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ECONOMIC ANALYSIS OF THE ELECTRONIZATION OF JUDICIAL ENFORCEMENT IN HUNGARY

Abstract: *The article reviews the fundamental economic analysis of law issues regarding civil procedure, then proves their applicability in the field of judicial enforcement procedure. The author formulates the equation for the rational decision maker for initiating enforcement procedure and also analyzes the elements of that equation. He identifies the costs as key issue to the efficiency of the procedure and presents those rules with economic analysis. Then he turns to the electronization of the Hungarian enforcement procedure, which resulted in great increase in efficiency. Electronic means of communication, electronic attachment and auction shall be reviewed and evaluated from the economic point of view. His conclusions – beyond demonstrating the validity of economic analysis on this field – show that electronization of judicial enforcement provides an increase in social efficiency.*

Keywords: *economic analysis of law, judicial enforcement procedure, economic analysis of judicial enforcement, electronization of judicial enforcement, efficiency of judicial enforcement.*

INTRODUCTORY REMARKS

Any legal instrument might serve multiple purposes, first and foremost its societal purpose in general. These needs of a society are embedded in legal instruments that ensure their application. However, underlying this there exists a fundamental rational issue: what makes it possible, useful to cooperate for the citizens in order to form a functioning society. It is in their self-interest to join their productive capacities into a working economic system that provides for the common functions of their joint enterprise: society and state itself. This is the economic system, which works as an exchange market for the activities of

individuals, useful or simply joyous they be, all contributing to the needs of a working society.

The importance of the economic system may not be underestimated, as we are personally familiar with the rise and fall of the communist economic system, the dangers of exaggerated collectivism. Hence, we now mainly see successful societies working in the framework of a more or less social capitalism, based on the operation of self-interest, with the correction of the state as social distributor. Naturally, the functions of the state (as the organ of the society), once classical – namely national defense, protection of the citizens from each other, the regulation of lawful behavior and adjudicating disputes – are on the growth, new functions arise that are incorporated by the social state, such as the welfare measures. But all these activities are made possible by the well-functioning economic system. The lack of economic incentive often renders desirable goals unattainable. For our purpose, we therefore assert that economic feasibility is a necessity for the proper operation of the laws, and it is also true to the adjudication of disputes in broad sense. It does not mean that this basic function of the state must operate for profit. But it does mean that judicial system – and enforcement as integral part of it – has to become ever more efficient, to spare societal resources for more productive activities.

Applying this analogy to the adjudicating of disputes, it must be maintained for achieving peace of the country, legal peace, which is in itself the bedrock of an orderly society, providing the framework for the citizens to pursue their own objectives. Hence, economic logic may convince us to uphold institutions that are in particular in contradiction with the self-interest of a person (why would we, who never been before court, pay for the salary of judges), but seen as a whole system, they provide invaluable services (we pay our share of taxes, because it upholds the legal order, in which we may thrive in our activities).

Does this mean that the legal system is completely exempt from the economic logic, then? On the contrary! Laws and even litigation operate under the umbrella of the economic logic, even though sometimes we need to see broader picture for this reality to appear. In this paper I try to reiterate well-established notions of law and economics and apply them to the particular field of enforcing civil judgments. I also analyze special regulations that are intended to enhance the enforcement of judgments, most importantly the incentive of the executor to carry out a successful procedure. I also examine the information disparity and its effect on the necessity of commencing enforcement procedure. I also present and evaluate recent efforts in Hungary to increase the efficiency of the enforcement by electronizing several parts of it. My aim – besides generating a debate on the issue – is to prove the economic feasibility of the present rules and point out those, that may be of problem.

1. ECONOMIC ANALYSIS IN GENERAL

Economic analysis of law is an over 60 years old discipline,¹ that has sprung out from the cooperation of economic and legal scholars in the United States; today it is applied not only to the civil law area, but also to the criminal law, administrative law, as well.² Beyond the wide range of international literature, numerous Hungarian³ or Serbian⁴ authors have written in this field. Textbooks cover the basic legal and economic theory, with special regard mainly to property and contractual issues,⁵ and devote smaller but important portion of their contribution

¹ Coase and Calabresi infra deemed the fundamental articles that initiated the thought experiment in this direction. See: Ronald Coase, "The Problem of Social Cost", *Journal of Law and Economics*, 3/1960, 1-44.; Guido Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts", *Yale Law Journal*, 70/1961, 499-553. One other authority on the topic, author of several fundamental books and articles and former chief circuit judge in the 7th District Court of the USA is Richard A. Posner, see e.g., "Boston: Little Brown", *Economic Analysis of Law* 1973.

² Marianna Nagy, "The Application of Rational Choice Theory in the Study of the Administrative Enforcement of Law", *ELTE ÁJK Annales*, 2010. https://www.ajk.elte.hu/file/annales_2010_13_Nagy.pdf 11 October 2021.

³ See: Attila Harmathy, András Sajó, *A jog gazdasági elemzése*, Közgazdasági és Jogi Könyvkiadó, Budapest 1984.; Attila Menyhárd, "A kötbérről és a foglalóról", *A Polgári Jogot Oktatók XXII. és XXIV. Országos Találkozásának Válogatott Tanulmányai*, Novotni Alapítvány, Miskolc 2018, 67-78.; Ákos Szalai, *A magyar szerződési jog gazdasági elemzése*, L'harmattan, Budapest 2013.; Béla Pokol, "Posner gazdasági jogelmélete", *JESZ* 3/2000. <http://jesz.ajk.elte.hu/pokol3.html> 11 October 2021;

