

THE ROLE OF THE ENFORCEMENT OFFICERS AND PUBLIC AGENTS IN ENFORCEMENT PROCEDURES

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Abstract: *The article analyses the general rules on the role of bailiff in enforcement proceedings and summarizes the main procedural rules regarding the enforcement body activity. It also analyses the obligation of public force agents to assist the bailiff in enforcement activity, in order to comply with obligations under the enforcement order, respecting the rights of all persons involved.*

Keywords: *enforcement, bailiff, public force, agents, enforcement order*

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1. INTRODUCTION. THE PRINCIPLE OF CARRYING OUT ENFORCEMENT ACTIVITIES ONLY VIA ENFORCEMENT OFFICERS

The new CPC and Law no.188/2000 on bailiffs provide the rule that the bailiffs have complete competence in enforcement procedures. According to art.623 CPC, „enforcement of any enforceable title except those which concern the consolidated budget, European Union budget and the European Atomic Energy Community budget is made only by the bailiff, even if by special laws is provided otherwise”. Likewise are the provisions of art.1 of Law no.188/2000.

These regulations are an express consecration of the principle of carrying out enforcement activities only by the bailiff and lead to a repeal of all other contrary provisions that would be covered by special laws. Moreover, the CPC does not allow other exceptions than those expressly covered by it, to which we will refer further. Therefore, even after the entry into force of the new CPC special laws could not derogate from it, establishing special jurisdictions regarding enforcement procedures. Likewise are the provisions of art.7 letter a) of Law no.188/2000 on bailiffs which provide, among the powers of bailiffs, those of "enforcement of civil provisions of enforcement titles" and of art.625 para.2 of CPC, which provides, as a guarantee of the principle of legality of enforcement, prohibition of carrying out enforcement activities by persons or bodies other than those referred to in art.623 CPC.

The bailiff is therefore enforcement body with full jurisdiction in enforcement procedures and may bring out the obligations contained in enforceable titles regardless of their nature. The bailiff has, from this point of view, an intermediate status: although not an agent of the state, being, instead, a freelancer, he performs a function of a public nature, and therefore is an agent of the public force, because it achieves one of the main functions of the state regarding justice (Boroi, 2015).

CPC establishes two categories of exceptions to the rule stated above, relating to situations when the enforcement activities can be carried out by the creditor without the intervention of a bailiff, and enforcement by other enforcement bodies.

With reference to the first case, art.622 para.5 CPC provides that „the sale by the creditor of mortgaged movable property under art.2445 of the Civil Code is to be made after the approval of the court, without the intervention of a bailiff”. This special enforcement procedure is regulated by the Civil Code regarding mortgaged movable goods, the creditor acting as an enforcement body, after the approval of the enforcement court. It should be noted, however, that the creditor has only the possibility to sell the movable mortgaged goods without the intervention of a bailiff, but not the forced takeover of goods, which can be done only by the bailiff (art.2441 par.1 C.civ.). However, the forced takeover of mortgaged goods can be done by the bailiff without prior approval from the enforcement court, according to art.2443 Civil Code.

A second category of exceptions to the principle of carrying out enforcement activities only via bailiffs is the one concerning the enforcement of titles regarding debts to the consolidated budget, European Union budget and the European Atomic Energy Community budget. These debts are subject to the regulation of the Fiscal Procedure Code, and their enforcement is being accomplished through enforcement bodies referred to in art.136 of the Fiscal Procedure Code, namely or by fiscal enforcement officers (art.138 of the Fiscal Procedure Code).

2. THE PRINCIPLE OF THE ACTIVE ROLE OF THE BAILIFF

As noted above, the bailiff has unlimited jurisdiction in the current regulation for performing acts of enforcement, in order to fulfill the provisions of enforcement order. The bailiff is not an agent of the state, but also not a representative of the creditor and its activity is concentrated not only on the fulfillment of the obligations under the executory title, but also on ensuring lawfulness of the enforcement procedure, by complying with the terms and conditions of provided by law and guaranteeing the rights of the parties (creditor and debtor) or other participants in the proceedings (Boroi, 2015).

