

Judgment of 3<sup>rd</sup> December 2003, [K 5/02](#)  
**EMPLOYMENT AND SALARIES OF COURT JUDGMENT  
 ENFORCEMENT OFFICERS**

<b>Type of proceedings:</b> <b>Abstract review</b> <b>Initiator:</b> Court Judgment Enforcement Officers' Independent Self-Governing Trade Union	<b>Composition of Tribunal:</b> 5-judge panel	<b>Dissenting opinions:</b> 0
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Legal provisions under review	Basis of review
Alteration of the enforcement officers' status from court employees to persons conducting enforcement proceedings on their own account ("privatisation" of enforcement officers' profession) [Court Judgment Enforcement Officers and Enforcement Proceedings Act and Certain Other Statutes Amendment Act 2001: Article 6(2)]	Rule of law Principle of proportionality Principle of equality Protection of property rights Freedom to choose and pursue one's profession Obligation to bear public burdens and duties  [Constitution: Articles 2, 31(3), 32, 64(2), 65(1) and (2), 84; International Labour Organisation Convention No. 111: Article 2]
Making the enforcement officers' remuneration conditional upon the results of their enforcement activities (the so-called proportional fee) [Court Judgment Enforcement Officers and Enforcement Proceedings Act 1997: Articles 45(2) and (6), 47 and 49 (in the wording modified by the aforementioned Amendment Act 2001)]	
Disciplinary liability on enforcement officers having exceeded the statutory time-limits for undertaking enforcement activities [ <i>Ibidem</i> : Article 45a(2) (in the wording modified by the aforementioned Amendment Act 2001)]	

In Polish law judgments of the civil courts are enforced by legal officers called Court Judgment Enforcement Officers (*komornicy*), hereinafter referred to as "enforcement officers". The responsibilities of such officers are wider than those of a bailiff and include not only the enforcement of debt obligations arising from judgment against a defendant (i.e. debt collection) but also the enforcement of court decisions in other areas (e.g. enforcing eviction orders, child custody orders etc.).

In civil cases enforcement proceedings (compulsory execution of court judgments and other enforcement titles) are conducted by enforcement officers, who are attached to the various District Courts. The activities of enforcement officers are controlled by the courts to the degree, and in accordance with the procedure, specified by statute.

The legal status of enforcement officers is regulated by the Court Judgment Enforcement Officers and Enforcement Proceedings Act 1997 of 29<sup>th</sup> August (hereinafter referred to as "the 1997 Act"), which has been amended on a number of occasions. According to the initial version of this Act, enforcement officers were court employees, with the President of the District Court acting as their superior. The Court Judgment Enforcement Officers and Enforcement Proceedings Act and Certain Other Statutes Amendment Act 2001 of 18<sup>th</sup> September (hereinafter referred to as "the 2001 Act") amended the 1997 Act and "priva-

tised” the profession of enforcement officers in a *sui generis* manner. The 2001 Act provides that enforcement officers conduct enforcement proceedings on their own account, with the President of the District Court merely supervising the “formal propriety” of their activities. Enforcement officers are appointed by the Minister of Justice, following consultation with the court judgment enforcement officers’ self-government. The 2001 Act lays down certain requirements which must be fulfilled by anyone wishing to practice as an enforcement officer.

Article 6(2) of the 2001 Act revoked the hitherto employment relations of enforcement officers as regards their position as court employees, thus leading to the “privatisation” of their functions. This revocation came into effect on 1<sup>st</sup> January 2002, when the amending Act entered into force.

At the time when enforcement officers were court employees, their salaries were composed of a basic remuneration, being a fixed monthly sum, and a commission fee charged for the enforcement of pecuniary obligations. A condition for instituting enforcement proceedings was that the creditor deposit a proportion of the monies owed to him (although finally it would be the debtor who would be liable for this amount). The amending Act of 2001, in addition to abolishing the position of enforcement officers as court employees, introduced a system of remunerating enforcement officers which was made entirely dependent on the results of their enforcement activities. Under the new system, enforcement officers collect a so-called proportional fee – at an amount of 15% of the value of the enforced claim – solely from the debtor (Article 45(2), as amended); this fee may not be lower than one tenth of the predicted average monthly salary in the public sector, nor higher than thirty times this amount (Article 49).

