

# DEALING WITH DEBT: A PUBLIC ADMINISTRATION DILEMMA

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## 1. INTRODUCTION

The debt owed by individuals – whether natural or legal persons - is a significant issue for CEE governments in a number of different ways. First of all, the individual may owe money to the state in the form of unpaid taxes or other charges (public law debts). One part of the overall management of the tax system is the recovery of these unpaid dues. Secondly, transition to a free market economy in CEE states gave prominence to the need to improve mechanisms for the enforcement of contracts – including the recovery of private law debts – in order to encourage investment. Rule of law projects also emphasize the importance of effective enforcement of civil court orders.<sup>1</sup> Forced recovery of debts necessarily involves an exercise of public authority, which may include the authorised access to private property, the right to acquire information concerning the debtor's income and assets, and deprivation of ownership of assets. In certain circumstances, it can also involve a deprivation of liberty.

The relative significance of public law debts and private law debts in the economic and social life of a given state will depend on the vitality of its commercial sector and on political choices about social provision. Enforcement institutions<sup>2</sup> play a secondary role in the commercial sector: more attention is (rightly) focused on insolvency policies and procedures.<sup>3</sup> As to social provision, Domurath (2015, p. 157) notes that

in states with a weak public pension system the lack of social welfare is compensated by private home ownership, which reduces the need for income through public pension schemes – a credit-welfare trade-off.

Consumer credit, meanwhile, 'gives households the possibility to supplement current income to manage financial difficulties' (ibid). The importance of private law credit agreements to the overall mix of welfare provision to citizens means that the state needs to acknowledge responsibility for the structural problems that arise from these policy choices.

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<sup>1</sup> Such as the World Justice Project, Rule of Law Index, available at <https://worldjusticeproject.org/our-work/wjp-rule-law-index> (accessed 2 September 2019).

<sup>2</sup> A note on terminology: 'enforcement' in this paper always refers to forced recovery of debts by an institution exercising public authority.

<sup>3</sup> Those responsible for forced recovery of debts are rarely also insolvency practitioners. Forced recovery is likely to occur immediately before insolvency proceedings, or at the direction of the liquidator.

Issues such as supervising responsible lending, ensuring the financial capability of citizens and consumer protection are increasingly perceived as social policy and regulatory concerns (Comparato, 2018; I. Domurath, 2016, 2017; Micklitz & Domurath, 2015), which in turn give rise to public management issues.

Against this background – and given high levels of household indebtedness in many jurisdictions – there is remarkably little research that focuses on the institutions responsible for forced execution of judgments and orders in the absence of voluntary compliance by debtors. Little attention is paid to their structure, functions and incentives; still less is given to their potential role in a ‘joined up’ approach to the public management issues outlined above. The purpose of this paper is to highlight this gap in research and explain the different mechanisms used in Europe for forced execution, which may suggest some lines of enquiry for public management scholars.

## 2. ENFORCEMENT INSTITUTIONS

In the case of both public law and private law debts, effective mechanisms for accessing the assets of debtors are important. If there is no voluntary compliance with a court judgment, administrative order, authentic instrument issued by a notary or other ‘enforcement title’, formal certification that the title is enforceable can be obtained from the competent authority.<sup>4</sup> It can then be submitted to the relevant enforcement institution by the creditor. The extent to which the creditor has control over the choices made in relation to further enforcement varies significantly between legal systems.

There are essentially three different models of enforcement institution used in EU Member States, although there are often some elements of hybridity. Administrative agencies are typically responsible for the recovery of public debts. In the area of private law, civil courts are often responsible for the enforcement of judgments and other enforcement titles. But a third type of enforcement institution has become widespread: Judicial Officers (originating from the French *huissiers de justice*) are regulated legal professionals, external to the courts, who have the authority to enforce judgments and other titles.

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<sup>4</sup> Usually the issuing authority.

## 2.1. ADMINISTRATIVE MODEL

In the field of public law, the entity responsible for collecting unpaid taxes or other charges is often closely connected to entity that imposed the charge. Nevertheless, various forms of specialisation or outsourcing may be employed.

Sweden offers an interesting example of this approach to civil enforcement, although it cannot be described as typical. The Swedish system is more centralised and transparent than administrative systems of debt recovery in most other EU states. Nevertheless, it is of particular interest since the improvement of administrative systems for tax recovery is a growing priority in many jurisdictions and some moves toward centralisation can be found (Gardette, 2019; Garnier et al., 2014; Murphy, 2019). Moreover, an examination of the approach adopted in Sweden provides an opportunity to appreciate the breadth of a public management perspective on civil enforcement.

The Swedish Enforcement Authority (SEA) has sole authority to adopt coercive measures for the purpose of enforcement of enforcement titles. This is the case whether the creditor is a public authority or private entity: the SEA is the competent body for the enforcement of civil court judgments and other private law enforcement titles as well as public law ones. Although coercion is seldom necessary in practice, the SEA deals with a large number of enforcement applications.<sup>5</sup> There is a flat fee for enforcement, plus costs incurred in the process. This is ultimately paid by the debtor if enforcement is successful. However, if enforcement is unsuccessful, liability to pay the fee varies as between private and public law creditors. Only private law creditors are obliged to make the payment. Any shortfall in the running costs of the agency is paid by the state.<sup>6</sup>

It is the SEA that can make decisions on how to proceed, whether a debtor is worth pursuing, and how much time and effort should be expended. There are clear policies to be followed in this respect. For example, debtors who have newly been registered on the system are given priority, in the hope that a robust immediate treatment of their case will encourage them to take a disciplined approach to their finances in the future (Espersson, 2010). There is a file for each debtor, so their overall financial position – encompassing all debts owed – is

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<sup>5</sup> There are approximately 2.3 million applications each year, involving about 500,000 debtors, 85 percent of whom are natural persons.