In this context, we are talking about the active role of the bailiff, which constitutes a general rule applicable to all procedures during enforcement activities. In this respect, art.627 para.1 CPC states that "throughout the course of the execution, the bailiff is bound to have an active role, insisting, by all means permitted by law, to achieve full and with celerity of the obligation under the enforceable title to the provisions of law, the rights of parties and other interested parties". The principle of the active role of bailiff is therefore subordinate to the principle of legality (Durac, 2014).

The active role of bailiff can manifest in many directions. First, it involves performing enforcement activities in the order, conditions and within the limits provided by law, without the need for creditor perseverance to achieve each of them. The creditor is obliged, according to art.646 para.1 CPC, to give to the bailiff effective support to comply, in good conditions of enforcement procedures, placing at his disposal the means necessary for this purpose, and to advance the expenses necessary to perform enforcement activities, but this does not mean that the creditor should ask the bailiff to perform each act of enforcement. On the contrary, once before the application for enforcement is launched and approved, the executor is obliged to conduct ex officio enforcement provisions necessary to comply with the obligation contained in the executory title, he is the one that will require support the creditor, if necessary, that would require advance for the costs necessary to perform acts of enforcement.

There are exceptions to this rule, namely acts of enforcement that the executor will bring out only at the request of the creditor or, where applicable, after obtaining its prior agreement. For example, if the enforcement order was granted interest, penalties or other accessories, without being determined their amount, they will be calculated by the bailiff ex officio (art.628 par.2 CPC).

But if the enforcement order had not been granted interest, penalties, or other such amounts bailiff can update the value of the principal obligation established in money only at the request of the creditor. If the creditor asks for an update of the debt and the enforcement order does not contain any criterion in this respect, the executor will proceed with the update in the inflation rate, calculated from the date the judgment became enforceable or, in the case of other executive titles, the date when the claim fell due until the date of actual payment of the obligation contained in any of these securities (art.628 par.3 CPC).

Another situation, in which the bailiff cannot perform an act of execution ex officio, but only at the request of the creditor, is regulated in relation to the execution of immovable goods. If in the second auction there are no bids, the bailiff can organise a third auction only at the request of the creditor (art.846 par.9 CPC). In this case, the procedural step is not performed ex officio, but at the express request of the creditor, the bailiff is otherwise kept to stop the proceedings in existing state (after the second auction). The first and second auction are made by default, while for the third specific request of the creditor is required.

As noted above, the principle active role covers not only enforcement activities in order to fulfill the obligations under the title, but also preserving the rights and obligations of the parties and third parties. Even if the creditor requires the performance of an act of execution, the bailiff is one that will appreciate over its legality, through the terms and conditions provided by law, and may, if it considers that they are not satisfied, refuse to make that act. In this regard, the bailiff may refuse to carry out enforcement by rejecting the enforcement application (art.666 par.5 CPC), in which case the creditor may file a complaint with the enforcement court (art.666 par.6 second sentence CPC) or refuse to perform acts of enforcement, in which case the creditor may contest the execution (art.712 par.1, last sentence CPC).

Therefore, the active role of executor must be understood not only in the sense of perseverance that he must show in order to fulfill the obligations contained in the title, but also the attention that must be kept for the principle of legality, by the deadlines and conditions for conducting enforcement activities and guarantee the rights of all participants in enforcement activity. For example, based on the provisions of art.672 CPC, bailiff can start the actual enforcement activities only after the expiry of the deadline indicated in the notification served to the debtor, even if the creditor would insist on enforcement activities before the period expires.

Secondly, the active role of the bailiff is manifested towards the identification of assets and incomes of the debtor or the persons having guaranteed the payment for the enforcement of pecuniary claims. The bailiff can, in this regard, obtain information from third persons or institutions on the incomes and assets of the debtor (art.659 CPC). Also, information of this nature may be required to the debtor. In this regard, according to art.627 para.2 first sentence CPC, if deems it in the interest of the execution, the bailiff may request the debtor, under the law, written clarification in relation to his income and assets, including those under the joint ownership, over which it can perform the execution, with the indication of their location. The unjustified refusal of the debtor to appear or to give necessary clarifications and bad faith giving incomplete information attract its responsibility for all damage caused and judicial fine in the amount of 100 to 1000 lei (Article 188 par.2 CPC).

