with, or leverage

28 For a list of State debt collection statutes and connected data see https://www.privacyrights.org/fs/fs27plus.htm#New_York; last visited on 17 Dec. 2012. Not downloadable anymore on 20 Nov. 2019.

29 The 2016 Code of Conduct of ACA International – the Association of Credit and Collection Professionals (<https://www.acainternational.org/assets/code-of-conduct/2016-code-of-conduct.pdf>, 20 Nov. 2019). See also the Code of Ethics of the American Recovery Association Inc. at <https://repo.org/about-ara/code-of-ethics/>, 4 Apr. 2020.

30 For a continuous update on major court cases involving the debt collection industry see the US industry's publication 'InsideArm' (<http://www.insidearm.com/>).

provided by the industry even if indirectly. Although there are already US cases confirming that the banks extending loans may add to their contracts provisions as per which consumer-debtors' disputes with the repossession or debt collection-related disputes are to be resolved by way of arbitration and not through courts, this has elevated to a hotly debated issue in the US.³¹ In the lack of related empirical evidence from Europe it is hard to claim anything firmly in that respect, what however should not lead to the outright discarding of the idea that similar problems may surface in Europe as well. Quite to the contrary: with the growth of the private debt collection sector in Europe, one should reckon with the fact that problems of the sort are doomed to emerge on this side of the Atlantic as well.

4.2. EUROPEAN CIVIL LAW SYSTEMS

4.2.1. The Commonalities of European Civil Law Jurisdictions

Continental European civilian jurisdictions do share a number of common denominators as far as private debt collection is concerned. To start with, while on a doctrinal level they invariably look unfavorably towards out-of-court enforcement, there is virtually no system today without, at least, a fledgling private business sector that specializes directly in debt collection or linked services. Often debt collection emerges as a natural corollary of established types of professional or business activities such as provision of legal services or factoring. Legitimization of self-help repossession – the most questionable out-of-court collection method – is still unthinkable in most jurisdictions as that is perceived to be a crime (offense). In high rule of law countries with developed regulatory systems, self-help repossession is, indeed, completely associated with organized crime (in Germany referred to as “*Moskau Inkasso*” or ‘Moscow-type debt collection’).

In some jurisdictions, what the law says, however, is not that crystal clear because if guided by the principle *‘everything which is not forbidden is allowed’*, assisting legitimate owners, or possessors, enforcing their possessory or other proprietary rights is not necessarily and always against the law. This may be the case, for example, with helping financiers that have retained title (ownership) of motor vehicles marketed based on ‘leasing’

31 See in particular FTC, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (2010), (<http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>, 20 Nov. 2019). As it was concluded already in the Executive Summary “[...] the current [US] system for resolving consumer debts is broken, [...] because consumers are not adequately protected in either debt collection litigation or arbitration.” *Ibid.* at i.

contracts, repossess (retake) the object of leasing upon debtor's default, which in the US, the Canadian provinces or Australia qualifies as collateral. In the lack of clear regulations paralleled by efficient regulatory oversight, such obscurity of the law may then tempt some profit-driven debt collectors cross the thin blue line that divides the lawful and the unlawful.

The range of regulations that have been employed so far in some of these, typically in older EU Member States, is considerably varied. It would be fair to claim that the predominant method of protection is via licensing with the possibility of disciplinary sanctions and exclusion from the otherwise normally lucrative market. The systems differ, however, because of a number of reasons, each leading to differing regulatory outcomes. Two of the discrepancies deserve special attention. On the one hand, the spectrum of the ways systems look upon this new industry ranges from assimilation to attorneys (Germany), bailiffs (Denmark), entities that pose public security concerns similar to pawnshops³² (Italy) through the combination of factoring and general business entities (Hungary). On the other hand, it seems that there is also a difference in the importance industry self-regulation plays in the various European systems. The ensuing more detailed overview may properly corroborate these claims.

4.2.2. Western European Civilian Jurisdictions

4.2.2.1. Denmark

To those who are not proficient in Danish language, very little could be learned about the Danish sector-specific act – *the Debt Collection Act* (“*Inkassoloven*”) – passed in 1997. Learning about the related experiences, or even about the act's subsequent amendments and the underlying reasons, is hard as for some reasons this topic is not given much attention to in Denmark. Hence, the ensuing cannot be but a synoptic chronicle of what the few English language publications have aired on the experiences of otherwise one of the richest countries of Europe and the world.

32 Article 115 of the attacked Italian act – the Consolidated Law on Public Security (“*Testounico delle leggi di pubblica sicurezza*”, R.D. 18 giugno 1931, n. 773 (Gazz. Uff. 26 giugno 1931, n. 146)) – placed the debt collectors into the same category with pawnbrokers, subjecting them to acquisition of a license issued by the Questore – the local policy authority. Furthermore, the Circular 559/C 22103.12015 of 2 July 1996 of the Ministry of Interior, sent to all Questori in the Italian State to supplement and interpret some provisions of the Consolidate Law stated that the activity of extra-judicial debt recovery do not qualify as provision of financial services governed by Legislative Decree No 385/93 (essentially the Law on banking and credit services) “*which are reserved exclusively for financial intermediaries expressly entered in the appropriate register of the Ministry of the Treasury.*” See respectively points 3 and 9–11 of the Judgment in case C-134/05.

Bearing in mind the scarcity of publications on Danish debt collection laws, one may only speculate that the act was enacted as a reaction to abuses and excesses of private businesses specialized to debt collection.³³ The law introduced a three-legged system made of licensing, rules on ‘sound debt-collection’ practices and some sanctions.³⁴ Both individuals as well as ‘*private and public companies registered with the Danish Commerce and Companies Agency*’ may get such license; lawyers are on the other hand automatically entitled to practice these activities. As some related cases have reached the courts over time,³⁵ it may be concluded that the law has ‘left a few stones unturned,’ what otherwise is normal corollary of organic growth. Contrary to the German model, however, this approach does not try to regulate private debt collectors by adding them to the system otherwise designed for attorneys.

4.2.2.2. France

International and autochthonous debt collectors³⁶ are also present in France. Moreover, sector-specific regulation – forming part of the law on civil enforcement – exists as well. The designations used, however, are already a bit unusual. The first term that comes to mind when trying to find the English equivalent for the French legal phrase for out-of-court collection of debts is ‘amicable debt collection’ (“*recouvrement amiable des créances*”), though perhaps ‘peaceful’ would be more fitting. A special decree from 1996³⁷ governed the field until 1 June 2012, after which it

33 Examples of private debt collectors can easily be found. The Danish Investment Foundation, for example, used to have a subsidiary – Difko Inkasso AS – specialized specifically to private debt collection, which was acquired by Intrum Justitia (<https://www.crunchbase.com/organization/difko-inkasso#section-overview>). See also the website of the private debt collector Atradius Collections (<https://atradiuscollections.com/global/reports/debt-collections-handbook-dk.html>, 20 Nov. 2019) or NORDICO (<https://www.tcmgroup.com/debt-collection-denmark>, 20 Nov. 2019).

34 For a brief and concise description of the basic tenets of the system see Werlauff, E., 2010, *Civil Procedure in Denmark*, Wolters Kluwer.

35 For example, one case dealt with the consequences of the failure to serve a ‘reminder’ letter to the debtor with sufficient information that would allow the debtor to make a learned decision about his debt (Werlauff formulated this as “*clearly stating all the information required for the debtor’s assessment of the claim*”). *Ibid.*, p. 39.

36 E.g., “*Gestion Credit Expert*” (<https://www.gestioncreditexpert.com/index.php>, 20 Nov. 2019); or “*Europe – Debt Collection*” (“*Europe Recouvrement*”) (<https://www.europages.fr/EUROPE-RECOUVREMENT/FRA807867-000009385001.html>, 20 Nov. 2019).

37 *Décret 96-1112 du 18 décembre 1996 portant réglementation de l’activité des personnes procédant au recouvrement amiable des créances pour le compte d’autrui* (Decree No. 96/1112 of 18 Dec. 1996 on the Regulation of the Activities of Persons Engaged in Peaceful Debt Collection for the Account of Others), (<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005622315&dateTexte=vig> 20 Nov. 2019).

became integrated into the Civil Enforcement Procedure Code (“*Code des procédures civiles d’exécution*”) and hence now provisions R124–1 through R124–7³⁸ are to be consulted. The system rests on two legs: registration with public prosecutors and a number of explicit rules aimed to protect consumers. As far as the first prong is concerned, the system is not as stringent as the German model (or so it seems based on reading the pertaining provisions) as it requires only filing of a written declaration with the public prosecutor of the seat or residence of the collector on the satisfaction of the imposed requirements³⁹ for getting engaged in the business of private (amicable) debt collection.⁴⁰ Furthermore, requirements like training and passing of exams or possession of a clean criminal record are not included in the text – contrary to the detailed German rules.

On the other hand, the text contains relatively detailed rules on the duties towards debtors, the most important of which are backed up by criminal sanctions of maximum 3,000 Euros.⁴¹ Consumers from those CEE countries which do not have a sector-specific regulation ought to envy their French colleagues as the law requires not only a written contract to be concluded between the debt collector and the creditors⁴² (obviously trying to prevent debt collection based on fictitious or dubious claims) but it also prescribes the contents of the letters⁴³ to be sent to debtors. This

The decree was abolished by *Décret No. 2012–783 du 30 mai 2012 relatif à la partie réglementaire de code des procédures civiles d’exécution*.

38 See Book I, Title II, Chapter IV of the Civil Enforcement Procedure Code, (<http://www.legifrance.gouv.fr>, 20 Nov. 2012).

39 These essentially include proof on conclusion of a contract for insurance against professional civil liability (“*un contrat d’assurance les garantissant contre les conséquences pécuniaires de la responsabilité civile professionnelle*”) and a proof on an opened bank account with a recognized financial organization to which all collected moneys should be paid.

40 See paragraph 3 of section R-124–2.

41 See section R124–7, which points to paragraph 5 of article 131.13 of the Criminal Code (“5° de l’article 131–13 du Code pénal, 1994”).

42 See section R124–3; especially the first line stating “*La personne chargée du recouvrement amiable adresse au débiteur une lettre qui contient les mentions suivantes [...]*”

43 The information to be communicated to the debtor in the letter based on section R 124–4 are the following: 1/ data for the identification of the private collector (name and address of individual collectors or firm name and seat of juridical entities as well as the warning that the collector is undertaking amicable debt collection); 2/ identification of the creditor whose claim the collector will try to collect (name/firm name, address or seat); 3/ the basis and the sum of the debt – itemized to principal, interest and other costs with the exclusion of fees payable to the debt collector; 4/ statement that the debt is due and payable as well as the modality of the payment of the debt; and 5/ reproduction of the caveats from paragraphs 3 and 4 of section L.111–8 of the Code. According to this in case of enforcement without an executive title – what would be normally the case in amicable debt collection – the costs are to be borne

includes such minutiae as the duty to use the same reference numbers and dates in all communications with the debtor in a case.⁴⁴

A final point on the bailiff system (“*Huissiers de Justice*”)⁴⁵ ought to be added. Namely, these public officials (appointed by the Ministry of Justice preconditioned on passing a professional examination) are primarily responsible for collection of debt in the jurisdiction they are appointed for (in addition to serving the process, advising and acting as conciliators especially in landlord-tenant disputes). Given that they are public servants, their fees are regulated by the law; though cases of overcharges are not unheard of either.⁴⁶ What is of importance for our purposes is that they may also step into the shoes of an amicable debt collector.⁴⁷ If they do that, they do not enjoy the privileges their monopoly status otherwise guarantees them. In other words, in such cases they are subject to the same rules as the private debt collectors not being linked to courts. In other words, contrary to the trend noticeable in some Central and Eastern European countries, the French solution allows court bailiffs to engage in private debt collection, too.