<sup>6</sup> Annual reports and budget information are available at <https://www.kronofogden.se/arsredovisningochbudgetunderlag.html>

known to case workers. Public and private law debts are treated equally: no priority is given to public law debts.<sup>7</sup>

The SEA is a one of the many semi-autonomous state agencies in Sweden that give effect to central government responsibilities (Greve, Lægreid, & Rykkja, 2016; Hall, 2015; Levin, 2010; Molander, Nilsson, & Schick, 2002). The significant literature discussing public management in Sweden (Greve et al., 2016; Hall, 2015; Jacobsson & Sundström, 2016; Kuhlmann & Wollmann, 2014; Pierre, 2004; Pollitt & Bouckaert, 2017; Wockelberg & Ahlbäck Öberg, 2016; Wockelberg & Ahlbäck Öberg, 2018) thus transfers readily to the area of enforcement. The agencified structure of the Swedish can be traced back, in embryonic form, to the 17<sup>th</sup> century and was formalized in the 18<sup>th</sup> century (Hall, 2015). Similarly, the current enforcement system has deep historical roots. Enforcement agents are called *kronofogdar* (crown bailiff). This originates from the bailiffs appointed by the Crown to manage a local area. Records relating to such bailiffs can be found dating back to the 13<sup>th</sup> century (Westerberg, 1999). They had a role similar to the medieval English sheriff – managing crown property, keeping the peace and collecting taxes. After some formalisation and administrative restructuring in the 16<sup>th</sup> century, detailed regulations concerning the duties of *fogdar* began to be issued in the 17<sup>th</sup> century (Haikari, 2017). In 1669 they became formally responsible for the enforcement of civil court judgments (Berglund, 2009, p. 103). The first general regulations for district *fogdar* were issued in 1688 (Westerberg, 1999), but their main responsibility was for the administrative and managerial aspects of the work, with the practicalities of tax collection and debt recovery being delegated to lower administrative officials, such as the rural police chief (Haikari, 2017, pp. 168 and 173-174). The importance of their administrative role can be evidenced by the fact that a law degree was required for the position from 1823, and from that date appointments were made by the Crown rather than the regional governor (Espersson, 2010, p. 23; Westerberg, 1999).<sup>8</sup>

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<sup>7</sup> Lag (2003:535) om ändring i förmånsrättslagen (1970:979)

<sup>8</sup> Westerberg notes that in the early 19<sup>th</sup> century *kronofogdar* were police, tax-collectors, prosecutors and general supervisors. They were also, as state functionaries and literate individuals, the source of information about new legislation and other matters concerning the Crown (at 1.2; 5.2.) The Instructions for *fogdar* of 1855 (SFS 1855 No. 91) listed their responsibilities as the following: maintain public order; act as public prosecutor; ensure that regulations are complied with and that they are published in the church; handle tax collection and recovery of unpaid taxes; ensure inn and transport businesses are functioning; ensure the laying and maintenance of public roads, bridges and ferries; supervise health care, poor care and spread of communicable diseases in humans and animals; supervise trade, factories and crafts; issue

After a long relatively stable period in the 19<sup>th</sup> century, a series of reorganisations took place in the 20<sup>th</sup> century, notably related to improvements in transport and communication that rendered the previous organisational structure inefficient (Espersson, 2010; Westerberg, 1999). Enforcement became a specialised function. The enforcement system – previously organized by region and municipality – was nationalized in 1965. The 81 new enforcement authorities (*Kronofogdemyndigheterna*: KFM) were overseen by a central government agency. A debate took place as to whether the KFM should be subject to the National Tax Board or the National Courts Administration, but the fact that the majority of the work of the KFM related to public law debts, and the need for close collaboration with public authorities swung the argument in favour of the National Tax Board, which became the central authority with responsibility for organisational and administrative issues from 1973.

Like other Swedish agencies, the KFM was strongly impacted by NPM reforms (Espersson, 2010). Its hierarchical administration, in which *kronofogdar* occupied the senior positions, became flatter and more team based. *Kronofogdar*, as technical experts, became subject to professional managers. Management by objectives and results was introduced, using annual appropriations directives as a steering tool (Modell, Jacobs, & Wiesel, 2007).

The KFM was also an early adopter of digital technology. The combination of IT solutions and management changes meant that fewer and larger authorities were needed: by 1997, only ten regional enforcement authorities existed. Further change took place soon after this. Concerns were expressed as to whether administration of enforcement by the National Tax Board was appropriate. The KFM performed a dual role, acting as creditor in pursuing public law claims in court while also being responsible for enforcement. This was increasingly recognised as giving rise to a conflict of interests, and in 2003 a commission of inquiry concluded that a separation of functions was required (SOU 2003:97). In the wake of this report, the SEA was created as an independent state agency in 2008.<sup>9</sup> Although it is a unitary authority, it has local offices. These share files and information, and certain types of work are concentrated in teams in one location.