In the same vein are the provisions of art.646 para.2 CPC, according to which the debtor is obliged, under the penalties provided for in art.188 para.2 CPC, to declare, at the request of the bailiff, all his property, movable and immovable assets, including those under the joint ownership or condominium, with the revelation of where they are and all its revenues, current or periodic. Also, the debtor whose assets have been seized is held to notify the executor previous seizure of the same goods and the enforcement officer who applied it, by giving the bailiff a copy of the minutes of seizure (art.646 par.3 CPC). Failure to do so by the debtor may have other consequences in some cases, more serious, not just a fine.

Thus, as a general rule, enforcement of real estate can take place only for the execution of writs of execution relating to claims whose value exceeds 10.000 lei.

By exception to this rule, real estate can be sold for lower claims if the debtor has no other propriety or he has only movable goods that cannot be sold. However, and if the debtor unjustifiably refuses to supply to the bailiff the information regarding his income and assets, or gives the required explanations and evidence in bad faith or providing incomplete information about the existence and value of movable or of income, his immovable goods can also be put out for auction (art.813 par.5 CPC).

Finally, the third element of the active role of the executor in order to comply with the provisions of the enforcement order is to determine the debtor to perform his obligation voluntarily. In this regard, the executor informs the debtor about the consequences enforcement procedures and estimated amount of costs (art.627 par.2 final sentence CPC).

3. USE OF PUBLIC FORCE IN PERFORMING ACTS OF ENFORCEMENT

According to art.626 CPC "the state is obliged to ensure, through its agents, promptly and effectively execution of court decisions and other enforcement titles, and in case of refusal, the injured are entitled to full compensation for the suffered damage."

This regulation does not refer to the bailiffs as they are not state agents, as mentioned above, but to bodies of public force who have an obligation to support and assist the bailiff in the work of fulfilling the obligations contained in enforcement orders. In this regard, the provisions of art.659 CPC, entitled "agents of public force". In short, the police, the gendarmerie or other agents of the public force are required to support the prompt and effective enforcement of all provisions without conditioning this obligation by the payment of money or other type of conduct. This obligation must be accomplished in cases expressly provided by law, as well as whenever bailiff would consider necessary (Boroi, 2013).

The law regulates several situations in which the participation of public force agent in enforcement proceedings is mandatory. For example, in the procedure of indirect enforcement, when the goods are movable, according to art.734 para.1 CPC., the presence of a police officer, a gendarme or other agent of the public force is necessary under penalty of nullity of enforcement activities carried out if the doors of buildings owned by the debtor or third parties are locked and the owner refuses to open them, if they refuse to open rooms or furniture, or the debtor or third party holding the property is missing and there is not any adult, or one does not respond to the bailiffs request to open the doors.

The rule is an application of the general provisions contained in art.680 para.1C proc. civ., which regulates the participation of public force agents if the debtor does not consent to the bailiff entering the rooms where he is domiciled, resident or where a company has its headquarters, in order to enforce a judgment. Art.680 CPC makes an important distinction between the situations where the debtor's assets are to be accessed based on a court order and that of enforcement procedure carried out based on another enforcement order. In the first situation, the law does not require a special authorization from the court of enforcement while in the second, in order to be able enter in a person's domicile, residence or headquarters, the bailiff or the creditor must apply to the enforcement court, in order to obtain a prior authorization from it. The court will decide upon this application urgently, after summoning the parties, including third parties owning the property, by a decision which is not subject to appeal. (art.679 par.2 CPC)

Also, in the procedure regarding the forced surrender of property, eviction from the estate of the debtor, as well as any other person who is occupying it without any right can be done with the help of public force (article 898 par.1 CPC). Where the debtor is missing or refusing to open the doors, the executor must be accompanied by public servants or representatives of the gendarmerie force, if applicable (art.898 par.2 Civil Procedure. Civ.). The participation of public force agents is also provided in enforcement proceedings regarding other obligations to do or not to do (art.908 CPC) and the enforcement of judgments relating to minors (art.911 para.3 Civil Procedure. civ.). Also,

the Civil Code regulates the obligation of public force agents to provide support for forced takeover of mortgaged movable (art.2442 par.3 of the Civil Code).