⁴ Aleksandra Jovanović, *Uvod u ekonomsku analizu prava*. Pravni fakultet Univerziteta u Beogradu, 1998; Aleksandra Jovanović, *Teorijske osnove ekonomske analize prava*. Pravni fakultet Univerziteta u Beogradu, 2008; Aleksandar S. Mojašević, *Primena biheviorističkih nalaza u javnim politikama*, Univerzitet u Nišu, 2021; Aleksandar Mojašević, „Pojam i značaj Ekonomske analize prava.” *Zbornik radova Pravnog fakulteta u Nišu*, 50/2007, 189-208; Boris Begović, Aleksandra Jovanović, Branko Radulović: *Ekonomska analiza prava*, Pravni fakultet Univerziteta u Beogradu, Beograd, 2019; Aleksandar S. Mojašević, „Biheviorističko pravo i ekonomija – multidisciplinarnost na delu.” *Zbornik radova Pravnog fakulteta u Nišu*, vol. 58, 84/2019, 191-207; Dragutin S. Avramović, „Richard Pozner podvlači crtu – pravni realizam kao odgovor na izazove današnjice.” *Zbornik radova Pravnog fakulteta, Novi Sad* 49, 3/2015, 1231-45; Dejan Matić and Dušan Jerotijević. „Aksiološki aspekti ekonomske analize prava.” *Ekonomika*, vol. 64, 3/2018, 47-54; Aleksandar Mojašević, „Ekonomska analiza ekološkog prava i politike.” *Zbornik radova Pravnog fakulteta u Nišu*, 53/2009, 199-218; Dragan Petrović, „Bihevioralna ekonomija – novi pristup osmišljavanju paternalističke uloge države u ekonomiji.” *Teme*, Univerzitet u Nišu, vol. 39, 2/2015, 345-60.

⁵ Robert Cooter, Thomas Ulen, *Jog és közgazdaságtan*, Nemzedékek Tudása Tankönyvkiadó, Budapest 2014; Svetozar Pejović, „Društvene i ekonomske posledice različitih svojinskih odnosa u Jugoslaviji.” *Anali Pravnog fakulteta u Beogradu*, vol. 39, 5-6/1991, 619-30; Luka Baturan, „Ekonomska i pravna analiza zabrane strancima da stiču pravo svojine na poljoprivrednom zemljištu u Srbiji.” *Ekonomika poljoprivrede*, vol. 60, 3/2013, 479-91; Luka O. Baturan, „Ekonomska analiza instituta prava preče kupovine u Zakonu o vraćanju oduzete imovine i obeštećenju.” *Zbornik radova Pravnog fakulteta u Novom Sadu*, vol. 49, 4/2015, 1961-70; Luka O. Baturan, Goran B. Milošević, Cvjetana M. Cvjetković, „Ekonomska analiza fiskalnih i nefiskalnih troškova registracije oružja

to the assertion of claims, mainly in civil judicial procedure.⁶ However, the actual enforcement of civil verdicts; the issue of coercive measures related to the already asserted civil claims; how these rules fit into the general system of economic theory – these topics are seldom subject of economic analysis. This paper discusses that topic and endeavors to set these rules into a new framework.

According to a Hungarian author on law of enforcement of civil claims, Ignác Frank: “It is futile to hold tribunal, should the enforcement of the verdict not follow.” Though our doctrine of civil procedure separated the issues of enforcement from the Code of Civil Procedure; although the right to enforce a decision is not automatically part of the legal binding force of a verdict, the statement of Ignác Frank can be intuitively proven with the assumption of the contrary. Should the judgement of a court be rendered a dead letter, should the parties not be fearful of its actual enforcement, the judicial procedure would lose the very element that provides for the restoration of the peace under the law. The very fact that dispute arose amongst the parties or for other reasons judicial protection of rights was necessary, is the proof that the peace under the law needs to be preserved, since at least one party defies the order and the other party considers this important enough to plead for legal protection. Hence, institutionalization of the enforcement is necessary element of any legal order – should it have been questionable for anyone.

For a lawyer, it is the content of the norm that is relevant, the fulfillment of any obligation shall be viewed through the prism of whether a deed is prescribed or prohibited in a norm. Economic analysis of the law has no such presupposition. Quite the reverse, it has a deeper theoretical insight, that legal relationships have several options dependent upon the choice of a rational actor, and when it comes to a decision, their welfare shall be their primary concern. Hence, the deduction with persuasive mathematical and logical apparatus, that *pacta sunt servanda* – axiomatic for a lawyer – might not apply in every case from the economist’s point of view; there are cases where the logical and economic decision is the termination or even the breach of the contract. During this rational sequential decision process or simultaneous gameplay – with simplification – the laws of welfare economics shall apply; where parties seek maximizing their utility. This might be modified by the economic theories such as introducing social utility. Within this framework

i problem neregistrovanog oružja,” *Zbornik radova Pravnog fakulteta u Novom Sadu*, vol. 52, 4/2018, 1747-1764.

⁶ Čedomir Gligorić, Vladimir Grdinić, „Uticaj vrednosti spora, diskontne stope i parničnih troškova na odluke o pokretanju parnice.” *Ekonomija: teorija i praksa*, vol. 9, 4/2016, 19-32; Danijela Petrović, „Ekonomska analiza parničnog postupka.” *Ekonomski signali: poslovni magazin*, vol. 14, 2/2019, 65-79; Aleksandar Mojašević, Branko Radulović, „Značaj inata u ekonomskoj analizi parnice.” *Zbornik radova Pravnog fakulteta u Nišu*, vol. 59, 8/2020, 145-64; Aleksandar Mojašević, „Ekonomska analiza pojedinih rešenja iz Nacrta zakona o posredovanju u rešavanju sporova.” *Zbornik radova Pravnog fakulteta u Nišu*, 66/2014, 257-74.

of decision-making process, norms, whether be ethical or legal, are only one factor among others; expectantly not overriding the economic logic.

Here we refer to the two schools in economics of law, namely the normative school and the institutional school analyzing the efficiency of particular legal institutions. While normative analysis aims to create a norm which fits economic rationale best, analysis of particular legal institutions endeavors to show the dynamics of incentives and disincentives within a set framework of legal regulations. This short essay begins with several normative aspects and then sets off to analyze concrete legal regulations and their beneficial or disadvantageous nature.