As part of the reorganisation in 1965, the responsibilities of *kronofogdar* became focussed on debt collection and enforcement and their supervisory tasks in respect of police and public prosecution functions were assumed by other authorities (Westerberg, 1999). But their role

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industry permits and monitor development; assist in the eventuality of accidents; ensure observance of customs duties; ensure the peace of ancient monuments.

<sup>9</sup> For the stages in this process of separation of functions, see Prop. 2005/06:200 and Prop. 2006/07:99.

has expanded again as commissions of inquiry concerning other aspects of debt related state administration have suggested that the tasks in question could be performed most efficiently and effectively by the KFM/SEA. Thus, Westerberg (1999, p. 5.2) concludes:

The development can ... be described as a movement from a multi-functional public representative of the state via a pure recovery and execution officer to a kronofogde who has overall responsibility for the entire area of indebtedness. The difference is that the various tasks are today divided between different units in the organization and not, as at the beginning of the century, concentrated in one person. Today, kronofogdar are experts in their specialized fields such as debt restructuring or collection of the debts owed by businesses.

A broad vision of the SEA's mission is communicated by Ordinance 2016:1333 with instructions for the Swedish Enforcement authority. § 1 of the Ordinance sets out its main tasks. The first of these is the collection of debts backed by an enforcement title, with forced execution if necessary. From 1980, the SEA acquired responsibility for bankruptcy supervision, reviewing the work of insolvency administrators.<sup>10</sup> From 1992, it became the competent authority to issue orders for payment and other summary orders.<sup>11</sup> These are enforcement titles that are issued if a claim is not contested. If the debtor contests the claim, it can be transferred to the courts for further hearing.<sup>12</sup> Finally, from 1994 the SEA assumed responsibility for debt restructuring procedures. A debtor can ask to have their debts consolidated and make regular payments towards them for a period of time, after which they will be debt free. The Ordinance also provides that the SEA has wider societal roles, such as working to ensure that a good level of willingness to pay is maintained in society and combating financial crime.

In terms of post-NPM public management trends, e-government certainly features strongly along with the related aims of transparency and the provision of a good customer service. The SEA was already using computer processing in the 1960s and now uses digital technology extensively internally and externally as part of Sweden's desire to be a digital information society ("Government Bill 1999/2000: 86 *Ett informationsamhälle för alla*," ; "Government Bill 2009/10: 175 *Offentlig förvaltning för demokrati, delaktighet och tillväxt*," ; "SOU 2010: 4 *Allmänna handlingar i elektronisk form - offentlighet och integritet*," p. 67; "SOU 2015:66

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<sup>10</sup> The gradual acquisition of these tasks is explained in SOU 2003:97.

<sup>11</sup> The summary procedure is not limited to debt collection. It can also be used for non-monetary orders, such as a landlord's application to evict a tenant, or an energy supplier's application to shut off electricity.

<sup>12</sup> Lag (1990:746) om betalningsföreläggande och handräckning § 33-37.

*En förvaltning som håller ihop,*" ; "SOU 2016:85 *Digitaliseringens effekter på individ och samhälle – fyra temarapporter,*" ; "SOU 2016:89 *För digitalisering i tiden,*").As to aspirations for 'joined-up' government, it can be seen that the coalescence of debt-related tasks in one agency in itself enables these problems can be treated holistically. But, the expertise of the SEA is also recognised in inter-agency collaboration and contributes in particular to collaboration for fighting organized crime, promoting financial capability in young people, and working towards joined-up e-government between central and municipal authorities.<sup>13</sup> More recently the desire to build a collaborative relationship with the public based on trust (SOU 2018: 47). the strengthening of a public service ethic (Statskontoret, 2018),<sup>14</sup> and the involvement of users in co-production of services<sup>15</sup> have all been trends in Swedish public management that are reflected in the management of the SEA. User surveys provide feedback on the quality of the service provided and the SEA performs well in an annual survey of public confidence in Swedish public authorities.<sup>16</sup>

While administrative bodies are commonly responsible for the collection of taxes and other public debts in EU Member States, the Swedish model of centralisation and specialisation is rare. Finland has a similar system, originally derived from Sweden, and there is evidence of movement in this direction in other jurisdictions (see e.g. Servièrè, 2019), but in most EU Member States a variety of different entities are involved in public sector debt recovery and comparisons are complex.

## 2.2. COURT-CENTRED ENFORCEMENT

For private law debts, until recently court-centred enforcement was the most common approach in Europe. It has a long history, having been developed in Roman times. Although initially no sharp distinction was drawn between criminal and civil law, and failure to

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<sup>13</sup> See the SEA website at <https://www.kronofogden.se/Myndighetssamverkan.html> (accessed 14 September 2019).

<sup>14</sup> See further at <http://www.statskontoret.se/forvaltningskultur/> (accessed 14 September 2019) for publications in relation to the development of a strong public service ethic.

