



TRIP REPORT

Workshop with enforcement agents and president judges to discuss implementation of the changes to the Law on Enforcement enacted in 2008 and 2009

Submitted by:
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The authors views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United State Government

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Introduction

This project falls under the JRIP Work Plan for 2009, program task 2.3, Support Implementation of the Law on Enforcement.

In 2005 in Macedonia a new Law on enforcement was adopted, introducing a system of private enforcement agents. The Ministry of Justice and Macedonia Court Modernization Project/Judicial Reform Implementation Project have worked closely on supporting implementation of this law.

The Macedonian Court Modernization Project worked with the consultant, Mr. Jos Uitdehaag, enforcement agent of Netherlands, and Mr. Ton Jongbloed from the Law School Faculty of Utrecht, on introduction of the private enforcement system in the Republic of Macedonia. The Law on Enforcement was implemented on May 26, 2006. The Ministry of Justice and Macedonia Court Modernization Project/Judicial Reform Implementation Project have worked closely on supporting implementation of this law. The support in implementation of the Law on Enforcement encompasses: assistance in drafting amendments of the law if needed, follow up on success rate of enforcement and proposed solutions to improve it; trainings for improving professional skills of private enforcement agents; provide capacity building trainings for staff and Executive Board of the Chamber of Enforcement Agents and Sector that overseas work of enforcement agents, mediators and public notaries.

The amendments and changes to the Law on Enforcement enacted in 2008 are related to decisions of the president judges of basic courts upon complaints of the debtors regarding the work of enforcement agents. These decisions can be appealed to the Appellate Court. Some president judges in the past period have made some decisions that do not exactly correspond with the intent of the law and caused negative effects on further enforcement in those cases. There is need for unification of these decisions on national level.

The changes on Law on Enforcement enacted in 2009 regulate transfer of old pending cases from courts to enforcement agents. President Judges have a crucial role in organizing work in the courts in order to prepare an electronic entry of old enforcement cases and prepare inventory of those.

President Judges will be also informed about draft amendments to the Law that will enter Government procedure in early 2010.

Tasks

Within this mission the following activities were performed:

Review of the current Law on Enforcement (off site) and review of the working draft of the amendments to the Law on Enforcement regarding enforcement agents disciplinary procedure and closing agents' offices (off site)

The most important suggestions were the following:

Regarding the closing of the office:

In the event of deputising on account of illness or absence the deputy enforcement agent shall continue the records of the deputy enforcement agent to be substituted subject to the latter's agreement.

In the event of death or dismissal from office (art. 62), the Minister of Justice shall appoint or re-appoint a deputy enforcement agent.

This deputy enforcement agent will be appointed for a certain time limit and is given wider powers:

- *In the event of death or dismissal from office (art. 62) the Minister of Justice shall (re-)appoint the deputy enforcement agent (or a new deputy enforcement agent) for a definite period of time in order to continue the activities of the office and to work towards closing down the office*
- *Meanwhile without prejudice to the provisions contained in Article 44 the deputy enforcement agent shall be authorised to execute an application for the performance of official acts directed at the deputy enforcement agent to be substituted or the deputy enforcement agent.*
- *The deputy enforcement agent shall inform the applicants of the deputising.*
- *Purpose of this appointment is to stop the office*
- *The enforcement agent or his heirs (or any other person to whom the documents have been handed) shall hand over the records to the deputy enforcement agent or a custodian to be designated by the Minister.*
- *The enforcement agent to be substituted or his heirs shall grant the deputy enforcement agent access to his records insofar as required for the deputising.*
- *When performing official acts the deputy enforcement agent shall state his capacity. Except in the event of discharge, he shall mention not only his own name and first names, but also the name, first names and place of practice of the enforcement agent for whom he deputises.*

Regarding supervision: more focus on the money flows:

In my opinion it is even more important to focus on the financial supervision: money flows et cetera. Supervision in most countries focuses on the the financial supervision (e.g. Bulgaria, Netherlands). For that reason I would change the wording of this article in such a way that the financial supervision is considered to be part of the supervision too.

Regarding disciplinary proceedings:

Disciplinary proceedings are part of the administration of justice and as such also have to meet those demands.

This means disciplinary proceedings also have to be in accordance with the requirements of art 6 ECHR. So when the determination or civil rights and obligations are a point of discussion, disciplinary proceedings have to meet the requirements of art. 6 ECHR. (see ECtHR 23 June 1981, NJ 1982 no. 602, concerning Le Compte, of Leuven and the Meyere, and ECtHR 10 February 1983, NJ 1987 no. 315 concerning Albert and Le Compte).