4.2.2.3. Germany

Until 1 July 2008, when the new law liberalizing the provision of extra-judicial legal services stepped into force, Germany had had presumably Europe’s strictest regime going back to the days of the Third Reich and the 1935 Act on Provision of Legal Counseling (abbreviated as “*Rechtsberatungsgesetz*” or Legal Counseling Law).⁴⁸ The tight control of the profession has essentially remained intact after WW II, leading to a period that was characterized as the period of ‘attorney monopoly’ (“*Anwaltsmonopol*”).

entirely by the creditor, unless otherwise provided by the law or if the creditor could prove to the judge that the costs and expenditures were necessary because of the debtor not acting in good faith (“*débiteur de mauvaise foi*”).

44 See paragraph 2 of section R124–4.

45 The official website of the National Chamber of French Court Bailiffs (“*Chambre Nationale des Huissiers de Justice*”) <https://www.huissier-justice.fr/>, 15 Nov. 2019. For a somewhat older description of the system of huissiers see Kennett, W. A., 2000, *Enforcement of Judgements in Europe*, Oxford University Press, pp. 76–77.

46 See the caveats of French-Property.com (<http://www.french-property.com/guides/france/working-in-france/letting-property/disputes/>, 20 Nov. 2019).

47 For a chart on the position and the activity types the court bailiffs are engaged in see <https://www.huissier-justice.fr/nos-missions/>, 20 Nov. 2019.

48 The act’s full title was “*Gesetz zur Verhütung von Missbräuchen auf dem Gebiete der Rechtsberatung*.” See Kleine-Cosack, M., 2008, *Rechtsdienstleistungsgesetz (RDG)*, Heidelberg, C.F. Müller Verlag, p. 26. According to Kleine-Cosack, the exclusion of Jewish people from the profession was one of the important motivations behind the passage of the act.

During the last decades of the 20th century, however, the law had been increasingly subjected to criticism notwithstanding that both the Federal Supreme Court and the Federal Constitutional Court have made important rectifications,⁴⁹ including the latter quashing some parts of the law and the implementing regulations.⁵⁰ Eventually even the basic functions of the act came into question, the overall result of what was that the act metamorphosed into a consumer protection act. Thus, in the 1997 ‘MasterPat’ judgment,⁵¹ the Federal Constitutional Court (ruling on the old 1935 act), stated that the act is to protect the consumers (clients of providers of legal services) rather than to guarantee the monopoly of lawyers. It proclaimed as well, however, that the subjection of provisions of legal services to licensing is also in public interest. This approach essentially was found to be compatible with European Union’s law by the European Court of Justice⁵² if it does not go “*beyond what is necessary to protect*”⁵³ consumers’ interests. The new 2008 Law, replacing the old 1935 – titled differently as the Law on Extra Judicial Services (“*Gesetz über ausserge-*

49 See Remmert, F. R., 2018, Scope and Limits of the German Legal Services Act for Legal Tech Service Providers, *Compliance Elliance Journal*, Vol. 4, No. 1, pp. 63 et seq.

50 See the decision of the Federal Constitutional Court BVerwG, 16.07.2003 – 6 C 27.02. According to this decision §1 (1) of the Fifth Decree for the Implementation of the Act on Legal Services as of 29th of March 1938 (RGBl I S. 359) was declared inapplicable. The case is otherwise interesting also because it involved a foundation that was founded in 2000 with one million German Marks capital “*counseling and protection of consumers in particular protection of consumers from enforcement of debts by others than attorneys.*” To protect consumers from collection of debts by others than attorneys, the debts were purchased by and transferred onto the foundation, which thereafter attempted to collect the debts exclusively by engaging attorneys for that purpose. After an amendment of the foundation’s bylaws in 2001, it even waived its right to the costs of collection. The suit ensued when the administrative body in charge rejected to issue a declaration to the foundation according to which the foundation’s debt collection (“*Inkasso*”) activities – limited to acquisition of debts for its own account – were not subject to licensing under the Act on Provision of Legal Services (or any of the implementing decrees).

51 Federal Constitutional Court (= BVerfG) Judgment of Oct. 29, 1997 –1 BvR 780/87, BVer-fGE 97, 12, 26ff. = NJW 1998, 3481 (MasterPat).

52 Court of Justice, Judgment of July 25, 1991, C-76/90 – Manfred Säger and Den-nemeyer & Co. Ltd. The reference for a preliminary ruling was submitted by the Oberlandesgericht München, Germany concerning EEC Treat Art. 59 (Freedom to provide services). The case involved Manfred Saeger, a Patentanwalt (patent agent) in Munich and the UK company Dennemeyer & Co. Ltd. (specialist in patent renewal services), which provided its services from the UK but for holders of patents in other member states, including Germany. Säger stated the Dennemeyer is guilty for unfair competition and is contravening the Rechtsberatungsgesetz (Law on Legal Advice, hereinafter referred to as the “RBerG”, of 13 December 1935, BGBl. III.303–12).

53 *Ibid.*, notes 16 and 17.

richtliche Rechtsdienstleistungen” – hereinafter: RDG) – now proclaims that in its first section.⁵⁴

Consumer protection concerns, however, were not the only reasons a new law was adopted. Given our interest in private debt collection, of key importance was also the desire to open the market before and strengthen *private* actors providing some specific types of legal services (“*die Stärkung des bürgerschaftlichen Engagements*”).⁵⁵ This includes now debt collection – ‘*Inkassodienstleistungen*’ – as well. Obiter: deregulation, decrease of bureaucratic burdens (red tape) as well as some policies of EU law were further important factors behind the reform.⁵⁶

The 2008 Act lists debt collection (“*Inkasso*”) as one category of out-of-court legal services.⁵⁷ Debt collection according to this law is such a service that can be undertaken solely by registered persons (“*Rechtsdienstleistungen durch registrierte Personen*”), who however do not have to be attorneys. They may be either juridical persons or persons without a legal entity status (e.g., some partnerships under German law) as well as natural persons.⁵⁸ As far as the Act’s reach is concerned, it is important that its mandate is limited to the protection of consumers not only against the services of unqualified counseling (“*unqualifizierterrechtlicher Beratung*”) but also from rogue debt collectors (“*unseriöse Schuldeneintreibern*”).⁵⁹

The system achieves this through licensing – including a register of service providers, administrative oversight, the possibility of withdrawal of the license and imposition of fines.⁶⁰ Additional layer of protections exists thanks the requirement of compulsory liability insurance.⁶¹ Moreover, the law aims to ensure that only persons having the necessary training and qualifications,⁶² a clean criminal record for a designated period of time,⁶³

54 See § 1(1) of the RDG.

55 See the foreword (Vorwort) in: Eversloh, U., 2008, *Das neue Rechtsdienstleistungsgesetz*, Freiburg-Berlin-München, Haufe Mediengruppe.

56 This applies especially to Directive 2005/36/EC of the European Parliament and of the Council of 7 Sept. 2005 on the Recognition of Professional Qualifications.

57 RDG § 2(2).

58 See §10 (1)(1) of the RDG.

59 See Kleine-Cosack, M., 2008, p. 143.

60 As per § 20(2) of the RDG fines up to 5,000 Euros could be imposed, e.g., for providing regulated services without being registered.

61 See § 12 (3) of the RDG.

62 See § 11(1) of the RDG according to which debt collectors must have knowledge of debt collection-related fields of law, to wit, private and commercial law, negotiable and investment property law, company law, civil procedure including enforcement, as well as bankruptcy law.

63 See § 12 (1)(1)(a) of the RDG, which requires clean criminal records for the last three years.

and non-problematic financial status (“*geordnete Vermögensverhältnisse*”)⁶⁴ could appear on the market. Involvement of a fully qualified lawyer is also a requirement, most presumably to ensure that quality legal advising is handy when debt collection is at stake. Especially this last formal requirement is what made some authors criticize the new system, noting that “[t]he ultimate effect of the opening of the legal services sector remains relatively moderate.”⁶⁵

One of the key drawbacks of such a licensed-based system is that it was not capable to protect consumers and the market from exactly the most problematic types of private debt collection – to wit, private debt collectors that do not even intend to become registered (in Germany known as “*Moscow-type collection*”⁶⁶). No wonder that the law was amended already in 2013 specifically to deal with this problem.⁶⁷ It ought to be noted as well that such licensing-based systems – where the system acts as a sort of gate-keeper and tries to prevent entry to, or remove those from the market who cannot be trusted – often react with substantial delay to wrongdoings of licensees. In other words, substantial harm can be caused to many consumer-debtors by unconscious collectors from the moment their wrongdoings or overreaches are reported to the authorities, the disciplinary actions launched against them reach their final ending, and their license gets effectively revoked.

The drafters of the law should be praised, however, for having realized that while conceptually, in theory, one could clearly distinguish debt collection perceived as pure business service from factoring, in practice the difference may not always be that crystal clear. Consequently, often it is hard to determine what the true nature of the acts undertaken by debt collectors is, partly because what the collectors offer increasing is a package made of varying types of services and transactions. In brief, the act reaches factoring as well though subject to a limitation: it is limited to *recourse debt* collection. This means that the debt cannot be transferred (assigned) *fully* onto the debt collector and the risk of non-collectability must remain with the original creditor (assignor).⁶⁸

Although one could not really encounter articles on the problematic practices of debt collectors on the pages of German law reviews, investigative journalists, the media and consumer protection organization have

64 See § 12 (1)(1)(b) of the RDG.

65 See the foreword (Vorwort) in Eversloh, U., 2008.

66 See Kleine-Cosack, M., 2008, note 57 on page 191. The author speaks of them as ‘not-serious’ (“*unseriöse*”) debt collectors.

67 *Gesetz gegen unseriöse Geschäftspraktiken* as of 1 Oct. 2013 (BGBl. I 2013, S. 3714).

68 §2 (2) of the RDG and *Ibid.* at 131. The somewhat descriptive language of the act reads: “*Abgetretene Forderungen gelten für den bisherigen Gläubiger nicht als fremd*”.

tried to fill the empirical gap by reporting on and gathering information on these.⁶⁹ Not unsurprisingly, many of the problems causing headaches in Germany ever since the appearance of debt collectors are exactly those concrete forms of abuse and overreaches which are explicitly listed, for example, in the US FDCPA but not necessarily in the German act. In other words, as the post-2008 empirical evidences suggest, the gate-keeping system positioning licensing as the main, virtually exclusive shield, has failed to satisfy the expectations. It was a mistake, in other words, not to regulate also what debt collectors can and cannot do similarly to the FDCPA or the UK Handbook. The debate on the new law to tackle exactly some of these issues has been started in Germany in 2019. The focus is on the calculation and charging of collection costs (e.g., duplication of costs), entry exams and need to strengthen the oversight.⁷⁰ Thanks to the outbreak of the corona-virus pandemic and reaching Europe and Germany in early 2020 halted the process. Hence, for more concrete outcomes of the reform process we will have to await the days when humanity will prevail over the virus.

What is interesting that all these developments aimed at opening the legal services market to private actors during the last decade or so occurred in a milieu, a legal system for which court bailiffs (*“Gerichtsvollzieher”*) continue, at least conceptually, to be the main building blocks of the system up until today.⁷¹ They are public officials (*“Beamter”*) who are deemed to act on behalf of the state, not of the creditors, and they do not operate as private businesses (entrepreneurs). They are attached to local first instance courts (*“Amtsgerichts”*)⁷² with the function of enforcing judgements and other enforcement titles within the exclusive territory

69 See, e.g., Justizministerium will Inkassoabzocke beenden, *Spiegel Online*, (26th May 2019, at 16:16), (<https://www.spiegel.de/wirtschaft/service/ueberzogene-inkassoforderungen-justizminister-will-abzocke-beenden-a-1269350.html>, 20 Nov. 2019); or Müncher, T., Inkasso-Terror: Fünf Alarmzeichen, woran Sie einen Betrüger erkennen (30 April 2019), in: *FOCUS-Online* (https://www.focus.de/finanzen/recht/falsche-forderungen-ueberhoehnte-gebuehren-nicht-registrierte-firmen-inkasso-terror-fuenf-klare-alarmzeichen-woran-sie-einen-betrueger-erkennen_id_10650574.html?drucken=1, 20 Nov. 2019).

