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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 ONE

*“The title [debt] collector conjures up a very negative image. It connotes a cold, ruthless, insensitive individual whose only purpose is to extract monies from other human beings without emotion or feeling. A collector might be a credit manager, adjuster, accounts receivable clerk, bookkeeper – anyone who has been assigned the task of collecting delinquent accounts. Collectors are a valuable asset to any business, but, unfortunately, they are often viewed as a necessary evil.”*

A. Michael Coleman<sup>1</sup>

**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 One of the article reflects on the importance of extra-judicial enforcement, clarifies the terminology, and illustrates*

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1 Coleman, M. A., 2004, *Collection Management Handbook – the Art of Getting Paid*, John Wiley & Sons, p. 1.

*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 are then assessed under sector-specific laws of Australia and the United States as developed regulatory systems. Part Two 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 Provision of Out-of-Court 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.*

**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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## LIST OF ABBREVIATIONS AND ACRONYMS

AGCM – Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority)

CEE – Central and Eastern Europe

EBRD – European Bank for Reconstruction and Development

FCA – Financial Conduct Authority (UK)

FCDPA – Fair Debt Collection Practices Act (US) (federal and the mini-FCD-PAs on the level of the various States)

FSA – Financial Supervisory Authority (Hungary)

OFT – Office of Fair Trading (UK) (closed in 2014)

RBerG – *Rechtsberatungsgesetz* (Germany)

RDG – *Rechtsdienstleistungsgesetz* (2008, Germany)

UCC – Uniform Commercial Code (United States)

UK – United Kingdom

US – United States of America

## 1. INTRODUCTION

### 1.1. PREFACE AND A ROADMAP TO THE ARTICLE

Debt collection has become a major problem in most parts of the world due to such factors as the growing indebtedness of the populace generated by the spreading of credit cards, easier access to credit, or the economic crises bankrupting businesses and consumers alike, as well as the growing backlog of courts (debt crisis). In many European civil law systems, the regulatory reaction typically ensued in the form of privatization of bailiffs' services and introduction of summary proceedings for collection of some specific types of debts operated by private bailiffs (Serbia) or public notaries (Hungary). Less known is that the reaction of the

market was the appearance and exponential growth of private debt collector-companies, which as new participants on the market, either completely escape regulatory oversight, or were subject to regulation only recently (e.g., the German Law on Extra-Judicial Legal Services 2008 – revamping in progress in 2019). A related problem also is that often empirical data are lacking on the tactics and practices of private debt collectors' work, and years are needed until their aggressive and other problematic practices become visible to policy-makers. In the lack of regulation clearly delimiting what is permitted by law, eventually the legitimacy of some of the activities inevitably comes into doubt as well.

This all is part of a trend tilting the balance more towards private forms of enforcement and debt collection even in civil law systems traditionally having been hostile to all forms of self-help, contrary to common laws that have always reckoned with it as a pivotal part of their commercial laws, including private (extra-judicial) repossession and various services linked to debt collection. They possess more developed regulatory systems aimed at protecting debtors as well; some dominated by hard (US), other by soft laws (Australia, UK). While Continental European systems typically protect the market of legal services through regulation of the status of service-providers (e.g., licensing, disciplinary powers), common laws tend to go further and prescribe in detail which practices of debt collectors are prohibited (e.g., US FDCPA). As the aggressive behavior of some debt collectors causes major concerns, Germany for example is amidst of revamping of its 2008 Act.

Having the above in sight, this article focuses on private debt collection as the youngest market participant in Continental Europe, which has been given the least attention by comparative scholars to date. As this requires positioning of private debt collection vis-à-vis court – and other forms of extra-judicial enforcement, the article's attention expands to the full spectrum of extra-judicial and collection forms known today globally. The view propounded is that for proper understanding of the role and corollary risks of each of the out-of-court legal services require, as well as the formulation of adequate regulatory policies, such a holistic approach is a must, instead of their observation in isolation from one another.

To prove that, this paper will, first, provide an overview of the pertaining developments in a selected number of western (France, Germany, Italy, United Kingdom and the United States) and CEE countries (Croatia, Hungary, Lithuania, Poland and Serbia). Second, as the related scholarship and empirical studies from CEE are scarce, the concrete forms of aggressive debt collection and other problematic practices of debt collectors and firms engaged in repossession, as well as the questionable reactions of consumer protection authorities will be illustrated by two short case

studies from the recent history of Hungary. One from under the pen of an investigative journalist and the other describing the unhappy experiences of the author of this paper himself with private debt collectors. Third, the main problematic practices detected in Hungary will then be compared to what the sector-specific regulations, hard or soft laws, of Australia and the US as systems possessing developed regulatory responses specifically targeting abusive collection practices.

## 1.2. WHAT JUSTIFIES THE FOCUS ON OUT-OF-COURT ENFORCEMENT AND PRIVATE DEBT COLLECTION?

Myriad reasons could be mentioned why extra-judicial enforcement and debt collection is today a hot topic in many parts of the world. Each would deserve a separate paper. For our purposes, however, brief sketching of only a few should suffice here.

*First*, one obviously should point to the law reforms in many parts of the world aimed at increasing the efficiency of enforcement and debt collection. In Central and Eastern Europe (CEE) this was one of the first items in the schedule of law reforms after the fall of the Berlin Wall in the 1990s; recommended and expected also by international financial organizations assisting these, like the World Bank or the EBRD. These were sometimes self-standing projects, yet the issue of efficient enforcement routinely came up also as part of secured transactions law reforms, another top-priority in CEE. Notwithstanding the efforts, however, very few countries could be fully satisfied with the outcomes. The privatization of bailiffs' services, as one of the frequently followed recipes for increasing the efficiency of enforcement has been, for example, as a rule paralleled by major social dissatisfaction or political pressures, sometimes forcing the policy-makers to backpedal, as it was the case in Croatia. Furthermore, as it will be seen below, the last few decades were characterized by reforms targeting the bailiffs' systems almost in countries within our purview herein. It is thus fair to say that the topic remains a living topic not only in much of CEE and Western Balkans, but also in the western hemisphere of Europe and beyond – like China these days.

The reforms were to a great extent driven by such changes and challenges on the market, *second*, as the increased indebtedness of the populace thanks not only to the spreading of credit cards but also to economic crises, from the 2008 global and the subsequent sovereign debt crises to a number of lesser, geographically limited ones. Technological development has further intensified these processes. For example, the number of insol-

vencies of offline (traditional) businesses has increased due to the intensifying competition from the side of internet-based rivals, many losing their jobs and capability to pay.<sup>2</sup>

As in China collection of debts has become a genuine systemic issue recently as well, they resorted to technology in a very unique manner, not really reconcilable with European human rights standards. Concretely, courts are now empowered to deny access to some public services to non-paying consumers (and those committing perjury in court-rooms). This includes, for example, that the affected debtors are not in the position to purchase train or flight tickets, to check in hotels, or enroll their kids into private schools. These sanctions all are efficient and do works in practice thanks exactly to technology as all these amenities today are run based on centralized electronic systems.<sup>3</sup>

*Third*, in much of CEE, it is fair to claim, civil enforcement has been *a neglected subject*, the weaker brother surviving under the penumbras of the stronger kin of civil procedure.<sup>4</sup> This was obviously to a great extent product of communist ideology to which evictions and other forms of enforcement were undesirable as threats to social peace. This applied *a fortiori* to taking justice in ones' hands by creditors, to self-help, as something that could threaten even the regime's existence. In other words, there is a lot to do in this domain. Comparative law, for example, is continuously lagging behind the developments and with providing answers to many of the concomitant questions especially from a perspective of countries that have only recently embarked on improvement of their enforcement systems; a vacuum this paper will strive to start filling.<sup>5</sup>

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2 See on this Tajti (Thaythy), T., 2019, Unprotected Consumers in the Digital Age: The Consumer-creditors of Bankrupt, Abandoned, Defunct and of Zombie Companies, *Tilburg Law Review*, 24(1), pp. 3–26, DOI: <https://doi.org/10.5334/tilr.139>.

3 See Tajti (Thaythy), T., 2018, Bankruptcy Stigma and the Second Chance Policy: the Impact of Bankruptcy Stigma on Business Restructurings in China, Europe and the United States, *China-EU Law Journal*, Vol. 6, Nos. 1–2, pp. 1–33.

4 As Šarkić noted related to Serbia and the region in 2008 on the eve of the passage of the new Serbia Act on Civil Enforcement: “*Civil enforcement procedure is once again gaining on importance globally, and especially in the countries from our region. It seems that civil enforcement procedure is regaining the prestige it used to have and which was denied to it for some time without a basis. The minimization of the role of civil enforcement procedure appeared in various forms. Laws have as a rule stressed the role of civil procedure [...].*” See Šarkić, N., Nikolić, M., 2008, Sudski izvršitelj ili privatni izvršitelj [Court of Private Bailiffs?], in: *Zbornik radova*, pp. 245–264, at 245.

5 For a bibliography on self-help and connected topics see Stănescu, G. C., 2015, *Self-Help, Private Debt Collection and the Concomitant Risks. A Comparative Analysis*, Springer, [Hereinafter: Stănescu, G. C., 2015].

The domain of private debt collection additionally properly exemplifies *the deficiencies of empirical scholarship*, which is devoid of properly developed methods for collecting and analyzing the evidences and information on the excesses of private debt collectors, that are rampant especially in regulation-free environments. It would thus be desirable to agree on methodological conventions covering how to collect, prove and treat such empirical evidences that could be accessed only by being a victim of abusive private enforcement and debt collection practices are lacking; the second Hungarian empirical case study should properly prove what we mean by that. This may not only distort the societal picture about private debt collectors, or for that matter private bailiffs, but would also procrastinate the time needed for effectuation of regulatory reactions aimed at protection of consumers and the markets by years if not decades.

### 1.3. THE DIFFERING PHILOSOPHICAL UNDERPINNINGS AND APPROACHES TO SELF-HELP

If one puts aside the pre-capitalistic ages, one of the key distinguishing traits of Anglo-Saxon and Continental European civil law systems has been their different attitude towards self-help in the sphere of private and commercial law.<sup>6</sup> While the former have always looked favorably on self-help – elevating it to the pedestal of an important building block of commercial law<sup>7</sup> – the attitude of the latter has been exactly the opposite. As a result, professional businesses specialized to provide enforcement and debt collection-related services have routinely come into existence in common law jurisdictions over time gradually forming distinguishable industrial segments. It is not without reason that terms like ‘repossession and repomen’ (the private businesses specialized to repossessing collateral), are terms that are primarily known in the United States (US) and other Anglo-Saxon systems rather than in civil laws.

The major civil law jurisdictions’ attitude to enforcement has always been conservative in modern times if compared to their common law kin.

6 As Europe possesses both monist and dualist legal systems – this division being of no relevance to the present discussion – for the purposes of this article, the phrase ‘private law’ will extend to both private and commercial law.

7 As the doyen of English commercial law, Roy Goode eloquently put it “[c]ompared to continental legal systems, the common law is remarkably indulgent towards self-help.” As per this multifaceted indulgence “[a]cceleration clauses can be invoked, contracts can be terminated and rescinded, goods repossessed, liens and rights of contractual set-off exercised, receivers and managers appointed and securities realized, all without any need for judicial approval, the only limiting factor (in the absence of special legislation) being that one must not commit a breach of the peace.” See Goode, R., 1988, The Codification of Commercial Law, *The Monash Law Review*, 14, p. 151.



This conservatism is due that various private businesses specialized to debt collection, eventually leading to birth of professional industries, were delayed in time. Hence, while developed common law systems should be located at the liberal end of the enforcement spectrum each relying on, recognizing and specifically regulating out-of-court debt collection, the conservative extreme is occupied by those restrictive legal systems that officially do not, or have not recognized and thus penalized enforcement and debt collection services provided by private entities. In the latter, enforcement is strictly limited to court bailiffs, public servants employed by the courts. The *former* socialist systems of Central and Eastern Europe (CEE) (and beyond) could be mentioned as genuine prototypes of the conservative variant given that, at least in Europe, no such strictly closed system seems to exist anymore. Formally, for these taking the task of making the debtor pay in one's own hands qualified as a crime (felony).

The end of the 20<sup>th</sup> and especially the 21<sup>st</sup> century, the concerns with the inefficiency of court enforcement systems and the reactions of the markets, however, sped up this process, at least, in Continental Europe. Today, hardly could one point to a European system where no private business would offer some kind of debt collection-related services. This is a fact notwithstanding that often law-makers and legal scholars take no notice of their presence. The true transnational debt collection corporations of EOS<sup>8</sup> headquartered in Hamburg, Germany and the Stockholm-based Intrum<sup>9</sup> being the best examples as they have expanded their operations virtually to all countries of Europe.

Although private debt collection has always been prone to industrial abuses and overreaches in common law systems and although some limited protections were provided to victims by law, a genuine *volte face*, sector-specific systemic regulatory responses ensued only from the 1970s on primarily to protect consumer-debtors. The Fair Debt Collection Practices Act (FDCPA) of 1977 passed on the federal level in the United States (US), to be followed by the supplementary State-level 'mini' FDCPAs, should be primarily mentioned as the path-breakers in the camp of legal systems favoring hard regulatory responses. Others, like Australia, relied more on self-regulation of the industry but with a contents that targeted the debt collectors' practices as well. These came in addition to the tools offered by classical branches of law from criminal to tort law through such se-

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8 For information on the company visit <https://www.eos-solutions.com/> (20 Nov. 2019).

9 For information on the company visit <https://www.intrum.com/about-us/company-info/> (20 Nov. 2019).

cured transactions law-specific paraphernalia as the self-help repossession standard of ‘without the breach of peace.’