Legal order extends to the whole of society and shall regulate such issues, that are not evaluated in monetary value, rather on emotional level. For example, family law regulates the parental custody rights, that can hardly be monetized at first glance, still its enforcement must be part of our laws undisputedly. The theory of utility – that is to be maximized by the individual – is a very powerful tool, since it enlightens that parental custody is also a valued right, even though its monetary value is hardly expressible. Even though we try to avoid those areas where the claim is not monetary, based on the prior remark, these claims also may be subjected to this economic prism, since the utility maximizing citizen shall allocate value-bearing assets (time, energy, money to enforce etc.) to these claims.

2. MONETARY CLAIM'S ENFORCEMENT

Enforcing monetary claims and the economic analysis of their legal background are considerably easier to analyze. Since we face financial claims here, their value is easier to determine, both from the point of view of the parties and other participants in the enforcement. Main parties of the transaction are the creditor and the debtor and for the sake expediency, we assume the existence of an enforceable decision. However, there is much difference in the ways of obtaining an enforceable decision. Typically, the right to enforcement shall be based upon a non-appealable, final judicial decision, that contains obligation on the losing party and the time-limit for voluntary completion has passed without effect.⁷ These are important in our analysis, because if we consider the dynamics of the whole transaction in economic terms, we have passed almost the whole decision tree, that is usually analyzed in the legal economic literature. Parties concluded a contract, whereby they assessed their capability and willingness of compliance and (wrongly, as the dispute proves); relevant legal facts show that fulfillment did not take place, upon which the creditor – after having assessed her costs and

⁷ General preconditions of enforceability in the Act on Judicial Enforcement – VHT, *Hungarian Official Gazette*, No 51/94. (hereinafter: Vht.) art. 13.

chances of winning – reacted as claiming her rights at the court (setting aside other summary procedures for the moment). In the civil procedure, that is a sequential gameplay according to the economic analysis of law, the set of facts were ascertained, to which the judge rendered a sentence obligating the losing party, first instance and on appeal, second instance.⁸ Legal economic concept of perfect damages is of less importance to us now (it is important from the perspective of being incentive or disincentive at deciding whether to sue); it is enough to presume that the creditor rests assured with the sentence, that is now enforceable by using coercive forces of the state.

There is a similar decision tree present for the minor pecuniary claims not exceeding 5 million HUF (cca. 14.000.- EUR), where there is a mandatory order for payment procedure before the notary public in Hungary. According to the statistics, small minority of the cases shall turn into the time and money-consuming litigation before the courts upon the debtor's statement of opposition. Its result is, however, the same: the final order for payment is enforceable as final sentence of the court. A third typical enforceable document is the enclosed document by notary public, which very cost effectively avoids the litigation or order for payment procedure and shall provide for a direct route to enforcement, provided that strict conditions have been met. Our analysis does not cover the assessment of costs and chances of those decisions as steps necessary to produce an enforceable document; however, it is remarkable that according to the Hungarian rules on costs of procedure, in accordance with the European and British rule, the loser pays the costs of the prevailing party (loser pays principle). Therefore, the costs of obtaining a judgement (or at least part of it) shall be added to the successful claim. In other words, the obligation of reimbursement of costs is an important incentive to settle, for the parties may reduce their losses if, having assessed the true costs of losing the lawsuit, settle in due course, where they even might split the costs.

The costs of claim enforcement are proportional with the volume of the claim. According to the thesis of the economic analysis of the law, if the number of violation of rights increase or if the costs of litigating the claims decrease, the numbers of litigations shall rise, and together with it, the enforcement cases will increase, too (although in lesser numbers, due to the possibility of negative sentence and the voluntary fulfillment). It is consistent with reason to assume, that together with the rise in the numbers of the litigation, the coercive enforcement of judgements shall rise, and also, assuming same base of enforceable decisions, any decrease in the costs of enforcement procedure shall increase the initiated enforcement procedures. Same base means same volume of enforceable documents (final judgement, order for payment, enclosed document), where the higher costs of

⁸ We neglect the economic analysis of these steps, as they are extensively covered by Cooter and Ulen, see: Robert Cooter, Thomas Ulen, *Law & Economic* (6th ed.), USA 2013, 382-453.

enforcement might deter even the prevailing party to initiate the actual execution. Particularly so, if even the costs of enforcement have high chance not be reimbursed, thus the judgement stays dead paper.

It was the litigation procedure, for which the following equation was created by legal economists, according to FC (filing cost) = EVC (estimated value of claim),⁹ and the equilibrium represents the point where the decision of the rational decision maker turns. At lower rate of filing costs, she files the claim, at higher rate she recedes her filing intentions and abandons her claim. I point out that if the claimant creditor loses her claim completely [$EVC=0$], that counts as failure of the system of the claim-enforcement system, a 100% failure with respect to the actual claim. According to the legal economists, the aim of the legislator should be to minimize the costs of litigation together with the minimizing of the costs of systematic failures. The function where $FC > EVC$, also shows that the system of claim enforcement certainly creates failure (at least in economic sense).

3. COSTS OF THE ENFORCEMENT AND THEIR ANALYSIS

This equation might be referred to the execution procedure itself. If we assume the same volume in enforceable decisions (that might be unfounded assumption, since the will to litigate a claim will react to the efficiency of execution, especially to the decline in that), than we might accept FC_e (filing cost of enforcement) = EVC (estimated value of enforced claim)¹⁰ as equilibrium. Under that range, filing for execution is irrational, whereas over this point it is irrational to neglect it.

Hungarian rules of judicial enforcement, especially the regulations on costs¹¹ regulate in a proportional way, with low and high threshold of costs. The lowest threshold of wage of the executor is 9.000.- HUF, the highest wage must not exceed 1.000.000.- Ft, between the two amounts the wage corresponds to the value of the claim to be enforced. There are further elements of costs, some proportional with the value of the case (that is the flat rate cost, 50% of the abovementioned wage, adding to it); other elements are itemized (such as hourly pay based on on-the-spot work, travelling costs). There is a so-called flat cost of the chamber, which is based on the 34/A§ of the Vht. and due after successful enforcement; 1000.- HUF up to 400.000.- HUF claim value, over this, 1% of the claim value without upper threshold. Further element of the costs is the incentive to the executor, the enforcement

⁹ EVC equals to the total value of the claim multiplied with the chance of successful litigation ($V \cdot p$, where $p \leq 1$).