<sup>15</sup> At the time of writing the SEA is conducting a programme of interviews with debtors with a view to enhancing their interaction with them: <https://www.kronofogden.se/80401.html> (accessed 14 September 2019).

<sup>16</sup> Coming 14<sup>th</sup> out of the 40 authorities investigated. For Kantar Sifo's Government Reputation Index 2019 see <https://www.kantarsifo.se/rapporter-undersokningar/anseendeindex-myndigheter-2019> and for the results for the SEA over the past five years see <https://www.kronofogden.se/79877.html> (accessed 14 September 2019)

respond to the orders of a judge could attract imprisonment, or even slavery or death as a punishment, Roman law evolved the possibility of confiscation of the totality of the judgment debtor's assets (*venditio bonorum*) as a sanction for failure to pay a debt (Bruns, Baur, & Stürner, 2006, p. 20).<sup>17</sup> Later it became possible to enforce a debt out of individual assets (*distractio bonorum*). Although these were initially private remedies, with the development of the empire bureaucratic machinery of justice also emerged and something recognisably related to modern methods of enforcement came into being. The Roman procedures influenced civil procedure in medieval Italy and beyond— partly through the study of Roman law in universities from about the 12<sup>th</sup> century, and partly through canon law. As romano-canonical law it throughout much of Europe (Bruns et al., 2006, p. 24; van Rhee, 2003).

The particular impact of romano-canonical law on enforcement was nevertheless influenced by the timing of the spread of these procedures, and the extent to which other mechanisms were already in place. In northern Europe, courts did not supervise enforcement until a late date and the delegation of enforcement to local public officers (such as the Swedish *fogde* and the French *huissier de justice*) was widespread.

A distinctive feature of enforcement through the courts is that – as with other court proceedings – the court responds to party initiatives: it is not proactive. The judgment creditor decides whether and how to seek enforcement and makes applications accordingly. In particular, traditionally the judgment creditor had to apply for a specific method of enforcement. Historically, debtors' assets largely consisted of tangible property – household goods, tools, or luxury items for the wealthy – and these goods could be identified, seized and sold by a court bailiff to realise their value and satisfy the debt. Moreover, most people did not change their residence very often. Thus, the local presence of court bailiffs allowed them to acquire useful information.

In more modern times, however, court-centred enforcement has proved to be very inefficient. In a consumer society, although debtors may have many goods, those goods often will not have a high resale value. Some debtors own immovable property, but many do not. Their main assets are likely to consist of money standing to their account in a bank, shareholdings and other securities. They will also normally have some form of income from employment or social insurance, from which regular payments can be taken. In contrast to the position of the SEA – which has access to information held by other Swedish agencies and notably the tax office – information about these forms of income and assets is not readily

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<sup>17</sup> A. Bruns, F. Baur and R. Stürner, *Zwangsvollstreckungsrecht*, 20 (CF Müller 2006).

available to private creditors, so that it is difficult for them to choose an appropriate method of enforcement, and identify the assets concerned.<sup>18</sup>As a result of these changes, court-centred enforcement is seen as inefficient: a problem that is aggravated by the communication improvements that lead to bailiffs working over a larger area, with the consequent reduction in local knowledge.

In CEE states, enforcement of civil court judgments at the fall of socialist regimes was court-centred. Procedures were slow. Incentives for bailiffs to be productive were limited and enforcement rates were in the region of 1-3% of the debt. Improvement in the effectiveness of enforcement was therefore among the myriad aspects of public management on which advice was given by external advisers and consultants. In the great majority of CEE states, this has led to the adoption of the third model of enforcement institution: the Judicial Officer model.

### 2.3. JUDICIAL OFFICER MODEL

Judicial Officers are regulated legal professionals, who are ‘independent’ in the sense of being self-employed, and whose core business is the formal service of documents (*signification*) and the enforcement of judgments and other enforcement titles. They benefit from a monopoly of these functions and earn their income from fees generated in the process.<sup>19</sup> The fees are ultimately paid by the debtor if enforcement is successful. Once a title has been certified as enforceable, a judgment creditor can submit it to a Judicial Officer, who can undertake most types of enforcement action.<sup>20</sup>

The Judicial Officer model has its roots in practices in France and the Low Countries (the ‘donor states’) during the medieval period. Independence from the state apparatus occurred as a result of the sale of offices by French kings during the *ancient regime*. Professionalisation began in the mid 19<sup>th</sup> century in France as a means of surviving the harsh economic environment (Isnard, 1995). It was consolidated in the mid-20<sup>th</sup> century against a background of corporatist politics which ensured that the national chamber of Judicial Officers had a close

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<sup>18</sup> Creditors may, however, have relevant information acquired as a result of their contractual relationship with the debtor, if the debtor’s circumstances have not changed. Some information may also be acquired from credit reference agencies.

<sup>19</sup> Typically this is a combination of flat fees for some actions, a fee proportionate to the amount recovered, plus costs.