70 See the document issued by the Federal Ministry of Justice and Consumer Protection on 16 Sept. 2019, *Entwurf eines Gesetzes zur Verbesserung des Verbraucherschutzes im Inkassorecht*, [Draft Law for Strengthening of the Protection of Consumers in the Context of Debt Collection, https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Verbraucherschutz_Inkassorecht.pdf;jsessionid=1B92B8EC2F94B50E441340565719C3EA.1_cid334?__blob=publicationFile&v=2, 20 Nov. 2019.

71 For details in English language see the related portal of the European Union – the E-Justice website – on Germany (https://e-justice.europa.eu/content_procedures_for_enforcing_a_judgment-52-de-en.do?member=1, 20 November 2019).

72 In some matters the applications must be filed with higher, regional courts. *Ibid.*

assigned to them. Enforcement proceedings (“*Zwangsvollstreckung*”) are otherwise started by a decision of the court having jurisdiction. Bailiffs have a monopoly over enforcement but are overseen by courts and are subject to a quite extensive regulatory regime.⁷³ Objections (“*Erinnerung*”) may be filed against their acts, or refusal to act, to courts.

It ought to be mentioned as well that one of the central goals of the latest reform of the civil procedure regime applicable from 1 January 2013⁷⁴ was exactly equipping bailiffs with new specific tools to increase the efficiency of their work. One should in particular mention the so-called ‘Debtor Asset-Declaration’ (“*Vermögenseinzeichnis*”), in which the debtor has to list its assets, income and their location, as well as confirm all that with an affidavit (“*eidesstattlichen Versicherung*”). False affidavits, or rejection to cooperate, may lead even to detention of the debtor.

4.2.2.4. Italy

To the extent the year of the foundation of the National Association of Debt Collectors (UNIREC – “*Unione Nazionale Imprese a Tutela del Credito*”) indicates the maturity of the industry, the year from which one should reckon with the growing presence of private debt collection should be 1998.⁷⁵ The regulation of the industry is, however, very much on the agenda in contemporary Italy; in fact, a draft industry specific bill has already been in the parliamentary process⁷⁶ for about seven years, initially motivated by the need to modernize and adjust the system to some newly passed laws (e.g., law on privacy). In fact, the proposal is still being discussed in the parliamentary commission in charge in 2019.⁷⁷ It is not

73 The laws in particular of relevance for the work of bailiffs are, first and foremost §§ 704 et seq. of the Code of Civil Procedure (*Zivilprozessordnung* – ZPO), then the Act on Forced Sales and Receivership (*Gesetz über die Zwangsversteigerung und Zwangsverwaltung* – ZVG), Court Bailiffs Code (*Gerichtsvollzieherordnung* – GVO) and Bailiff’s Costs Act 2001 (*Gesetz über Kosten der Gerichtsvollzieher* – GvKostG). [Text of these are available in German language at <https://www.gesetze-im-internet.de/gvkostg/BJNR062310001.html>, 20 Nov. 2019].

74 The Reform was introduced by the 2009 Act on the Reform Localization of [Debtors’] Property in Compulsory Civil Enforcement Proceedings [*“Gesetz zur Reform der Sachaufklärung in der Zwangsvollstreckung.”*], which amended a number of other laws, including the Code of Civil Procedure (*Zivilprozessordnung* – ZPO).

75 The association was formed by the merger of two earlier ones (AIIREC – l’Associazione Industriali di Vicenza and ASSOREC – Assolombarda di Milano) in 1998. Though it is to be noted that even its predecessors were also formed only in the mid-1990s (<http://www.unirec.it/associazione>, 20 Nov. 2019).

76 See Proposta di legge: Mariarosaria Rossi e Ventucci, “*Disciplina del settore della tutela del credito*” (4583), (<http://www.euroservicespa.com/recupero-crediti-presentato-ddl-disciplina-dei-servizi-la-tutela-del-credito-le-interviste/>, 20 Nov. 2019).

77 <https://leg16.camera.it/126?idDocumento=4583>, 20 Nov. 2019.

clear what reason is behind the neglect. However, one could comfortably claim that the subject matter of extrajudicial debt recovery and the activities of the businesses that live from such activities is a burning issue on the Italian Peninsula as well. Suffice to take a glance at the website of the Italian Competition Law Authority (“*Autorità Garante della Concorenza e del Mercato*”) to see the press releases on fines imposed for aggressive debt collection practices.⁷⁸

Foreign, EU-based as well as domestic⁷⁹ collection businesses (“*agenzia di recupero stragiudiziale crediti*”) are also present in Italy.⁸⁰ Moreover, it was exactly Italy that was sued by the EU Commission for creating barriers of entry to foreign collection businesses by trying to subject them to disproportionately onerous registration and other requirements. The condemned requirements included, *first*, the requirement to hold license in *each Italian province* where the business wanted to carry on its activities in addition to the one issued by the *Questore* of the first province where the foreign business acquired its Italian license (unless “*it confers authority on an authorized agent in that other province*”). *Secondly*, the requirement to have premises in *each province* – with the list of services provided for clients displayed – where it plans to operate was also found as contrary to the Rome Treaty.⁸¹ Yet, at the same time, the ECJ heeded to the arguments of the Italian State and recognized that the other requirements imposed by the Consolidated Law were proportionate with the objective pursued: i.e., “*close supervision of extrajudicial debt recovery activities*”.⁸²

Otherwise, similarly to other Continental European civil jurisdictions, Italy does not have, as of yet, a comprehensive one-piece regulation

78 On 15 November 2019 concretely 13 press releases were publicized on the English language pages of the Authority against a larger number of debt collectors (<https://en.agcm.it/en/search>, 15 Nov. 2019). The largest was a fine of 3,310,000 Euros imposed on three insurance companies (<https://en.agcm.it/en/media/detail?id=5e7e8e1c-80a2-4b1e-8781-ca44d193301d>, 15 Nov. 2019).

79 See, e.g., the website of ‘One Recupero Crediti’ (<https://www.oneinfo.it/recupero-crediti-stragiudiziale>) or Astrea S.p.a. (<https://www.recuperocreditifacile.com/societa-recupero-crediti/>, 20 Nov. 2019).

80 See the website of Intrum Italy (with 49% Intesa Sanpaolo stake), (<https://www.intrum.it/clienti/chi-siamo/privacy/intrum-in-italia/>, 20 Nov. 2019).

81 See point 87 of the Judgment of the Court (First Chamber) of 18 July 2007 in case C-134/05. The contested Italian act was the Consolidated Law on Public Security (“*Testo unico delle leggi di pubblica sicurezza*”), approved by Royal Decree No 773 of 18 June 1931. With respect to the EU Treaty, the court concluded that “[a]ccording to settled case-law, Article 49 [of the EU Treaty] precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State [...]”. *Ibid.*, point 70.

82 *Ibid.*, point 30.

designed specifically for private debt collectors. The applicable provisions are scattered over the Consumer Code (sections 40–43 on consumer credit),⁸³ the assignment-related rules of the Civil Code (in particular section 1264) essentially requiring proper notification of the obligor on the assignment⁸⁴– though much of it is delegated to the Law on Banking and Credit as well.⁸⁵

Italian court bailiffs naturally also play a role in enforcement. One could say that their status is similar to their kin in other continental European. Similarly to German law, for example, they are entitled to order the debtor to reveal the location of assets or to make its accounting books available for inspection by the debtor.⁸⁶

4.2.3. Central and Eastern European Systems

CEE countries tend to still model themselves after major western European civil law systems, primarily Germany and France, in this domain as well. As the first-generation regulation of private collectors in Germany occurred more than ten years ago in 2008, it is surprising that, for example, Hungary has failed to follow the suit. Although it is not unheard of lately that CEE lawmakers take a glance also at some leading Anglo-Saxon systems in some fields of law, the FDCPA, the UK Handbook, or other common law systems' related laws have completely escaped the attention of the lawmakers basically of all the CEE systems covered herein. Bypassing of either UK or US related experiences, their acts putting the emphasis on the problematic practices, abuses and overreaches and not only on licensing, however, it is claimed here, is mistaken because history seems to be repeating itself: the identical problems and issues emerge in this part of the globe that are specifically addressed in the said UK and US acts.

The ongoing German revamping of the law on debt collection (“*Inkasso*”) might change the stance in CEE given that, as we saw that above in the section devoted to German law, the changes are driven exactly by the

83 The English translation of the Italian Consumer Code – Legislative Decree as of 6 September 2005 no. 206, Consumer Code, pursuant to Article 7 of Law no. 229 of 29 July 2003 – is available through the website of the Italian Consumer Protection Association (<http://www.consumatori.it/images/stories/documenti/Codice%20del%20consumo%20english%20version.pdf>, 20 Nov. 2019).

84 For a brief explanation, though not concerning consumer finance, see Nath, R., Crans, B., 2010, *Aircraft Repossession and Enforcement – Practical Aspects*, Aspen Publ., pp. 200–201.

85 See section 43 of the Consumer Code.

86 See, e.g., Gucineri, R., Marelli, F., National Report on Italy, in: Klose, B. H., (ed.), 2009, *Asset Tracing and Recovery – the Fraudnet Word Compendium*, Berlin, Erich Schmidt Verlag, p. 746.

realization that practices need to be specifically targeted and regulated in detail as well and reliance of licensing is insufficient. Adequate protection of consumers clearly requires that. As opposed to UK or the US, none of CEE countries seems to possess at present time laws that protect consumers by specifically tackling problematic practices of collectors by as detailed rules as one can find either in the FDCPA or the UK Handbook. Time will be needed unfortunately until this deficiency will be noted and properly reacted upon notwithstanding that templates to learn from, as it is suggested herein, could readily be exploited.

As it will be seen below, CEE systems have several common features. First, these countries realized (or were made aware) that their court bailiff systems are seriously deficient. Their reaction in the first phase was, however, cautious and they have each tried to keep enforcement within or closely linked to courts. Second, the first meaningful reform almost invariably ensued in the form of the privatization of the bailiff system by allowing the formation of a bar of private bailiffs providing their services on a fee basis.

Third, notwithstanding the reforms, private businesses that offer debt collection and variety of related services have gradually appeared all over the region. Though, admittedly, this seems to have occurred faster in those states that have acceded to the EU in the meantime and were required to open their borders also to international debt collection firms.

Fourth, self-help repossession, the most questionable, riskiest form of private services, remains a grave problem in CEE because this service *de facto* has been present in the region yet often amidst of a complete legal vacuum, or obscure legal background, from the first years of the transitory process – basically from 1990 on.

Fifth, the presence, significance, and visibility of extra-judicial enforcement and private debt collection, logically, increased parallel especially with the growth of consumer credits, spreading of various versions of motor vehicle leasing transactions and the booming of the home mortgage markets. This further intensified once the spillover effects of the 2008 global financial crisis have reached the region. As years were needed for the first regulatory reactions to emerge, the industries' growth has not been significantly restrained in the first regulations-free era. In fact, their arrival and presence has hardly been even noted for years. Even a cursory look at local law reviews could confirm that as very few, if any, has devoted an article to them as if private debt collectors had been existing on another planet. For example, the names of the large international debt collector companies of Europe have first been heard in Hungarian media – note: not law reviews or publications from under the pen of lawyers –

only starting somewhere from the middle of the first decade of this century and related to the problems the city of Budapest had faced with the mounting uncollectable sparking ticket debts.

Regulatory inaction is understandably a particularly grave issue in those countries where the lower level of the rule of law makes primarily the consumer-debtor rather than the collectors pay the price. This is because the cogwheels of the justice system are here very slow. Although consumer protection experts may disagree, an important part of the story is that the obviously increased importance of general consumer protection laws (to a large extent due to the impetus coming from the EU) have hardly been capable of supplementing sector-specific regulations of the FD-CPA-type. What matters is, without pointing to any of the region's countries invoking various rule of law indexes, that open issues concerning the protection of consumer-debtors against the abuses and overreaches of private bailiffs and private debt collectors remain even in the best performing regulatory systems. The ensuing synoptically chronicled reforms, successful or failed ones, from a select number of CEE countries, therefore is also a proof that the above claims and observations merit attention. Likewise, it is encouraging to see that it is increasingly realized by Continental European systems as well how pressing filling of the regulatory vacuum is.