¹⁰ $EVC-t$ equals to the total value of the claim multiplied with the chance of successful enforcement ($V \cdot p$, where $p \leq 1$).

¹¹ 35/2015. (XI. 10.) IM decree on the Costs of the Judicial enforcement procedure – DSZ, No. 169/15 (hereinafter: Dsz.).

premium, that is due only in proportion with the successful execution, and it measures 8% up to 5.000.000.- HUF enforcement, between 5.000.000.- and 10.000.000.- HUF enforcement, this premium equals to 400 000.- HUF plus 6% of the sum above 5 000 000.- HUF; finally above 10.000.000.- HUF enforcement 700.000.- HUF and 3% of the portion above 10.000.000.- HUF shall be due as enforcement premium.¹² Premium might not exceed 4.000.000.- HUF, thus above 110.000.000.- HUF claim the cost curve flattens: above this claim no further costs shall be added to the already incurred costs. This premium is clearly an incentive of the executor to attend to his work carefully, while also can be viewed as risk-division between the creditor and the executor.

For the creditor, this clear set of cost rules facilitates the calculation of the left side of the equation, namely the evaluation of the FCe (filing cost of enforcement), since these costs are fixed by law (just as the costs of the public notaries and judicial procedures). Those cost elements that are proportional to the value of the claim, are connected to the successful execution, thus they do not burden the creditor in advance, therefore there is no need to take them into consideration from his point of view. The other side of the equation is the estimated value of enforced claim (EVeC), which equals to the total value of the enforced claim (plus interest and other accessories) multiplied with the chance of successful enforcement. Calculation of this side is not a trivial exercise, since creditor might well lack the proper information.

The lack of the will to comply on the debtor's side is proven by the unsuccessful passing of the time limit to voluntary completion. The remaining question concerns the capability to comply. However, legal order does not entitle the creditor to gather information from the databanks (excluding that information available from open, authentic records). On the contrary: only authorized persons in the name of the state shall be able to review the financial status of the debtor, and only after the execution procedure has commenced. That means that the creditor may only calculate her real chances – receiving the information gathered by the executor – only after having commenced the enforcement procedure. This informational asymmetry (and also lack of capability to comply) is assuaged by those *in rem* (like mortgage) or *in personam* (like guarantor) securities if given in the contract, but even in this case, the danger of being underinsured is still possible.

According to my thesis, legal system – based on understandable data protection principles – does not support creditor with independent data-collection license for evaluating her chances of recovery, her information asymmetry – is she did not defend herself during the transaction with the abovementioned securities –

¹² See. Dsz. arts. 14-16., where there are several exclusions from the main rule. For example, costs are reduced by the discount given to the debtor who voluntarily vacates his house that was sold on auction (as provided by Vht. arts 154/A-154/B).

shall be alleviated only during the enforcement procedure. However, lack of information could be eased on the part of creditor with a partial procedure, where – assuming a final judicial decision, still before the filing for enforcement and with proper legal guarantees – executor, upon request and for appropriate fees would be able to retrieve information on the debtor and provide it to the creditor. That would set her in a position, where she could soundly evaluate the chances and could neglect instituting the enforcement procedure for a debt beyond reasonable hope of recovering. Even though neglecting such procedure is a loss on the part of the creditor, she avoids incurring the advancement of further (flat) costs, that would remain her burden in case of an unsuccessful execution. On the societal level, these decisions would appear as gain in the form of non-paid procedure costs,¹³ with remarking that the enforcement institutions would not gain this income but also would not have to do the procedural steps and the work with it. However, there are other structural perspectives, that make the decision on the commencement of the enforcement procedure unilateral. Debtor is interested in – as proven by the lack of voluntary fulfillment – the hiding his assets, thereby detract it from the execution. Should the data on his financial positions be retrieved before the commencement of the procedure – of which action he must be informed of due to data protection principles –, it would serve as a warning for him and enable him of *mala fidei* actions. Since securing assets for coercive measures may only rest upon commenced enforcement procedure and be done by authorized persons (namely the executor), the simultaneous nature of retrieving information and commencing coercive measures seem indispensable

There are other factors that support the initiation of enforcement procedure, most eminently financial and accounting considerations. Should the management of a corporate creditor neglect their fiduciary duty by failing to enforce a claim, it might constitute civil liability of the management, even criminal liability in a form infidel or neglectful management, a criminal offense with further preconditions. On the accounting side, any claim may be written off as uncollectable only if the enforcement procedure delivered that result. These factors increase the right side of the equation [EVeC], increasing the justification of commencing an enforcement procedure. It is clearly apparent that dismissing or easing these requirements, the volume of enforcement procedures would decrease. However, this decrease would also be a failure of the enforcement system,¹⁴ provided that a final judicial decision remains unenforced, contradicting our thesis about the use of execution in maintaining the legal order of a society.

¹³ Procedural costs are always transactional costs increasing the total costs of a transaction without furthering its real merit.

¹⁴ See Point 6., by analogy to the EVC=0 case, in this cast EVeC=0, totaling a 100% failure.

4. THE ORGANIZATION OF ENFORCEMENT

Up to this point we did not mention the systematic background of the enforcement. The Hungarian system heavily relies on the private incentive to make its enforcement efficient. Before 1994, the judicial enforcement was part of the judicial organization and the actors were employed by the courts. Their job was ill-regulated, due to the completely different approach to judicial enforcement under the socialist regime, that remained mainly unchanged until 1994.

As one of the last Acts of the first freely elected Parliament, they passed the Act LIII of 1994 on Judicial Enforcement, which introduced a two-prong system. A body of so-called County-Court executor remained in the employment of the court – this part of the organization was responsible for the enforcement of mainly state dues and costs, such as unpaid criminal costs, court fees etc. Their efficiency did not rise in terms of successfully enforced cases. As of January 1, 2020 County Court executors ceased to function, their competence was absorbed by the National Tax And Customs Administration.

