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OUT-OF-COURT MORTGAGE SETTLEMENT PROCEDURE IN THE LIGHT OF EU LAW AND THE LEGISLATION OF THE USA, ENGLAND, GERMANY AND THE CZECH REPUBLIC

ABSTRACT: The out-of-court settlement procedure for claims in European continental civil law presents a challenging area of study, both from a doctrinal perspective and in terms of its normative foundation. Therefore, its characteristics are analyzed within the context of EU law, with special attention to the legislation of Germany and the Czech Republic, as well as the legal frameworks of the USA and England. However, the primary focus of this paper is on the out-of-court procedure for the settlement of mortgage-secured claims in the Republic of Serbia, which is examined in light of the relevant provisions of Directive 2014/17/EU of the European Parliament and the Council of February 4, 2014, on credit agreements for consumers relating to residential immovable property (Mortgage Credit Directive 2014/17). While the directive contains numerous provisions, this paper will focus only on those aspects of the Mortgage Credit Directive 2014/17 that are significant for improving certain *de lege lata* legal rules governing the Serbian out-of-court mortgage settlement procedure. The research employs dogmatic legal and comparative legal methods. The main objective of this paper is to evaluate future legal amendments in the context of the corresponding provisions of the Mortgage Credit Directive 2014/17.

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1.Introduction

The introductory part of the paper contains the general characteristics of the Mortgage Credit Directive 2014/17, the main goals and importance of its adoption, as well as the field of its application ratione materiae in the EU.

The Mortgage Credit Directive 2014/17 entered into force on March 20, 2014. In addition to its numerous provisions that have a private law and public law character, the paper will analyze only those provisions relevant to the topic of this paper. The Mortgage Credit Directive 2014/17 was adopted with the intention of removing differences in the regulations of EU member states for the simplified conclusion of cross-border contracts on mortgage loans. The main goal of its adoption was to establish uniform standards in terms of lending in the EU in order to reduce potential risks related to mortgage loans. The Mortgage Credit Directive 2014/17 is based on the principle of minimum harmonization of the national legislation of EU member states. It regulates the most delicate issues for consumers in the field of mortgage loans, such as problems related to the orderly payment of loan obligations and the procedure for forced execution of overdue loan claims. Despite the clearly proclaimed goals, it is noticeable that the Mortgage Credit Directive 2014/17 still allows for a wide variety of different national legislations and their disunity regarding the regulation of mortgage loans (Mišćenić, 2014, pp. 114–119).

The field of application of the Mortgage Credit Directive 2014/17 *ratione materiae* refers to credit agreements secured by a mortgage or other real legal means of security that are applied in the respective member states for residential real estate or secured by law in connection with residential real estate, as well as to credit agreements whose basic purpose is to retain or establish property rights on land or on existing or future real estate. The basic meaning of the Mortgage Credit Directive 2014/17 is to achieve a high level of legal protection of consumers when concluding loan agreements related to real estate. Member states have the discretionary authority not to apply certain provisions or the Mortgage Credit Directive 2014/17 as a whole to certain types of loans, as well as to extend the application of the rules to those credit agreements that are excluded from the scope of the Mortgage Credit Directive 2014/17, for example to real estate that is not considered residential real estate (Mišćenić, 2014, pp. 119–120).

It should be clearly emphasized that directives represent legal acts of the EU as a separate legal system. Therefore, they do not have the significance of international custom or general legal principles of international law, which as constitutional categories bind all states (subjects) of international law, not only EU member states. (Dimitrijević, et al., 2012, pp. 46–51). However, even so, directives are not insignificant for domestic legislation. Although Serbia is not obliged to apply EU regulations (this obligation arises from the day of accession to the EU), this is not an obstacle for the Serbian legislator to gradually harmonize domestic regulations with EU regulations. Considering that EU law is superior to the national rights of the member states, it represents a significant legal category and a sufficient reason for it to be seriously studied in Serbia (Beširević, 2023, p. 8).