4.2.3.1. Croatia

Croatia represents a special case in the Western Balkans. Namely, Croatia initially had set out to embark on the same path as Hungary or Serbia and had passed even a special law aimed at introducing private bailiffs into the legal system in 2010. Albeit named not as 'private' but rather 'public bailiffs,' these were foreseen to be organized also into a bar (chamber) and were to be appointed by the minister. Yet the public outcry against the law was so forceful, in particular by attorneys and public notaries which would have lost a significant portion of their income had the system been implemented, that the law was revoked. Instead, a new Enforcement Act and a special act on the Financial Authority (FINA) were enacted; the latter taking over much of the tasks originally foreseen to be performed by private bailiffs. As the first generation of 'public bailiffs' was in fact appointed but were prevented from launching their activities, lawsuits ensued against the state, including a case that reached even the Court of the European Union.⁸⁷

⁸⁷ See the case *Ante Šumelj and others v. the European Commission* (T-546/13, appeal case No. C-239/16P). The appellants in the case are such appointed public bailiffs who were not in the position to start their work because of the revocation of the respective law. They sued the European Commission for its alleged failure "to meet its obligation

With the exception of the unusual case of private bailiffs, otherwise Croatia faced similar problems, challenges and expectations as the rest of the region's countries. To increase efficiency of the enforcement system and debt collection as well as to disburden courts, it did pass a law in 2005 whereby public notaries (*"javni bilježnici"*) were empowered to issue decisions based on enforcement titles (*"vjerodostojna isprava"*).⁸⁸ Later, it transferred the enforcement powers on monetary assets to a special body, the Financial Agency (FINA), which were subsequently given comparably even more powers in that respect than what public notaries had been empowered with.⁸⁹

Yet what matters for us as well is that private debt collectors are also present in this country.⁹⁰ Similarly to other CEE systems, they have not earned much attention by the media as of yet, let alone lawmakers and legal scholarship. Separate analysis would be needed to go more in-debt on the reasons yet their market share remains modest today as compared not only to the larger western European countries but also compared to some of Croatia's neighbors (e.g., Hungary).

4.2.3.2. *The Czech Republic*

The post-1990 history of the Czech Republic shares many elements with those other CEE countries discussed herein that have joined the EU thereafter. First of all, this country has also embarked on reforms early on to increase the efficiency of its judicial and enforcement system. In the first stage, this was limited to measures within the courts only, which was, however, in 2001 followed by the privatization of the bailiff system by allowing the formation of a bar (association) of private bailiffs – named

to monitor the application of the Treaty of Accession of the Republic of Croatia to the European Union as regards the establishment of the profession of public enforcement officer in the legal order of the Republic of Croatia in accordance with Article 36 of the Act of Accession." Or, in other words, for the EU Commissions failure to prevent Croatia from revoking the mentioned act.

88 For an overview of these developments see Maganić, A., 2018, Dejudicijalizacija ovršnog postupka u Hrvatskoj i nekim zemljama njezina okruženja, in: *Zbornik PFZ*, Vol. 68, Nos. 5–6, pp. 707–737. See also Uzelac, A., 2018, Javnobilježnička ovrha i zaštita potrošača: Novi izazovi europeizacije građanskog postupka, in: *Zbornik PFZ*, Vol. 68, Nos. 5–6, pp. 637–660 [noting how important enforcement tool has developed over time from the optional and marginal public notary enforcement avenue in Croatia, the author discussed what the consequences of the growth of EU consumer protection laws might be on it, concluding that its importance may radically fall in cases involving consumers].

89 FINA stands for 'Financijska agencija' (<https://www.fina.hr>).

90 See, e.g., EOS Matrix Croatia – list of services (<https://hr.eos-solutions.com/services.html>, 20 Nov. 2019).

somewhat confusingly as ‘court executors’, irrespective of the fact that the system of court-employed bailiffs has not been abandoned.⁹¹

Self-help repossession is prohibited as well and the Czech Civil Code’s related provision is a far cry from what is normally understood by this powerful out-of-court method of enforcement.⁹² One could say that with respect of self-help (out-of-court) repossession (retaking of possession) the situation is the same as in Germany: formally prohibited yet in practice individuals and businesses offering such services could be found through internet or otherwise though perhaps under different designations.

Notwithstanding the efforts, reforms and the fact that normally the private bailiffs are more efficient in collecting in commercial cases,⁹³ the market was obviously in need of the services of private debt collectors on top of private bailiffs: both autochthonous and international firms⁹⁴ (e.g., Intrum) have gotten established in the Czech market by now.⁹⁵ The reasons presumably are similar as in Germany or the other regional countries though some inconsistencies in local laws might have also played a role. A recent such example relates to the Czech Supreme Court’s decision from 1 July 2016⁹⁶ according to which foreign arbitral awards cannot be enforced by private bailiffs but only through the much less efficient and rarely-resorted to court enforcement proceedings. Experts of arbitral law frown at the decision because this results in double-standards, making enforcement of foreign arbitral awards much more onerous and risky than domestic ones; something contrary to the spirit one of the most successful international conventions, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the New York Convention) from 1958.

For our purposes of utmost importance is that the commentators have,⁹⁷ in very practical terms, highlighted why enforcement by private bailiffs is not only less burdensome for creditors but also why it normally ends successfully contrary to court enforcement. In particular, first, while

91 See Hergottova, A., Enforcement of Contracts in the Czech Republic, in: Messmann, S., Tajti, T., 2009, *The Case Law of Central and Eastern Europe – Enforcement of Contracts*, Bochum, Germany, European University Press, pp. 169–173.

92 *Ibid.*, p. 174.

93 *Ibid.*, p.170.

94 For example, both EOS (http://www.eos-ksi.cz/en/company/facts-and-figures/?no_cache=1) and Intrum Justitia (<http://www.intrum.com/cz/>) are present in this country as well.

95 See the website of the Czech affiliate of Intrum (<https://www.intrum.cz/zakaznik/>, 20 Nov. 2019).

96 File No. 20 Cdo 1349/2016 (as of 1 July 2016).

97 See Mikliková, E., Vacek, L., *Is There a Double-Standard for the Enforcement of Foreign Arbitral Awards in the Czech Republic?*, Kluwer Arbitration Blog as of 3 Oct. 2019.

in case of court enforcement the creditor has to advance a court fee of 5% of the amount sought, the creditor does not have to prepay anything in case of private bailiffs as the costs are paid directly by the debtor. Second, while in case of the court avenue it is the creditor who has to locate and specify to the court which assets he is asking the enforcement to be conducted upon, private bailiffs do that themselves. Third, once the private bailiff starts the proceedings, all debtor's assets are frozen and thus cannot be disposed of by the debtor. This ultimately shows why are private bailiffs more efficient and why is it that it is rather the court enforcement avenue that often ends unsuccessfully.

4.2.3.3. *Lithuania*

This Baltic state seems to have followed the fate and approach of CEE countries such as Hungary, to wit self-help repossession is prohibited and no comprehensive law has been passed that specifically targets the private debt collection industry as of yet. Already during the first years of the post-1990 transitory period, however, businesses emerged that employed practices – somewhat problematic to say the least – with which by consumers in other parts of Europe had been faced as well. However, due to some strange turn of fate, some special authorizations have, nonetheless, been given to the sector, for example the 2002 decree which makes the gathering of information from real property registries easier.⁹⁸ Moreover, some level of innovativeness was characteristic of the sector as well – like the use of so-called 'boards of shame' on which the names of the debtor, or in case of legal entities, of the director were placed.⁹⁹ It needs to be added, that the private industry came into existence notwithstanding the

98 This was the Decree on the Register of Real Estates. See Aleknaite, L., Enforcement of Contracts in Lithuania, in: Messmann, S., Tajti, T., 2009, p. 351.

99 Similar practices have surfaced in Spain, which was heavily affected by the US Credit Crunch and its spillover effects already in 2008. As it was stated in a related article of the “[i]n times of crisis, [debt collecting] companies sprout like mushrooms after the rain.” Moreover, debt collectors are forced to resort to unusual collection practices, like humiliation that is “a powerful motivator in a country where people’s honor and public image are paramount concerns.” According to the article, the Spanish debt collector firm *El Cobrador del Frac* not only appears publicly in ‘top hat and tails’ but resort to unusual practices like calling the guests who had been present at a wedding party the bills of which remained unpaid and asking them to pay for what they had eaten and drunk. It is also telling that a group of former employees of this collector firm had organized a counter-organization to defend against the collectors – the Debtor’s Defender – which has already won court cases. Mention is made also of a Scottish collector that threatens to send a bagpipe player to the debtor’s home to shame the debtor that way. See Catan, T., 2008, Spain’s Debtors Feel the Shame, *Wall Street Journal*, 13 Oct., p. 5.

privatization of the bailiffs system in 2003 – a common denominator with Hungary or Serbia.¹⁰⁰

Bailiffs are not employees of the court, nor civil servants, but a self-standing organization in Lithuania, entrusted with enforcement of writs, serving of summons and other tasks as envisaged by statutory law. For some of their activities remuneration is based on a fixed tariff yet for others (such as storage and administration of property, legal consultations, mediation, bankruptcy administration and the like) they have freedom to set their fees.¹⁰¹

Interestingly, after the spillover effects of the 2008 global financial crisis reached the country, the earlier promising private debt collection sector began to decline. This was to a great extent due to the fact that especially large corporate clients have realized that they can become more cost effective if they entrust debt collection to in-house counsel in lieu of outsourcing. Learning how better to select clients, a process that has obviously improved over time, contributed also to the decrease of cases. Eventually, it is fair to claim that private debt collection has shrunk to collection of small debts from consumers. The increasing awareness of the recently introduced court summary proceedings contributed to the decreased popularity of the sector as well. Similar to the German “*Mahnbescheid*” and other simplified court proceedings, Lithuanian law likewise requires only filing of a simple form, which could get before the bailiff already within two weeks if the debtor fails to file an objection.¹⁰²

The second decade of the 21st century brought with it the establishment of the local branches of such transnational debt collector companies as Intrum; being in the country since 2014.¹⁰³ It seems that the market

100 *Ibid.*, p. 351.

101 For a full list of these non-tariffs-based activities see section 21(2) of the 2009 Law on Bailiffs. The link to the English text of the Law on Bailiff is at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.343401?jfwid=11dyhevu2f>.

The most recent version of the Law on Bailiffs in Lithuanian is available at <https://www.e-tar.lt/portal/lt/legalAct/TAR.94F5702CA0F1/asr> though without the post-2009 amendments. The updated statutory text in Lithuanian is at <https://www.e-tar.lt/portal/lt/legalAct/TAR.94F5702CA0F1/asr>, 20 Nov. 2019.

102 These information on the developments concerning the private debt collection industry in Lithuania are based on an email-based interview with Lina Aleknaitė – Van der Molen (today Senior Associate at the law firm COBALT and earlier also faculty at Kazimieras Simonavičius University, both seated in Vilnius, Lithuania). See also Tajti, T., Security Rights and Insolvency Law in the Central and Eastern European Systems, in: McCormack, G., Bork, R. (eds.), 2017, *Security Rights and the European Insolvency Regulation*, Cambridge-Antwerp-Portland, Intersentia, para. 182 at 625.

103 See the related website (<https://investlithuania.com/success-story/intrum-global-business-services/>, 20 Nov. 2019).

niche where they thrive are collections of overdue debts purchased in bulk at a discounted price.