Another body was founded in 1994, the independent judicial executors, later organized into their Chamber. The independent judicial executor applies for his post, fulfills his duties upon license from the state, bears official duties and licenses, but she works as entrepreneur, at her own financial risk. Her fees and costs are determined by the law and covered from the debtor or rarely from the creditor. She is strongly incentivized by her position to rationalize the functioning of her office, and for the successful procedure, there is the abovementioned enforcement premium, which holds the promise of profit for her activities. This part of the enforcement organization has improved the enforcement greatly in terms of recovered debts. The economic motor behind this was the well-guarded self-interest of the official executor, who holds state powers, therefore must be strongly controlled, but also have to be incentivized – that is the for-profit operation of the office. In my opinion, it is a balanced system, which contributes to my thesis supra, that the efficiency of the enforcement system corresponds to the health of the legal system: should the enforcement be systematically inefficient, the rule of law shall suffer ultimately.

5. ELECTRONIZATION AS A MEANS OF EFFICIENCY

The legislator, understandably, had no interest in electronic enforcement at the conception of the Act, but as time has passed, the new methods found their way into the amendments of the Act. Curiously enough, the first mentioning of electronic means in the Act was a negation: in 2005, the administrative procedure rules applied to the registration of independent judicial bailiffs, which rules allowed

electronic means of communication by then already. The Act excluded the electronic application for registration into the chamber – because the Chamber lacked the infrastructure to accept such electronic applications. Thus, a first trembling step was taken into the territory of electronic enforcement; the next steps headed to a better direction.

Here we must specify the possible fields of use of electronic means in judicial enforcement. The application of these modern methods must point into a direction of progress, the improvement of the efficiency of the former procedure. Though means of communication is of secondary importance to the fundamental structure of the judicial process: it might accelerate the exchange of positions between the parties, but the structure of the legal action is unchanged if we replace postal delivery of documents via e-mail, to put it directly.

These positions affect the thinking about electronic enforcement, too: According to our academic opinion, the “electronization” or even the digitalization of the enforcement will affect well-described areas of the law of execution, which are of practical importance, but do not change the basic structure of the process. Still, we have to admit, that in certain cases quantity will turn into quality: As we will demonstrate *infra*, the problems of auction were practically solved by the introduction of electronic auction, simply by leveling the field for the auction buyers. With this in mind, let us identify the possible entry-points of electronic means of communication, action into the judicial enforcement in Hungary. With all point, we also show the Hungarian regulation in effect (if there is any) and then we attempt to evaluate the Hungarian system from the point of efficiency. We have to observe though, that efficiency of enforcement is dependent on multiple factors, electronic communication being only one of them. Therefore, we do not tackle with the deteriorating effect of the 2008 crisis and its aftermath, which caused decline in market prices, thus practical difficulties in alienating the enforceable assets.

6. ELECTRONIC ISSUING OF ENFORCEABLE DOCUMENT AND THEIR DELIVERY

Enforcement is based on enforceable documents¹⁵ (of which has three fundamental prerequisites: let it contain obligation, let it be final or subject to a provi-

¹⁵ Article 10 of the Act on Judicial Enforcement (1994:LIII)

“The enforcement of court decisions (hereinafter referred to as: enforcement) must be ordered upon issuance of an enforcement order. Enforcement orders are:

- a) an enforcement certificate issued by the court or a notary;
- b) a document bearing the enforcement clause, issued by the court or a notary;
- c) an execution order or restriction, or a transfer order, or else a decision of direct notification, a restraining order or an order of reference made by a notary;

sional enforcement and the time given to the debtor to comply with the decision has expired¹⁶). These enforceable documents are official documents, for which the claimant/creditor must (or more precisely: may) apply to the court, which shall issue the „enforcement certificate”.¹⁷ Application for the enforcement order must be sent to the court with jurisdiction on a paper-based form, with original signatures – if no legal representative is authorized by the claimant. Even though the form may be downloaded from electronic databases,¹⁸ it does not count as electronic procedure until the application may not be handed in via electronic means. Thus, application for the enforcement ordered by the court is analog in the Hungarian procedure. However, from July 1, 2015, the courts shall be obliged to keep contact with other authorities, bailiffs included, therefore this lacking component shall be supplemented, at least in the part that the courts will communicate the enforcement order to the bailiffs in electronic form. Also, if legal representative is authorized by the claimant, this attorney must communicate with the court via electronic means, thus, in case of attorney-issued application for enforcement, it shall be communicated via electronic means.¹⁹

However, there is an evolving field of debt-collection: Order of payment, issued by the public notary in Hungary, which cover vast majority of the enforcements. This order, if the defendant (debtor) does not lodge an opposition with the notary, goes final, and thus, enforceable. The final enforceable document will be issued by the notary, who issued the order for payment against the debtor. It is an exception from the exclusivity of judicial enforcement; however, participation of the notaries in administration of justice is constitutionally allowed and judicial-like

d) judicial notice of a fine or penalty, a fine for willful contempt, a court decision ordering the seizure of assets, a fine imposed by a Member State of the European Union in criminal proceedings regarding an offence committed; an order to seize assets issued in a European Union Member State within the scope of criminal proceedings;

e) judicial notice of the costs of criminal proceedings or costs of arrest or escort, or notice sent by the court registry of a fine imposed by a notary, a fine for willful contempt or the costs of criminal proceedings imposed by the public prosecutor or the authority responsible for the investigation, and the costs set by the National Parole Board in mediation proceedings, put forward by the government and which are subject to reimbursement;

f) criminal seizure order;

g) the order to seize assets associated with the implementation of restrictive measures imposed by the European Union on liquid assets and other financial investments.”

¹⁶ Art. 13 of the Act on Judicial Enforcement (1994:LIII)

¹⁷ For the sake of allowable simplification, I ignore the other available enforceable documents and shall mention only the enforcement certificate. Other types of enforcement orders shall be mentioned only if necessary.