2. General notes on the out-of-court procedure for the settlement of claims

In this part of the paper, a general overview of comparative law solutions on the out-of-court claim settlement procedure will be presented. Of course, this is an out-of-court procedure for the settlement of claims that the debtor has not settled within the due date (due claims).

The German Law on Out-of-court Services from 2008 regulates the collection of claims as a special type of out-of-court procedure for the settlement of claim. Collection of claims in out-of-court proceedings can only be carried out by registered entities. Authorized subjects in the extrajudicial claim collection procedure are: lawyers, legal entities or partnerships that do not have the status of a legal entity, and natural persons. The legal rules, in addition to the strict licensing procedure of bodies that carry out out-of-court claims collection procedures, protect debtors (consumers) from various abuses by clearly prescribing the procedure for revocation of license and imposition of fines. The law expressly stipulates that service providers in the out-of-court claim collection procedure must be insured, which provides debtors with an additional level of legal protection. In addition to other requirements, providers of out-of-court debt collection services must undergo adequate training. During 2019, serious discussions for amending the law began. The following emerged as key issues that deserve additional legal regulation: the prescription of adequate amounts of compensation, the passing of examinations and the system of control of the work of bodies that carry out out-of-court claims collection procedures. Despite the legal regulation of the out-of-court debt collection procedure, court enforcement officers still play a

key role in Germany. They are public authorities and their work is subject to judicial control (Tajti, 2020, pp. 30–35).

The situation in the Czech Republic is particularly interesting. Private executors are part of the debt collection system, which over time have proven to be very effective in the out-of-court debt collection process. The peculiarity of the Czech claims collection system is reflected in the fact that the Supreme Court of the Czech Republic, in 2016, decided that foreign arbitration awards cannot be enforced by private bailiffs, but only through a less efficient judicial enforcement procedure. Thus, the procedure for the enforcement of foreign arbitration awards is separated and significantly more difficult compared to the procedure for the enforcement of domestic arbitration awards. Such a decision of the highest judicial instance caused a revolt of the legal public because it is contrary to the concept of the International Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1958 (Tajti, 2020, pp. 39–41).

One of the most developed systems of out-of-court debt collection procedures exists in the United States of America (USA). Court enforcement officers (*court enforcement officers*, *court bailiffs*) participate in the out-of-court claim collection procedure, as in Great Britain. However, in the USA, the debt collection procedure is regulated by systemic laws, both at the federal level and at the level of individual states. Their main features are strict legal regulations, with certain deviations that limit the procedural activity of the debtor. For example, the debtor is obliged to accept unconditionally that the arbitration chosen by the creditor is competent for resolving disputes related to the collection of claims. In practice, such a procedure additionally initiates many disputed situations (Tajti, 2020, pp. 24–26).

In Europe, Great Britain has the most developed system of out-of-court debt collection. He relies heavily on solutions from the US legal system, despite the fact that there is no single legal act that regulates the out-of-court claim collection procedure. Legal entities that perform services of out-of-court debt collection procedures became part of the legislation with the adoption of the Consumer Protection Act of 1974. The Consumer Credit Act was adopted in 2006 with the aim of providing adequate legal protection for consumers. The law expanded the jurisdiction of the Office for Fair Trade in connection with the licensing procedure for legal entities that provide debt collection services. In addition, consumers are provided with additional legal security, even if other dispute resolution methods have been contracted, through the legal protection procedure before a special body – the Financial Ombudsman Service. One of the more important protective legal provisions

is the ban on charging the costs of out-of-court procedure for the settlement of claims.that were not previously agreed upon. In order to provide additional protection to debtors against unfounded demands of bailiffs, the British bailiff system underwent significant changes in 2014. The law introduced different categories of bailiffs. Civil bailiffs are a special type of private bailiffs who, unlike court enforcement officers, are not employed by state bodies. In order to protect the debtor, the law, among other things, in the debt collection procedure strictly prescribes procedural powers when entering the debtor's premises (Tajti, 2020, pp. 18–24).