4.2.3.4. Poland

Similarly to Hungary, Lithuania or Serbia, Poland has no sector-specific regulation on private debt collection businesses either as of yet. This should not come as a surprise: the venerable Polish Civil Code prohibits self-help just as most other continental European systems. However, the Registered Pledge and Register of Pledges Act 1997 (as amended) does provide for some limited forms of out-of-court enforcement.¹⁰⁴

As a consequence, private debt collectors, as profit-oriented businesses, operate based on the general freedom of establishment and commerce; i.e., no special licensing requirement exists but registration with the company registry and – if also performing financial services as defined by the respective laws – also with the banking supervisory authority. This means that contrary to bailiffs (“*Komornicy*”) they do not have any special powers in the enforcement phase, what – given their meaningful market share in Poland – seems to be of little importance given that they have become popular and quite frequently resorted to notwithstanding the “privatization” of and the resulting increased efficiency of bailiffs.

Otherwise, similarly to the region’s countries, Poland had also embarked on the reform of the system in late 1997 aiming at increasing the efficiency of the enforcement system by partially privatizing it.¹⁰⁵ The new regime underwent thereafter more changes, refinements, eventually culminating in a new Act on Court Bailiffs of in 2018.¹⁰⁶ The bailiffs are public officials overseen by the district courts for the territory of which they were licensed but are not employees of courts (i.e., they are not on their pay-roll). They run their own offices and their remuneration stems from what they collect from the enforcement activities. They are more intensively regulated than other legal professions in the sense that, for example, they must refrain from carrying our business activities, or have

104 See Kaźmierczyk, K., Kijowski, F., Enforcement of Contracts in Poland, in: Messmann, S., Tajti, T., 2009, p. 597.

105 On the reform and the judgment of the Constitutional Tribunal of 3 Dec. 2003 (case K 5/02, published in *Journal of Laws* 2003, No. 212, item 2077) – dealing with the legal status and liability of court bailiffs as well as the financing of enforcement proceedings (i.e., what level of costs and expenditures should be borne by the private bailiffs) – see Messmann, S., Tajti, T., 2009, p. 577.

106 *Journal of Laws*, 22 March 2018, item 771. The text of the Act was not available in English on 20 Nov. 2019. Though the texts of a select number of Polish statutes in English are available at <https://www.knf.gov.pl/en/>, 20 Nov. 2019.

functions in commercial companies, and they must file public statements on their income (like politicians performing public duties).

It is indicative that private debt collectors appeared on the market roughly simultaneously with the privatization of the bailiffs' system. Their presence was noted relatively early even by the *Financial Times*, which devoted a report to Polish debt collectors in 2012.¹⁰⁷ That they have strong presence on the Polish debt collection market and that sometimes they do employ problematic practices could be seen from a number of indicia. Perhaps the most telling are the autochthonously developed interpretations of the Polish Office for Protection of Consumers and Competition as well as the data, information on concrete abuses¹⁰⁸ having been regularly displayed on the Office's webpage from the beginnings. Another important indicator is the 2011 introduction of a new crime targeting specifically some aspects of private debt collectors' practices.

Amending banking laws contributed to their strengthening and growth as well. In particular, the amendments that allowed banks to outsource debt collection, a hurdle that had been noted already in the 1990s.¹⁰⁹ Namely, without providing for an exemption from under bank secrecy laws outsourcing by banks would not have been possible. As a result of the amendments, banks were empowered to communicate data on debtors in case of transfers of claims for debt collection purposes¹¹⁰ and in case of sale of 'lost' (non-performing) receivables (claims).¹¹¹ These

107 See, e.g., Cienski, J., 2012, Debt Collector Took a Polite Approach and It Paid Off, *Financial Times*, 14 June, p. 5.

108 Very instructive is the case of the "Euro Bank" that was fined with more than PLN 1.2 million exactly for questionable private debt collection practices. Press release of 05.10.2011 available in English at the website of the consumer protection agency (http://www.uokik.gov.pl/news.php?news_id=2981, 16 Nov. 2019).

Having issued (until the date of the press release in 2011) nine decisions in the Euro Bank case, the President of the agency noted: "[i]ntimidation, pressuring, and unreliable information about the consequences of failing to pay the debt – [were] the most common irregularities [...]. Invoking fear, psychological pressure and confusion – [were] the main reservations of the President of the Office against the bank debt collection activities." Needless to say, the number of consumers who have experiences identical or similar to "practices" in other CEE countries are in tens of thousands – irrespective of the fact that often no reaction ensued from the side of, either lawmakers, nor the local consumer protection agencies.

109 Article 6a(1)(I) of the Banking Act (the Act of August 29, 1997 – Banking Law, published in *Journal of Laws* 1997, No. 72, item 665). Text of the Banking (and a selected number of other Polish acts) is available in English at <http://www.polishlaw.com.pl>, 20 Nov. 2019.

110 Article 104(2)(1) of the Banking Act.

111 Article 104(2)(4) of the Banking Act.

changes made possible for larger debt collection firms to expand their operations even to such complex financial transactions as securitization.¹¹²

These Polish developments properly illustrate how the world of debt collection and banking may be linked and how the interests of the two sectors may meet. This, however, should not lead to the erroneous conclusion that, therefore, it is sufficient and appropriate to leave the regulation, monitoring and sanctioning of private debt collection businesses to the banking or financial supervisory authority. Decidedly not: the latter are neither expert in, nor equipped for supervising private debt collection unless specifically staffed and trained for that. One should not forget that banking and debt collection, irrespective of the potential linkages and shared interests, represent two significantly different worlds. As one could learn perhaps best from the Italian regulatory philosophy: the risks corollary to debt collection (especially if repossession or acts bordering with it) are equal with, or are more similar, to the risks inherent to the pawnshop industry and not that of banking. No wonder that normally it is the consumer protection authority that is entrusted with enforcement of laws (if any) on private debt collectors (e.g., US, Italy) and not the banking supervision agency.

4.2.3.5. Serbia

Serbia is not yet a member of the EU, yet it is already closely following and gradually approximating its laws to that of this supra-national organization. Yet it deserves special attention because it is a legal system illustrating that taking some forms of enforcement from the hands of courts is not inherently foreign to countries that have been affected by the winds of war. These and the other considerations to follow otherwise are to a large extent of relevance also to the other West-Balkan countries, save Croatia because in this country the project of the privatization of the bailiffs' system was given up (at least, for the time being) primarily for political reasons.

At different phases in its history, Serbian laws were influenced by different laws. Yet until present time these were primarily German, Austrian and French laws. For example, once the Kingdom of Serbs-Croats and Slovenes was formed after WW I, the work on the new common law for the country had begun resulting in the clash of two main strands, the 'Serbian front' and the one represented by the lawyers from the former

112 For example, Intrum Justitia had founded such a securitization fund specifically for its operations in Poland in 2005 (*Intrum Justitia Debt Fund 1 Fundusz Inwestycyjny Zamknięty Niestandaryzowany Fundusz Sekurytyzacyjny*).

Austro-Hungarian Empire.¹¹³ Given such legal particularism, one had to wait until 1930 when the first common Law on Enforcement Proceedings was enacted by the Kingdom – then already under the new name of the Kingdom of Yugoslavia. This introduced court bailiffs as permanent bodies of courts for enforcement of court decisions.¹¹⁴

In principle, the same western legal systems remained the main models for the drafters of the laws of the former socialist Yugoslavia in the post-WW II period, though until the clash of Stalin and Tito in the early 1950s, soviet law appeared as well among those impacting some influence. Then, a few decades later, upon the dissolution of the former (socialist) Yugoslavia in the 1990s, Yugoslav laws were taken over by Serbia and the other successor countries to be gradually replaced, amended as time passed by. Therefore, due to the fact that Serbia is a continental European civil law system, which in addition was influenced by the mentioned major European civilian legal regimes, Serbia's more recent efforts to increase the efficiency of enforcement, in particular through the privatization of the bailiffs' services, resemble the solutions of these.

Still, unlike Germany, Serbia has failed to regulate out-of-court debt collection so far notwithstanding that the private debt collector companies are present in the country. Thus, Serbia has no law similar to the German 2008 Act on Out-of-Court Legal Services, let alone a regulation like the US FDCPA. This paper should exactly for this reason be of utmost relevance in this country as well.

The crucial step Serbian lawmakers made in the 21st century towards more efficient enforcement and debt collection undoubtedly is the privatization of the bailiffs' services. More, precisely, partial privatization because enforcement of court decisions in some areas of law remained in the hands of court bailiffs. Hence, the official nomenclature of the first version of the dual-track bailiff system knew for '*court bailiffs*' and '*bailiffs*';¹¹⁵

113 See Pavlović, M., 2018, Problem izjednačenja zakona u Kraljevini Srba, Hrvata i Slovenaca/Jugoslaviji, in: *Zbornik PFZ*, 68, p. 494.

114 See Šarkić, N., Nikolić, M., 2008, Sudski izvršitelji ili privatni izvršitelji?, in: *Zbornik radova*, pp. 246–247. See also Šite, D., 2016, *Kolege Glembajevi – Zapisi o našim prvim privatnim izvršiteljima*, (The Glembajevs, Our Colleagues – Entries on our First Private Bailiffs) Subotica, Lyceum iuris, on the individuals serving as court bailiffs in courts on the territory of the northern province of Vojvodina. The monograph was written in both Serbian and Hungarian languages.

115 While the unofficially used designation is 'private bailiffs' (privatni izvršitelj), they are simply bailiffs (izvršitelj) in the Act as contrasted to court bailiffs (sudski izvršitelj) who are employees of courts. See Bodiroga, N., 2014, O ustavnosti izvršenja potraživanja putem privatnih izvršitelja (On the Constitutionality of Enforcement by Private Bailiffs), in: *Anali Pravnog fakulteta u Beogradu*, Vol. LXII, No. 1, p. 114.

the latter colloquially called ‘private bailiffs’ [“*privatni izvršitelji*”] by the media and others. The novelty was introduced in May 2011 through the amendment of the Act on Enforcement and Ancillary Security Measures (“*Zakon o izvršenju i obezbeđenju*”).¹¹⁶ The first group of private bailiffs had passed the entry exams and had given their oaths of office in May 2012. The main justification for the volte face was the inefficiency of the court bailiff system inherited from socialism. Though other factors like the epidemic levels of unpaid utility bills of consumers were also among the driving forces behind the passage of the act.

Many had doubts in the new dual-track bailiff system, if reading the reports of investigative journalists, media, and complaints on the internet. As one Serbian author noted commenting on the prospects of this new dual-track bailiff system somewhere in 2014, “*the existence of the parallel tracks of enforcement is a positive development because we will be in the position to see which system is better [and if] it shows that the new one fails to increase the efficient of enforcement, the state may return to the old [i.e., exclusive court bailiff system] at any point in time.*”¹¹⁷

Yet the new system has passed the test of times as the private bailiffs regime was kept by the new 2015 Law on Enforcement. Moreover; actually the position of private bailiffs (now named, metaphrased, as public bailiffs or “*javni izvršioци*”) was even strengthened. While court bailiffs are exclusively entrusted to enforce decisions on reinstalling employees into their positions, family matters, injunctions (orders to do, omit, or suffer certain acts) and joint sales of immovable and movables, in all other cases – including collection of public utility debts – private bailiffs remain exclusively empowered for enforcement of court decisions.¹¹⁸

As per media reports, the percentage of collections has drastically increased thanks to the new regime especially as far as utility bills are concerned. This is obviously to a great extent due to the fact that consumers now pay voluntarily to avoid private bailiffs, and the fees they charge for

116 *Zakon o izvršenju i obezbeđenju* (*Sl. glasnik RS* [Official Gazette] Nos. 31/2011 and 99/2011). Section 11(8) of the Act defines the private bailiff (“*Izvršitelj*”) as “*a natural person who is appointed by the Minister of Justice to undertake, in the status of a government official, enforcement actions within the limits of the enforcement decree as well as to undertake other actions for which he is empowered based on this Act.*”

117 See Bodiroga, N., 2014, p. 129.

118 See section 4 of the 2015 Law on Enforcement and Ancillary Securities Measures [*Zakon o izvršenju i obezbeđenju*, *Sl. glasnik RS*, Nos. 106/2015, 106/2016). See also section 493(1) based on which private bailiffs are empowered to make a decision on enforcement based on so-called authentic documents (“*verodostojna isprava*”) and then to enforce them as well without turning to a court.

their work and the ‘uncomfortable’ steps they may take.¹¹⁹ For an average Serbian citizen it is a great and obviously unusual novelty that suddenly there are businesses on the market that do the job of detectives (tracing the assets of the debtor), and given that they are profit-driven (contrary to court bailiffs), indeed, they do know how to do that professionally and efficiently. A great novelty is also that if the consumer fails to file an objection against the decision (“*zaključak*”) of the private bailiff within a short period of time, enforcement can be expected to be imminent and without court oversight.¹²⁰

Understandably, Serbian legal scholars, media and even bloggers are now preoccupied by private bailiffs and their enforcement and debt collection practices. The new kids on the block, the genuinely private debt collector agencies and companies, remain to be overshadowed by these developments, presumably only for the time being given that they are already present on this market, too.