<sup>20</sup> There is some variation between systems as to how far court involvement may also be necessary, particularly in relation to sensitive issues such as the seizure and sale of immovable property, and the seizure of wages and salaries.

relationship with the Ministry of Justice (Le Coq & Poiroux, 2015; Suleiman, 1987). Similar processes occurred in Belgium, the Netherlands and Luxembourg (van Rhee, 2010). The result is a hybrid system: Judicial Officers claim to be neutral agents of the state – *officiers publics et ministériels* appointed by the Minister of Justice – who are able to issue authentic instruments bearing the state seal, which are presumed valid until forgery is proved (Untermaier & Houillon, 2014, p. 9). At the same time, they are dependent on creditors to bring them business and their relationships with (private law) creditors are governed by private law.

However, historically judgment creditors have had a limited choice between Judicial Officers. The stability of the profession has been maintained by controlling the number of posts ('offices') available and limiting the territorial area within which a Judicial Officer can carry out their functions. Those aspiring to enter the profession have had to wait until an office becomes available because the incumbent has retired or been discharged. This approach has also ensured that there is coverage of the whole state territory, and that Judicial Officers have some degree of proximity to the debtors with whom they come into contact (Untermaier & Houillon, 2014; Wade, 2018).

### 2.3.1. *Exporting the Judicial Officer model*

Judicial Officers have been proactive in lobbying for the wider adoption of their enforcement model, arguing that it is efficient and effective. The International Union of Judicial Officers (*Union Internationale des Huissiers de Justice*: UIHJ) was established in 1952, with representatives from seven countries. Its objectives include making 'every effort to promote ideas, projects and initiatives which help to move forward and elevate the independent status of officers of Court'.<sup>21</sup> Since 1952 it has grown into an influential international NGO with 90 members or associated organisations, although by no means all of its members are independent professionals. Rather, they are enforcement agents meeting certain criteria in terms of their competences and level of professionalisation, many of whom in fact work in the public sector. Some, indeed, have limited involvement in enforcement in their domestic context, but seek to expand their role.<sup>22</sup>

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<sup>21</sup> See the UIHJ website at [https://www.uihj.com/en/purpose-of-the-uuhj\\_1019850.html](https://www.uihj.com/en/purpose-of-the-uuhj_1019850.html) (accessed 15 September 2019).

<sup>22</sup> E.g. Spanish procuradores – see de Andres (2019).

The Judicial Officer model of enforcement has both advantages and disadvantages. Judicial Officers, through the actions of their professional bodies, have been adept at responding to social and legal changes, adopting new technologies and identifying new opportunities.<sup>23</sup> As commercial operators they can reasonably be expected to understand the mindset and processes of business debtors. They have the financial incentive to tackle difficult situations that a public sector employee might avoid. But at the same time, those financial incentives – unless carefully calibrated and verified – can lead to an additional burden on debtors that is not present in the case of public sector enforcement agents. As explained below, competition between Judicial Officers has become more widespread in recent years and the consequences of this need to be taken into account in the public management context.

The UIHJ is the only international organisation representing the interests of enforcement agents and demonstrating expertise in this field, and so has observer status with many international organisations. Leading members of the organisation have regularly been involved EU programmes in CEE states and in development projects run by e.g. the World Bank, USAID, the Centre for International Legal Cooperation (CILC) and the Deutsche Gesellschaft für internationale Zusammenarbeit (GIZ). Thus, at the same time that consultants were seeking ways of improving the enforcement of judgments, the UIHJ was promoting the Judicial Officer model. And for consultants seeking solutions to the inefficiency of courts in CEE states – at a high point in the implementation of NPM techniques – the advantages offered by the Judicial Officer model are obvious.<sup>24</sup> It offers a lean, flat, small, specialised organisational form. Since enforcement is outsourced, cases are removed from the courts' backlog: the debt to be enforced remains in existence, but it is no longer within scope of (direct) judicial administration.<sup>25</sup> And as a privatised service, Judicial Officers are subject (to a greater or lesser extent) to market pressures which drive performance and customer service.

It is not surprising, then, that variations on the Judicial Officer model have been transplanted to most CEE states ('the recipient states') (Kennett, In press). Collection rates on

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<sup>23</sup> This is not intended to prejudge the extent to which these levels of enterprise and ingenuity are widely shared throughout the profession.

<sup>24</sup> It is beyond the scope of this research project to consider how far other enforcement models were considered, and how far the position of the UIHJ was taken to be authoritative. But adoption of an administrative model would not have dealt with immediate problems of cost reduction and effective administration, and it was precisely court-centred enforcement that East European jurisdictions sought to abandon because of its ineffectiveness..

<sup>25</sup> In a number of CEE jurisdictions, the president of the district court plays a role in the supervision of Judicial Officers. This is not the case in the donor states.

civil court judgments have increased dramatically, and in some jurisdictions the use of Judicial Officers has also been extended to the collection of public law debts.<sup>26</sup>