In its initial wording, Article 47 of the Act defined a separate basis for determining the level of the proportional fee in relation to the enforcement of repeated (periodical) performances. The effect of the 2001 Act is that this provision now only regulates issues concerning enforceability of the fee, whereas the amount of the fee is defined on the basis of Article 45(2).

In accordance with Article 45a of the amended Act, enforcement officers are obliged to undertake actions essential for effective enforcement proceedings within three days from receipt of the application (paragraph 1). Failure to adhere to this time-limit will result in the officer being liable to disciplinary proceedings (paragraph 2).

The aforementioned provisions were challenged before the Constitutional Tribunal by the Court Judgment Enforcement Officers Independent Self-Governing Trade Union.

In the applicant’s opinion, the challenged amendments to the Court Judgment Enforcement Officers and Enforcement Proceedings Act 1997 impose an excessive burden on enforcement officers in relation to the risks of conducting enforcement proceedings, whilst at the same time limiting the creditor’s liability for the effects of such proceedings to a minimum, or excluding such liability entirely. To burden enforcement officers with enforcement expenses, in the absence of a fixed salary, constitutes a violation of the principle of equality before the law (Article 32(1) of the Constitution) and amounts to discrimination in relation to the performance of professional activities (Article 32(2) of the Constitution, read in conjunction with Article 2 of International Work Organisation Convention No. 111). The entrusting of certain State functions to enforcement officers may not justify imposing an obligation on them to perform such functions

at their own expense and without an appropriate salary. In the applicant's opinion, the challenged provisions deprived enforcement officers of the protection of their property rights, in contravention of Article 64(2) of the Constitution. Moreover, the applicant alleged that the imposition of an obligation to perform activities without reimbursement of costs, or without a fixed salary, constituted a duty to bear and perform public duties, within the meaning of Article 84 of the Constitution. The limitation of the right to a salary and the imposition of the obligation to bear costs without the possibility of their reimbursement, in the applicant's opinion, also contravene the constitutional principle of proportionality (Article 31(3) of the Constitution).

The applicant furthermore argued that the aforementioned regulations infringe the principle of a democratic State governed by the rule of law (Article 2 of the Constitution), the duty of which is to ensure effective enforcement of rights.

The applicant also alleged that, in revoking the prior conditions of employment of all enforcement officers, the entry into force of the challenged provisions on 1<sup>st</sup> January 2002 amounted to an infringement of the freedom to choose and pursue one's profession and to choose a place of work (Article 65(1) of the Constitution) and the rule of law principle (Article 2 of the Constitution).

## RULING

**All of the challenged provisions of the 1997 Act and the amendments contained in the 2001 Act conform to, or are not inconsistent with, the provisions of the Constitution and International Labour Organisation Convention No. 111.**

## PRINCIPAL REASONS FOR THE RULING

1. A court enforcement officer is an organ of public authority, possessing his own powers. Such officers are attached to the District Court but do not constitute an organ of judicial power; they do not implement the administration of justice within the meaning of Article 175(1) of the Constitution. Nevertheless, organisational and functional relations do exist between enforcement officers and judicial authorities (e.g. Article 758 of the Civil Procedure Code and Articles 1 and 3 of the Court Judgment Enforcement Officers and Enforcement Proceedings Act 1997).
2. The profession of an enforcement officer is a profession in which the public repose confidence within the meaning of Article 17(1) of the Constitution. The very nature of this provision justifies the placing of limitations on their "professional freedoms".
3. An enforcement officer is linked with the parties of the enforcement proceedings (the creditor and the debtor) by a public-legal, as opposed to a private-legal, relationship. Although the obligations enforced by this officer are usually of a civil-legal nature, this does not mean that the enforcement proceedings themselves have the same character. In accordance with the rule of law principle, the enforcement (compulsory execution) of judgments in civil cases is not performed by way of the creditor's personal activities, nor the activities of any other person(s) whom the creditor orders

to execute a particular judgment. As a result of this legal principle, the State has a monopoly over the application of coercive measures. Enforcement of judgments is ensured by State organs, acting not on the basis of the creditor's instructions but, rather, within their own powers, vested upon them by the State.