Undoubtedly, it can be concluded that despite the significant expansion of the legal powers of private bailiffs in the out-of-court debt collection procedure, there are no adequate and systematic solutions in comparative law for the many challenges and problems that accompany the out-of-court debt collection procedure (Stänesku, 2015). Taking into account the presented comparative legal solutions, the question arises whether it is necessary to adopt a common regulatory framework for the EU area. In case of a positive answer, he would sublimate in himself all the advantages of good practice in the procedure of out-of-court collection of claims in European countries, as well as positive solutions from Great Britain, such as the legal authorization of consumers to waive mandatory arbitration and settle the dispute before the financial ombudsman (Kilborn, 2018).

3. Out-of-court mortgage settlement procedure and corresponding rules of the Mortgage Credit Directive 2014/17

The functioning of any legal system cannot be imagined without an enforcement procedure because the right to legal protection acquires its full meaning only after the successful completion of the enforcement procedure. The physiognomy of the enforcement procedure undoubtedly affects the degree of organization of the entire legal system. As there is no codification of the rules of enforcement procedure in the Republic of Serbia, in addition to the law that regulates the enforcement and security procedure, there are other laws that regulate certain special enforcement procedures (Crnjanski, 2019a, pp. 127–128). One of such laws is the Mortgage Law, 2006 (hereinafter: ZH). In addition to substantive legal provisions, it also contains procedural rules on the out-of-court mortgage settlement procedure.

The out-of-court mortgage settlement procedure is governed by the mandatory norms of Art. 29-38 ZH and contains several stages: it starts with the first warning delivered by the mortgage creditor from the enforcement

document to the debtor or the owner of the mortgage immovable property (if they are different persons) if the debt on maturity has not been paid, then follows the warning about the sale of mortgage immovable property, the record of the mortgage sale and the sale procedure. The right to sell is realized by auction sale and sale by direct agreement. If the debtor does not pay the debt within 30 days from the day of receipt of the first warning, the creditor will send the debtor and the owner of the mortgage immovable property and other mortgage creditors a warning about the sale, which must contain the legal elements from Art. 30 ZH. If the debtor does not pay the debt after the expiration of 30 days from the date of receipt of the first notice, the mortgage creditor is authorized to submit to the real estate registry a request to record the mortgage sale in his favor (Art. 31, paragraph 1 ZH). If the debtor does not pay the debt by the date of finality of the decision on recording the mortgage sale, and if a period of 30 days has passed since the date of issuance of that decision, the creditor may, based on the decision, proceed with the sale of the mortgage immovable property through auction or direct sale (Art. 34, paragraph 1 ZH).According to the provisions of Art. 34, paragraph 3 ZH, after the finality of the decision on the recording of the mortgage sale, and before starting the auction sale, the creditor is obliged to evaluate the market value of the mortgage immovable property through an authorized court expert (or another person authorized by law to perform evaluation tasks). Sale by direct negotiation until the moment of the announcement of the auction sale is possible at a price that cannot be lower than 90% of the estimated market value of the mortgaged real estate (Article 34, Paragraph 4 ZH). If the mortgage immovable property remains unsold at the first public auction, the creditor can continue the sale by direct negotiation, but at a price not lower than 60% of the estimated value of the real estate, or can schedule another auction sale that must be held no later than 120 days from the day of the end of the unsuccessful auction (Art. 34, paragraph 5 ZH). If the mortgage immovable property remains unsold in the out-of-court settlement procedure within 18 months from the date of finality of the decision on the note of mortgage sale, the immovable property registry will issue a decision on deleting the note ex officio (Art. 34, paragraph 6 ZH). The creditor is obliged to hold the first auction sale within six months from the date of finality of the decision on the recording of the mortgage sale (Art. 35, paragraph 2 ZH). Based on Art. 38, paragraph 3 ZH, if the mortgage creditor settles by acquiring ownership rights to the mortgage immovable property, it is considered that the claim is settled at the time of acquisition of ownership rights (Crnjanski, 2019a, p. 128).