¹⁸ [http://www.birosag.hu/en/allampolgaroknak/nyomtatvanyok-urlapok/vegrehajtasi-nyomtatvanyok-31-2012\(vl29\)-kim-rendelet](http://www.birosag.hu/en/allampolgaroknak/nyomtatvanyok-urlapok/vegrehajtasi-nyomtatvanyok-31-2012(vl29)-kim-rendelet) 11 October 2021.

¹⁹ These forms are available at the general website of the courts. <https://birosag.hu/eljarasok-nyomtatvanyai/vegrehajtasi-elektronikus> 11 October 2021.

activity.²⁰ As of the electronic procedure, application for the enforceable document may be lodged with the notary on a paper form,²¹ or an electronic form. The Chamber of Public Notaries operates a nation-wide Order for Payment Electronic System,²² where the commencement of the procedure and other steps of it can be completed; application for the enforceable document may be lodged. The electronic form is available via the internet on a User Interface and may be filled in. The identification is crucial in such a procedure, the proper authorization is most important to complete any procedural actions. Thus, the user must register in the Chamber's system with qualified electronic signature, where XAdES type electronic signature is supported. After having registered, the user may fill in the forms and apply for enforceable document, as well, in electronic form. In this latter case the enforceable document shall be issued and sent to the bailiff (through the system of the Chamber of Judicial Bailiffs') as a single electronic copy, through electronic communication channels and shall be genuine in this form.²³

Summing up, though issuing enforceable documents might be "analog" in Hungary for the unrepresented parties; order for payment procedure is completely electronized (though still available in paper form), thus, application for enforceable order for payment and its transmission to the bailiff (via their Chamber of Judicial Bailiffs) is available in electronic form. The two chambers maintain and operate an electronic system which directly communicates the genuine documents. This system accelerates the procedure, saves printing and postal costs, however, has considerable maintenance costs, which is borne by the Chamber, indirectly by the clients. The balance is positive, though: the higher labor costs of processing analog applications and documents are spared and the swiftness of procedure raises general trust in judicial enforcement – a positive side-effect of electronization.

The bailiffs have and use all available means of electronic communication. §35/A of the Act regulates the Electronic System of Delivery of Enforcement Documents (Végrehajtási Iratok Elektronikus Kézbésítési Rendszere, VIEKR),²⁴ which is optional for the most cases, however, is mandatory, when the Act so orders. According §79/G. of the Act financial institutions are required to use this

²⁰ 1208/B/2010 Constitutional Court decision, III. 3.1.; available only in Hungarian at <http://public.mkab.hu/dev/dontesek.nsf/0/3542073A6FD8CD96C1257ADA0052AA45?OpenDocument> 11 October 2021.

²¹ This form is also available on the internet, however, they are not – strictly speaking – part of an electronic procedure, but a paper-based form. http://mokk.hu/linkgyujto/FMH_pub/Fizetesi_meghagyas_vegrehajtasanak_elrendelese_iranti_kerelem_papir_urlap_A4_20120315.pdf 11 October 2021.

²² <http://fmh.mokk.hu> 11 October 2021.

²³ Act L of 2009 on the Order for Payment art. 53 para. 1. Issuing and relaying the enforceable document from the notary to the bailiff is subject to fees, regulated in the same Act, art. 54.

²⁴ Information about the VIEKR is available in Hungarian at <http://www.mbvk.hu/> 11 October 2021.

electronic communication system when receiving and completing the bailiff's requests for information and specific actions. The VIEKR system accepts optional registrations, as well. Upon the acceptance of the General Terms and Conditions of the system, the user shall be subject to the regulations of the system and enforcement documents shall be delivered to him (and vice versa) via the VIEKR system. The system is available 24/7, logs the electronic deliveries, which may be commenced with electronic signatures. The encrypted system must exclude the misuse of the data, the access of unauthorized persons. Delivery through the system shall be considered as legally valid delivery of the official documents, thus legal consequences may apply, for example the terms (e.g. period of appeal etc.) set out in the Act commence.

VIEKR system is available not only for the delivery of the enforceable documents, but also for the implementation of the procedure.²⁵ Thus, electronic communication is available during the attachment and the distribution phase of the procedure for those persons (legal or natural), who optionally registered for the VIEKR system and for those, who are mandated to use it. However, electronic auction is exempt from this kind of communication, since it constitutes a completely different system of electronic sub-procedure (see *infra*!). The regarding regulations of the Act are limited to the application for electronic communication by the party and the conditions of that application. It is worth mentioning that even under the electronic regime of communication; a party may communicate on paper – by the permission of the bailiff – if the quantity of the documents necessitates it.

Hungary has made further steps towards the electronization of procedures in general, affecting judicial enforcement as well. Since 2018, all authorities and firms must use the Client Gate System, which is based on the Central Authentication Agency (Központi Azonosítási Ügynök, KAÜ). KAÜ provides authentication and secure communication channel for the firms, which is mandatory for official communication between firms and official authorities (but not mandatory for business use, naturally). Also, the voluntary use of E-paper system, which provides authenticated e-communication with the authorities for firms and citizens as well, was propagated. Citizens with higher digital literacy use this cheap and reliable system often, for it provides paper-free, real time connection with authorities, judicial bailiffs amongst them. Bailiffs must use therefore the VIEKR, the KAÜ and the E-paper system for in- and outflow of the documents. Only those communications remained in the analog form, that are directed towards non-represented natural persons, but even they have the option to use free electronic channels. According to the estimation of an actual bailiff office, the costs of postal delivery dropped to the half to the prior level between 2018 and 2020. This shows two things: first, there was a huge rise in efficiency in monetary terms,

²⁵ Arts. 35/C-35/D of the Act.

since these channels of communications are free of charge, hence no such costs shall be incurred to the parties of the procedure. That is a rise in efficiency in social dimensions, since these monetary sources might be allocated to other, productive areas. But on the other hand: this also shows that for the fairness of procedure, analog means of communications might not be dropped completely, since there are still great numbers of digitally illiterate persons, many of them likely subject to the enforcement procedure. To coerce them to communicate via electronic means would simply mean that they will not be reached by the authorities, hence, the procedure might be unfair without properly reaching them.