4. The statutory formula for performing enforcement activities in civil cases and other enforcement activities "on the enforcement officer's own account" (Article 3a, read in conjunction with Article 2 of the 1997 Act) is an expression of the "privatisation" of the enforcement officer's profession brought about by the amending 2001 Act. This "privatisation" refers to the financing of an enforcement officer's activities and, as a result, his salary, but does not affect the nature of the enforcement officer's activities.
5. The constitutional freedom to choose one's profession (Article 65(1) of the Constitution) does not give rise to claims for the creation of a particular employment post, nor does it guarantee a particular legal form in which one's chosen profession would be performed. This constitutional freedom is not infringed by the revocation of enforcement officers' prior conditions of employment, by virtue of Article 6(1) of the 2001 amending Act. This finding is strengthened by the fact that the alteration of an enforcement officer's status was consistent with expectations within the enforcement officers' community and was performed in relation to the whole professional body, without any differentiation whatsoever.
6. The constitutional freedom to choose and pursue one's profession may not be understood, in the case of enforcement officers, as involving the freedom to perform certain professional activities in the manner one chooses. It is the legislator's role to specify the obligations and competencies of an enforcement officer and, since such an officer is both a public official and a State organ enforcing judicial decisions, the freedom to pursue professional activities is irrelevant.
7. The risks placed upon enforcement officers, by virtue of the fact that they shall bear the costs of ineffective enforcement proceedings (in accordance with the challenged provisions), may not be assessed from the perspective of Article 65(2) of the Constitution (restrictions on imposing the obligation to work). The obligation to work, within the meaning of the Constitution, applies to continuous activities and not to one-off activities undertaken without a pecuniary equivalent within the scope of a profit-making activity. The challenged provisions do not compel anyone to perform the profession of an enforcement officer, nor do they limit the possibility of resigning from such a position.
8. Likewise, Article 84 is also an inadequate basis for review in the present case. This provision refers to the obligation to bear public burdens and duties, including the payment of taxes, which have been laid down by statute. In essence, this relates to obligations owed by persons and citizens towards the State (public authority). Meanwhile, the duties imposed by the Act on enforcement officers, as organs of enforcing debts arising from court judgments (i.e. as organs of public authority), only relate to persons holding the position of an enforcement officer and performing their official activities, rather than activities undertaken in their own name and in their capacity as a natural person. Such activities (which are actually obligations requiring the fulfilment of certain responsibilities, from a substantive point of view) do not fall within the scope of Article 84 of the Constitution. As a result, the allegation that there

has been an infringement of this Article, read in conjunction with Article 31(3) of the Constitution, must fail.