### 2.3.2. *The impact of deregulation*

At the same time as the Judicial Officer was being exported to CEE states, it was beginning to come under pressure in donor states: in particular, the Netherlands and France. While Judicial Officers position themselves as successful entrepreneurs and legal experts, they are widely perceived as overpaid beneficiaries of a protectionist regulatory system. Deregulation of the legal professions to open them up to greater competition has thus included Judicial Officers within its scope (Darrois, 2009; Ferrand, Deltour-Becq, & Dumay, 2014; Jongbloed, 2010; Kruisheer, 1999; Untermaier & Houillon, 2014).<sup>27</sup> This has developed in four significant ways: first, the introduction of mechanisms by which new offices can be created, thereby increasing choice; second, the enlargement of the territorial competence of Judicial Officers; third, liberalisation of forms of organisation – allowing company structures, multidisciplinary practices and the expansion of business through employment of salaried Judicial Officers (Wade, 2018); and finally, liberalisation of fee structures – rather than the imposition of fixed fees. In the donor states, this process has gone furthest in the Netherlands (Jongbloed, 2010; Odekerken, 2017; van den Berg-Smit, 2013; van der Winckel, 2009; Voert & van Ewijk, 2006). Subsequent official reports, while noting areas of improvement in practice, highlight concerns about the impact of these regulatory changes (van der Winckel, 2009; Voert & van Ewijk, 2006). Competition has led to more aggressive enforcement practices, and to debtors being confronted with demands from a larger number of Judicial Officers than would previously have been the case. Changes in public sector debt recovery practices have contributed to this picture. Public law creditors have outsourced debt recovery and, as large clients, they have been able to demand terms very favourable to themselves as a consequence of the liberalisation of Judicial Officers' fees (Odekerken, 2017; van der Winckel, 2009). But in addition, digitalisation has enabled them to simplify debt recovery practices via the seizure of bank accounts and other credits.

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<sup>26</sup> E.g. Estonia. There seems also to be some use of Judicial Officers to collect public debts in other CEE states such as the Czech Republic.

<sup>27</sup> For the Netherlands the relevant legislation is the *Gerechstdewarderswet 2001*. For France, there is a large volume of legislation, but the crucial law commencing the process is *Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques* (Loi Macron).

As a result, easily collectible debt may be recovered by public sector creditors before cases are passed to Judicial Officers. This has a knock-on effect on Judicial Officers: they are left chasing debt that is more difficult to recover, with the consequent reduction in their fee income and increased pressure to extract fees from debtors who are already in difficult circumstances.

Thus, although it has led to efficiency gains, outsourcing has enabled enforcement to become subject to the logic of competition. Judicial Officers are dependent on marketing their services to creditor clients and less able to maintain their theoretically neutral role. But whereas competition is largely beneficial in a context where it is solely concerned with satisfying customers, it is more problematic when the service offered to customers – in this case creditors – involves the use of coercion in relation to third parties. In this respect, enforcement of judgments and other titles is more analogous to police or prison services – areas in which there has been considerably less experimentation with privatisation (Button, 2019; Johnston, 1992; Le Vay, 2015). Moreover, there are significant differences between debt recovery services and police or prison services. First, whereas the customer for police or prison services is the state itself,<sup>28</sup> in the case of debt recovery services the customer, in private law cases, is a private – usually commercial – entity. Second, in the case of debt recovery, the focus for the customer creditor is the end result – the collection of the maximum possible amount of the money owed – rather than the provision of a service which encompasses a number of elements, and for which quality standards are necessarily considered.<sup>29</sup> In addition, whereas in the case of police or prison services, competition will typically take place at the time of tendering to provide a service for a period of years and service users will not be met with conflicting demands, in the case of debt recovery services, service users (debtors) may continue to be met with demands from competing Judicial Officers in respect of different (public and private) debts.

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<sup>28</sup> As distinct from the third party ‘service user’ who is the subject of the agreement between customer and service provider.

<sup>29</sup> The public management dimension of the debt recovery may of course be taken seriously so that standards for debt recovery are established and enforced. Conversely, although quality standards must be considered for police and prison services, they may not be set at a high level or enforced adequately.

### 2.3.3. *The public management challenge*

Currently, then, the Judicial Officer model of enforcement institution is the one most commonly employed in the EU. The level of competition to which the profession is exposed varies dramatically between jurisdictions, as does the range of debts (public/private) recovered by officers. The model offers important advantages in tackling debtors who resist payment, but – in a competitive environment – it may be less well adapted to dealing with debtors who are unable to meet their obligations and have multiple debts.<sup>30</sup> A public management perspective and strong steering of the network of actors with a role to play in this field is desirable to obtain the best social and economic outcomes. The problems observed in relation to Judicial Officers in the Netherlands, for example, have led to developments on several fronts, including: (i) increased internal regulation (by the professional body which has the power to issue bye-laws)<sup>31</sup> and external regulation (by the Office of Financial Supervision which ensures financial rectitude and proper office administration<sup>32</sup>); (ii) a strengthened system of disciplinary proceedings; (iii) the creation of a register of seizures so that Judicial Officers can check what measures have already been taken against debtors;<sup>33</sup> (iv) improved collaboration with debt organisations, including the establishment of a register whereby Judicial Officers can check with the Dutch Association for Debt Assistance and Social Banking (NVVK) whether a debtor is receiving debt assistance (ter Voert & Beenackers, 2016);<sup>34</sup> and (v) streamlining of public sector debtor collection through a single agency (the *Centraal Justitieel Incassobureau*: CJIB), thus bundling the debts of an individual debtor so that they can be treated holistically.<sup>35</sup> While this combination of measures has brought improvements, they have been introduced only slowly. Concern about the impact of the

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<sup>30</sup> Competition is particularly intense in the Czech Republic. In this respect Smrčka & Plaček (2015) seem to take an unduly complacent view.