The aforementioned legal rules on the out-of-court mortgage settlement procedure do not contain the achieved European standards of protection of housing loan beneficiaries as consumers. The Mortgage Credit Directive 2014/17 contains comprehensive rules that include all stages of contracting, starting from the negotiation to the conclusion of the loan agreement. Due to the fact that in the Mortgage Credit Directive 2014/17 there is a special chapter on information and procedures before the conclusion of the loan agreement (chapter 4), it is necessary to first emphasize the important features of the negotiation process. Negotiations represent a certain time interval in which the parties consider the possibility of concluding a contract and agree on its terms. This is a regular situation with contracts in which higher property values are exchanged. Negotiations imply an exchange of opinions on the subject of the contract between potential contractors. The negotiation process is legally regulated and when the parties enter into negotiations, they have certain duties towards each other. In legal theory, pre-contractual liability is known as *culpa in contrahendo*. It designates negligence (*culpa*) as a sufficient degree of guilt for the existence of liability in the course of contracting. If the negotiations end with success, they, along with other circumstances, contribute to the interpretation of the contract. In Serbia, there is a consistent legal solution on negotiations. In Article 30 of the Law on Obligations, 1978, it is prescribed that the negotiations that precede the conclusion of the contract are not binding and either party can terminate them whenever they want. However, the party that conducted the negotiations without the intention to conclude the contract is liable for the damage caused by conducting the negotiations. In addition, the party that conducted the negotiations with the intention of concluding the contract, then abandons that intention without a valid reason and thereby causes damage to the other party, is also responsible for the damage. Such a legal formulation prescribes a general duty to negotiate with expressly emphasized legal deviations (Orlić, 1993, pp. 19–32).

Considering the importance and property value of the housing loan contract, the rules of the Mortgage Credit Directive 2014/17 regulate the part of the negotiation process that refers to the obligation to provide information before concluding the contract (Chapter 4, Article 14 of the Mortgage Credit Directive 2014/17). The member states ensure that the creditor makes available to the credit user (consumer) the personalized information necessary for a comparative analysis of the available credits on the market, the assessment of their consequences and for deciding whether he wants to conclude a credit agreement (point 1). Personalized information in paper form or on some other permanent medium is provided through ESIS (item 2). Member states

shall allow the consumer a period of at least seven days in which he will have sufficient time for comparative analysis, risk assessment and making a decision based on complete information. Also, the member states determine that the time period represents either a period for consideration before the conclusion of the credit agreement or a period for exercising the right to withdraw after the conclusion of the credit agreement, or a combination of the mentioned possibilities. If the member state determines a time interval for consideration before concluding the credit agreement, during that time period the offer is binding for the creditor with the possibility that the consumer can accept the offer at any time. However, member states may determine that the consumer is not obliged to accept the offer within a certain period that does not exceed the first ten days from the day of its consideration (point 6).

The mortgage creditor who conducts the out-of-court settlement procedure is obliged, among other things, to include in the contract for the sale of mortgage immovable property the costs of the sale, which include the costs and fees of third parties (Art. 41, paragraph 1, item 1 ZH). The legal norm formulated in this way, which does not contain a limitation regarding the amount of costs and fees of third parties, may impair the position of the mortgage debtor regarding the total amount of the amount settled in the out-of-court mortgage settlement procedure. The legislator completely excluded the mortgage debtor from the procedure of determining the total due amount of the secured claim. The right to return surplus value in the out-of-court sale of mortgage immovable property is a protective instrument for the mortgagor against unjustified enrichment of the mortgagor. The right to determine the amount of the due debt (the amount of the due debt for collection is an integral part of the notice of sale) is exclusively on the side of the creditor, bearing in mind that the determined amount is not considered by any other entity in the process of settlement of an enforceable out-of-court mortgage (Hiber & Živković, 2015, p. 257). Therefore, it would be necessary for the mortgage creditor to inform the mortgage debtor in advance of the amount and costs of the mortgage immovable property sale procedure and to enable him to express his opinion on them, because legal protection can only be enjoyed by those costs that are necessary and sufficient to complete the out-of-court mortgage settlement procedure (Crnjanski & Knežević, 2015, pp. 255–276).