5. WHAT EUROPE SHOULD DO

5.1. IS A COMMON EUROPEAN REGULATORY RESPONSE POSSIBLE AND IS SECTOR-SPECIFIC REGULATION NEEDED IN EUROPE?

The above discussion, hopefully properly showed that the private debt collection and the corollary excesses is a common issue in Europe; reacted upon differently only by a handful of jurisdictions. With passage of time, however, one should not expect that the hinted at concerns will subside or disappear, evaporate. As it has already been concluded, quite rightly, for example by such more exposed countries as New Zealand, the more sophisticated the industry becomes, the stronger the need for regulatory intervention.¹²¹ This caveat should relate primarily to the EU, which

119 See, e.g., Antelj, J., 2016, Izvršitelji zatvorili pola miliona predmeta [Private Bailiffs have Closed Half a Million Cases], in the daily *Politika*, 24 May issue.

120 Bodiroga criticized the system for not providing adequate safeguards to consumers given that courts may interfere only if objection is filed by the consumer, moreover, only for a limited number of reasons, in case of utility bills. In other words, irrespective that the system possesses tools to control private bailiffs through the appointment powers of the Ministry of Justice, the Chamber of Private Bailiffs and its disciplinary powers, as well as the possibility of judicial review of Private Bailiffs’ acts, these may not be sufficient. See Bodiroga, N., 2015, Kontrola rada izvršitelja, in: *Anali Pravnog fakulteta u Beogradu*, Vol. LXIII, No. 2, pp. 62–63.

121 The basic policy position of a recent Report of the Law Commission of New Zealand directly apply also to Europe, notwithstanding the variety of systems of the Old Con-

should perhaps take a more sober stance and, at least, start gathering and analyzing related data and information from all four corners of the Union, instead of heeding only to the expectations of the stronger Member States. Especially as both, the four freedoms, and the consumer protection agendas of Brussels are increasingly affected by the above hinted at developments.

One option is the status quo, leaving Europe with a multi-colored, independently developing, sometimes even incompatible regulatory responses. This is inevitably a formula for unequal protection of consumers in various part of the Union because in countries with sector-specific regulation the additional layer is obviously providing targeted, inherently more efficient protections on top of classical branches of law, including general consumer protection laws. Here, contemporary EU mainstream scholarship's position promulgating the idea that general consumer protection law is sufficient to protect consumer- and SME-debtors can easily be refuted not just by invoking the experiences of common law systems but also by pointing to the reasons that made Denmark or Germany pass specific legislation to regulate private debt collectors.

If there is consensus that sector-specific regulation is justified, however, the ultimate question that lends itself be formulated is whether a comprehensive regulatory response similar to the FDCPA specifically targeting also the prohibited practices or rather a licensing act similar to the German 'gate-keeper' model would be sufficient? If it is accepted that the concrete forms of excesses listed in the FDCPA, the UK Handbook, or described in the two Hungarian empirical cases above are regularly reoccurring in larger numbers in most of the jurisdictions in Europe, then the strength of the comprehensive model should not be contested anymore. This notwithstanding that no model is foolproof, providing complete guarantee against abuses and overreaches.

If empirical evidences and practical concerns are swept under the carpet and rather theoretical considerations and system thinking so characteristic to Continental European civil law systems prevails, nothing would justify resorting to overseas experiences in Europe or for civil law

continent and the radically different approaches to self-help: *"While self-help by creditors was traditionally a feature in English commercial law, intervention in the consumer credit market has long been seen as necessary. This need has arguably increased as sophisticated and potentially risky financial products have become more widely available. All of the submissions that we received proceed on the assumption that some degree of regulation in this area is necessary."* See point 2.27 of Consumers and Repossession – A Review of the Credit (Repossession) Act 1997, Report No. 124 of the New Zealand's Law Commission (April 2012), at 17, (<https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R124.pdf>, 20 Apr. 2020).

lawyers taking a look at UK law (especially after Brexit). Europe and the US are obviously divided by many things in the context of private enforcement but presuming that questionable practices as experiences in the US (or UK) may not be replicated in Continental European systems is simply erroneous. The obvious pragmatic reason is that most real life problems emerge in complete disregard to which legal family a country belongs to. The still unfolding UK discourse concerning ‘logbook loans’¹²² may be a perfect illustration of the point that financial innovation, including also questionable practices, are present not only in the US but also in the UK. Likewise, the details of the above-sketched Hungarian cases proves of the replication of practices that have long been known in the US or UK.

As a final gloss: the idea that the horizontal application of constitutional (fundamental) rights might be a full scale substitute of sector-

122 Logbook loans are typical examples of the innovativeness of the industry and the need for constant vigor by the regulators. These loans – concluded in huge numbers in the UK – have been offered to consumer-debtors in need of cash but with bad credit history and who, thus, could offer the car they own as collateral for loans with interest rates as high as 400%. Besides the extremely high interests charged, the failure to properly inform the debtor of all the linked risks and the possibility of bypassing the Consumer Credit Act’s prohibition on repossessing cars out-of-court are also problems. The last could be achieved by way of effectuating the transaction through a bill of sale and retaining the title for the benefit of the lender (signing over the car’s V5 logbook or motor vehicle registration certificate to the lender – sample available at http://www.scrapcars.co.uk/popup_image.php?id=v5c.jpg). For an advertisement on a ‘logbook loan’ see, for example, <http://www.azmoney.co.uk/loans/logbook> or <http://www.mobilemoney.co.uk/>; both last visited on 20 Nov. 2019.

The Bill of Sale to be valid and enforceable must be registered with a High Court after what “*there is no legal action that consumers in default can take to prevent seizure of the property.*” See the document of the UK Department for Business Innovation and Skills (BIS), *A Better Deal for Consumers – Consultation on Ban the Use of the Bills of Sale for Consumer Lending* (Dec. 2009), point 22, at 10, available electronically at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31481/a_20better_20deal_20for_20consumers_20consultation_20on_20proposals_20to_20ban_20the_20use_20of_20bills_20of_20sale_20for_20consumer_20lending.pdf, 20 Nov. 2019. See also Bachelor, L., 2009, ‘Logbook loans’ to be Outlawed, *Guardian* (22 Dec. issue).

The case is illustrative of two important points: first, it is not only self-help repossession that is a cause for concerns, and secondly, it is questionable whether self-help repossession could be fully and adequately separated from other types of out-of-court enforcement. In those respects that words of the chief officer of Citizens Advice Bureaux (a UK-based registered charity organization <http://www.citizensadvice.org.uk>) are telling: “*Missed payments can lead to aggressive debt collection tactics, and problems with bills of sale debts do not end with repossession. Bureaux have seen cases where lenders pursue shortfalls after sale aggressively, including putting people’s homes at risk through the use of charging orders – a second chance at securing a previously secured debt.*” Quoted by Bachelor, L., 2009.

-specific regulations is hardly acceptable. To remind ourselves, the protagonists of this strand in constitutional and human rights law claim that fundamental rights apply not only vertically between the citizen and the State, but also horizontally, between the citizens themselves. In the context of extra-judicial enforcement and private debt collection this would boil down in employment of constitutional law to provide consumer-debtors with efficient remedies against abuses and overreaches in these sectors.¹²³ That this is at the moment hardly a potent avenue for protecting citizens appearing in the shoes of consumer-debtors but rather only a rarely resorted to supplement to sector-specific regulations (in Europe: if any) could be concluded also based on the small number of publicized European cases applying this theory to debt collection. Whether this will change for the better, remains to be seen. Though court cases where constitutional and debt collection laws have met could already be found, like the Irish High Court's *Sullivan v. Boylan*¹²⁴ case from 2013, in which the Court held that the “*exceptionally unpleasant debt collection tactics by a building constructor unconstitutionally violated the dwelling*.”¹²⁵ Still, until such cases emerge in greater numbers not only from national constitutional courts but ideally also from the dockets of the European Court of Human Rights in Strasbourg, optimally changing the horizontal application of fundamental rights from exceptional to something more routine in this context, hardly could one speak of real and meaningful protections emanating from the ‘horizontal application of fundamental rights.’

5.2. SPECIFIC REGULATORY CONSIDERATIONS

The list of specific regulatory questions to be addressed is long. The ensuing few serve only to show how complex is to decide how to bridge the gaps. One important policy choice is related to private enforcement of consumers' rights.¹²⁶ The US experiences with opening the doors to

123 As expressed by Gerstenberg: “[C]onstitutional law not only gives rise to a ‘protective function of the state’ or ‘positive obligation of the state’ to develop private law with due regard [to – sic] constitutional values, but it is also the business of constitutional law, and of courts applying it, actively to promote and enforce such a function, and thereby to ensure that conduct in civil society that infringes unjustifiably on constitutionally protected interests of persons is made civilly actionable. [...]” See Gerstenberg, O., 2004, Private Law and the New European Constitutional Settlement, *European Law Journal*, Vol. 10, No. 6, (Nov.), pp. 766–767.

124 *Sullivan v. Boylan* [2012] IEHC 389; [2013] IEHC 104.

125 Quoted by Doyle, O., 2018, *The Constitution of Ireland – A Contextual Analysis*, Bloomsbury Academic, p. 109.

126 See, e.g., Spiller, P., Tokeley, K., Individual Consumer Redress, in: Howells, G. *et al.* (eds.), 2010, *Handbook of Research on International Consumer Law*, Edward Elgar, pp. 498–499.

private enforcement of consumer-debtor claims too wide – both individual and class actions – should be instructive of the excessive number of cases that such policies may generate. Suffice to browse the web-journal of the US private collection industry – the *InsideArm*¹²⁷ – to see how frighteningly high the number of cases launched against collection agencies have become.¹²⁸ Europe should reckon with such undesirable outcomes: while private actions, including collective ones, are not something to be excluded uncritically a priori, proper filters, or alternatives ought to be found not to create incentive for mass scale litigation potentially further congesting the courts of Europe. Some useful experiences seem to be already available, like the UK Claims Management Ombudsman (service of the Financial Ombudsman Service), an initiative dating back to the first years of the 21st century, having been expanded to its present form in-between.¹²⁹

While alternative dispute resolution mechanisms deserve attention as well, the US experiences with abuses of arbitration as a dispute resolution method for consumer claims against repomen should again be borne in mind as nothing suggests that their European kin would be less inclined to drive disputes with consumers towards arbitration before arbitral institutions linked to them. This notwithstanding that the short history of arbitration in the US significantly differs from that in Europe. In fact, no empirical data seems to exist that would unequivocally prove that this is not occurring already now. Evidence seems to exist, indeed, to the contrary: one of the novelties of the 2006 UK Consumer Credit Act – giving the power to consumers to opt out from the disputes resolution mechanism consented to by signing their credit or hire agreements¹³⁰ and bringing

127 The journal's website is at <http://www.insidearm.com>, 17 Nov. 2019.

128 See, e.g., the article of Lansford, P, (*InsideArm*, 12 Oct. 2012 issue) the title of which – More than 3,000 Debt Collection Dismissed per Class Action Settlement – speaks for itself.