7. DATA-COLLECTION BY THE BAILIFF

Collecting available data on the debtor and her assets is vital from the perspective of the success of the enforcement. Thus, §47 of the Act gives authorization to the bailiff to gather personal data of the debtor regarding her personal identification, place of residence (in case of legal person: official seat, secondary establishments etc.), her occupation and income, her personal movable and immovable property, assets. Bank accounts of the debtors shall be queried via electronic mass-query from the bailiff to the Chamber, which transfers the request to all registered banks (all banks are required to join the system). The banks in turn must reply in timely fashion with a negative report (they have no data on the debtor) or a positive report, where the available account(s) of the debtor and the amount on them shall be sent to the bailiff. Through that fast information it is possible to secure the assets of the debtor in several days.

Automobiles occupy an important place amongst the movable assets, since they have a large secondary market and are easy to sell. Therefore, our law gives direct permission to the bailiff to apply to the registering authority of automobiles, and along this register the tax authority, pension authority, Land Registry, banks shall be contacted and asked for relevant information. This application by the bailiff may be issued in electronic form, and – more importantly from our interest – in the case of personal identification data, the respective registers may be electronically accessed – upon request – by the bailiff. Thus, the trend of the electronic data-collection points into the direction of direct access of registers, with proper safeguards of data privacy [i.e. §57/A. (8) of the Act, which orders the confidential treatment of the collected data].

8. ELECTRONIC ATTACHMENT AND AUCTION

Attachment of bank account, movable and immovable property is no exception from the above-mentioned means of electronic communication – if available.

Therefore, the bank account of a debtor shall be attached via electronic “transfer order” to the bank, which orders the bank to transfer the proper sum to the bailiff’s account.²⁶ Banks are mandated to use the VIEKR (electronic communication) system, thus this is a swift procedure. Seizure of immovable property is commenced with a seizure warrant, an official request to the Land Registry which will register the execution lien to the registry, with priority. This takes electronic form, since it is a communication between official authorities (bailiff and Land Register).

The real novum of the electronization is the auction system, though, which is slightly different in the case of movable or immovable property (or some other special assets). Property may be alienated from the debtor in several legal ways during the enforcement procedure. However, auction – forced open sale – is the most important process, since it is capable of reaching market price or close to it. However, regarding movable and immovable property as well, there are risks as well. “Real property mafia“ was a widely known and combated phenomenon in Hungary, which used the loop-holes of execution law and staged even lawful auctions in a way that no real bidders were admitted to the on-the-spot auction or were intimidated from making a higher bid. So, in several cases the property was sold on the lowest possible price of the put-up price.²⁷ Even with law-abiding bailiffs the procedure allowed such abuses, not to mention cases, where even bailiffs were corrupted and parts of such schemes. Thus, the legislator set up the electronic auction system in 2008, effective from January 1, 2009. This system is optional for movable property and mandated for real estate.

The regulation of the system is detailed in the part of movable property auction, because the inner logic of the Act assumes that due to the proportionality principle, the immovable property shall be alienated in the last place. Thus, the regulation is detailed regarding the movable assets, and shall apply *mutatis mutandis* to the immovables. We shall ignore the “analog” auction, and immediately start with the electronic auction of movable assets.

Negative condition of the electronic auction that no asset below the value of 100.000.- HUF shall be electronically auctioned,²⁸ and even with an object of higher value, the creditor must (may) apply for the electronic auction and should advance the costs of the procedure. Business share shall always be auctioned in an electronic way. Auction announcement shall be published on the Chamber’s web site,²⁹ which is 24/7 accessible platform for auction bidders and bailiffs or other officially interested persons. Any person (including legal persons) may apply for registration into the Electronic Auction System (EAS); however, this

²⁶ Art. 82/A. of the Act.

²⁷ 35% of the movable assets, 50% of the immovable property with the exception of place of personal habitation, when the lowest biddable price is 70% of the estimated value.

²⁸ Art. 132/B. of the Act.

²⁹ www.mbvk.hu 11 October 2021.

registration must be completed before any bailiff and the applicant must appear personally to identify himself properly. After the identification and payment of the fee, the bidder shall receive a username and a code, with which he will be able to access the EAS as bidder. (Anyone may access the list of auction announcements; however, he will not be able to bid without registration.) Still, this registration is only an abstract possibility to enter auctions, because according to the law, bidders must deposit a 10% advance to the auction. In case of analog auctions, this advancement is simple: takes place on the spot, in cash. However, in the electronic procedure, this connection is not physical, thus must be created.

Any registered user/bidder may apply to the actual bailiff of the specific auctioned object (auctioning bailiff) for activating his username for the concrete auction. With this request, the bidder must advance the 10% of the put-up price, as announced in the electronic notice. The transfer may be electronic money transfer to the bailiff's deposit account. The bailiff must check whether the bidder is excluded from the auction,³⁰ and if not, he will be allowed to place a bid on the anonym system. It is of vital importance from the perspective of the efficiency of the system, that the identity of the bidders is confidential, only the bailiff may know. Thus, the anonym bidder may place his bid, which must reach the lowest announced price. Should any bid not reach or be higher than the last bid (with the bid threshold at least), it will be automatically excluded from the bidding. The bidding log shall record any permissible bid, bids cannot be withdrawn. The 10% advance of those bidders, who have been outbid, shall be reimbursed within 3 days.

After having announced the auction on the Chamber's web-site, the auction will hold until 30 days in four phases, ending at the specified hour of the day between 08-20 hours, specified by the bailiff. The lowest possible bids decrease in each phase, if permitted by law. At the close of the log, the highest bidder shall win the auction, with the exception of the following. If 5 minutes before the close of the election a new bid appears, the auction time shall be automatically extended with 5 minutes from the last permissible bid. It keeps on extending with the incoming higher bids until five minutes from the last bid pass, then the auction will be finally closed. This regulation transforms the psychology of the auction into a practical rule: the competition element in the auction shall be ignited at the end of the process, and according to common practice, the bids tend to arrive at the closing part of the deadline.