By the end of the 20<sup>th</sup> century, however, such sharp bipolarization of common and civilian systems seems to have begun melting away with the emergence of private debt collectors also in the latter. Furthermore, some of the European countries, wanting to increase the efficiency of the enforcement system, have resorted also to the privatization of their bailiff systems; expression of a mind shift more inclined to tolerate appearance of the private element in the domain. The wave has reached not just the older EU Member States but – after the fall of the Berlin Wall and the beginning of transition towards market economy in the 1990s – also the post-socialist Central and Eastern Europe (CEE). As the undesirable corollary of these changes, abuses, aggressive behavior and overreaches in various forms, many long-known by common law systems, have surfaced in civilian systems lacking regulations as well.

The distinguishing feature of common laws and especially the post-socialist civilian systems is that in the latter these anomalies corollary to the work of private debt collectors have neither been noted and researched, nor reacted upon, by certain regulatory responses. Three notable exceptions should be pointed at: Germany, the Scandinavian systems and the United Kingdom and Scandinavia. In Germany, this is to be ascribed to the passage of the 2008 Law on Out-of-Court Legal Services, which regulates also debt collection (‘Inkasso’) yet to the extent this overlaps with the meaning of debt collection in the UK or US. The United Kingdom, similarly to the United States, have already in the 1970s stepped on the path of addressing these problems by sector-specific consumer protection laws; though constant updating to match the innovations of the industry always outpacing lawmakers remains an issue.<sup>10</sup> The Scandinavian response ensued with more than a decade delay and unfortunately very little is known about the experiences of these systems. Today in Europe, thus, in a great number of countries there is no sector-specific regulation on private debt collectors. Especially vulnerable are countries with fledgling regulatory systems in which consumer protection law, just as banking and financial services regulations

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10 Quite telling in this respect is the Law Commission’s 2012 Report entitled *Consumer Redress for Misappropriations and Aggressive Practices* point 1.33 of which pronounced that “[t]here was also strong support for our proposal that the new Act should provide redress for all unfair payment collection against private individuals. This was even described as ‘the best proposal within the new legislation’ [...]” See the Report at 8 downloadable at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/236079/8323.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236079/8323.pdf) (20 Nov. 2019).

are of very recent vintage and where therefore the regulatory agencies, the judges and public prosecutors are inexperienced in these matters.

#### 1.4. OUT-OF-COURT ENFORCEMENT AND PRIVATE DEBT COLLECTION DEFINED: THE ‘ENFORCEMENT’ SPECTRUM

Before embarking on the substance, we will first explain what kinds of industries, professionals and legal services are within the purview of our analysis. Then a word will be cast on why is it important to tackle all non-court enforcement and debt collection forms together; an approach rarely employed so far by comparative scholarship.

##### 1.4.1. What Qualifies as Out-of-Court (Extra-Judicial) Enforcement and Private Debt Collection?

The classifications and thus the designations may radically differ if more systems are observed as it is the case here. US law, and the categories known to it, should thus be a useful benchmark for our purposes as it not only knows for all main forms of court and out-of-court enforcement and debt collection methods, but it is a system which also clearly differentiates them; on top of possessing one of the richest repository of pertaining court cases and secondary literature.

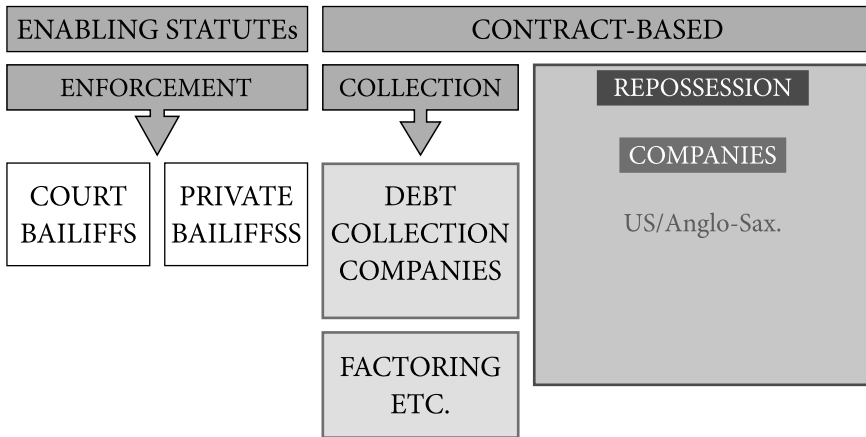
Such ‘*civil enforcement spectrum*,’ providing us with a holistic and multi-jurisdictional perspective, is the most suitable method to explain and comprehend the issues we are interested in here. In particular, to see which enforcement and debt collection methods are known today globally, and through identifying the various categories, to see the pros and cons of each, and to assess how they interrelate.

It is also important to stress here that other idiosyncratic enforcement and debt collection methods are known in various systems. Blocking of bank accounts of non-paying corporate debtors is, for example, another technique employed today in Croatia and Serbia.<sup>11</sup> The length of this paper and our central claim that comprehension and thus regulation requires a holistic approach, seeing the whole spectrum, in lieu of and before dealing with each particular proceedings and method separately, allows us, however, to focus on the main avenues.

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11 For details on blocking of accounts see Tajti (Thaythy), T., 2019, Unprotected Consumers in the Digital Age: The Consumer-creditors of Bankrupt, Abandoned, Defunct and of Zombie Companies, *Tilburg Law Review*, 24(1), pp. 3–26, DOI: <https://doi.org/10.5334/tilr.139>, at 21 et seq.

The following main particular forms of non-court enforcement and debt collection should be differentiated for the purposes of this article:



To be in the position to forge the spectrum, however, first we need to clarify the connotation of the key terms to be used in this paper, which we will stick to throughout this paper. First, we will borrow the term ‘*bailiff*’<sup>12</sup> from common law systems to refer to officers who are in charge with enforcement of court decisions (and other enforcement titles in civil law systems) based on, and as regulated by the respective enabling statutory laws. If they are employees of courts, we will refer them as *court bailiffs*. If, on the other hand, they are not employed by courts, they are not on their payrolls, but are independent businesses and their remuneration is contingent (fully or partially) from the successfulness of their activities, we will refer to them as *private bailiffs*. This admittedly is not necessarily fully fitting the connotation of this term in various Anglo-Saxon systems<sup>13</sup> yet it is a term that could be utilized to clearly demarcate these court-linked enforcement forms from private, contract-based forms of debt collection.

As opposed to that, *debt collectors*<sup>14</sup> do not have such a special status. They are not deemed to perform their activities for the state or the gov-

12 The etymology of the term bailiffs goes back to Middle English ‘*baillif*’, and old French ‘*baillis*’ presumably originating from Latin ‘*bajulus*’. Old French verb ‘*bail*’ meant, besides charge, office, also custody obviously leading to the still existent bailment law.

13 The Black’s Law Dictionary, for example, defines bailiffs as 1. “A court officer who maintains order during court proceedings, and 2. A sheriff’s officer who executes writs and serves processes”.

14 The FDCPA defines debt collector in section 803(6) as follows (only the first sentence is quoted here): “The term ‘debt collector’ means any person who uses any instru-

ernment; rather they work based on contracts concluded with private clients, creditors who have uncollected claims, non-performing loans (NPSs) and the like. The international corporations EOS or INTRUM, often mentioned in this paper, may be the best examples. The US FDCPA explicitly falsely representing as being affiliated with the state (federal or any State).<sup>15</sup> It needs to be added also that the term debt collection is a generic term that may encompass various activities, services aimed at making the debtors pay. The designations used for the various services differ as well and may include the combination of such already established activities as *factoring* (paired with the term *receivables financing*, less known in Europe) and a mixture of services for which new designation are in the making – like ‘handling of claims’ (“követeléskezelés” in Hungary) to *fiduciary collection*, *international receivables management* or *business process outsourcing* – all borrowed from the webpage of EOS, one of the largest European such transnational corporations.<sup>16</sup>

It needs to be added also that the term debt collection is a generic term that may encompass various activities, services aimed at making the debtors pay, especially in systems that – unlike the US – have no sector-specific law defining who a debt collector is. Moreover, the stronger companies engaged in debt collection grow by expanding the types of services, types of business activities they offer. This should be borne in mind when reading this paper. The designations used for the various services differ as well and may include the combination of such already established activities as *factoring* (paired with the term *receivables financing*, less known in Europe) and a mixture of services for which new designation are in the making – like ‘handling of claims’ (“követeléskezelés” in Hungary) to *fiduciary collection*, *international receivables management* or *business process outsourcing* – all borrowed from the webpage of EOS, one of the largest European such transnational corporations.<sup>17</sup>

Lastly, a separate category of private businesses ought to be distinguished in US law: the members of the *repossession industry*, colloquially

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mentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.”

15 See section 807(1) of FDCPA which reads: “A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.”

16 See at <https://www.eos-solutions.com/> (30 Nov. 2019).

17 See at <https://www.eos-solutions.com/> (20 Nov. 2019).

known as ‘*repo-men*.’ For one, because they do not necessarily qualify as debt collectors under the US FDCPA; simply the system looks upon them as distinct class of private businesses being active in the field of enforcement. It is not only that they are specialized to repossession of assets, typically assets used as collateral to secure credits, but their method of work significantly differs from those of debt collectors. For example, while debt collectors contact the debtors by telephone or otherwise trying to persuade them to pay, *repo-men* often undertake the repossession without communicating to the debtor anything beforehand. Put simply, in the US *repo-men* are caught by the *federal* FDCPA only if they undertake common collection services like sending warning letters, placing telephone calls or dispatching demands for payment by other means offered by technology. However, impersonating police officers is a condemnable act for both, the breach of the peace standard of Article 9 of the Uniform Commercial Code governing the actions of *repo-men*, and is a violation of the FDCPA.<sup>18</sup> To make the picture more complicated some of the US States do look upon possessors as debt collectors.<sup>19</sup>

It is also of importance to stress in a comparative analysis like this, that while what was defined above as private debt collection is existent and tolerated in European civil law systems, repossession by private companies is prohibited by them. Or, it is not fully clear whether and what – typically limited forms – of private (in US: self-help) repossession are tolerated in civilian systems.

The caveat, especially to researchers from common law jurisdictions inquiring about the existence of self-help repossession in European civil law jurisdictions, is that the fact that law does not recognize formally or tacitly self-help repossession (retaking), does not necessarily mean that no private ventures offering those services could be found in a country. Simply the law, policy-makers and often scholars as well, do not take account of the realities and market needs. In such cases it is advisable to engage in empirical research, and compare for example what one could find about this topic in scholarly publications and what investigative journalists report. In the leading commentary of the 2008 German Act regulating provision of out-of-court legal services, for example, only a single footnote refers to *Moskau Inkasso*<sup>20</sup> (roughly: Moscow Debt Collection), a private venture presumably offering repossession services as well, yet referring to it as *not-serious* debt collectors. Consequently, Warren and Walt, the doyens of American

18 See Stanescu, G. C., 2015, note 11, p. 232.

19 Stanescu listed Colorado, Nebraska and New Mexico. Stanescu, G. C., 2015, note 119, pp. 232–33.

20 See the section on German law below as well.

commercial law were right expressing how Europeans perceive self-help: “Europeans tend to see it as another example of American Barbarism: You mean the creditor can just go and steal the property back?”<sup>21</sup>

In this paper, thus, the term ‘debt possession’ will *not* include repossession. However, what should not lead to the conclusion that in practice such services are not offered on the market in some countries, sometimes actually by debt collection companies guided by the principle that what is not explicitly prohibited, can be undertaken. This may especially be the case in civil law countries without sectoral regulations clearly defining what is debt collection and what types of out-of-court services they exactly may offer. That these are not unheard of, for example, in CEE countries, unfortunately can be learned of primarily from anecdotal evidences normally recorded by investigative journalists rather than by legal scholars, as it will be illustrated with the first Hungarian case study below. The point to be stressed is, however, that in common law countries self-help repossession is a recognized and legitimate business, naturally subject to regulations as well as standards of behavior as the already mentioned ‘without breach of the peace’ standard in UCC Article 9. *This article, however, is devoted to legitimate forms of extra-judicial enforcement and private debt collection.* Here, the reader is only warned that while repossession is completely legitimate, for example, in the US, it may be prohibited, or extremely limited, typically in civil law jurisdictions. Similar dilemmas along the lines of what qualifies as in accordance with the law, and what transgresses it, may not be crystal clear in case of private collector companies either until sectoral regulations clarify that.

#### 1.4.2. Why is a Holistic Approach Needed?: the First Reason – the Multi-Jurisdictional Focus and the Concomitant Differing Terminology

The *first* reason we have to set out by definitions is *the multi-jurisdictional focus* of this paper given that significant structural differences exist among the herein covered systems. Such state of affairs is inevitably reflected also on the connotation of the linked legal terms what requires us further clarifying the terminology to be used throughout this paper.

As a result, various expressions are in use, moreover, often with significantly different meaning; a fact that should be always borne in mind when dealing with this subject matter. This must not apply only to private debt collectors that may not even have a proper designation, at least, in

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21 Warren, W. D., Walt, S. D., 2007, *Secured Transactions in Personal Property*, 7<sup>th</sup> ed., Foundation Press, p. 269.

written law. Dilemmas may, however, arise even related to bailiffs. For example, in countries where some form of the privatization of enforcement is of very recent vintage, the opted for nomenclature might have undergone changes just within the time span of few years. For example, Serbia had partially privatized the enforcement function in 2011 by introducing the category of private ‘bailiffs’ named in the law as simply ‘bailiffs’ (“*izvršitelji*”).<sup>22</sup> However, they were invariably unofficially referred to by journalist, media and laymen as ‘private bailiffs’ (“*privatni izvršitelji*”). By the 2016 new Act on Enforcement<sup>23</sup> their designation turned into ‘public bailiffs’ (“*javni izvršitelji*”) irrespective of which they are continuedly spoken of as ‘private bailiffs.’ The attribute ‘public’ was added to express that eventually they are performing governmental (public) tasks entrusted to them by the decision of the Ministry of Justice appointing them.<sup>24</sup>

As far as the terms applied to private debt collectors are concerned, as already noted, notwithstanding of the opening the doors to private initiative and the appearance of private debt collecting companies like EOS or Intrum virtually in all CEE states, the activities of these seems to have escaped attention not only of the lawmakers but also of scholars to the level that no special expressions have even become crystallized yet. The Serb language page of EOS, for example, speaks of ‘*solving your claims*’ (“*rešavamo Vaša potraživanja*”),<sup>25</sup> actually encompassing a package of services aimed at debt collection from handling invoices through factoring (i.e., purchase of claims). In other words, at this moment, the services are described rather than covered by a single term.