129 For example, about 55% of cases brought before FOS in 2004/05 were resolved through the process named as 'guided mediation', which – as all mediations – is not about decision making but rather about "*guid[ing] each side towards a mutually acceptable solution*". Only in case of the failure of this stage will the case proceed to a phase that is a bit misnamed as 'adjudication' by a FOS adjudicator; the reason behind the misnomer is that the adjudicator still makes only a recommendation. The dissatisfied party may thereafter ask for review and for a final decision by an Ombudsman. Faster tempo is ensured by not guaranteeing a general right to oral hearing to the parties in any of the three stages: oral hearing is scheduled only if the Ombudsman deems that necessary. See MacNeil, I., 2007, Consumer Dispute Resolution in the UK Financial Sector: the Experience of the Financial Ombudsman Service, I (6) *Law and Financial Markets Review*, Vol. I, No. 6, (Nov.), p. 521. For more recent information, see at <https://cmc.financial-ombudsman.org.uk/>, 20 Nov. 2019.

130 Jointly named as '*consumer credit jurisdiction*'. See point (6) of the new section 226A added by section 59(1) of the Consumer Credit Act 2006. As corroborated by the

the case before the Financial Ombudsman – seems to be a panacea specifically against this arbitration-related malady.¹³¹ As Belochlavek correctly noted, “*all EU Member States generally recognize the need for protection of the weaker party, [...] their understanding of the interplay between arbitration and consumer protection [still] is highly diverse.*”¹³²

A similar, largely bypassed topic of relevance, is the complex interplay of extra-judicial debt enforcement, private debt collection and bankruptcy¹³³ laws, especially in case of consumer debtors. This subject matter might at first instance look of little (if any) relevance to a discussion on extra-judicial enforcement; in particular, if observed from the perspective of countries where the operation of the bankruptcy system is far from being perfect and bankruptcy as a phenomenon is not only little known but also distrusted and widely avoided. The nexus has at least two sides of relevance here. First, in jurisdictions where there is no individual (consumer) bankruptcy law in place, debtors cannot resort to it to get at least partial discharge from their debts, or extra time for their payment. The same could be said of systems, which have only recently introduced such laws and are thus still in a kind of experimental phase suffering from imperfections and unintended consequences.¹³⁴ Debtors in such systems are

Explanatory Notes to the Act, all such business types that are subject to licensing under the 1974 Act (*‘consumer credit licensees’*) may be brought under the consumer credit jurisdiction – what includes private debt collection businesses (s. 226A(3) (f)). See Explanatory Notes (<http://www.legislation.gov.uk/ukpga/2006/14/notes/division/17>, 17 Nov. 2019).

- 131 It seems, however, that this development ensued in the UK driven by other reasons: first, the fact that arbitration also involves legal confrontation, and secondly, it presupposes equal level of knowledge and strategic position – similar to litigation. In consumer cases, however, these are typically lacking. See Office of Fair Trading, *Raising Standards of Consumer Care – Progressing beyond codes of Practice* (Febr. 1998), cited by Woodroffe, G., Lowe, R., 2010, *Woodroffe & Lowe’s Consumer Law and Practice*, Sweet & Maxwell, para. 10.35.
- 132 See Bělochlávek, A. J., *Autonomy in B2C Arbitration: Is the European Model of Consumer Protection really Adequate?*, in: Alexander J. Bělochlávek, A. J., Rozěhnalová, N., 2012, *Czech (& Central European) Yearbook of Arbitration*, Vol. II, Juris Publishing, p. 29.
- 133 Note that under US law the term ‘bankruptcy law’ extends to all types of bankruptcy proceedings, from the ones conducted against juridical entities, municipalities and individuals (consumers). As opposed to that, for English and UK law, the term ‘bankruptcy law’ is limited to insolvency of individuals and the proceedings initiated against insolvency companies is named ‘insolvency law’. The European Union took over the English/UK nomenclature. Above, however, we are using the term bankruptcy as in US law.
- 134 Russia, for example, introduced bankruptcy proceedings for individuals for the first time in its history in 2015. As one could expect, the system is plagued with numerous defects, many of which should have been foreseeable had comparative law more

then inevitably doomed to remain not only targets of private bailiffs' and debt collectors' actions but might also be pushed out to the periphery of the financial system for a decade or more. That is satisfactory, neither to creditors, nor the economy; let alone the debtors themselves.

The other side of the coin is best illustrated by US experiences with individual bankruptcies. Namely, under US bankruptcy law enforcement of money-judgments against individual debtors, both wage-earners and salaried ones, can quite easily be blocked, procrastinated or written off (fully or partially) by resorting to one of the three applicable Chapters of the US federal Bankruptcy Code.¹³⁵ No matter whether through discharge (writing off) of some of the debtors, or giving extra time to the debtor to pay, creditors (especially unsecured¹³⁶ ones) often end up not being able to collect their claims; even if enshrined into final court judgments. It should not come as a surprise therefore that besides cross-border bankruptcies, the reform of the individual bankruptcy system has been in the focus in the US during the last decades. Although improving European laws, cooperation and coordination among the bankruptcy courts of the Member States, as well as the shift towards a business culture that would tolerate risk-taking by making discharge sensibly accessible to both businesses and consumers ranks high on EU agenda, the nexus of extra-judicial enforcement, private debt collection and bankruptcy law has spectacularly escaped the attention of this supra-national organization so far; similarly to extra-judicial enforcement and private debt collection.

intensely been exploited. As Kilborn aptly put it: “*While the law on the books suggests a permissive and effective relief delivery procedure, the law in action has seen the vast majority of debtors barred from accessing that relief due to explicit and implicit financing burdens.*” See Kilborn, J. J., 2019, *Fatal Flaws in Financing Personal Bankruptcy: The Curious Case of Russia in Comparative Context* (November 22). Available at SSRN: <https://ssrn.com/abstract=3491945> or <http://dx.doi.org/10.2139/ssrn.3491945>.

135 Based on the federal Bankruptcy Code, Chapter 7 and Chapter 13 (titled: Adjustment of Debts of an Individual with Regular Income) are the normal avenues for insolvent individuals. Chapter 11 that is the US success story as far as reorganization (restructuring) of businesses are concerned, can also potentially be exploited by individuals. For an in-depth discussion see Kilborn, J. J., 2019, *Eyes on the Prize: Procedures and Strategies for Collecting Money Judgements and Shielding Assets*, Caroline Academic Press.

136 Unsecured creditors are the ones for the benefit of whom no proprietary (in rem) security – such as a mortgage, pledge or retained title (ownership) – was created. Normally, most of the creditors of a bankrupt (insolvency) debtor are, indeed, unsecured ones. Although the bankruptcy priority (ranking) system differs from country to country, the general rule that unsecured creditors are paid after preferential (e.g., tax authorities, employees for some portion of unpaid wages) and secured creditors seems to be generally accepted.

5.3. WHAT TO DO WITH SELF-HELP REPOSSESSION IN EUROPE?

Self-help repossession, as a specific form of out-of-court enforcement, would deserve a longer treatment, at least, for finding an acceptable common ground given the opposing position of (European) common and civil laws though the formula of Book IX of the Draft Common Frame of Reference (DCFR) is undoubtedly a major step ahead in that respect. At any event, evidence properly suggests that self-help repossession is not unheard of in civilian systems either. In some of the CEE laws the status of self-help repossession is dubious at best notwithstanding the common law-inspired reforms.

The other, perhaps even more important reason why the topic of self-help repossession should not be left out of our discussions in Europe (and beyond) is the relationship of self-help repossession and private debt collection the common denominator of which is that both business activities are undertaken by private agents and companies. As the inefficiency of court enforcement remains a headache in many European countries, it may be validly presumed that there is a very lucrative market for such services. With such background, it seems logical that debt collectors may be tempted gradually expand also to self-help repossession. The hypothesis is that the non-existent regulatory framework in effect stimulates not just resort to private ordering and the emergence of agents of private enforcement but also drives them towards more violent practices. In fact, the post-1990 history of CEE abundantly proves that such presumptions are not baseless, as illustrated, for example, by the first Hungarian empirical case above. A range of questions pops up in relation to what happens if private agents in fact do get engaged in private repossessions, notwithstanding the law to the contrary; especially in a legal environment lacking unambiguous and strictly enforced regulations. In systems with a legal vacuum, where typically neither the law makers, nor the academia pays attention to real-life developments, the worst case scenario is the infiltration of, if not the complete takeover, of the business of private, out-of-court enforcement by organized crime.

The question whether Europe should or should not allow self-help repossession has been neither properly discussed, nor given the final answer as of yet. If the mentioned DCFR is taken as some kind of indicator of the direction in which Europe should be heading, then the question is definitively a living one and is one that should be answered affirmatively. Namely, Book IX of this voluminous but unusual scholarly product – entitled: *Proprietary Security in Movable Assets* – gives unreserved support to the idea of ensuring efficient enforcement of security interests in Europe

through self-help repossession; in particular, in cases of so-called ‘acquisition finance’ contracts or contracts containing retained ownership (title) clauses like leasing, conditional sales or hire-purchase. As the DCFR was put aside by Brussels, nobody knows whether only for the time being or for good, it is not known either whether the policy recommendations of its drafts should be taken seriously or whether they still mean something as far as future European developments are concerned. Still, the fact that a group of top European private and commercial law experts had sided with the idea of giving more room to self-help repossession (retaking) in the European legal space when shaping the contours of the DCFR, should be indicative of the legitimacy of the above line of thinking and the recognition of the important role this legal institution plays in modern times.

Lastly, as self-help repossession is inherently fraught with risks, more “dangerous” than the other ‘milder’ forms of private debt collection and extra-judicial enforcement, if Europe is to give a green light to it, that ought to be accompanied by appropriate counter-balances to counter the risks especially when consumer debtors are at stake. The difference that matters the most, as it was formulated in 1965 by the chief drafter of UCC Article 9 – Grant Gilmore – is that while “[i]n the financing of business debtors repossession causes little trouble or dispute, [i]n the underworld of consumer finance, however, repossession is a knockdown, drag-out battle waged on both sides with cunning guile and a complete disregard for the rules of fair play. [Moreover,] [a] certain amount of trickery seems to be accepted: it is all right for the finance company to invite the defaulting buyer to drive over to its office for a friendly conference on refinancing the loan and to repossess the car as soon as he arrives.” Although this brilliantly formulated passage stems from the US of the 1960s, it has not lost its relevance and it remains instructive not only for the US but also for the ‘skeptical’ part of Europe, today and in the future as well.

6. CONCLUSIONS

Two central lines of concluding thoughts lend themselves to be formulated based on the above. On the one hand, a global trend pushing enforcement and debt collection increasingly in the direction of private ordering is undeniably detectable, at least, in the systems observed herein. The privatization of the bailiffs’ services, introduction of summary proceedings of the pay-order type, and empowering public notaries or private bailiffs to operate the enforcement system (fully or only some specific segments of it) instead of courts, or the mere tolerance of the appearance of private debt collectors all were driven by the very same efficiency

concerns. The trend is more visible in European civil law systems as historically, starting somewhere in the 19th century, they used to be restrictive in this domain compared to their common law kin. In their case the contrast between the past and the present is more conspicuous compared to common law systems that have always looked upon extra-judicial enforcement and private debt collection as important building blocks of their commercial laws. In the leading Anglo-Saxon systems, the last few decades brought about rather the realization that out-of-court enforcement and debt collection must be counter-balanced by potent, constantly refined regulations. The guiding principle is that the more widely one opens the doors to private initiative in the domain, the more sophisticated and multi-pronged the regulatory system inevitably becomes.