One of those requirements is accessibility. One could wonder whether the access to the disciplinary proceedings is not too limited. In disciplinary proceedings the quality of professional conduct is at stake. For that reason there should not be any restrictions for those who want to file a complaint (providing of course the complainers have an interest in the case)

A two day workshop with president judges from February the 19th to the 20th (on site)

Main conclusions:

From the law it is unclear what the role of the Ministry of Justice is when it comes to monitoring and control. Both the Chamber and the Ministry need to agree on the contents of the monitoring and control.

The communication with the Ministry however is difficult. Although a draft for the amendments was produced which was agreed upon by all the members of the WG, another draft for amendments was sent to the Parliament. This is strange as the Ministry was also represented in the WG. The draft that is now sent to the Parliament does not have the support of the WG and contains some very radical changes in the law. The balance that there is now in the law will disappear once these amendments are adopted.

Meeting with Executive Board of the Chamber of Enforcement Agents and discussion on the strengthening of the regional cooperation with other Chambers (on site)

This meeting was mainly focusing on the issue of monitoring and control and disciplinary proceedings. During the meeting suggestions were made and a draft was made for amendments to the law (regarding the provisions on disciplinary proceedings)

Meeting with MOJ Sector that overseas enforcement agents, mediators and public notaries to discuss and offer assistance in the area of supervision

Unfortunately the Ministry of Justice seemed to be unwilling to have such a meeting. During the two days meeting on site we have approached the representatives of the Ministry numerous times with an invitation for a meeting. Without result. It seems as if the Ministry is chosen its own direction. This direction is very dangerous and might have substantial influence on the continuity of the present system. We tried to convince the Ministry of these dangers during the workshop.

Conclusions

See above

Jos Uitdehaag
March 2010

**WORKSHOP WITH ENFORCEMENT AGENTS AND PRESIDENT JUDGES TO
DISCUSS IMPLEMENTATION OF THE CHANGES TO THE LAW ON
ENFORCEMENT ENACTED IN 2008 AND 2009
JUDGE STILLE REPORT (2010)**



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TRIP REPORT

Workshop with enforcement agents and president judges to discuss implementation of the changes to the Law on Enforcement enacted in 2008 and 2009

Consultancy February 19-20, 2010

Submitted by:

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This project falls under the JRIP Work Plan for 2009, program task 2.3, Support Implementation of the Law on Enforcement.

My task was the following:

1. Review the current Law on Enforcement (off site)
2. Review Bylaws of the Chamber of Enforcement Agents (off site)
3. Review the working draft of the amendments to the Law on Enforcement regarding enforcement agents disciplinary procedure and closing agents' offices (off site)
4. Conduct a two day workshop with president judges from February the 19th to the 20th (on site)
5. Meet with Executive Board of the Chamber of Enforcement agents and discuss work of Chamber as a disciplinary body
6. Meet with MOJ Sector that oversees enforcement agents, mediators and public notaries to discuss and offer assistance in the area of supervision.

Travel: On Thursday 18th we travelled from Skopje to Ohrid (Metropol Hotel) where the Conferences were organized.

On 20th after the discussions we left Ohrid for Skopje (Hotel Karpos).

Work: See Agenda as attached; and my Comment on the proposals concerning Disciplinary Responsibility of Enforcement Agents, both as attached.

I explained on Friday 19th to the audience the Dutch Disciplinary System for Enforcement Agents, especially the way how to appeal in disciplinary cases (see my PowerPoint Presentation). Further on I gave my comments on Saturday 20th on the proposed amendments and changes on the Law of Enforcement and as a result of that comment, on Sunday 21st we had a meeting with the Executive Board of the Chamber of Enforcement Agents and discussed the proposals. The result of those discussions is given in the attached Comment on proposals concerning Disciplinary Responsibility of Enforcement Agents.

Comment on proposals concerning the Disciplinary Responsibility of Enforcements Agents

Article 54¹: Wouldn't it be better to use a more general description of the behaviour of the Agent? Now, for example, it seems not possible to complain about impolite behaviour or about a behaviour outside the profession, with implications for the profession (e.g. a drunken Agent)? See article 34 § 1 Dutch Law on Enforcements Agents:

Article 34

1. Enforcement agents shall be subject to disciplinary proceedings with regard to any acts or omissions in breach of any provision laid down by or pursuant to this Act and with regard to any acts or omissions not befitting a good enforcement agent or candidate enforcement agents.