Adjudged based on Hungarian developments, it should be expected that over time a new single term, or a simple catchy expression, will emerge in Serbian language as well. Namely, in Hungary, to where the international private debt collector companies had arrived about a decade earlier compared to Serbia, a new term has been coined for their services and could be said to have become part of legal nomenclature in the meantime, roughly expressing ‘handling of claims’ (“*követeléskezelés*”). Other

22 The system was introduced by Act on Enforcement and on Preliminary Measures (Zakon o izvršenju i obezbeđenju), *Official Gazette of the Republic of Serbia*, (Sl. glasnik RS), Nos. 31/11, 99/11, 109/13, 55/14 and 139/14).

23 The new act has the same title as the first one: Act on Enforcement and on Preliminary Measures (Zakon o izvršenju i obezbeđenju), *Official Gazette of the Republic of Serbia*, (Sl. glasnik RS), Nos. 106/15, 106/16 and 113/17 (the last two containing official interpretations [“autentično tumačenje”]).

24 See Bodiroga, N., 2015, *Sudska kontrola rada izvršitelja* [Judicial Control of the Work of Bailiffs], *Anali Pravnog fakulteta u Beogradu*, Vol. LXIII, No. 2, p. 74.

25 See the website of EOS Matrix d.o.o. (Ltd) at <https://rs.eos-solutions.com/> (20 Nov. 2019).



languages might have resorted to other solutions. In case of Germany, for example, even the German language sources use also the English expression of 'Credit Management' besides 'Inkasso,' factoring and other terms with more established meaning.

For our purposes the key point is that the services various international and local private businesses offer under the rubric of 'handling of debts' and similar expressions are for US and other developed common laws simply referred to as 'debt collection.' Herein comes the title of the sector-specific US law, the Fair Debt Collection Practices Act (1978). The terms debt collection and debtor collector therefore will be used in this sense in this article.

#### 1.4.3. Why is a Holistic Approach Needed?: the Second Reason – Common Regulatory Concerns on Abuse of Consumers' Rights and Bypassing of the Regulatory System

The *second reason* that justifies the holistic approach relates to the pivotal question of whether these should be subject to regulation, and if yes, to what type of regulation (soft or hard law), with what contents (status and/or regulation of behavior, practices)? This question includes also whether the same or differing regulatory regime should be imposed on them?

Let us support this by three examples offered by comparative law.

The first is hidden in the ensuing quotation from under the pen of R.M. Goode, the doyen of English commercial law, related to the state of affairs in the United Kingdom (UK) in 1978; during the decade in which the most important consumer protection acts of the country were enacted. In it, he stressed that private enforcement (self-help), as presumably the most efficient yet most dangerous extra-judicial enforcement method that can easily be abused at the detriment of consumer debtors and may even amount to physical conflict, has many manifestations yet which present a common concern no matter which area of commercial law is concerned. As he put it: "[S]elf-help [in the UK] is not limited to the enforcement of rights in rem. [In consumer finance as well] a considerable volume of consumer credit is extended on an unsecured basis. A wide range of collection practices is utilized, ranging from quite proper formal demands for payment at one end to intimidation and violence at the other."<sup>26</sup> His position vouching for such a comprehensive approach to extra-judicial enforcement has hardly lost its relevance in the UK; moreover, it is a lesson that should be heeded by other countries as well, like Croatia, Serbia and the rest of the countries of West-

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26 Goode, R. M., 1978, *United Kingdom National Committee of Consumer Law*, A.W. Sijthoff – Leyden/Boston, p. 79.

ern Balkans or Hungary that continue to struggle with finding the right path. More concretely, instead of these countries being focused almost exclusively on privatization of the bailiff systems, they should also pay due regard to the risks inherent to the activities of the new debt collection businesses and those offering the services of repossession (if any).

*Secondly*, the borderline between various activities that aim at, or are linked to debt collection, conceptually may often be very thin. This point applies though more to private debt collection because the rules on the powers and competences of private bailiffs tend to be fixed by the enabling statutes. Yet even in their case it may be questionable what concrete steps they are entitled to take especially in jurisdictions with first-generation laws. Differentiation of various forms of extra-judicial enforcement and the exact limits of these may, in other words, sometimes be a challenge even to lawyers, let alone laymen. It is not without reason that the webpage of the Hungarian Private Bailiff's Chamber underlines that debt collection ("*behajtás*") should be clearly distinguished from court enforcement ("*bírósági végrehajtás*"), similarly to the FDCPA.<sup>27</sup> The difference from the perspective of consumers normally is hardly recognizable, which is a tactical advantage debt collectors may, and actually do, exploit. They can do that because out of ten consumers, more than half knows very little of law, is afraid of even mention of courts, and rather pays voluntarily.

For example, what is came to be named as '*handling of debts*' in Hungary over time, could be very close to purchase of claims – known as factoring. Though as the websites of such European debt collection market leaders as EOS or Intrum could easily disclose today, they openly list that they engage also in purchase of debts, or in factoring, which normally qualifies as a particular type of financial service subject to licensing and regulatory oversight by the financial supervisory authorities. In fledgling regulatory systems, however, this may not be so clear and unequivocal as a result of what the gap may be exploited by these profit-oriented entities to bypass the existent financial, consumer protection or other applicable regulations that would otherwise impose on them substantial regulatory costs (red tape). In other words, it is possible to exploit the lack of, or indeterminacy of the law, and the lack of experience on the side of the supervisory authorities, to refer to that interpretation of the nature of their services that suits their interests best.

A clearer, physically observable, demarcation exists between self-help repossession and private debt collection, which is then given recognition

27 See the page providing short definitions/explanations of key terms appearing on the Chamber's website ("*Jogi kisokos*") at [http://www.mbvk.hu/jogi\\_kisokos\\_zold.html](http://www.mbvk.hu/jogi_kisokos_zold.html) (20 Nov. 2019).

by laws that tolerate the former. For example, this is the reason the US FDCPA only exceptionally apply to repossession companies (repomen), private businesses specialized to physically repossess movables used as collateral for credit transactions.<sup>28</sup> In two 2016 cases, federal courts in California, for example, ruled on such a questions. In the *Lee v. Toyota Motor Sales USA Inc.*,<sup>29</sup> the court ruled that the repo company violated the Act because it qualified as a ‘debt collector’ under the act, one rarely resorted to provision which says that FDCPA applies if repossession is threatened or undertaken when there is not yet a default on the underlying credit.<sup>30</sup> In the other case, *Brooks v. Leon’s Quality Adjusters, Inc.*,<sup>31</sup> the court ruled that the repossession of the claimant’s truck was not violating the FDCPA, though the repomen did qualify as a debt collector under the Act, because the debtor was already in default.

*Thirdly*, notwithstanding the differences, some rapprochement in the approaches is noticeable at least in the western world. This is to a great extent driven by the growth of the respective industries, which enter new markets often completely unnoticed by lawmakers. Then typically years are needed to pick up the regulatory gauntlet to tackle the emerging issues that the industries generate. These routinely are close replicas of the problems they had created in their home countries years ago. In other words, it makes sense to heed and learn from the positive or negative experiences of more advanced systems, other similarly situation systems, and comparative law in this domain, too.

To sum up, we are here interested in all forms of out-of-court enforcement of claims and private collection of debts as they share a few common elements: they are all driven by profits, both private bailiffs and private debt collectors are experts possessing sophisticated techniques for making debtors pay often voluntarily, and as such they *per se* present increased risk of abuses, overreaches and harassment if debtors are consumers who are less capable to protect themselves than business debtors. On top of that, as best illustrated by the practices of US repossession agents they are in possession of the needed equipment as well, from trucks, cranes through weapons; the last prerequisite legal in the US but obviously simply unacceptable in European civil law systems and beyond.

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28 See Caton, A.V., When is a Repossession Company a “Debt Collector” under the FDCPA? (28 Oct. 2016), at <https://www.hudsoncook.com/article/when-is-a-repossession-company-a-debt-collector-under-the-fdcpa/index.cfm?print=yes>.

29 *Lee v. Toyota Motor Sales USA Inc.*, 2016 U.S. Dist. LEXIS 120102 (N.D. Cal. September 6, 2016).

30 See Section 1692f(6) of FDCPA.

31 *Brooks v. Leon’s Quality Adjusters, Inc.*, 2016 U.S. Dist. LEXIS 116803 (E.D. Cal. August 30, 2016).

For the purposes of this paper therefore the designations ‘*private debt collection business*,’ ‘*private collection agency*’ or simply a ‘*debt collector*’ will denote a highly professionalized individual or enterprise that offers various services aimed at debt collection and which is not a governmental body, nor is performing functions on behalf of the state. Their services range from collection of data on debtors, locating assets of the debtor, contacting debtors by mail, telephone or otherwise, through purchase of debts (factoring, what may conveniently named as ‘deemed debt collection’) as ancillary activity. In common law systems, this is topped off by agents or companies specialized to out-of-court (self-help) repossession.

Last but not least, it ought to be stressed that this paper is *not* about debt collection, repossession by organized crime, Mafia.’ This must clearly be emphasized right at the beginning because for readers from legal systems not knowing for any type of private collection, the designation ‘private debt collection’ may denote something criminal. For comparative scholars, or governments that would like to regulate the new industry, it is imperative to cast a few words on the thin borderlines that exist between legitimate and criminal debt collection especially in systems lacking sector-specific regulations and where thus it is obscure what qualifies as criminal. The question whether the lack of appropriate regulatory responses is in fact an incentive for infiltration of organized crime into the legitimate debt collection sector would deserve special attention as well.

Some particular classes of debt collectors would also deserve special consideration. While it is largely irrelevant from the perspective of consumers, whether ‘first party’ (or in-house) or ‘third party’ (or extraneous) agencies contact them for the debt, the risks regulators should care for are radically different in case of true multinational debt collectors<sup>32</sup> as op-

32 The size of the industry could be indirectly inferred from the existence and the data of trade associations: i.e., European Collectors Association [ECA] (<http://www.europeancollectors.org/>) and the Federation of European National Collection Associations [FENCA – established in 1993] (<http://www.fenca.org/>). National associations of the industry exist as well: see e.g. the Credit Services Association [CSA – established in 1902] (<http://www.csa-uk.com/welcome>).

The size, territorial reach and types of activities of some of the key players should be considered. Some of the big names include ‘Intrum Justitia’ (<http://www.intrum.com/>) at the time of writing of this paper being active in 22 European countries or the Hamburg headquartered EOS Group with its ‘EOS KSI Inkasso Deutschland GmbH’ (<http://www.eos-ksi.de/en/>) also being present in more than twenty states. One of Europe’s largest insurance companies, Euler Hermes (headquarters in Paris), also has interests in the industry through its subsidiary Euler Hermes Collections GmbH (Potsdam) since 2009 (<http://www.eulerhermes-collections.de>). For a list of UK collection agencies see <http://directory.independent.co.uk/debt-collection/in/uk/page/6>, <http://www.debtcollectorsscotland.co.uk/>. In France, the Cash Management Group [CMG] and its subsidiary France Contentieux specialized to debt collection

posed to small (typically indigenous) or individual agents known in many European countries. The latter due to their sheer size more easily escape the public eye. Often remaining invisible is the result of deliberate choice as that allows for transgressing the vaguely defined thin blue line between legality and illegality more easily. Not a few of these niche market entities profit from operating behind the veils; at least until noted and reacted upon. The behemoth international firms, on the other hand, exploit their strategic advantages (e.g., professionalism, application of elsewhere tested practices) and the pretension that being linked to a parent from a more developed EU country inherently means a guarantee of legality.<sup>33</sup> Further, often private debt collecting firms also engage in accounts receivables financing (which may include factoring),<sup>34</sup> either as the dominant or as an ancillary business activity. Needless to say, this combination of activities adds a further obscurity to the theme though it is something that should not be bypassed.

These variations properly point to one of the main problems new regulatory systems are struggling with yet what has long been recognized

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may be mentioned (<http://en.france-contentieux.com/france-contentieux-international.html>). A Dutch business is Nederlandse Inkassodienst <http://www.dutch-incasso.com/> or De Incassokamer BV at [www.incassokamer.com](http://www.incassokamer.com). In Italy, Equitalia (<http://www.gruppoequitalia.it/equitalia/export/sites/default/it/cittadini/cosafacciamo/index.html>) is the leader in collection of debts to municipalities.

A visit to the webpage of the UK debt collection company – Federal Management – (website at <http://www.federalmanagement.co.uk>) shows properly how wide the panoply of various creditors-assisting services are in the UK: it ranges from debt collection straight (commercial, consumer and international), checking services (i.e., information on LTDs, bankruptcies), tracking services through asset and vehicles recovery services; the last being the local version of repossession. For a law firm specialized also in debt and asset recovery see the webpage of Moore & Blatch at <http://mooreblatch.com/business/debt-asset-recovery/>. Both last visited on 20 Nov. 2019.

As a good example of exponentially growing CEE collection company see the webpages of the Polish “Kruk S.A.” company <https://en.kruk.eu/investor-relations/kruk-group>, having spread also to Czech Republic, Romania and Slovakia as well as subsidiaries specialized in some other linked activities (i.e., credit information bureau, legal services and securitization). See the company’s website (with English pages) at <http://en.m.kruk.eu/offer/about-kruk/>. For a Czech business see, e.g., the firm ‘Reticulum’ at [www.reticulum.cz](http://www.reticulum.cz). Both last visited on 20 Nov. 2019.