There is one exception to the "last/highest bidder wins" rule, as well. In 2011, the legislator introduced the "pre-emptive bidder" into the system. Those shall have the right to enter auction as "pre-emptive bidder", who have legal right to preemptive purchase of the special object (e.g. soil or other protected objects),

³⁰ E.g. relatives of the bailiff are excluded from auction, see more at art. 123 of the Act.

however, the right to pre-emptive auction cannot be established by contract.³¹ The pre-emptive bidder shall not place his bids, but shall register and activate his username as “pre-emptive bidder” and at the closure of the auction he shall take the place of the last bidder with the same conditions. This rather complex system ensures the legal preemptive rights, however, if there is more entitled person, there is no hierarchy between them, they must enter the bidding contest if they want to purchase the object.³²

Real property may be attached at the commencement of the enforcement procedure; however, its auction may take place after a minimum 45 days from the attachment and if the collection of the debt is not possible in due time without less onerous actions, such as attaching bank account or the auction of the immovable. Real property must be alienated through auction, unless the Act otherwise regulates.³³ Electronic auction of the real property is governed by the rules of the electronic auction of movables, however, there are certain distinctions. Thus, the auction announcement is more detailed, it must give information not only about the basic features of the property, but e.g. must refer to the possibility of pre-emptive auction, as well. This announcement is published on the Chamber’s web site, must be served to other interested persons and published on the official authorities, courts’ notice board. Each and every announcement regarding real property must contain a photo of the subject, unlike for the movable properties, where it is just an option for the bailiff.

Rules of placing a bid apply *mutatis mutandis*, however there is an important distinction. There are complex rules regulating the conditions of the purchase of real property, soil being the most affected. If the purchase of a real property is dependent on official authorization, the username may be activated only after having presented the proper documentation to the auctioning bailiff, who is responsible for checking the application of conditions. With this regulation, the legislator filters out those bidders, whose acquisition would be unauthorized, thus the whole process should be repeated. Put-up price shall be the estimated value, which can be lowered during the four phases to 50% at most (the lowest bid must reach 50% of the put-up price). However, lowest possible bid is 70% of the esteemed value if the home of the debtor is auctioned, debtor has no other home, and it has been his official residence for at least six months before the commencement of the enforcement procedure. The lowest bid might not decrease if any of the claims against the debtor derives from consumer contract (which is very likely in actual cases). The social impact of this regulation can be easily grasped: even

³¹ Art.123/A. of the Act.

³² *ibid.*

³³ Other possible ways of alienating the real property is sale of property out of auction upon the mutual request of the parties. After having two unsuccessful auctions, the creditor may decide to take over the auctioned property for the lowest possible auctioning price, see arts. 157-158 of the Act.

though such real property may be sold on auction, the exchange value should reach higher than the average (or second) property.

At the closing of the auction the highest bid, again, determines the winner, however, the exception of the pre-emptive bidder applies. The bailiff shall produce an Auction Protocol, which shall contain the most important data regarding the auction – taken from the electronic log –, this protocol then shall be sent to the interested persons and authorities, including Land Registry (if the full price has been paid) for registering the purchase. This protocol is communicated via electronic channels. Then after a 30 days period, data regarding the auction shall be deleted from the logs, thus keeping the privacy of the bidders and the parties. There is a possibility of a “continuous auction”, if the second electronic auction was unsuccessful and even the creditor did not take over the real property: in this unwanted case, the real property shall be placed on the list of continuous auction and the 30 days of bidding period shall start with anyone applying for the activation of his username regarding this particular real property. After this action, the rules of the electronic auction shall apply.

9. CONCLUSION

We have showed in this paper that enforcement of civil judgment, seldom subject to economic analysis of law, are also governed by the theoretic notions of that area of research. Even for matters of emotional value, these laws may be applied to. The well-developed equations related to the civil litigation may be duly modified to enhance our understanding of this particular area a civil procedure. We have shown how the cost-benefit analysis works in deciding over the commencement of the execution procedure, and also uncovered the information disparity, that might lead to either under-enforcement or over-enforcement (in terms of initiated procedures). We also have shown that this disparity, the lack of information on the side of the creditor might only be overridden with official assistance from the executor, who can lawfully collect the data necessary to the proper decision. And hence, this work must be compensated, no real incentive in terms of lessening the enforcement costs might be given to decrease the number of total procedures. We also showed that the enforcement institutions and the systematic incentive helped enhance its efficiency.

Furthermore, Hungary has introduced several important measures regarding the electronization of the enforcement, mandatory means of communication for the courts, official authorities and firms together with optional ways of communication for natural persons. This highly increased the efficiency and swiftness of the procedure alone. However, the bailiffs' Chamber have moved forward and established optional electronic auction system for movables and mandatory system

for real property. This auction system was designed to combat corruption and misuse of the “analog” auction rules, and it was successful in that perspective. Even though practical problems, margins of interpretation arise regarding the rules, their efficiency is clearly visible from the legal-economic perspective.

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Економска анализа електронизације судског извршења у Мађарској

Сажетак: У раду се разматра фундаментална економска анализа правних питања која се односе на парнични процесуал, а којом се доказује њихова применљивост у области судског извршног процесуала. Аутор формулише једначину за рационално доносиоца одлуке за покрећење извршног процесуала и анализира елементе ње једначине. Одређује проценове као кључно питање ефикасности процесуала и представља ња правила са економском анализом. Појом се окреће ка електронизацији мађарског извршног процесуала, што је резултирало великим повећањем ефикасности. Електронска средства комуникације, електронски протоли и аукција биће разматрани и оцењени са економске тачке гледишта. Његови закључци – поред демонстрација ваљаности економске анализе у овој области – указују да електронизација судског извршења доприноси повећању друштвене ефикасности.

Кључне речи: економска анализа права, судски извршни процесуал, економска анализа судског извршења, електронизација судског извршења, ефикасност судског извршења.

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