Article 54 a: It is not clear for me what this proposal means. If I understand it well, article 54-a of the proposal contains the measures that can be given by the Disciplinary Committee.

Article 54 b: My question is: must on every founded complaint follow a measure? According to Dutch law, the Disciplinary Tribunal 'may order' measures. There is – just like in the Dutch Penal Code – the possibility of declaring founded a complaint, without any measure. The Dutch Disciplinary Tribunal has no obligation of taking measures in case of a founded complaint.

Article 54 d: I wonder if it is necessary to make a classification of infringements with corresponding specified measures? In my opinion the Disciplinary Committee must have freedom in ordering measures if it declares founded a complaint about an infringement. That is the right way for the Committee to give a good decision, taking in account all the facts and circumstances.

Article 57: This proposed new article contains the words 'disciplinary penalty'. I suppose that is meant 'disciplinary measures'. That is the same, but sounds not so heavy.

¹ Alle the articles mentioned in this comment are articles or proposed of the Macedonian Law on Enforcement, of not indicates otherwise.

Article 58: If I read this proposed article well, than is the time limit running regardless the moment of awareness of the complainant of the facts?

Is this a period limitation or a peremptory time limit?

Article 59 § 1: How independent is the Disciplinary Committee?

Is it possible that a member of the Board of the Chamber is a member of the Disciplinary Committee? If, yes that it seems to be an infringement of article 6 ECHM. See also article 35 § 5 Dutch Law on Enforcement Agents:

Article 35;

1. (...)

5. The membership of the Disciplinary Tribunal for Enforcement Agents shall be incompatible with membership of the Board of the KBvG.

In what cases does a member of the Disciplinary Committee resign? For example when he loses his membership of the Chamber, or his position as a judge?

Article 59 § 2: How many deputies can be selected? Wouldn't it be better to use the word 'elected' or 'appointed' instead of 'selected'?

Article 59 § 3: What is required for Agents – besides the membership of the Chamber – for being selected as a member of the Disciplinary Committee?

Article 59 § 4: There are no written rules for the disciplinary procedure? Or is the 'authorized body' the producer of this rules? What is the 'authorized body'? Is it desirable that these rules are not rules recorded in the law itself, but in other (lower) legal regulations?

Article 59 a § 1: Complaints can only be filed by the president of the Chamber, the President of the Basic Court and Minister of Justice? And also not by any one else?

Article 59 a § 5: Is there an obligation for the Disciplinary Committee – after receiving a complaint of one (or more) of the persons mentioned in § 1 – to consider the complaint?

Article 59 a §§ 7 and 8: The terms of ‘five’ and ‘eight’ days are rather short. I would suggest in both §§ a term of ‘one month’.

Article 59 b: There will not be any oral procedure of hearing?

Article 59 c § 3: There may be serious doubt if it is according to article 6 EHRC that the Steering Committee – the governing body of the Chamber and the supervisor over the work of the Enforcement Agents; see article 68 § 1 sub e – is the ‘appeal court’ for decisions of the Disciplinary Committee. I wonder if the Steering Committee, functioning as a judge, is sufficiently independent. See also ECHR 23.06.1981, Series A 43, p. 13 §41, and 10.02.1983, Series A 83 (Cases of Albert and Le Compte vs Belgium) and many other decisions.

The Steering Committee can be one of the initiators of a disciplinary procedure against an Enforcement Agent and is as such acting as a (kind of) prosecutor. And it is a general principle of good justice that the prosecutor can never be the judge. Having said that, I add that it cannot be that a member of the Steering Committee – namely the President of the Chamber (article 69 Law of Enforcement) – acts also as member of the ‘appeal court’.

See article 35 § 5 Dutch Law on Enforcement Agents that declares incompatible the membership of the Disciplinary Tribunal with the membership of the Steering Board of the professional organisation.

So I would suggest to establish an ‘Appeal Disciplinary Committee’ in the same way as the ‘Disciplinary Committee’, or to give the appeal power in disciplinary cases to one court of appeal in Macedonia.

The term of ‘eight days’ for appealing is a rather short one. See article 45 § 1 Dutch Law on Enforcement Agents:

Article 45

1. *Our Minister², the relevant enforcement agent or the complainant may lodge an appeal against a decision by the Disciplinary Tribunal of Enforcement Agents on a complaint against an enforcement agent within thirty days of the date of the written notification referred to in Article 43(6) with the Court of Appeal of Amsterdam, by means of a notice of appeal which must be supported with reasons.*

What are the rules of proceeding in appeal?

²

That is in this case the Minister of Justice.