33 This behavior is similar to the attitude of some multinationals to labor standards: while they fully respect labor laws in the countries of their headquarters (typically in Western Europe), their records are disastrous in CEE due to the leniency and unpreparedness of the local regulators.

34 See, e.g., the panoply of services offered by Intrum Justitia under the heading of ‘accounts receivables management’: “[...] We offer a full outsourcing of all your accounts receivables, including invoice service, payment booking, monitoring of due dates, reminder service and, if necessary, collection services.” See at <https://www.intrum.com/about-us/business-solutions/accounts-receivable-management/> (20 Nov. 2019).

in the UK or the US: regulation based on a neatly defined closed-list of businesses forms instead of an open-end definition might not yield proper results and consumers would hardly be properly protected. This is so because it is in the very nature of debt collection that it has multiple angles, and tends to expand and engage in innovation of ever newer techniques of collection. A closed end definition may not catch some of the newer activities. This is yet another reason that requires European civil law systems heed to UK and US experiences.

## 2. THE UNNOTED DIMENSIONS OF THE PHENOMENON OF PRIVATE DEBT COLLECTION IN EUROPE

### 2.1. PRIVATE DEBT COLLECTION AND THE IMPOTENCE OF CLASSICAL BRANCHES OF LAW

The American and the most recent German experiences properly corroborate that what Europe could expect is increasing sophistication, growing strength and market share of private debt collectors. The addition of special restrictions on *commercial* collection practices, for example, by the mini-FDCPA of Florida,<sup>35</sup> shows furthermore that the abuses transcend the narrow confines of consumer protection. The SMEs at the hands of collection agencies might deserve attention as well.

In other words, what the systems having the most developed private debt collection sectors have already noticed is that classical branches of law are ill-suited to counter the abuses in the sector.<sup>36</sup> Primarily because they operate dominantly by remedies having ex post effects. Yet against the tactics of private debt collectors prophylactic remedies would be desirable. Consumer protection law, as a form of regulation and thus a branch of law forged to operate with ex ante protection is less suitable for another reason: it fails to pay regard to the radically different nature of the risks inherent to private debt collection. Namely, classical consumer protection laws are formulated based on, and to fit completely different types of risks. It is not only US law, but more recently also of Germany that sector specific regulations are the right path to step upon in this idiosyncratic domain.

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35 See Florida statutes Title XXXIII, Chapter 559, ss. 559.541 – 559.548 on Commercial Collection Practices.

36 It is not without reason that the drafters of the section containing the legislative intent behind adding the regulations on *commercial* collection practices found it important to add that “*current criminal laws are inadequate to deal with certain unlawful and fraudulent activities specifically involving the collection of commercial claims.*” Florida statutes Title XXXIII, Chapter 559, section 559.542.

In the UK, since the 1970s, unlawful harassment of debtors has been a crime and collectors are subject to licensing – which is still not necessarily the case in many European jurisdictions. Even if “*general*” harassment is criminalized, the definition of the crime does not necessarily extend specifically to harassment of debtors in the lack of prescriptive language more clearly delimiting what amounts to a crime and what not if debt collection is at stake. As a result, general criminal law is not capable of living up to the challenges the ever-more sophisticated collection practices of debt collectors present. Even with its deterrent effect, criminal law is insufficient to adequately protect consumers against the tactics of private debt collectors.

Company law with its fiduciary liability prong is even less capable of disciplining private debt collection companies notwithstanding that company registers do act as gatekeepers in the company registration proceedings and eventually, more theoretically than in reality, may prevent the entry onto the market to rogue collectors. That is, however, a far cry from what is needed in this sector and hardly can company law registries replace sector-specific licensing regulations. Namely, as company registries are, neither specifically empowered, nor expert in looking behind the corporate façades, registration of a legitimate company is a no brainer even by persons who should never be given permission to enter the market. No wonder that in most systems knowing for private debt collectors, besides registration with the company register (if any), license is to be obtained from designation governmental bodies, and in addition, subject to further onerous regulatory requirements like tests or clean criminal records.

If a debt collecting company is engaged also in factoring (or receivables financing) business, registration with the financial supervisory body is a must and hence in such cases regulatory oversight is in place, at least, for that particular type of ancillary activity of collectors. The question in such situations is whether a financial supervisory authority – designed to oversee banks and other financial organizations being radically different in many respects from pure debt collection companies – are equipped and expert in adequately monitoring the debt collection prong of such mixed entities. Suffice to mention here that in many systems exactly because of these considerations it is the competition and/or the consumer protection agency that is entrusted with this industry.

It is another, by policy-makers often neglected practical consideration, that even if a licensing scheme is in place giving the supervising authority the power to impose disciplinary sanctions, including revocation of the license, years may be needed until that end could be reached. This inevitably leads to the conclusion that regulatory systems that rely only on

licensing-cum-disciplinary powers but fail to regulate the what tactics the debt collectors may employ, may end up being unsuccessful.

## 2.2. THE SLOWLY CHANGING AGENDA OF THE EUROPEAN UNION

Private debt collection has so far largely bypassed Brussels irrespective that the goal of supporting economic activities by making enforcement of judgments and collection of debts more efficient (e.g., 2009 Stockholm Programme) and the protection of consumers rank high on the agenda of the EU. Albeit a number of legislative acts have been drawn up regulating some very specific issues, all with the aim of making enforcement of court decisions – and indirectly collection of debts as well – easier in the EU,<sup>37</sup> the Commission itself admitted in a 2011 proposal that there is “*the need to improve the enforcement of decisions and to establish protective measures against debtor’s assets at EU level.*”<sup>38</sup>

A corollary problem is that the EU does not have a clear position on how to balance the two. True, the 2016 EU Commission Staff Guidance

37 To wit, 1/ Directive No 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions and Directive No. 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions – both aimed at fighting late payments; 2/ Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure – assisting creditors in chasing down debtors in Europe; 3/ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure – establishing simplified procedure for enforcement of small claims (not exceeding 2,000 Euros); 4/ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims – introducing the European writ of execution; and 5/ Regulation (EC) No 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) – fixing the conflicts of law rules also for the previous EU acts.

38 See European Commission, *Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to Facilitate Cross-Border Debt Recovery in Civil and Commercial Matters* (Brussels, 25.7.2011 – COM[2011] 445 final – 2011/0204 [COD]), point 1.1., p. 2. The proposal was enacted in the form of Regulation 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters. On the European Account Preservation Order see Chapter 5 ‘The European Account Preservation Order: Nuclear Weapon or Paper Tiger?’ in: Tajti, T., Iglkowski, P., 2018, *Cross-Border Study of Freezing Orders and Provisional Measures – Does Mareva Rule the Waves?*. Springer, pp. 83–86.



on the Implementation of Directive 2005/29/EC on Unfair Commercial Practices<sup>39</sup> quite unexpectedly added ‘*after-sales practices, including debt collection activities*’ to the list of activities falling under the scope of this directive. It is questionable, however, whether a general consumer protection law, as already mentioned above, originally drafted not having the specifics of debt collection in sight is sufficient to deal with the abuses. Bearing in mind that most of the developed Anglo-Saxon systems has long ago opted for a sector specific regulatory path, the European approach that treats debt collection as only something ancillary, atypical is most presumably insufficient to efficiently deal with the emerging abuses and overreaches. No matter which position one sides with, it is a fact that no such EU-wide empirical survey of debt collection-related unfair practices (abuses and overreaches of debt collectors) seem to exist that would be a basis for more properly assessing the graveness of problems.

The 2016 Guidance already mentions three debt collections-related practices that were qualified by courts as unfair. Thus, a Slovak court held that threatening a consumer that his name will be published in local media if he fails to pay would be unfair.<sup>40</sup> As opposed to that, a Polish debt collector was fined for, first, misleading the consumer about the magnitude and gravity of the adverse consequences of non-payment, second, for failing to inform the consumer about the exact contractual bases for the debt, and third, for exerting ‘*undue psychological pressure*.’<sup>41</sup> The Italian competition authority (AGCM), in the third mentioned case, took action against a private debt collector for using a logo, name and documents similar to those used by governmental agencies thereby creating “*the misleading impression that it was enforcing official court orders to force consumers to pay their debts when in fact such powers are reserved for public authorities*.”<sup>42</sup>

It seems that from the point of view of creditors and the collection industry, it was the judgment of the European Court of Justice Case C-134/05 (*Commission v. Italy*)<sup>43</sup> which achieved more in this respect, given that it managed to demolish the entry barriers before the growing number of international debt collection firms (e.g., Intrum Justitia, EOS). The problem with this development is that EU lawmakers seem to have forgotten about another equally venerable philosophical foundation of EU

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39 Guidance on the Implementation of Directive 2005/29/EC on Unfair Commercial Practices (Commission Staff Working Document, SWD [2016] 163 final as of 25 May 2016). [Hereinafter: 2016 EU Commission Staff Guidance.]

40 *Krajsky sud v. Presove*, 27 October 2011, 2Co/116/2011.

41 DKK – 61 – 10/07/DG/IS in 2016 EU Commission Staff Guidance, at 7.

42 PS9042-Esattoria-Agenzia Riscossioni. Provvedimento n. 24763, 22 January 2014.

43 See the Judgment of the Court (First Chamber) of 18 July 2007 in case C-134/05. For details see section 4.2.2.4. below.

law: the protection of consumers and – as a pretty recent initiative rather than a development – of small businesses.<sup>44</sup>

A further problem is that in the lack of guidance from Brussels, the Member States have begun to formulate their own regulatory responses to the emerged challenges – and they inevitably differ radically one from another. At one end of the spectrum is, for example, the UK having industry specific regulation dating back to the 1974 Consumer Protection Act (as amended in 2006). On the opposite side are systems that have no tailor-made regulations, where, thus, even such collection practices are tolerated that had long become prohibited, for example, in the UK and other major Anglo-Saxon systems. Save consensus (through Brussels or otherwise), Europe risks a cavalcade of prohibitively varied and, fully or partially, irreconcilable regulatory systems with all the possible negative corollaries on the common market.

## 2.3. THE LAW V. REALITY DISTORTION<sup>45</sup>

### 2.3.1. The Doctrinal Dimension

While out-of-court enforcement was always looked upon favorably by common laws, Continental European systems took exactly the opposite stance somewhere during the 19<sup>th</sup> and early 20<sup>th</sup> century in the great codification era. The divergence was almost absolute: while common law elevated *‘the encouragement of self-help’* to the pedestal of a *basic principle of commercial law* – making it not only a *‘policy choice’* but rather a building block of the *‘philosophy of commercial law’* – most civilian laws even now in the 21<sup>st</sup> century only grudgingly give way (if at all) to changes in the

44 The best most recent example of the changed attitude of the EU to protection of small and mid-scale businesses is the Common European Sales Law (CESL), which not only declares this goal but has already specific provisions with such content. As Wendehorst noted while “[...] SME protection belongs to the widely recognised policies of the Union in the context of the internal market [...] [s]o far, only instruments in the field of economic law, in particular concerning EU and state subsidies, have been designed specifically for SMEs. In the context of contract law [as materialized in the CESL] is a novel concept.” See Wendehorst, C., comments to Article 7 of the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, in: Schulze, R., (ed.), 2012, *Common European Sales Law (CESL)*, C.H. Beck – Hart – Nomos, pp. 53–54.

45 This is similar to the ‘reality distortion field’ of the former Apple leader, Steve Jobs. According to Isaacson, Jobs’ *reality distortion field* played a positive role of often being the driving force behind the quest for ever newer innovations that “*infused Apple employees with an abiding passion to create groundbreaking products and a belief that they could accomplish what seemed impossible.*” See Isaacson, W., 2011, *Steve Jobs*, Little & Brown, p. 124.

domain. In brief, civilian legal systems' approach to self-help continues to be essentially hostile; though – as this paper should corroborate – this has not only begun changing but in many of the countries major steps in the opposite direction have already been taken.

It would require a separate analysis whether and to what extent is this antagonism contingent on the limited nature of the civilian concept of self-help, which is in essence constrained to mere fending off imminent attacks against one's property or body yet with proportionate actions and immediate recovery of lost possession.<sup>46</sup> Obviously, the limited concept of civilian self-help does not even come close to self-help repossession known and recognized by common law systems, neither as far as its breadth, or the concomitant powers are concerned as best demonstrated by the commonly known services of repossession agencies – colloquially named as 'repo-men' – in the US.

The manifestations of this position of civilian systems could be tracked down easily. Research based on the term 'self-help' would hardly yield a considerable number of (if any) publications related to European civil law systems: most sources would be about one of the common laws. Not unsurprisingly the few cases that are used as illustration of the narrow concept of civilian self-help are about such "innocent" topics as *fight for a parking space*<sup>47</sup> and not repossession of a car in possession of the debtor under a leasing contract at dawn by professionals possessing cranes and weapon. This being so even though versions of leasing and installment sales contracts have become one of the most popular financing vehicles in all parts of Europe during the last few decades.

Likewise, a scrutiny of a model German leasing contract would also show that in case of default in this leading jurisdiction of the Old Continent, resort to self-help is not thought of as a legitimate alternative.<sup>48</sup>

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46 In German law these categories are known as "*Besitzwehr*" (§859(1) BGB) and "*Besitzkehr*" (§859(2) BGB). Van Erp and Akkermans described the first as "*a specific form of self-defence*" and the latter as giving the possessor "*to recover the object from the dispossessor immediately after the interfering act.*" Erp, S. van, Akkermans, B., 2012, *Cases, Materials and Text on Property Law*, Hart, p. 115. The entitlement additionally is limited to the direct possessor primarily. The right of indirect possessors to resort to these self-defense mechanisms of the BGB is explicitly not provided for in the BGB but seems to be recognized by some scholars. Erp, S. van, Akkermans, B., 2012.