<sup>31</sup> Recommended in van der Winckel (2009). The KBvG has since adopted several regulations.

<sup>32</sup> *Gerechtsdeurwaarderswet* 2001 (as amended) arts 30 ff.

<sup>33</sup> See the legislation cited at <https://www.kbvg.nl/5615/verordening-digitaal-beslagregister-voor-gerechtsdeurwaarders> (accessed 14 September 2019).

<sup>34</sup> The NVVK is the umbrella organisation. Individual municipalities are responsible for debt counselling and assistance. Available information suggests that a number of municipalities are not co-operating in this project (for reasons which include data protection), and that some creditors (including public authorities) are not willing to agree to refrain from further enforcement where a debtor is registered in the system.

<sup>35</sup> Although this is the objective, the critical assessment of the National Ombudsman as to the operation of the agency, and of other public sector creditors should be noted (Nationale Ombudsman, 2019). See also ter Voert & van Ewijk (2006), Odekerken (2017 at 3.1.3) and van den Berg-Smit (2013 at 4.2.2.)

the *Gerechtsdeurwaarderswet* 2001 was increasingly expressed in the first decade after its enactment. A further decade has elapsed, during which reforms have gradually been introduced, but legislative amendments to simplify the law relating to debtor income exempt from seizure and to facilitate a co-ordinated approach are still awaiting implementation,<sup>36</sup> and a recent Ombudsman's report remained critical of the approach of public authorities (Nationale\_Ombudsman, 2019).

#### 2.4. REVISITING THE COURT-CENTRED MODEL

In the last twenty years, significant efforts have been made to improve the efficiency of enforcement through the courts in some jurisdictions where a Judicial Officer model has been rejected (or has not been considered at all).<sup>37</sup> Digital technology is an essential tool in this process. In Spain and Slovenia, new systems have been created allowing online filing and management of claims; files can be processed digitally within court offices; and the construction of networks linking the courts to legal professionals, state agencies and financial institutions has revolutionised the potential for access to information about debtors' assets.<sup>38</sup> Although permitting less extensive access to information, similar processes of improved online access and digital processing can also be found in Austria and Italy. At the same time, court reorganisation has sought to professionalize and streamline administration (Contini, 2017; Fabri & Langbroek, 2000). Although it is reasonable to assume that the application of public management ideas and tools to judicial administration – facilitated by the work of the European Commission for the Efficiency of Justice (CEPEJ) – is a factor in this process of reorganisation, it is also apparent that there are also entirely

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<sup>36</sup> Rijksoverheid, 'Kamerbriefvoortgangimplementatie Wet vereenvoudiging beslagvrijevoeten Verbreding beslagregister' 13 February 2019: <https://www.rijksoverheid.nl/documenten/kamerstukken/2019/02/13/kamerbrief-voortgang-implementatie-wet-vereenvoudiging-beslagvrije-voet-en-verbreding-beslagregister> (accessed 15 September 2019).

<sup>37</sup> An important reason for such rejection is the constitutional entrenchment of current arrangements. e.g. Spain (Art 117(3) of the Constitution), Germany (Art 33(4) of the Basic Law). Legacy effects and manoeuvring between legal professionals are also major factors ((de Benito Llopis-Llombart, 2017, p. 32 ff.). In Slovenia, the introduction of a Judicial Officer model was considered, but the inheritance of Austrian laws meant that modernisation continued to draw on Austrian legal concepts.

<sup>38</sup> For Spain see the information (including Revista E-Justicia) available at <http://www.poderjudicial.es/cgpj/es/Temas/e-Justicia/Servicios-informaticos/Punto-Neutro-Judicial/> (accessed 14 September 2019). For Slovenia see Zakono izvršbi in zavarovanju (ZIZ), Art 4.

domestic pressures at work. Thus, in Spain the *Secretario Judicial* (court administrator), was paid out of court fees until the mid 1980s<sup>39</sup> and had a higher income, but lower status, than judges (de Benito Llopis-Llombart, 2017, p. 32 ff.). Part of the trade-off for their accepting a salaried position was an increase in the status and authority of the *Secretario Judicial* (now called a *Letrado de la Administración de Justicia: LAJ*). This dynamic, along with the new potential for digital management of enforcement, is leading to a concentration of enforcement decision-making in the hands of the *LAJ*.

In both Spain and Italy, roll out of the reforms has been prolonged and painful. Successes have been local rather than national: for example, as a result of regional autonomy in respect of judicial administration in Spain, introduction of the ‘new judicial office’ commenced ten years ago in some regions but is yet to begin in others. The creation of the necessary digital infrastructure has been slow, as incompatible systems have been replaced.

A combination of factors has led to a shift away from the dominant role of the creditor in court-based enforcement processes. First, the need for better information about debtors’ assets in order to achieve more effective enforcement becomes problematic if information any obtained by the court – through its networks with state agencies and banks – has to be passed on to creditors. This is not consistent with data protection rules.<sup>40</sup> Secondly, there is greater recognition of the fact that methods of enforcement should be proportionate: the priority order in which assets should be seized is set out in the legislation of several Member States. Leaving decision-making in the hands of creditors does not secure this objective. A third factor is the restructuring of court administration, which has created administrators with greater decision-making powers. A practice is developing whereby creditors can apply for enforcement and combine this with a request for information about the debtor’s assets, with the decision as to what enforcement measures to take then being made by the competent court administrator.