Contrary to such legal solutions, according to the rules of the Mortgage Credit Directive 2014/17, the payment of fees is allowed only for those amounts that represent the necessary compensation for the costs of non-fulfillment of the loan debtor's obligations. If the price of the mortgage immovable property affects the amount of the secured mortgage claim, a fair settlement procedure

and the necessary measures that will enable the achievement of the most favorable price for the mortgage immovable property must be prescribed (chapter 10, article 28, points 2 and 3 of the Mortgage Credit Directive 2014/17). If the achieved price of the immovable property affects the amount owed by the consumer, member states must provide procedures or measures that will enable the achievement of the best price of the immovable property in question in the foreclosure procedure. If, after the enforcement procedure, the amount of the claim remains unpaid, member states will ensure the adoption of measures that, in order to protect consumers, will facilitate the payment of the remaining amount (Chapter 10, Article 28, Item 5 of the Mortgage Credit Directive 2014/17).

In the settlement procedure, the creditor undertakes to perform an assessment of the market value of the mortgage immovable property after the decision on the recording of the mortgage sale becomes legal validity and before starting the auction sale by an authorized court expert or other person authorized by law to perform assessment work. The law omits the active role of the mortgage debtor, or at least his timely knowledge of the very important fact of assessing the value of the mortgaged real estate. Such a legal solution is content-deficient in relation to the rules of the Mortgage Credit Directive 2014/17. Taking into account the rights and obligations of consumers, EU member states are obliged to prescribe such legal rules when providing additional services in connection with credit agreements, on the basis of which credit creditors will commit to fair, just, open and responsible behavior (Chapter 3, Article 7, Item 1 of the Mortgage Credit Directive 2014/17). The property valuation procedure is also clearly prescribed. The member states undertake that the property valuation procedure is carried out by expert appraisers who are sufficiently independent from the execution procedure – in the form of a document that has the value of permanent evidence (Chapter 6, Article 19, Item 2 of the Mortgage Credit Directive 2014/17).

The key shortcoming of ZH is reflected in the fact that the participation of public authorities during the implementation of the out-of-court mortgage settlement procedure is not prescribed. If the authority to implement the *de lege ferenda* out-of-court mortgage settlement procedure was transferred to public bailiffs, then they would control the legal conditions for its implementation. The public bailiff, as a public authority, would be the guarantor of the fulfillment of legal conditions and the balanced legal position of the mortgage creditor and the debtor in the out-of-court procedure for the settlement of claims secured by a mortgage (Crnjanski, 2019b, pp. 519–532) Based on Art. 4, paragraph 5 of the Law on Enforcement and Security, 2016, public

bailiffs are exclusively competent to carry out enforcement and when it is prescribed by a separate law. As a result, the latest amendments to the Law on Enforcement and Security, as the main law that governs the enforcement procedure, made it possible to transfer exclusive jurisdiction to the public bailiffs by a special law for the implementation of the out-of-court mortgage settlement procedure.