47 Erp, S. van, Akkermans, B., 2012, at pp. 115–16 referring to the German case *OLG Koblenz*, 8 July 1977, *MDR* 1978, 141, which held that "[a] possessor who strikes the trespasser in order to make him leave his premises acts unlawfully, unless he initially has exercised without success more modest remedies, which seemed to be suitable according to the circumstances."

48 See, e.g., the model lease agreement ("*Leasingvertrag*") offered by Stummel, D., 2003, *Standardvertragsmuster zum Handels- und Gesellschaftsrecht (Deutsch-English)* München, Beck, p. 387.

Whether that is exactly what is occurring in reality that is unclear as empirical evidences are lacking except the admittance that the so-called “Moscow-type collection,” dubbed as ‘not-serious’ collection, is existent also in Germany.<sup>49</sup> The refusal to face the reality inevitably leads then to the unhappy situation that such “not-serious” collection ventures are not regulated either: expositing consumers and smaller companies to abuses the detection of which will take years if not decades.

Pondering on further practical repercussions of such ‘regulatory blindness’ rejecting to recognize how important fast repossession is in business life, one may legitimately postulate that the incapability of emergence and growth of equipment leasing on the Balkans could be ascribed partially also to this? Admittedly, the answer to this question does not depend on this single factor as other prerequisites known in developed economies are as well lacking.<sup>50</sup> Still, it is a topic the deeper analysis of which should not be left out desiring to domesticate this, for growth inevitable, form of leasing business.

### 2.3.2. The Empirical Gap or What the Scarce Empirical Evidences Show

It is well-known that one of the eternal problems of regulators is that the law tends to be lagging behind developments. Out-of-court enforcement is not an exception. This especially applies to those legal systems that are still devoid of any regulations on debt collection like many of the CEE countries. Interestingly, this includes also Hungary and the systems of the Western Balkans for whom German law has always been one of the, if not ‘the’, main source of inspirations: none of them seems to have picked up the regulatory gauntlet to follow the suit, or at least debate on, the 2008 Law on Out-of-Court Legal Services. Let alone venturing as far as taking a look at the US FDCPA and the related practices. The problems, put simply, are not ‘seen’ by lawmakers, or they become visible and reacted upon only at the price of years, if not decades, of consumers suffering from these.

Consequently, one could hardly (if at all) find empirical studies that would try to map what is happening in reality in this sphere, what is not only strange and something to be criticized given that the presence of private debt collectors is known even by laymen. Or, perhaps it is fairer to say that actually laymen-consumers are more aware of their presence than the politicians, policy-makers and legal scholars, as it is them who are ex-

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49 See Kleine-Cosack, M., 2008, *Rechtsdienstleistungsgesetz (RDG)*, Heidelberg, C.F. Müller Verlag, note 57 on page 191.

50 See on this Tajti (Thaythy), T., 2017, Leasing in the Western Balkans and the Fall of the Austrian Hypo-Alpe-Adria Bank, *Pravni zapisi*, Vol. 8, No. 2, pp. 155–222.

posed to the questionable tactics and collection methods and who tend to follow the related blogs, reports of investigative journalist and other sources of information for fear from collectors.

Admittedly, in Hungary and Croatia as EU Member States, the disinterest is corroborated by the position of Brussels, to which the excesses of private debt collectors can properly be tackled through general consumer protection laws. The view propounded here is that this is inappropriate and sector-specific regulations, at least, of the German-type should be resorted to. Yet ideally Europe should develop its own version of the US FDCPA.

In brief, one of the key problems is that empirical data are lacking especially on what tactics and collection methods private debt collectors employ generally and especially in such regulation-free systems as Hungary or the countries of the Western Balkans. Hence, who have not been exposed to these personally, have hardships figuring out why would consumers deserve special, additional protections against the problematic practices of these private actors on the market. This is the reason the next section is devoted exactly to describing what debt collection entails from the first letter received from a private debt collector, the “aid” received from the consumer protection agency to the last, court phase, adjudicating on the appeal against the decisions of the agency. As it will be seen, most of the problematic practices are already known, and reacted upon by the western systems having soft or hard laws specifically targeting these and not (or not only) the status of debt collectors. Indeed, while the US FDCPA is an act targeting the practices, the German 2008 Act is trying to protect the consumers through preventing the entry to this segments of the legal services market to those it deems unqualified or otherwise unsuitable.

It needs to be added also that above does not apply equally to private bailiffs and private debt collectors. Namely, wherever the bailiff system was privatized, that meant passage also of regulations, or at least, a first generation of regulations. These, however, tend to regulate only the questions related to the status of bailiffs (e.g., necessary qualifications for getting the license, disciplinary rules, their powers, rights, duties and potential liabilities). Still, these do not necessarily deal with what enforcement tactics and practices are prohibited. For example, the 2015 Serbian Law on Enforcement<sup>51</sup> regulating private bailiffs, in its seventy-six relatively

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51 Part Seven regulates private bailiffs in the 2015 Law on Enforcement and Ancillary Security Measures and contains chapters like the register of private bailiffs (Ch. 4), organization and powers of the Chamber of Private Bailiffs (Ch. 5) as well as the control over private bailiffs and their disciplinary liabilities.

detailed provisions, essentially is limited to regulating the status. Hence, what will be said about private debt collectors' practices might be applicable to private bailiffs *mutatis mutandis*. Moreover, depending on what particular types of debts (segments of the market) were allocated to private bailiffs by the enabling laws by a legal system, what is in some countries entrusted to private bailiffs may in others be left to private debt collectors.

### 3. PRIVATE BAILIFFS AND PRIVATE DEBT COLLECTORS IN HUNGARY THROUGH THE LENSES OF TWO EMPIRICAL STUDIES

#### 3.1. THE HUNGARIAN LEGAL ENVIRONMENT

Before we embark on the two empirical studies, it is important to introduce the reader to the legal environment of Hungary surrounding enforcement and debt collection here, and not later in the last part of the paper devoted to the synopsis of key developments in selected number of jurisdictions. Hungary, by and large, shared the fate of other post-socialist systems as far as enforcement is concerned. It also inherited an inefficient court enforcement system from socialism, a factor that asked for reforms that ensued in two main forms: the privatization of the bailiff system and introduction of summary proceedings for collection of some categories of debts.

Hungary has introduced the system of private bailiffs (“*önálló bírósági végrehajtó*”) in 1995 by Act No. 53 of year 1994 on Court Enforcement.<sup>52</sup> Ever since, the overwhelming part of enforcements are undertaken by these. They are appointed by the Minister of Justice for seven years (and maximum up to age 65), specifically allocating also the courts to which they will be attached.<sup>53</sup> Although they are deemed to perform enforcement actions on behalf of the state, they are entitled to charge not only

52 Act No. 53 of year 1994 on Court Enforcement (“*1994. évi LIII. törvény a bírósági végrehajtásról*”) (as amended thereafter). The website of the Hungarian private bailiffs with direct electronic gates, databases and related information is at <http://www.mbvk.hu> (20 Nov. 2019). According to the website, about 500 private bailiffs are active in Hungary at the moment. It needs to be stressed again, notwithstanding the many amendments and reforms of the court enforcement regime and the existence of a professional private bailiff system, the 21<sup>st</sup> century eye witnessed the appearance and ever increasing role of private debt collection agencies of all sorts, with activities from the totally legal factoring (debt purchase) to the illegal but not reacted upon private repossession.

53 See section 232(2) of the Enforcement Act 1994.

fees for the work done and the incurred costs but also a commission (“*jutalék*”); the last only if they were successful (or partially successful).<sup>54</sup> They also have a Chamber,<sup>55</sup> which takes their oaths, maintains the register of bailiffs, handles complaints, makes internal regulations and have also disciplinary powers.<sup>56</sup> In Hungary, complaints related to the handling of evictions from residential buildings of defaulting mortgage-debtors has been the most frequent topic in the media.

The other centrally-orchestrated novelty was the introduction of summary proceedings for payment of monetary debts in 2009;<sup>57</sup> a system operated by the National Association of Public Notaries.<sup>58</sup> Debts based on security agreements, for example, do not qualify as such and their enforcement is thus subject to a different regime.<sup>59</sup> The system, to a great extent automated, runs successfully ever since though the number of filed requests for issuance of pay-orders fluctuates. The system resembles the German “*Mahnbescheid*” pay-order system.

What is important to bear in mind when reading the ensuing two empirical case studies based on a report of an investigative journalist and the documents that surfaced as part of the author’s own encounter with private debt collectors is that private debt collectors and private businesses that engage in physically repossessing motor vehicles, or employ various tactics from contacts by telephone to warning letters, emerged to satisfy market needs on top of and irrespective of the clearly increased efficiency of enforcement and debt collection thanks to the above two reforms.

### 3.2. HUNGARIAN EMPIRICAL EVIDENCES: THE CASE OF SELF-HELP REPOSSESSION OF CARS

Similar to the German or other Continental European civilian systems, the Hungarian Civil Code knows only a very narrow definition of self-help which is limited to the right to fend off imminent attacks against one’s property or body. The brand new Civil Code passed in 2013 rein-

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54 See section 254 of the Enforcement Act 1994.

55 The website of the Chamber is at <http://www.mbvk.hu> (20 Nov. 2019). As per the information on this site, while in 2015 only about 25% of bailiffs had a law degree, that has changed by 2019 and now about 2/3 of them possession a degree in law.

56 See section 249 and 250 of the Enforcement Act 1994.

57 See 2009. évi L. törvény a fizetési meghagyásos eljárásról [Act No. 50 of year 2009 on Pay-Orders].

58 The pertaining website of the Association is at <https://fmh.mokk.hu/#x> (20 Nov. 2019).

59 See section 3(1) of Act No. 50 of year 2009 on Pay-Orders.

forced the rule that enforcement of rights based on it are to be enforced as a rule via courts.<sup>60</sup> The reach of the yet-to-be tested soft version of out-of-court repossession of collateral in the secured transactions part of the Code may turn out to be a sign that the future stance of the lawmakers may be different; more tolerant of private enforcement. At the moment, however, if one would study only black letter law, or articles and commentaries of scholars, the conclusion would inevitably be that the most aggressive type of private enforcement – self-help repossession and the repo-industry – does not exist in this country.

The more attentive eye willing to look cautiously out of the box towards less orthodox sources of law can easily identify that the reality is less idyllic and self-help repossession has not been unknown in the country. A look at similarly unusual evidence from the neighboring countries – likewise evidencing the presence of the industry – would then further corroborate these tentative findings.<sup>61</sup> Otherwise, the media has also reported several times on repossessions during the first decade of the 21<sup>st</sup> century; typically not really seeing any problems with the legality of the practices. As the practices have emerged in a legal vacuum, it is legitimate to presume that the public and the media have associated the novel phenomenon with some forms of organized crime; which has resulted in some unease and fear. The brief synopsis of the article that follows is one of those rare instances that at least has been documented in a short paper of an investigative journalists.

It was one of the more popular business weekly magazines (“*Heti Világgazdaság*” – ‘HVG’) that published an article in 2011 of one car-repossession case<sup>62</sup> – hardly having rung the bells among lawyers or politicians.

60 The new Hungarian Civil Code lists among its basic principles: “§1:7. [Guarantying Court Enforcement] The enforcement of rights provided by this Code is through courts, unless otherwise provided.” The 2012 revised (Hungarian) text of the new Civil Code is available at [http://njt.hu/cgi\\_bin/njt\\_doc.cgi?docid=159096](http://njt.hu/cgi_bin/njt_doc.cgi?docid=159096) (20 Nov. 2019). Unfortunately, the text of the quite lengthy code became the victim of political fights and had been consequently rewritten more times. This inevitably postponed its coming into force, which occurred on the 15<sup>th</sup> of March 2014.

61 See, e.g., Klaudia Fabián, K., Alexandra Horváthová, A., Catalin Gabriel Stănescu, G. C., 2011, Is Self-Help Repossession Possible In Central Europe?, Vol. 4, No. 1, *Journal of Eurasian Law*, pp. 83–107, (Duke Univ.), available also through the SSRN network (<http://www.SSRN.com>).

62 Gyenis, A., 2011, Vajon hová fut a kocsi? – Törvénytelen autófogalások (Where is the Car being Taken? – Illegal Car Repossessions), *Hungarian language weekly ‘HVG,’* 26 March, issue, pp. 97–98. The author correctly summarized the reality in the sub-title: “The creditors running after their money sometimes resort to more than what is necessary: they take off the cars of their defaulting clients without informing them about that and without providing them records on that. They engage in these practices irrespective that they do not have any legal bases for that.”



The story is interesting for two main reasons. *Firstly*, it is evidence of the presence of (at least one) private repossession agent (company); something that would be routine car repossession in the common law world. *Secondly*, and more importantly, it also shows how unprepared the legal system and the various agencies of the system are in confronting such novel practices for which no black-letter law exists and for which, therefore, they could not have been trained either.

The facts of the case as described by the journalist are as follows. A citizen of Budapest woke up one day as usual, yet did not find his car that was routinely parked not far away from his condominium flat. He immediately reported the theft to the police which, however, had failed to undertake anything for days. Finally, they informed the victim, who was persistently inquiring about the car, that according to their knowledge, a bailiff towed away the vehicle on the basis of a court order. It has to be noted that the debtor was, neither informed about the planned repossession, nor given a document evidencing the conditions on which the car was taken or the things that had been left in the car.

As the pragmatic investigative journalist found out, in fact no court decision ordering repossession had ever been issued and no court bailiff was involved in the actions at all. The act was conducted by a private business (Ltd 'Auto-Next Szolgáltató' from Budakeszi, a small town north of Budapest) – duly registered with the Hungarian Financial Supervision (Pszaf)<sup>63</sup> yet which had no public contact address. Even more interesting is that the creditor who had made use of the services of the private repo-company was the duly registered Mercantile Bank; which either could not be reached by the journalist after they learned about the investigation or were unwilling to provide any information by invoking bank secrecy rules.