9. Furthermore, it is unfounded to claim that Article 32 of the Constitution is infringed by reason of the fact that the 2001 Act requires enforcement officers to bear the costs of ineffective enforcement proceedings. This does not, contrary to the applicant's arguments, result in unlawful discrimination between enforcement officers and other legal professions since lawyers belonging to other professional groups, such as advocates or legal advisors, do not discharge the functions of State organs and do not possess authoritative powers. In particular, no comparison should be drawn between, on the one hand, the activities of advocates appointed by the court to act as the client's representative or defence counsels appointed *ex officio* (both funded by the State Treasury) and, on the other hand, the activities of enforcement officers undertaken in the course of enforcement proceedings. An enforcement officer is not the creditor's representative, appointed to perform enforcement activities in the creditor's name and under his instructions, but is a person vested with the authority of State, appointed to ensure compliance with decisions of the court. The risk of advocates or legal advisors not receiving a fee for the performance of activities on behalf of their clients arises from other sources and is certainly not eliminated. It should be noted in this respect that advocates, legal advisors and notaries are unable to bring enforcement proceedings to recover sums due to them, whereas enforcement officers may bring such proceedings.
10. The status of enforcement officers, performing activities on their own account, means that they either receive income for such activities or bear the losses resulting from running an enforcement officer's practice. Accordingly, it is not possible for such a party to claim the right to obtain income, or to eliminate the risks associated with the collection of income, from activities which, by their very nature, are performed on the party's own account. Such a claim does not fall within the ambit of the right to ownership and other property rights, as guaranteed by Article 64 of the Constitution.
11. It is difficult to derive detailed assumptions relating to the financing of enforcement proceedings from the rule of law principle (Article 2 of the Constitution). However, in general, it can be stated that, in the final analysis, the costs of such proceedings should fall on the debtor. With that in mind, the legislator should consider the situation where the debtor has no means to bear such costs and to pay the enforcement officer's fee. It follows from the principle of proportionality that a solution whereby enforcement officers could realise claims for their enforcement fee (including expenses already incurred by them) solely from the debtor would be excessively strict – in situations where the assets subject to enforcement proceedings are absent or inadequate – with regard to the purpose of ensuring effective enforcement of debts, which requires appropriate motivation on the part of the enforcement officer. It would be disproportionate to make the salaries of enforcement officers entirely dependent upon successful results and for a salary to be unobtainable where, even though the enforcement officer has acted with all due diligence, enforcement proceedings proved unsuccessful. Such an interpretation of the principle of proportionality is not, however, violated by Article 45(2), Article 47 and Article 49 of the 2001 Act, since these provisions govern the collection of a proportional fee from the debtor in situations where he is in possession of assets subject to the enforcement proceedings. In fact, in the present proceedings, the applicant is challenging a legal lacuna in the

Act – the absence of provisions governing the recovery of costs in cases where enforcement proceedings proved ineffective.

12. The applicant's allegation that the constitutional principle of the rule of law (Article 2) is infringed by Article 45a(2) of the 1997 Act (which imposes disciplinary liability on enforcement officers having exceeded the statutory time-limit for undertaking activities necessary to ensure effective enforcement, or having performed illusory enforcement activities) was premised on the basis that Article 45(2) and (6), Article 47 and Article 49 of the 1997 Act (which impose the duty to conduct enforcement activities without guaranteeing a corresponding right to reimbursement of any costs thus incurred, or to receipt of a salary) are unconstitutional. Therefore, this claim is conditioned by the declaration of unconstitutionality of the mentioned provisions. The applicant did not submit any independent reasons for alleging the unconstitutionality of Article 45a(2) which would allow review of this provision in the event that the aforementioned Articles of the 1997 Act were found to be constitutional. To this extent, the Tribunal may not act independently or in lieu of the applicant who, in accordance with Article 32(1) point 4 of the Constitutional Tribunal Act, should present reasons for the claim of unconstitutionality and indicate any evidence in support of such a claim.

#### Provisions of the Constitution and the Constitutional Tribunal Act

##### Constitution

**Art. 2.** The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

**Art. 17.** 1. By means of a statute, self-governments may be created within a profession in which the public repose confidence, and such self-governments shall concern themselves with the proper practice of such professions in accordance with, and for the purpose of protecting, the public interest.

**Art. 31.** [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

**Art. 32.** 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.  
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

**Art. 64.** 1. Everyone shall have the right to ownership, other property rights and the right of succession.  
2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.  
3. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right.

**Art. 65.** 1. Everyone shall have the freedom to choose and to pursue his profession and to choose his place of work. Exceptions shall be specified by statute.  
2. An obligation to work may be imposed only by statute.  
3. The permanent employment of children under 16 years of age shall be forbidden. The types and nature of admissible employments shall be specified by statute.  
4. A minimum level of remuneration for work, or the manner of setting its levels shall be specified by statute.  
5. Public authorities shall pursue policies aiming at full, productive employment by implementing programmes to combat unemployment, including the organization of and support for occupational advice and training, as well as public works and economic intervention.

**Art. 84.** Everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute.

**Art. 175.** 1. The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts.

##### CT Act

**Art. 32.** 1. The application or question of law shall comply with requirements referring to procedural letters and shall, in addition, include:

[...]

4) reasons for the claim containing indication of supporting evidence.