Thus, although a rationalised court-centred model is slow to emerge, it is gradually developing the potential to achieve efficient results in a way that makes it comparable to the administrative and Judicial Officer models. In each case the key lies in recognising that debt enforcement involves administrative, logistical, negotiating and people management skills as

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<sup>39</sup> The principle of free access to justice was established in Ley 6/1985 of 1 July 1985, *Orgánica del Poder Judicial*.

<sup>40</sup> Under EU Regulation 2016/679 (General Data Protection Regulation), processing of data by an enforcement institution is covered by Art. 6(1)(e) and 23(1)(j), but the transmission of that data to a creditor is not consistent with the Regulation.

well as a knowledge of the relevant law and, at times, a careful judgment about it should be applied to the facts on the ground. Centralised direction and efficient data processing are essential.

### 3. CONCLUSIONS

Over-indebtedness is an increasing problem for citizens and is recognised as an important factor contributing to social exclusion and reduced participation in democracy. The outsourcing of enforcement has encouraged a fragmented approach to citizen debt, whereas a more holistic treatment could assist in the identifying and combating social exclusion.

This can be illustrated by reference to the SEA, which combines its debt recovery role with functions in debt restructuring, and education and prevention. As a state agency, it operates in a way that is transparent and it has experienced waves of reform to reflect public management priorities, including better co-ordination with related agencies and an enhanced public service ethos. Moreover, it sets its priorities in terms of debt recovery by reference to public interest factors rather than maximising profit. Nevertheless, this is not an argument for exporting the Swedish model. First of all, a description of the scope and objectives of the SEA does not imply any evaluation of its effectiveness in achieving those objectives. Moreover, a positive evaluation of the effectiveness of the agency could not be attributed to its particular institutional form and responsibilities: it would be a factor of wider public management policies and tools, as well as the surrounding legal, social and political culture. Sweden's culture of openness and honesty is undoubtedly a factor in the conception and operation of the SEA. And it is very evident that the current institutional arrangement can be traced back to its historic roots: legacy effects are strong and the status of the *kronofogde* is well established.

But similar observations also hold true for the Judicial Officer model: the profession in the donor states has benefited from the corporatist framing of its relationship to the state. Changes in regulation have been negotiated, so that detriment to the profession on one issue is compensated by new advantages elsewhere. Judicial Officers in recipient states do not enjoy these privileges. As members of a very small profession, squeezed between creditors who want a higher debt recovery rate and debtors who complain of oppression, they are in a somewhat precarious position. They also lack the centuries of tradition and network of ties to other legal professions that have buttressed the position of Judicial Officers in France or Belgium. They are seeking to establish themselves in an era dominated by a neo-liberal

market ideology. But market ideology is also dismantling the corporatist protections the profession has enjoyed in the donor states. In a range of jurisdictions, the fact that there are disadvantages as well as advantages flowing from the Judicial Officer model in a competitive environment has become apparent and various strategies are being employed to combat the problems identified.

It is easy to lose sight of the public management dimension of forced recovery of debt when the institution to which recovery is entrusted is made subject to the logic of competition. But social inclusion and participatory democracy will better be promoted if public administrators recognise the role of enforcement agents as part of a coordinated strategy, whereby those in regular contact with debtors are not solely tasked with efficient debt enforcement but also contribute to action and policy for the education and rehabilitation of debtors. A first question must be how far competition is desirable in this context. If it is accepted that a certain degree of competition is advantageous in improving the quality of performance of enforcement agents and encouraging creativity in the face of challenges, it becomes necessary to determine what restrictions of competition, if any, should be put in place. Experiments with the level of competition have taken place in some states,<sup>41</sup> and co-ordination to ensure that debtors are not faced with conflicting payment demands by competing Judicial Officers is also facilitated in some states.<sup>42</sup> Partnership between enforcement agents and NGOs, municipal workers or others who may play a role in supporting debtors – which is essential to improved understanding of the position of debtors and the provision of routes out of debt – is also hindered where competition has led to aggressive enforcement action and has fostered opposition between these different actors. In theory enforcement agents could act as an excellent source of data for public managers in seeking to understand the impact of various policies, such as those affecting household income or the operation of small businesses. In practice, however, this information resource is under-utilised.

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<sup>41</sup> In Poland the territorial competence of Judicial Officers has been changed several times, thus permitting greater or lesser degrees of competition.

<sup>42</sup> In Hungary, assignment of cases to Judicial Officers is done centrally, rather than via creditor choice. Once a case has been assigned to a Judicial Officer, the same officer will be made responsible for any new enforcement action commenced against that debtor. In the Netherlands, efforts to put improve co-ordination through the creation of a register of seizures that enable Judicial Officers to discover whether a debtor is subject to multiple demands, have been slow and partial.

This broad sketch of different models of enforcement institution may be helpful for the purposes of orientation, and highlighting some areas worthy of further investigation, but evaluation of the various models would require much more intensive investigation of their operation in individual states.

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