### 3.3. HUNGARIAN EMPIRICAL EVIDENCES: A STRAIGHT DEBT COLLECTION CASE STUDY INVOLVING THE AUTHOR

#### 3.3.1. What Justifies Resort to Anecdotal Evidence?

In Hungary, and in much of Continental Europe as well, one could still learn of the presence of private debt collection businesses primarily from the media looking for sensational news<sup>64</sup> or from facing them in

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63 Until 2013, Hungary had a single supervision for banking, insurance and capital markets: the Financial Supervisory Authority (in Hungarian: "Pénzügyi szervezetek állami felügyelete" – acronym: 'Pszaf' – hereinafter: FSA), the functions of which were then taken over by the Hungarian Central (National) Bank. The Bank's website with English pages is at <http://mnb.hu/en>.

64 It was the bulk assignment of all debts based on unpaid parking fees in Budapest that made the populace realize the presence of international private debt collectors some-

one's own life; rather from the analyses of legal scholars. Legal scholarship tends to lag behind developments. Moreover, notwithstanding the clear advancements on the front of consumer law, such novel developments subsumed under consumer protection law as 'aggressive debt collection' are still something new and not understood. Even the authorities expected to protect consumers against these may not fully understand what is at stake. It would be also mistaken to claim that consumer protection laws in Europe – on the level of both, EU and the Member States – are easy to apply to such new challenges as are the various risks corollary to extra-judicial enforcement and debt collection.

Additionally, although the number of consumer rights-related cases reaching high courts is increasing, years are needed until cases on such new developments as 'aggressive debt collection practices' reaches high courts and get publicized; especially in the newer Member States of the EU. Yet this hardly could be ascribed to the perfections of the consumer protection laws: the issue is rather that consumer laws that were drafted having conventional infringements of consumer rights at sight are hard to bend to apply unequivocally to new challenges in the form of unorthodoxies appearing related to extra-judicial enforcement. Sector-specific regulations would help speed up this process leading to better protection of consumers. In other words, it is highly questionable whether generalist consumer protection laws, or other regulations focused on industries significantly different from enforcement and debt collection could live up to the challenges posed by these *sui generis* sectors.

Consequently, in countries without a sector-specific regulation – as is Croatia, Hungary or Serbia today, thus, years are needed until supreme or constitutional court passes its verdict on the problematic practices of private bailiffs and especially private collectors. For unearthing what is in fact ongoing "in the trenches" of the "frontlines", one should therefore resort to unorthodox sources of law. Concretely, as far as the practices of

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where in 2004. The reason that triggered the bulk transfer of tens of thousands of claims was the amendment of the laws whereby the prescription time (statute of limitations) was radically shortened for such types of claims. As the companies collecting the parking fees in the capital had been idle in taking actions before the change, they were forced to do something about the claims virtually overnight: the only solution was to resort to private debt collectors, who immediately began the collection process by sending out letters and taking other actions routinely used in Western Europe.

This has awakened the country though it was only the Ombudsman for Fundamental Rights (officially named as 'the Commissioner for Fundamental Rights') who expressed his concerns regarding the citizens' right to due process. See the Ombudsman's Report in the case OBH 5140/2008 ("Az állampolgári jogok országgyűlési biztosának jelentése az OBH 140/2008. számú ügyben") available at <http://www.ajbh.hu/> (20 Nov. 2019).

private debt collectors in Hungary are concerned, our second case study will be based on the documents of the case I was, the author of this paper, involved in.

Given that this entails resort to unorthodox sources of law, to wit anecdotal evidence and the decisions and official communications involving the author are resorted to, in order to ensure that an objective picture is presented about the practices of debt collectors and the authorities handling related complaints, firstly, the process and the documents having surfaced are going to be described in more detail, quoting the key passages. Then, especially those conspicuous problematic practices will be highlighted that are prohibited, or at least restricted by subjection to certain rules of behavior in such developed systems that possess sector-specific regulations specifically listing prohibited collection practices.

It ought to be added here, especially to those readers who feel uncomfortable with the ensuing elaboration involving the author, that the problematic practices of debt collectors exactly as applied in Hungary, have brilliantly evidenced by a theater play ‘Case in Progress’ (“*Folyóügy*”),<sup>65</sup> a non-fiction absurd drama by the young cultural editor Braun Barna. The play has been running for year now and it essentially replicates the years-lasting harassment of the author by debt collectors, properly evidencing the Kafkaesque-nature of the practices of debt collectors.<sup>66</sup>

### 3.3.2. The Three Phases of Debt Collection and the Concomitant Open Issues

To put order in our train of thought, we will proceed hereinafter along the lines of the three subsequent phases that debt collection normally may entail. The conditional phraseology is needed here as most cases end with consumer-debtors voluntarily paying their debts upon receipt of the first, or the many-times reiterated, warning letters, telephone calls and other means of communication. The encounter with debt collectors in my concrete case denoted the following three stages: first, the initial contacting of the debtor by the collector and the subsequent exchanges by various means of communication, the second, where the consumer protection authority was already involved and the third, where court proceedings have been initiated by me as the debtor against the decisions of the consumer protection authority. In my case, the private debt collector has failed to

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65 The website of the author and the play is at <https://braunbarna.hu/folyougy/> (20 Nov. 2019).

66 See also one of the media-commentaries on the play at <https://24.hu/fn/penzugy/2015/08/12/vegye-tudomasul-ameddig-nem-jelentkezik-ugyfelszolgalatunkon-naponta-hivni-fogjuk/> (20 Nov. 2019).

start any court proceedings, and has not filed a request for issuance of a pay-order by public notaries either; or at least, no such documents have been delivered to me. This fact alone already should suggest that the two debt collector companies must have been fully aware of the baselessness of their claims. No clear differentiation can be made among these phases. What is important is that in my case the debt collectors have not stopped their activities reaching the next phase. In fact, after about eleven years, I received my last warning letter a day before the submission of the manuscript to the editors (18 Nov. 2019), which made me ponder what such long-lasting, repeated harassment infringes any of my constitutional or human rights?

In the first phase, the first step in the process was the receipt of a *non-registered* mail dispatched by the local subsidiary of one of the Europe-based international debt collection firms (the first debt collector) in February 2009. The single A4 format sheet of paper, with no writing on the reverse side, was made of a yellow postal check for payment of the “debt,” detachable from the other half of the page with a small-font text stating the name of the alleged creditor, the sum of the principal amount of the debt as well as the interest and the so-called ‘administrative costs’ – *none* backed up by any document or information on how the debt collector calculated the claimed sums. In bold letters, they also threatened with unspecified “sanctions.” I replied by a registered mail denying the claim, requesting proof of the origination of the debt, information on the methods of calculation applied and requesting them to stop harassing me with the letters. I received no answer, though the mails stopped for a while.

After a few months, the subsidiary of *another* Europe-based collection multinational (the second debt collector) began mailing me similar letters. This firm threatened launching summary proceedings and taking other unspecified measures against me.<sup>67</sup> It was conspicuous that the amount to be paid had increased by then. Furthermore, the debt increased with each and every new warning letter dispatched to me afterwards. As my last such letter was mailed to me somewhere in 2019, harassment in the form of letters lasted for more than ten years. To avoid misunderstandings, it is important that the letters stated nothing more about the basis of the alleged debt but that “*a contract was transferred onto [our firm] by the UPC [Hungary] Ltd*”<sup>68</sup> without any further specifications or enclosures. I again denied the claim, asked for clarifications and requested to cease

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67 See the next footnote with the entire text.

68 The text in English translation reads: “*Given that notwithstanding of our requests you have failed to pay the contract transferred upon [us] by the UPC Hungary Ltd, we shall start summary – payment order – proceedings against you before the public notary handling your case. The public notary may proclaim the payment order to be final on the*

the harassment by *registered* mail. As there had not been any replies by any means from the collecting company and as it continued to regularly mail me the standard form requests for paying with the perforated postal payment check, I decided to turn to the consumer protection agency having jurisdiction in financial matters, the Financial Supervisory Authority (FSA),<sup>69</sup> given that the agency was registered with it. This denoted the beginning of *the second phase*.

Similar to other systems, to forestall flooding of courts with consumer claims, Hungarian laws also provide for the possibility of getting advice from consumer protection authorities<sup>70</sup> and direct the claimants to them. The court phase normally might ensue only after exhausting the administrative level which ends with the decision of the consumer protection authority having jurisdiction to hear the case.

Following these rules, I first turned for advice from the FSA requesting also investigations by them. They stated in their reply that they cannot investigate the claim because the laws in force allow for an assignment of claims. More concretely and strangely, they were referring to data protection rather than financial or other types rules for these purposes; data protection laws, in other words, did not present obstacles to such transfers of claims. Giving a flickering sigh of hope, however, the FSA also added that I may turn to the debt collector firm and ask them to specify the legal bases of the claim – and if the firm fails to do clarify this, the FSA might be turned to again and requested to initiate an investigation in the case.<sup>71</sup>

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*30<sup>th</sup> day upon the receipt of our request, based on what we may initiate [court] enforcement proceedings against you.*"

69 The function of the Authority was taken over by the Hungarian Central (National) Bank in 2013.

70 In Hungary, two consumer protection agencies existed in those days: the Financial Supervisory Authority (Pszaf) in charge in financial matters, and the National Consumer Protection Agency having broader general competencies.

71 To avoid misunderstandings, the key sentences from the respective decision will be cited (in Hungarian with translation to English) to allow the reader to double-check. For data protection reasons, the names of the parties involved – except the governmental agencies and courts handling the case – were omitted.

The English translation of the sentences referred to in the document of Pszaf No. 158118–2/2010 of 16 Dec. 2010 reads: "Given that [according to section 51 (1) of the Act on Credit Institutions and Financial Enterprises from 1996] creditors can sell their outstanding claims by at the same time transferring also the data of the debtors, the Supervision cannot investigate the assignment of debts. At the same time, however, you may ask in writing from the [debt collecting firm] which had [purchased the claim from the creditor] to specify in itemized manner the legal bases for the claim. If the collecting firm will fail to satisfy such request of yours, you may approach this Supervisory Authority with a writing signed personally by you to start a consumer protection proceeding."

The request to the collector – as instructed by the FSA – was dispatched via registered mail (16 Dec. 2010) by me, to which no answer has been received to date. Following this – again based on the instructions of the very same authority (FSA or Pszaf) – I filed a request for starting a consumer protection case on 5 February 2011.

Surprisingly, the FSA – without any hearing or requesting any document – made a decision in April 2011, whereby it terminated the proceeding.<sup>72</sup> The puzzling main argument of the decision was that it did not have competence to hear the case because the claim was related to “*the contractual behavior*” of the financial organization which is not something that could be investigated and decided upon in an administrative consumer protection proceeding.<sup>73</sup> Leaving aside that no contractual relationship could have arisen between me as consumer and the debt collection company – as I had not signed any contract or other document could have qualified as such ever with the collector, the more puzzling issue related to something else. Namely, such a broad interpretation of what qualifies as a ‘contractual matter’ as was implied by the authority would result in leaving out quite a number of problematic tactics and practices of debt collectors from under the coverage of the applicable consumer protection laws as essentially almost all of them could be labeled as ‘*contractual behavior*.’ This was a major problem because in the lack of sector-specific laws consumer could be protected against the problematic practices of private debt collectors though the prohibition of ‘unfair trade practices’ (“*tisztességtelen kereskedelmi gyakorlat*”) as defined and abundantly exemplified by the applicable Hungarian consumer protection *lex specialis*,<sup>74</sup> – with the enforcement of which the Hungarian FSA was entrusted with in the domain of services of financial organizations. Otherwise, the mentioned decision

72 See case No. FK-I-5041/2011 (filing No; Ikt./Ref.: 27263/2/2011) of 29 April 2011 – on file with the author.

73 The English translation of the somewhat convoluted and – even in Hungarian – hard to grasp sentences reads: “*Based on the information collected during the analysis of the request it could be determined that the proceeding started following the request of the Claimant does not relate to detection and determination of practices that infringe section 64 [of the Act No. CLVIII of year 2010 on the Financial Supervisory Authority – FSA Act], but it rather asks for the scrutiny of a financial organization and the collection of previously onto the company assigned debts. In other words, that relates to the contractual behavior of a financial organization provided connected to activities defined in [FSA Act]’s section 4, what is not in the jurisdiction of this authority and deciding on that in administrative proceedings, as part of a consumer protection proceeding is not possible.*” [Emphasis added.]

74 See 2008. évi XLVII. törvény a fogyasztókkal szembeni tisztességtelen kereskedelmi gyakorlat tilalmáról (Act No. XLVII of year 2008 on the Prohibition of Unfair Trading Practices Committed against Consumers).

of the FSA itself referred to the FSA's obligation to ensure the application of the mentioned consumer protection statute.

*The third phase* involving the courts came about because the decision of the FSA could only be attacked by way of an extraordinary court review, which was already subject advanced payment of court fees.<sup>75</sup> The request for review was filed by me on 6<sup>th</sup> of June 2011 for the annulment of the decision of the FSA, ordering the Authority to conduct investigations on the practices of the debt collector, and depending on the outcome of the investigations, to prohibit the complained of activities of the debt collector and/or to fine them. Undoubtedly to discourage me to further pursue the case, the FSA outsourced the case to an attorney who, for writing of a lengthy reply to the request, wanted to collect a substantial amount of fees – of which only a portion was awarded eventually by the court. Both financial burdens, one should not leave this momentum out of sight, emerged in a case not involving a consumer, but aimed at protecting consumers.