An important element of principle of public force aid in completion of obligations contained in enforcement orders is the one relating to the seizure of auto vehicles. (art.740 CPC). According to this procedure, the bailiff can order the seizure of that vehicle, mentioning this measure on the registration certificate and the identity card of the vehicle. If this measure may be not be applied for various reasons, the bailiff mentions this in the minutes of seizure, describing the causes that have led to this situation. The bailiff may also institute the seizure of a vehicle based on data obtained from the community public service for driving licenses and vehicle registration, if the debtor is the registered owner of that vehicle.

As a general rule, the vehicle is impounded by applying seals or deposited with a person especially chosen by the creditor. A copy of the seizure minutes is communicated to the road police bodies and tax authorities in the area of which the good is registered, in order to make a notice of this measure in their records. If the vehicle, registration certificate and identity card cannot be impounded when the bailiff ordered the seizure, the minutes shall be notified to the police that can stop in traffic the pursued vehicle pursued. In such a situation, the police can stop in traffic the seized vehicle and hold the registration certificate, identity card, informing the driver that the property is seized and he has to present in a reasonable period of time to the enforcement officer. Also the traffic police has to immediately notify the bailiff who applied the seizure. The entire operation is recorded by the police in a report, including a summary description of the seized vehicle and a copy of that report is submitted to the driver. Both documents and a copy of the report will be sent to the bailiff who has ordered the seizure.

As noted above, the public force agents have to support the bailiff for enforcement of the provisions of the enforcement order without any type of pecuniary or non-pecuniary condition (art.659 par.1, last sentence CPC). The support will be granted without the need for a declaration from the court of enforcement, but on the sole request of the bailiff. According to Art.659 para.2 CPC, "the bailiff will address the competent authority to ensure public force participation, which will have to take emergency measures to avoid delay or prevent enforcement". In other words, the principle of public force competition is closely linked to the principle of fair trial rights. The participation of public force is a guarantee of the accomplishment of the obligations contained in the enforcement order within optimal and predictable time, without which enforcement activity may in some cases be without result (Ghiță, 2014).

In addition to not conditioning the participation in enforcement procedure, the public force agents may not refuse to support the work of the bailiff on the ground that are impediments of any kind to enforcement (art.659 para.3 CPC). The only responsible for eventual irregularities of enforcement acts is the bailiff. The agents of public force cannot verify the conditions for enforcement of the legality of the procedure. Practically, the agents of public force cannot refuse to give their support to the bailiff, even if the refuse is motivated, and cannot rely on motifs or regarding the legality or opportunity of the enforcement procedure. Failing to do so can be punished by fine or damages, under art.188 CPC and 189-191 CPC. However, the application for compensation covered by

art.189 CPC must not be confused with an action for damages referred to in the last sentence of art.626 CPC. The latter is a common law action founded on tort liability of the state in case of refusal to grant support in complying with the provisions of the enforcement order. The action regulated by art.626 CPC is not under the jurisdiction of the enforcement court or its president, but will be subject to the general rules of substantive jurisdiction, depending on the value of the claim brought by the applicant. Also, if the application for compensation based on art.189 CPC will be directed exclusively against the public force agents who refused the support, the action for damages based on art.626 CPC could be brought against the State.

4. CONCLUSIONS

The role of bailiff in enforcement proceedings is decisive: on the one hand, it operates in order to comply with the provisions of the enforcement order, showing active role in this respect; on the other hand, the executor is the guarantor of compliance with the law enforcement proceedings, by protecting the rights of all concerned. This role of the bailiff was stressed as a result of amendments to the CPC by Law no.138/2014, by giving to the jurisdiction of the bailiff the procedure for declaration of enforcement, which was previously in the jurisdiction of the court of enforcement. In implementing acts of enforcement, the bailiff receives the support of public force agents, who may not condition the support and cannot deny it, regardless of the reasons.

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