4. Conclusion

The right to fair legal protection in enforcement proceedings requires that the settlement of legally unsubstantiated amounts of claims be prevented. In other words, the right to guarantee protection against legally unfounded demands of the enforcement creditor in the enforcement procedure is also worthy of legal protection. The legal rules governing mortgages in the Republic of Serbia have not adequately eliminated possible deviations related to the legal position of the mortgage creditor and the mortgage debtor in the out-of-court mortgage settlement procedure. First of all, this is reflected in the fact that the debtor is not authorized by law to control the total amount of claims that are settled in the out-of-court mortgage settlement procedure. A justified and legally logical aspiration to enable a more efficient and faster procedure for the settlement of claims secured by a mortgage can turn into its opposite if there are no consistently prescribed legal instruments of control in the out-of-court mortgage settlement procedure. The legal and political requirement to enable faster and more successful settlement of the mortgage creditor must be correlated with the legal and political need for balanced institutional protection of the mortgage debtor.

The out-of-court mortgage settlement procedure is carried out without the participation of public authorities, so the balance of the legal interests of the mortgage creditor and the debtor can be significantly shifted. The rights of the mortgage debtor in the out-of-court *de lege lata* mortgage settlement procedure are not satisfactorily protected. It is necessary *de lege ferenda* to supplement certain legal solutions in order to protect the legal position of the mortgage debtor, taking into account the appropriate standards prescribed by the Mortgage Credit Directive 2014/17. Considering the fact that the main competence for the implementation of the enforcement procedure has been transferred to the public bailiffs, the most effective and systemically harmonized solution would be to transfer the competence for the implementation of the out-of-court mortgage settlement procedure to the public bailiffs through a special law regulating the mortgage. In this way, the public bailiff would

control the legality of the out-of-court mortgage settlement procedure from the point of view of public law powers. The public bailiff, as a holder of public authority, would guarantee a balanced position and equal legal protection of the mortgage creditor and the debtor. Specific proposals for amending the existing legal solutions would refer to the control role of the public bailiff during the implementation of the out-of-court mortgage settlement procedure. He would control all stages of the proceedings. First, it would allow the debtor to comment on the proposed appraiser of the mortgaged immovable property. Furthermore, as a public law entity, it would control and determine the total amount of the due claim that is settled in the out-of-court mortgage settlement procedure. Finally, it would control the material elements of the contract on the sale of mortgaged immovable property by direct negotiation because, in addition to the buyer, it is signed by the mortgage creditor as the legal representative of the owner of the mortgaged immovable property (Article 36, paragraph 1 ZH).

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VANSUDSKI POSTUPAK HIPOTEKARNOG NAMIRENJA U SVETLU PRAVA EU I ZAKONODAVSTAVA SAD, ENGLESKE, NEMAČKE I ČEŠKE

APSTRAKT: Vansudski postupak namirenja potraživanja u evropskom kontinentalnom građanskom pravu predstavlja izazovno polje posmatranja ne samo u doktrinarnom pogledu, već i sa stanovišta normativnog supstrata. Zbog toga se njegova obeležja posmatraju u kontekstu prava EU, s posebnim osvrtom na zakonodavstva Nemačke i Češke, ali i zakonodavstva SAD i Engleske. Ipak, težišna tačka ovog rada usmerena je na vansudski postupak namirenja hipotekom obezbeđenog potraživanja u Republici Srbiji, koji se razmatra u svetlu odgovarajućih pravila Direktive 2014/17/EU Evropskog parlamenta i Saveta od 4. februara 2014. o ugovorima o potrošačkim kreditima koji se odnose na stambene nepokretnosti (dalje

u tekstu: Direktiva o hipotekarnim kreditima 2014/17). Iako sadrži brojne odredbe, u ovom radu analiziraće se samo ona pravila Direktive o hipotekarnim kreditima 2014/17 koja su značajna za unapređenje određenih *de lege lata* zakonskih pravila koja uređuju srpski vansudski postupak hipotekarnog namirenja. Istraživanje je sprovedeno primenom pravnodogmatskog i uporednopravnog metoda. Osnovni cilj rada jeste da se buduće zakonske izmene sagledaju i u kontekstu odgovarajućih pravila Direktive o hipotekarnim kreditima 2014/17.

Ključne reči: *vansudsko namirenje hipotekarnog potraživanja, Direktiva o hipotekarnim kreditima.*

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