The High Court of the Capital Budapest rejected all of my claims<sup>76</sup> and closed the case on three main arguments, each properly displaying that the judges did not understand what was at stake either. *First*, the court sided with the opinion of the FSA that the case was a contractual matter that belonged to the jurisdiction of courts;<sup>77</sup> *second*, it determined that there is no such provision (legal norm) that the practices of the debt collectors could have infringed,<sup>78</sup> and *third*, it departed from such interpretation of the law that the debt collectors do not qualify as financial organizations (“*hitelintézet*”).<sup>79</sup>

Brief comments ought to be made here both, for the sake of the concrete case itself, and also to point to some wider reaching systemic issues. *Pro primo*, the fact that a contract was concluded between a seller, service

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75 The fee payable was 7,500 Hungarian Forints (roughly 25 Euros).

76 See High Court of Budapest (“*Fővárosi Törvényszék*”) decision No. 4.Kpk.34.703/2011/9 of 21 March 2012 on file with the author.

77 The English translation of the related sentences reads: “*The purpose of the consumer protection proceeding is not to make the consumer protection agency act instead of the client. The [Act No. CXLVIII. Of year 2010 on the Financial Supervisory Authority] specifically excludes the possibility of making investigations and formulating claims concerning breach of contracts and its effects; therefore, also whether the services provider has breached any rule/law when taking the steps towards the Claimant in the case.*”

78 The English translation of the sentences reads “*Based on the content of the presentations of the Claimant there is no such legal norm in the domain the infringement of which the procedural data would confirm.*”

79 The English translation of the sentence reads: “*The complained of organizations [...] are not financial organizations.*”

provider and a consumer does not *per se* exclude conducting of consumer protection proceedings by the competent agencies. To the contrary, a Hungarian high court decision explicitly confirms that such proceedings can be conducted notwithstanding that the consumer has the right to litigate the case.<sup>80</sup> Further, nothing in my complaints to the FSA or in the request for court review asked for dealing with the issue of whether there was a breach on my part. In fact, all the documents filed by me were *strictly limited* to the complaint that the debt collectors have failed to specify the legal bases of their alleged claims.

Perhaps it is the *second* point in the court's reasoning that could be the least contested: no sector-specific regulation – and, thus, no such legal norms – existed in Hungary back then. In fact, as we shall see below, no hard law with such contents exists even in 2019. The only source of law that could be taken as such is the below-commented guidelines, soft law instrument of the FSA. Though, to provide the reader with a full picture, norms that generally prohibit harassment or that entrust the judicial system with enforcement of rights and claims based on the Civil Code<sup>81</sup> have always been part of the system.

Another gloss ought to be added: both debt collectors having tried to make me pay were duly registered with the FSA, which, therefore, was also in charge of overseeing their activities. The dubious interpretation of the FSA proclaiming that it has no statutory duty to oversee debt collector companies' activities registered with none else but itself in the lack of such explicit regulatory language that would specifically request the FSA to monitor, regulate and sanction activities that qualify as debt collection, could be taken not only as manifestation of extreme positivism but rather a clear abuse of the statutory mandate of regulatory agencies. Needless to say, the High Court was warned of the fact that the debt collector was given license for its activities exactly by the very same FSA and based on this some – even if a limited – oversight of what these entities do, should have been implied by the court. The court, however, did not find any duty on the side of the FSA that would have justified even investigations into the complained activities.

80 See the decision EBH 2006.1477. The English translation of the relevant sentence of this decision reads: “*The duty of the consumer protection agency to conduct consumer protection proceedings exists also if in the case additionally a civil law claim could be enforced as well.*”

81 For example, the new 2013 Civil Code (*A Polgári Törvénykönyvről szóló 2013. évi V. törvény*) posits as one of the main general principles that: ‘§1:7. [Guarantying Court Enforcement] The enforcement of rights provided by this Act is through courts, unless otherwise provided.’ As stated above, there is no separate act that would state that otherwise unless the factoring-related provisions in the banking regulations could be taken to amount to that. However, such interpretation is dubious, at least.



As no further appeal or extraordinary review was possible under Hungarian law against such decision, no action was undertaken by me in Hungary. Consequently, for a number of years I continued to receive either red or green colored warnings about the alleged but still unproven debt, with bi-monthly mails with attached postal checks – demanding payment of constantly increasing sums of money, as well as threats of launching summary proceedings.<sup>82</sup> After about 2015 the number of letters decreased. Yet irrespective of my hope that this specific form of harassment is past, I did receive one even in 2019; when the prescription time for the underlying debt has long ran out.

The decisions properly illustrate, at least, that in the lack of explicitly formulated sector-specific rules, the authorities and courts will hardly be in the position and willing to afford a broader interpretation to provisions in consumer protection laws when facing new phenomena. Teleological interpretation, in other words, does not seem to work in this domain. Instead of aiming to protect consumers – without stepping outside the confines of law and legality – the bodies entrusted with consumer protection seem to be rather inclined to employ the otherwise convoluted and highly technical, fragmented consumer protection, financial and other non-sector-specific regulations to decrease their case load.<sup>83</sup> Empirical data from Hungary, at least, seem unfortunately to suggest exactly this.

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82 Hungary has introduced recently such summary pay-order proceedings – resembling the German “*Mahnbescheid*” proceedings – with the aim to speed up the collection of monetary claims; only a simplified form is to be filed and the debtor fails to object the case directly proceeds to the enforcement phase. This is a development embraced by many of the neighboring countries. As described above in section 3.1. this system is operated by public notaries.

83 In another unpublished case (documents on file with the author) decided upon by the non-financial consumer protection agency, the local and national offices of the national Consumer Protection Agency (“*Nemzeti Fogyasztóvédelmi Hatóság*”), the case went back and forth from the first instance local office and was more times remanded by the second instance consumer protection agency. The first instance’s argument in the first decision rejecting the request to start consumer protection proceedings was that no consumer protection (i.e., administrative) proceedings could be launched if a civil claim (i.e., litigation) could be filed. Yet such a position was clearly in contravention of the famous EBH 2006.1477 high court decision – i.e., a decision that is widely known and reproduced by all Hungarian databases containing law in force – that explicitly allows for parallel proceedings.

In the second decision of the very same first instance consumer protection office, the next spurious reasoning was that no consumer protection proceedings could be launched if bankruptcy proceedings were started against the seller or services provider the acts of which were problematic – the decision was also overturned by the appellate level as nothing in the law excludes conduct of consumer protection proceedings while bankruptcy of the service-provider is in progress. See case number KMF-06274–2/2010 of 25 May 2010.

### 3.3.3. The Strange Twist of Fate: the Financial Supervisory Authority's Decision of 30 October 2012

Unexpectedly, following modest media coverage, the FSA's decision<sup>84</sup> of fining the same international private collection company for the same activities against which I had launched my consumer complaint (as described above) became publicly available on the website of the agency on the 5<sup>th</sup> of November 2012. The company was fined for two problematic collection-related activities: on the one hand, for contacting alleged consumer-debtors with short text messages ("*rövid szöveges üzenetek útján*"), and on the other hand, for contacting them by postcards ("*nyílt postai levelezőlapok útján*"). Interestingly – and contrary to what the very same FSA has claimed in its decision in my case – both have been condemned as '*unfair commercial practices*' ("*tisztességtelen kereskedelmi gyakorlat*"). For the second type of activity, which was also employed in my case, the FSA imposed a relatively high fine of five million Hungarian Forints<sup>85</sup> and prohibited its continuation. The decision specifically stated that the investigations were started *ex officio*. It may be legitimately speculated that the agency was by that time already well informed about the magnitude of the problem. For example, as it stated in its decision of 5 November 2012, the debt collecting company has delivered altogether 163,638 warning postcards and 168,661 cell-phone SMS messages.

Generally speaking, the decision should obviously be welcomed given that the agency entrusted with protection of consumer against abuses in the world of finances eventually took notice of the problematic practices of these powerful new market participants. In fact, the agency has fined, in another case, the very same company again<sup>86</sup> and shortly, thereafter,

84 See the longer version of the Decision of the Hungarian FSP No. H-FH-I-B-1049/2012 on the Conclusion of Targeted Consumer Protection Investigation at the EOS Faktor Magyarország [Hungary]. The text of the longer version of the decision was available in Hungarian at the webpage of the FSA for some time at [http://www.pszaf.hu/bal\\_menu/hatarozatok/hitelintezeti\\_hatarozatok/H-FH-I-B-1049-2012.html](http://www.pszaf.hu/bal_menu/hatarozatok/hitelintezeti_hatarozatok/H-FH-I-B-1049-2012.html). It is unknown and was not communicated at the FSA's website, or by the Hungarian Central (National) Bank after it took over the roles of the FSA in 2013, where the text was moved.

On the 17 Dec. 2012 the longer version of the decision was not available anymore at the referred webpage. Only a two pages long excerpt could be found on the FSA's webpage at [http://www.pszaf.hu/data/24620558/keksz\\_7155202.pdf](http://www.pszaf.hu/data/24620558/keksz_7155202.pdf). This shorter version of the decision bears the date of 30 October 2012 though it appeared on the website on or around the 5<sup>th</sup> of November 2012. None of the decisions could have been tracked down on 17 Nov. 2019.

85 This amount was roughly 17,730 Euros (exchange rate: 1 Euro = 282 HUF).

86 See decision FK-I/B-8243/2011 of 12 Aug. 2011 fining EOS with 250,000 HUF for violating the rules on recording and storing in electronic form of complaints made via

has even issued a soft law instrument, a Guideline on the expected behavior collectors are supposed to adhere to when collecting debts.<sup>87</sup> In the light of the lengthy, cost and time-consuming proceedings that the FSA, as a consumer protection agency, forced the author of this paper to go through quite unnecessarily, however, one cannot but frown at the disparaging and arrogant behavior of the authority. Especially since simple correspondence informing me that investigations are already in process<sup>88</sup> would have prevented me from going through the entire process; in particular, the court phase. Admittedly, the relatively large fines imposed by the authority on the very same debt collector company in and of itself are indicators that the claims raised by were not only meritless but that sector-specific regulations would have been of great help, both to the authority and the courts.

A not less problematic point is that essentially the same (or similar) arguments and bases are used by the very same FSA in one case *to reject* the consumer's request for conduct of investigations against a specific debt collector<sup>89</sup> and yet, in another decision, made roughly in the same period of time, *to fine* the very same organization licensed by the agency.<sup>90</sup>

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telephone, decision FK-I/B7932/2011 of 22 Sept. 2011 fining EOS with 200,000 HUF for infringing the complaint-handling regulations; and decision H-FK-I-B-1089/2012 of 16 Apr. 2012 fining EOS with 100,000 HUF for failing to reply to complaints submitted in writing. The last two, as indicated by the agency, were imposed as a result of investigations initiated by consumers (though no concrete names are indicated).

87 The full title of the document in English is 'Recommendation of the FSA's President No. 14/2012 (of 13<sup>th</sup> of Dec) for Debt Collectors on the Consumer Protection Principles they are Expected to Apply when Engaging in Debt Collection' (Hungarian title: "A Pénzügyi Szervezetek Állami Felügyelete elnökének 14/2012. (XII.13.) számú ajánlása a követeléskezelők számára a követeléskezelési gyakorlatuk során elvárt fogyasztóvédelmi elvekről"). Text available in Hungarian at [http://www.pszaf.hu/data/cms2378841/ajanlas\\_14\\_2012.pdf](http://www.pszaf.hu/data/cms2378841/ajanlas_14_2012.pdf). Not downloadable anymore from this site on 20 Nov. 2019.

88 As per the FSA Decision H-FH-I-B-1049/2012 the investigations began *ex officio* on 4 January 2011 and have lasted until conclusion with the issuance of the decision.

89 The decision in the author's case (of 29 April 2011) only *referred to* the prohibition of 'unfair commercial practices' and did not find any of the debt collector's activities amounting to such infringement.

90 In count IV of the decision of 5 November 2012 it proclaimed that by contacting debtors by way of postcards merely saying "*It is in your interest to call us back*" coupled with a phone number qualified as being unfair, since, according to the FSA, these activities are aggressive. The relevant part of the decision in Hungarian reads: "*Saját érdekében azonnali visszahívását várjuk: 06/1-887-9000 INGYENES 06/1-887-9000.*" This as per (8. §) of the Act No. XLVII of year 2008 on the Prohibition of Unfair Commercial Practices against Consumers ("*A fogyasztókkal szembeni tisztességtelen kereskedelmi gyakorlat tilalmáról szóló 2008. évi XLVII. törvény*") is an aggressive commercial practice that per se qualifies as unfair.

In brief, if juxtaposing all the referred to key points from FSA's reasoning and its other debt collection-related proclamations, it should be easily seen how contradicting and unpredictable the authority had been. It is questionable also whether the authority was prepared to deal with new challenges, in particular, whether it had proper processes in place for early detection of problems and whether it possessed tools, if not for protecting, than at least for proper treatment of whistleblowers; a trend increasingly employed in Europe as well in the context of various regulatory fields.

What matters here is that these Hungarian case studies most presumably are hardly only of relevance to Hungary and it is most unfortunate that no similar empirically based researches seem to be available from other countries. For instance, to compare whether the corporations engaged in debt collection and being present on more markets of the EU employ the same collection practices as their subsidiaries do in Hungary or other countries lacking sector-specific regulation? Empirically supported answer to this question may readily justify the rational of such tailor-made laws.

#### 3.3.4. The Aftermath of the Case: the Next Steps

From 1<sup>st</sup> of October 2013, the FSA ceased to exist, and its functions were taken over by the Hungarian Central (National) Bank. As per the related amendments, however, the recommendations and guidelines that had been made by the FSA by that point in time were not affected by the change.<sup>91</sup> Hence, the FSA's Recommendation No. 14/2012 remains in force.