On the other hand, the proper comprehension of these changes and the corollary challenges ask for a new approach to our central theme, especially but only by jurisdictions that lack sector-specific regulations. What this paper tried to show, the quintessence is, indeed, that instead of observing the different avenues of extra-judicial enforcement and private debt collection in isolation, these should be perceived holistically as part of a spectrum in which each of the elements has its own place. Sometimes they compete-, at other times they supplement each other, on the shared route towards more efficient enforcement and debt collection. Such a perception would allow policy-makers better assess the strengths and weaknesses of each of the avenues, both in isolation, and compared to each other. This would allow for better assessment of which functions should centrally be allocated to court- versus private bailiffs (if introduced) and which aspects of debt collection should be left to the market, to private ordering. Comparative law could be of great help in that process, as hopefully demonstrated also by this paper. Croatian, Hungary or Serbian regulators consequently could already now take a look at and learn from the experiences of both, more developed systems, and that of their neighbors, in particular, as far as private debt collectors is concerned, who have not been even given proper recognition to so far in these countries (and beyond).

With the ‘new kinds on the block’ in mind, three key policy considerations should be given sufficient weight to. First, when pondering on the need of subjecting private debt collection to regulation, the task is to find a proper balance between permitting and fostering the autochthonous development of such a legal environment that would result in efficient enforcement and collection of debts and yet which would also ensure adequate protection of debtors, especially consumers and SMEs.

If consensus has been reached on the legitimacy of regulation, the next question is whether it is sufficient to ensure the “health” of the system, that a proper regulatory regime is in place, by regulating only the sta-

tus of service-providers and the entitlements of their controllers, the appropriately empowered gatekeepers, similarly to the German pattern? Or, rather a comprehensive approach would be needed, either following the US FDCP as representative of the hard law approach, or by way of soft law similarly to Australia or the UK. The all-embracing alternative presumes identifying and tackling as comprehensively as possible all known abuses and overreaches, moreover, having in mind that new technologies will make emergence of ever newer problematic tactics continuously possible.

After these practical points, the reader should not frown at the ensuing concluding remark, more of theoretical nature, directed especially to skeptics disagreeing with our proposal that the time of European comprehensive regulation of extra-judicial enforcement and private debt collection has arrived. Namely, proper understanding of these phenomena, the myriad concomitant dilemmas and concerns, as well as the threats they generate, undoubtedly presumes not only looking out of the box but also casting a more thorough glance at the experiences of others. Specifically, in case of CEE, the common wisdom that by the transplantation of the solutions of the traditionally followed pet major civilian systems the most optimal outcomes would be produced, does not necessarily work in this domain. These new challenges can be, neither understood, nor satisfactorily resolved, if uncritically sticking to old inherited concepts – no matter how venerable they are thought to be. While pondering, thinking and re-thinking what to do, which avenue to choose, the following words of Roy Goode, the doyen of English commercial law should echo in our ears:

“[C]oncepts ... must be our servants, not our masters. [Yet one should not forget that] [c]oncepts and categories fulfill an important function in giving order and predictability. They will not provide justice in every case; that is not their function. The purpose is to ensure that in the typical case the law reaches a result which would commend itself to a fair-minded commercial community as being reasonable.”¹³⁷

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HOLISTIČKI PRISTUP PITANJU VANSUDSKOG IZVRŠENJA I PRIVATNOJ NAPLATI DUGOVA

– Komparativni pregled trendova, empirijski nalazi
i povezani izazovi pravnog uređenja –

Tibor Tajti

REZIME

Efikasnije izvršenje sudskih odluka i brža naplata dugova bili su i ostali jedan od najvažnijih prioriteta ne samo u Srbiji i u okruženju nego praktično u svim postsocijalističkim zemljama Evrope a i šire. Dužnička kriza prouzrokovana širenjem različitih kreditnih i drugih kartica, jednostavniji pristup kreditima, kao i razne krize, a i založnopravne reforme bili su samo neki od uzroka. Problem nije zaobišao ni zapadne sisteme, dođuše tamo gde su ponekad i neki specifični razlozi bili od uticaja na izbor puta kojim se krenulo.

U kontinentalno-evropskim pravnim sistemima, zakonodavci su uglavnom reagovali uvođenjem ubrzanih postupaka za neke kategorije dugova i privatizacijom (dejudicizacijom) službi izvršitelja. U Mađarskoj, Litvaniji ili Srbiji, na primer, danas se gro izvršnih predmeta sprovodi putem privatnih izvršitelja, koji nisu službenici suda nego profitno orijentisane privatne firme organizovane i sa statusom sličnom advokatima ili notarima. U Hrvatskoj je privatizacija izvršne službe bila započeta otprilike u isto vreme kao u Srbiji, ali je proces bio ubrzo stopiran i ideja odbačena zbog političkih pritisaka prvenstveno od strane ostalih sudeonika tržišta pravnih usluga.

Praktično od samog početka rada, privatni izvršitelji su u žiži interesovanja zbog ekscesa nekih predstavnika profesije i problematičnih metoda rada u ovim zemljama. Malo je poznato da je i Ujedinjeno Kraljevstvo ove decenije, u 2014. godini, reformisalo svoj sistem izvršitelja baš zbog agresivnih i problematičnih metoda izvršenja.

Međutim, problematika obrađena u članku ne ograničava se samo na ove dve novine. Naime, ono što je zajedničko ovim državama jeste to da se nije obratila pažnja na pojavu privatnih agencija i društava koji su specijalizovani i pružaju usluge vezano za naplatu dugova praktično u svim zemljama Evrope. U anglosaksonskim sistemima su oni već odavno poznati pod nazivom naplatioci dugova (*debt collectors*). Ove firme samo delimično konkurišu privatnim izvršiocima jer po pravilu rade ono što izvršiocima ne rade – od detektivskih usluga usmerenih na pronalaženje imovine dužnika, kontaktiranja dužnika-potrošača putem telefona ili lično, kupovine dospelih dugova u blokovima i uz popust, pa do naplate tih dugova (factoring). Dok su status i rad privatnih (i sudskih) izvršitelja regulisani, privatne

inkaso firme i njihov rad, bar u postsocijalističkim zemljama nisu regulisani. Odnosno, potrošači su izloženi raznim oblicima uzurpacije koji često ostaju potpuno nezapaženi od strane državnih organa. Ove firme stoga još i dan-danas ostaju teme o kojima se retko može naći bilo šta u publikacijama pravnika iz ovih država. Literatura je oskudna čak i u Velikoj Britaniji. Bitno je istaći i to da ove naplatne firme postoje i pored sudskih ili privatnih izvršitelja, odnosno uvođenje sistema privatnih izvršitelja ne znači da nema ili neće biti potrebe za njihovim uslugama. Doduše, na primer u Litvaniji, njihov udeo na tržištu je manji nego u drugim zemljama regiona slične veličine, kao što je njihovo prisustvo i u Srbiji do sada uglavnom ostalo neprimećeno. Dve najveće takve evropske kompanije koje već posluju u najvećem broju evropskih zemalja su švedski Intrum i nemački EOS.

Situacija je sasvim drugačija u najrazvijenijim anglosaksonskim pravnim sistemima jer su oni oduvek bili otvoreni prema vansudskim i privatnim formama izvršenja i naplate. Pravni izraz za to je – u bukvalnom prevodu – koncept samopomoći (*self-help*), pravni koncept koji je za anglosaksonsko pravo ne samo jedna uska kategorija vansudske samozaštite već fundamentalan princip trgovinskog prava kao što je i sloboda ugovaranja. To praktično znači da su ovi sistemi oduvek tolerisali, ako ne i podsticali, rad privatnih firmi u ovom domenu. U tom pogledu Sjedinjene Američke Države prednjače jer znaju ne samo za spomenute privatne naplatne firme nego i za firme specijalizovane za povraćaj državnine (*repossession*). Ove treba poimati ne kao neke izuzetke, nego kao usluge koje se rutinski koriste, naročito od strane založnih poverilaca. Reposesija je u principu zabranjena, ili strogo limitirana, u kontinentalno-evropskim sistemima.

Ono što je važno jeste to da razvijeni anglosaksonski sistemi imaju razvijenu regulativu, standarde i metode sankcionisanja ekscesa bez obzira na to o kom obliku vansudskih pravnih usluga je reč. Doduše pristupi se razlikuju: dok se SAD prvenstveno oslanja na zakone kojima detaljno reguliše koji konkretni metodi kontaktiranja i naplate dugova su zabranjeni, Ujedinjeno Kraljevstvo ili Australija to rade preko mekog prava. Na primer, po ovima naplatne firme su u obavezi da na zahtev potrošača tačno specificiraju na osnovu čega postoji dug, kako su obračunali kamate, da li se dužnici mogu kontaktirati telefonom noću i kada i pod kojim uslovima imaju prava na naplatu troškova za svoj rad.

Evropska unija za sada nema posebnu sektoralnu regulativu. Ali izgleda da se postojanje ekscesa i problema polako priznaje i u nekim evropskim zemljama, kao što je Italija, i sankcioniše od strane organa za zaštitu potrošača u okviru agresivne naplate dugova a na osnovu propisa o zaštiti potrošača.

Nemačka zaslužuje posebnu pažnju, ne samo zbog snažnih ovlašćenja izvršitelja koji se poimaju kao glavni stožeri sistema izvršenja. Naime, s jedne strane, zbog očekivanja Evropske unije za postepeno otvaranje

tržišta pravnih usluga za firme iz drugih zemalja članica, a, s druge strane, radi intenziviranja konkurencije na ovom specifičnom tržištu, 2009. godine donet je Zakon o vansudskim pravnim uslugama. Ovim zakonom se regulišu, između ostalog, inkaso poslovi koji su nalik naplatiocima dugova u anglosaksonskim ili u poslednje vreme i u postsocijalističkim zemljama. Nasuprot američkom zakonu, zaštita se ostvaruje prvenstveno regulisanjem preduslova za dobijanje dozvole za obavljanje ovih poslova, kao i statusa, a ne zabranjenih aktivnosti. O važnosti ove tematike svedoči i činjenica da je baš u ovoj godini (2019) započeta revizija pomenutog zakona upravo zbog ozbiljnosti problema koje problematična praksa privatnih naplatilaca stvara.

Pored toga što su naplatne firme relativno nove pojave, kako u Nemačkoj tako i u postsocijalističkim zemljama, problem je i to da nema empirijskih dokaza i analiza o tome šta i kako one obavljaju svoju delatnost, koji bi u bitnome doprineli bržoj i boljoj spoznaji ovih pojava, a radi što brže zaštite potrošača donošenjem odgovarajućih propisa. Godine su potrebne da prvi sudski predmet stigne do najviših sudskih instanci, a kamoli do pokretanja procesa regulisanja tih predmeta. Tragovi i dokazi stoga najčešće se mogu naći samo u člancima istraživačkih novinara, u spisima konkretnih sudskih predmeta, kao i u blogovima na internetu.

Pitanje je i to da li je pravna nauka spremna da se suoči sa takvim pojavama ili bi valjalo razmisliti o razvijanju odgovarajućih metoda da bi se izbeglo to – kao na primer u Mađarskoj – da se prvi ozbiljniji članci o ovoj problematici čiji su autori pravnici pojave tek godinama nakon što se jedan tzv. apsurdni pozorišni komad, koji perfektno i u detalje pokazuje probleme, uspešno prikazuje već godinama.

Preko prikaza ovih novih tendencija i kratkog opisa pravne regulative jednog broja pravnih sistema Evrope i SAD, te kratkog opisa konkretnih oblika problematičnih radnji naplatilaca dugova, članak omogućava da se problematika vansudskog izvršenja i privatne naplate dugova sagleda holistički, zajedno, a ne odvojeno jedan od drugoga. To je važno ne samo za kompletnije i korektnije razumevanje ove problematike, između ostalog radi primanja na znanje postojanja i rasta, nego i za efikasniju zaštitu potrošača i celovito pravno uređenje tržišta vansudskih pravnih usluga.

Ključne reči: vansudsko izvršenje, povraćaj imovine, naplata duga, faktoring, obavezujući propisi i meko pravo, samoregulacija, založno pravo, lizing, zakonodavne reforme, uporedno pravo.

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