Moreover, it was even referred to it by the Supreme Court of Hungary – named as 'Curia' – in a 2017 case,<sup>92</sup> which involved the improper handling of personal data of consumer-debtors by a financial organization and a debt collecting company, culminating in an appeal against the Hungarian Data Protection Authority's fine imposed on them for that. The case is interesting not only because as per the Curia's decision the fine was imposed legitimately by the Data Protection Authority (as decided by the first instance court as well) but also for two further reasons. The first was that the first instance court (as determined by the Curia) departed from the definition of private debt collection ("*követeléskezelés*" – metaphrased as 'handling of debts' or 'handling of claims'), which is defined in the Recommendation of the FSA as follows: "*commercial activity aimed at collection of one's own or third person's mature debts originating from financial*

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91 See section 176(8) of Law No. CXXXIX of year 2013 on the Hungarian National Bank ("2013. évi CXXXIX. Törvény a Magyar Nemzeti Bankról"),

92 See the decision of the Curia No. Kfv.37370/2017/7 (available in Hungarian language).

services.”<sup>93</sup> It also added that legal proceedings, regulated by statutes, do not fall under this category. In other words, extra-judicial enforcements by private bailiffs are not caught.

*Secondly*, the Curia judgment describes the debt collection practices of the plaintiffs in some detail, too. Two phases were differentiated. In the first, so-called ‘late soft collection phase’ (“*késői puha behajtási szakasz*”), first a letter is sent to debtors to which a document named as ‘declaration’ is enclosed. The debtor is asked to sign this document to admit the existence of the debt, provide contact information, and mail it back. This is followed by attempts to reach the debtors through telephone, and by further warning letters. The next phase, (irrespective whether the debtor has replied or not), called as the ‘collection phase’ (“*behajtási eljárás*”), includes all kinds of steps taken aimed at making the debtor pay the debt, partially or fully, from giving extra time to the debtor to pay, visits of the debtor, or agreement for partial payment. This phase lasts until initiation of court proceedings by debt collectors.

In other words, essentially the same steps and method which were applied in my own case and more importantly about five years were needed for the FSA to react by a soft law instrument, and another half-decade for the Hungarian Supreme Court to speak of debt collectors and their practices, admittedly only obiter, as legitimate participants of the market and their practices some of which looked problematic. The one-million-dollar question is how many more years are needed and how many more consumers are to be harmed to realize that sector-specific regulations are needed to tame these profit-oriented firms?

### 3.3.5. The Hungarian Empirical Debt Collector Case: the Unnoted Concerns versus the Fair Debt Collection Practices Act of the United States and the Australian Debt Collection Guide

To further corroborate that the above voices vouching for sector-specific regulations are meritorious, we could offer as a further proof the responses of two developed Anglo-Saxon systems as well. If we juxtapose the above-identified problematic practices in Hungary, with the ones these target, the deficiencies of the Hungarian and, thus, other jurisdictions without any or with only fragmented regulations could become more readily visible. Two models for comparison are offered: the federal *Fair*

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93 The quotation in the original Curia decision in Hungarian reads as follows: “üzletszerűen nyújtott, saját vagy harmadik személyt megillető, pénzügyi szolgáltatásból származó, késedelmes, lejárt követelés érvényesítése érdekében végzett tevékenység.”

*Debt Collection Practices Act* (FDCPA)<sup>94</sup> of the United States as supplemented by the so-called mini-FDCPAs passed by a number of States<sup>95</sup> and the Australian<sup>96</sup> ‘*Debt Collection Guideline*’<sup>97</sup> (hereinafter: ‘Guideline’). The first representing the hard law-, and the other the soft-law-based approaches; benchmarks for our purposes here. Tackling even only some of the most striking issues may be sufficiently revealing of the gravity of the problem in Hungary and much of Europe likewise lacking sector-specific regulation. The latest developments introduced by the US Dodd-Frank Act<sup>98</sup> just further corroborate the claim that continental Europe is seriously lagging behind.

*First, as the methods, frequency, and timing of communications* was a major issue in the Hungarian debt collection case, we should note that detailed rules govern communication with debtor in both of our benchmark systems. Under US law, the consumer may cause the collector cease all future communications by a simple written notification.<sup>99</sup> Moreover, communication by post card is simply prohibited.<sup>100</sup> Similarly, the Australian Guidelines provide that “*communications with the debtor must always be for a reasonable purpose, and should only occur to the extent necessary;*”<sup>101</sup> including that unduly frequent contacting of the debtor may amount to har-

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

95 At the time of concluding this paper, 15 States have their versions of FDCPAs. These mimic the federal act but provide also for additional protections, for example, through licensing.

96 With respect to Australia, it must be added that debt collection is not governed solely by soft law such as guidelines. Detailed legislation is, in other words, in place. The following acts should be especially mentioned: 1/ the Trade Practices Act 1974 (renamed to the Competition and Consumer Act 2010 on 1 January 2011), and 2/ the National Consumer Credit Protection Act 2009 (Cth) (NCCP) which includes the National Credit Code (NCC) as Schedule 1 to the Act, and 3/ the Debt Collectors Licensing Act 1964 (WA).

97 The Guideline compiled by the Australian Competition & Consumer Commission and the Australian Securities and Investments Commission is especially suitable because it aims at providing a balanced set of recommendations – serving the interests of both – industry and consumers. The document was published in 2017 and is accessible at [https://www.acc.gov.au/system/files/776\\_Debt%20collection%20guideline\\_July%202017\\_FA.PDF](https://www.acc.gov.au/system/files/776_Debt%20collection%20guideline_July%202017_FA.PDF) (20 Nov. 2019).

98 Of particular reference is that the Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, H.R. 4173; *commonly referred to as Dodd-Frank*), Title X, established the Bureau of Consumer Financial Protection the activities of which extend also to debt collection. See website of the Bureau at <http://www.consumerfinance.gov>.

99 FDCPA § 805 (c).

100 FDCPA § 808(7).

101 Guidelines at 8.

assment.<sup>102</sup> Given that the collector has been sending me colored post card warnings plus mails with postal payment check since February 2009 and continued to do that even after the fine imposed on them by the regulator, the harassment has been ongoing altogether for almost ten years now and it seems that there is nothing offered by the system that would stop them.

Needless to say, this raises the issue of *penalties imposable on collectors* and remedies given to consumers. In this respect, the Hungarian (or the German) system primarily relies on administrative fines and the prospect of (hardly easily) revocable license to operate as a financial organization, which is a weak legal tool compared to the additional layers of shields offered by US law; including private cause of action available by some mini-FDCPA's with the threat of even punitive damages.<sup>103</sup> Of crucial importance is also that in Hungary (or the region's countries), partly due to the novel nature of private debt collection, it has not been yet recognized that "*criminal laws are inadequate to deal with certain unlawful and fraudulent activities specifically involving the collection of commercial claims*"<sup>104</sup> – something long known in our common law benchmark jurisdictions.

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102 The present form of the Guidance gives two concrete examples based on which one could understand the logic of the need to limit the number of contacts. The first example is section 31(2) of a *lex specialis* – the Property and Motor Dealers (Commercial Agency Practice Code of Conduct) Regulation 2001 (Qld) that prohibits unrequested communication with the debtor more than twice a week. Guidelines, footnote 13, at 13.

On the other hand, in the Australian case *ACCC v Esanda Finance Corporation Ltd [2003] PCA 1225*, it was the court which ordered the debt collector to restrict its agents to a maximum five personal visits during the collection period unless the visit was specifically asked for by the debtor or a repayment agreement had been made but was subsequently breached (in which case another five visits were allowed by the court). Guidelines at 14.

It was reported in the 2005 version of the Guidance that the Australian High Court has defined harassment in the case of *ACCC v The Maritime Union of Australia [2001] FCA 1549* as follows: "*The word harassment means in the present context persistent disturbance or torment. In the case of a person employed to recover money owing to others ... it can extend to cases where there are frequent unwelcome approaches requesting payment of a debt. However, such unwelcome approaches would not constitute undue harassment, at least where the demands made are legitimate and reasonably made. On the other hand where the frequency, nature or content of such communications is such that they are calculated to intimidate or demoralise, tire out or exhaust a debtor, rather than merely convey the demand for recovery, the conduct will constitute undue harassment. ... Generally it can be said that a person will be harassed by another when the former is troubled repeatedly by the latter. The reasonableness of the conduct will be relevant to whether what is harassment constitutes undue harassment.*" [Emphasis added].

103 See, e.g., [federal] FDCPA §813 or section 559.77 of the Florida FDCPA, Florida statutes, Title XXXIII, Chapter 559, Part VI.

104 Quoted from section 559.542 of the Florida FDCPA on legislative intent.

In my concrete case, the fact that I have more times in writing clearly *disputed the claim* with the debt collector, was not of relevance to the FSA acting as the consumer protection authority, irrespective that that was completely ignored by both of the private collector companies. More precisely, the agencies have failed to specify what the legal basis of their claim was and based on what proofs. This is alarming because Hungarian civil procedure foresees that no litigation could be initiated without specifying and evidencing the basis of the claim as a general principle.<sup>105</sup> Or, in other words, had they wanted to be, or at least show, that they know and obey the law, they would have specified that. What Australian laws require and what the Guidelines recommend in that respect consequently seem to be utopian in Hungary. For the latter situation, the Guideline recommends not just the stoppage of collection activities “*until the debtor’s identity and ongoing liability have been confirmed*” but cessation of the collection activities if “*the creditor and/or collector are not able to establish the debtor’s ongoing liability for the debt when challenged.*”<sup>106</sup> The FDCPA’s lengthy provision on *validation of debts* is similar to the Australian ones.<sup>107</sup>

The issue of *the fees charged* by private debt collectors is another cause for concern. In the Hungarian case, as the aggregate sum demanded (without specifying the sum of the principal, interest and costs) has increased with each and every new mail delivered, it must be concluded that the collectors have charged something for interest and fees.<sup>108</sup> Again, the Australian Guideline is quite specific on this and imposes quite a burden on collectors<sup>109</sup> similarly to the FDCPA according to which collecting of any amount – no matter whether interest, fee, charge or expense incidental to the principal obligation – qualifies as unfair practice “*unless such amount is expressly authorized by the agreement creating the debt or permitted by*

105 See section 121 (1)(c) and 121 (2) of the Hungarian Civil Procedure Act (“1952. évi III. törvény a polgári perrendtartásról”).

106 ACCC Guidance at 27, para 13(a) and (f) respectively.

107 See FDCPA § 809 on validation of debts.

108 To be precise, the first debt collector company has itemized the debt to principal, interest and “administrative costs”. The second one has failed to do that: it only indicated the total sum to be collected. No system could have been discovered in the calculations of the second collector.

109 See in particular para 11(b) – foreseeing that debt collector “can only charge for provision of documents if the contract that gave rise to the debt specifically allows for it charging”; para 19(f) (fifth line) stating that the debt collector should not state or imply that “additional fees or charges will be added to the debt if payment is not made, if such fees or charges are not permitted by law.” Or, in other words, fees and charges must be based either on contract of specific laws permitting that.



law.”<sup>110</sup> Yet this is not necessarily only beneficial for consumers because the rules based on which fees and charges could be collected make these entitlements of collectors legitimate.<sup>111</sup> At the moment, it is not clear and thus, highly dubious, on what basis do these Hungarian private collection businesses charge fees (be they called ‘fees’ or ‘administrative costs’). Namely, while there are proper statutory bases for the tariffs of attorneys, public notaries or individual bailiffs, no such thing has been passed by any regulator in Hungary. Hence, one must conclude that the figures are completely arbitrary. This notwithstanding that the right to impose charges is not unheard of in Europe, though the approaches differ.<sup>112</sup>

Last but not least, the focus of the Dodd-Frank Act on protection, proper treatment and providing incentives to whistleblowers, as well as the sophisticated complaint and claim-handling procedures, topped by the enforcement powers of the BCFP amply illustrate how important these are. None of these existed in the Hungarian system notwithstanding that formally complaints could have been filed. For example, instead of imposing the obligation on the authority to investigate the complaint and the duty to forward the complaint to the debt collector, the Hungarian system forced consumer-debtors go through a conventional administrative process ending with judicial review. Their lack, in fact, makes consumer-debtors no more than puppets of a whimsical system. These become visible, however, only if juxtaposed to such a developed benchmark as the US system and if scrolling through the otherwise publicly unavailable documents of a concrete case – as we did with our two Hungarian short case studies above.

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110 See FDCPA § 808 (1).

111 The text deserves to be quoted: “If a debtor requests information about an amount claimed as owing, or how that amount has been calculated, the creditor should normally provide the debtor with an itemised statement of the account clearly specifying:

- the amount of the debt and how it is calculated
- details of all payments made and all amounts (including principal, interest, fees and charges) owing.” [Emphasis added]. See the Guidelines, para 11(e), at 24.

112 For an overview of the fee-charging laws and practices of some European countries see Euler Hermes Collections, *Debt Collection Guide* (constantly updated) available electronically at [http://www.eulerhermes.se/sv/documents/debt\\_collection\\_guide.pdf/debt\\_collection\\_guide.pdf](http://www.eulerhermes.se/sv/documents/debt_collection_guide.pdf/debt_collection_guide.pdf) (17 Dec. 2012). Not downloadable anymore on 20 Nov. 2019. According to this, the no fee countries are: France, Finland (usually not chargeable), in Germany foreign creditors cannot charge fees from German debtors, Great Britain and Poland. In a number of other countries, fees are chargeable but are subject to limitations: in Denmark they are limited to 100 Danish Kroner per letter, which in Norway is 59 Norwegian Kroner per letter. Sweden has a more complex system made of three legs: 1/ 50 Swedish Kroner can be charged as a reminder fee, 2/ 150 for as a payment plan fee, and 3/ 160 Kroner as a demand letter fee.

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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 (faktoring). Dok su status i rad privatnih (i sudskih) izvršitelja regulisani, privatne inkaso firme i njihov rad, bar u postsocijalističkim zemljama nisu regulisani. Odnosno

sno, 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 državine (*reposession*). 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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