

## Reform Forum Note

# PARTICIPATORY ENFORCEMENT OF JUDGMENTS AND OTHER ENFORCEABLE INSTRUMENTS: BEST EUROPEAN PRACTICES

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**Summary:** 1. Introduction. – 2. International Standards. – 3 Role of Enforcement Agents in Debt Collection. – 4. Categories of Cases to Be Submitted to Participatory Enforcement. – 5. Application of Mediation by Enforcement Agents in Countries Where Enforcement Agents are not Officially Recognised as Mediators by National Law. – 6. Benefits of Participatory Enforcement. – 7. Conclusion.

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## ABSTRACT

*Mediation in the context of the enforcement of judgments and other enforceable documents should be distinguished from the broader and more general question of whether or not enforcement agents may serve as mediators. In Europe, there are some jurisdictions where enforcement agents may indeed serve as mediators. This does not necessarily mean that in these jurisdictions enforcement agents use mediation in ongoing enforcement procedures executed under their supervision (the latter is qualified as 'post-judicial mediation' or 'participatory enforcement'). In actual fact, examples of post-judicial mediation are scarce or non-existent even though they are discussed in literature. As will be shown in the present contribution, 'post-judicial mediation' is often not conceived as mediation in the strict sense (i.e. the bringing about of an amicable settlement under the guidance of a neutral mediator), but as a series of activities aimed at providing efficient and effective enforcement services. It is often better to refer to 'post-judicial mediation' as 'participatory enforcement' or 'amicable enforcement'. Best practices in participatory enforcement are the central topic of the present contribution.*

## 1 INTRODUCTION

Mediation in the context of the enforcement of judgments and other enforceable documents should be distinguished from the broader and more general question of whether or not enforcement agents may serve as mediators. In Europe, there are some jurisdictions where enforcement agents may indeed serve as mediators. Examples are France, Belgium, Italy, the Netherlands, Portugal, Switzerland and Spain.<sup>2</sup> This does not necessarily mean that in these jurisdictions enforcement agents use mediation in ongoing enforcement procedures executed under their supervision (the latter is qualified as 'post-judicial mediation' by the International Union of Judicial Officers (UIHJ)); hereafter also 'participatory enforcement'). In actual fact, examples of post-judicial mediation are scarce or non-existent even though they are discussed in literature.<sup>3</sup> However, examples where enforcement agents offer their services as a mediator in general, outside the context of enforcement, are more numerous. In this context it should not be forgotten that in the jurisdictions mentioned, enforcement agents can often be qualified as private enforcement agents (i.e. they do not act as civil servants and do not come under the authority of the civil service and the Ministry of Justice). Such private enforcement agents, who have a liberal and independent status, often provide additional services of a commercial nature next to enforcement, such as amicable debt recovery (i.e. debt recovery without a judgment ordering payment), voluntary sale of moveable or immoveable property at public auctions, the provision of legal advice, or the representation of parties in courts. In recent years (and this is relevant in the present context) they have also started to offer their services as mediators in various types of disputes.<sup>4</sup>

2 CEPEJ, *Mediation Awareness and Training Programme for Enforcement Agents Ensuring the Efficiency of the Judicial Referral to Mediation* CEPEJ (2021) 7, Introduction (2): 'Even if, to date, few member countries of the Council of Europe (France, Belgium, Italy, the Netherlands, Portugal, Switzerland and Spain among others) allow enforcement agents to officially practice as mediators, it is important to raise the awareness of enforcement agents as regards mediation in civil and commercial matters. Such role of the enforcement agent as a mediator is also confirmed by the CEPEJ Guidelines (2009) 11 REC on enforcement (Guideline 8):'

3 For a recent study on enforcement in a comparative perspective, see W Kennett, *Civil Enforcement in a Comparative Perspective. A Public Management Challenge* (Intersentia 2021).

4 CEPEJ, *Guidelines for a Better Implementation of the Existing Council of Europe's Recommendation on Enforcement* CEPEJ (2009)11REV2, para 34: 'Enforcement agents may also be authorized to perform secondary activities compatible with their role, tending to safeguard and secure recognition of parties' rights and aimed at expediting the judicial process or reducing the workload of the courts.'

Several of the additional services mentioned are of major importance to private enforcement agents since they provide them with the largest part of their income. After all, their official activities such as enforcement of judgments are executed at a relatively low standard rate set by the legislature, and these activities are often 'cross-financed', so to say, by their commercial activities. It is indeed in this context that the discussion about whether enforcement agents should be allowed to act as mediators may often be placed: not necessarily within the context of 'post-judicial mediation' or 'participatory enforcement', but in the context of providing additional commercial services in general. This is not surprising because, generally speaking, enforcement agents may be ideal mediators due to their training and practical experience requiring all kinds of legal and social skills. As the CEPEJ stated in the context of its *Mediation Awareness and Training Programme for Enforcement Agents Ensuring the Efficiency of the Judicial Referral to Mediation*:

For many years the profession of enforcement agent has been active in the field of mediation due to the nature of its functions. It was recognized that enforcement agents, because of the qualities of impartiality, neutrality and confidentiality inherent to their function, appear to be the ideal professional to act as mediators in the context of alternative dispute resolution. In the daily practice of their profession, they play a crucial role in the resolution of disputes.<sup>5</sup>

Within this same context, the CEPEJ also made important observations regarding 'post-judicial mediation.' It stated:

Enforcement agents must ... daily try to conciliate two opposing interests, on the one hand the interest of the creditor wishing to recover what is owed to him according to an enforceable title and on the other hand the debtor not knowing or not wishing to pay the debt to which he has been condemned. This is what the International Union of Judicial Officers (UIHJ) calls 'post-judicial mediation', a method by which the enforcement agent tries to obtain an agreement from the parties by negotiating either a payment plan, or obtain a remission of interest or even obtain a reduction of the debt against a payment of the negotiated sum.<sup>6</sup>

As will be shown below, 'post-judicial mediation' is often not conceived as mediation in the strict sense (i.e. the bringing about of an amicable settlement under the guidance of a neutral mediator), but as a series of activities aimed at providing efficient and effective enforcement services. It is often better to refer to 'post-judicial mediation' as 'participatory enforcement' or 'amicable enforcement'.

## 2 INTERNATIONAL STANDARDS

When looking for international standards on enforcement, little can be found on 'post-judicial mediation' or 'participatory enforcement'. The standards that may be found deal with enforcement in general, and obviously within this context the most important international standard is the human right to effective enforcement that is part of the fundamental guarantees of Article 6 of the European Convention of Human Rights. As is widely known, in *Hornsby v. Greece*,<sup>7</sup> the European Court of Human Rights stated as follows:

40. The Court reiterates that, according to its established case-law, Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights

5 CEPEJ (n 2) 2.

6 *Idem*.

7 *Hornsby v Greece* App no 18357/91 (Judgment of 19 March 1997) Reports 1997-II, 510.

and obligations brought before a court or tribunal; in this way it embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect ... However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 (art. 6-1) should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 (art. 6) as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention ... Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6 (art. 6) ...

Given the fact that effective enforcement is a human right, member states of the Council of Europe are advised to make sure that their enforcement systems are effective and efficient. In Recommendation Rec(2003)17 of the Committee of Ministers of the Council of Europe to member states on enforcement, one finds expressed that the enforcement creditor and the enforcement debtor have a duty to co-operate to make enforcement as effective and efficient possible, whereas the relevant authorities have a duty to facilitate cooperation. Furthermore, 'a proper balance should be struck between claimants' and defendants' interests' during enforcement. These requirements should be kept in mind when discussing ideas on constructing models of alternative or participatory enforcement as discussed below since a participatory approach to enforcement might increase possibilities to take into consideration all interests involved in debt enforcement.

Further international standards may be found in the 2009 CEPEJ Guidelines for a Better Implementation of the Existing Council of Europe's Recommendation on Enforcement. These Guidelines provide:<sup>8</sup>

6. .... enforcement may only be achieved where the defendant has the means or ability to satisfy the judgment.
7. Enforcement should strike a balance between the needs of the claimant and the rights of the defendant. ...
8. The enforcement process should be sufficiently flexible so as to allow the enforcement agent a reasonable measure of latitude to make arrangements with the defendant, where there is a consensus between the claimant and the defendant. Such arrangements should be subject to thorough control to ensure the enforcement agent's impartiality and the protection of the claimant's and third parties' interests.

It is within this context that 'post-judicial mediation' is explicitly mentioned. Par. 8 cited above continues:

[t]he enforcement agent's role should be clearly defined by national law (for example their degree of autonomy). They can (for example) have the role of a 'post judicial mediator' during the enforcement stage.

The Guidelines do, however, not discuss in detail what the tasks of a 'post judicial mediator' should be. It is likely that participatory enforcement may be brought under this heading.

In the context of the Mediation Awareness and Training Programme for Enforcement Agents Ensuring the Efficiency of the Judicial Referral to Mediation we also find a reference to 'post-judicial mediation'. It is stated that:

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<sup>8</sup> CEPEJ (n 4).

Enforcement agents must ... be able to communicate in a fair and balanced manner in order to carry out their mainly judicial mission but also regularly in their accessory missions such as, for example, amicable debt collection. It is therefore essential that enforcement agents have a full knowledge and understanding of the process and benefits of mediation, not only to practice so-called 'post-judicial' mediation but also to be able to act as mediators in a broader sense in the context of alternative dispute resolution.<sup>9</sup>

In the Global Code of Enforcement of the International Union of Judicial Officers (UIHJ) we also find relevant information on best practices in this field. This Code introduced 'modern concepts such as 'amicable' enforcement, 'participatory' enforcement and 'soft' enforcement'. 'Participatory' or 'amicable' enforcement is defined as an 'enforcement procedure that allows parties to reach an agreement on enforcement terms and conditions under the authority of the enforcement agent and the supervision of a judge'. It should be noted that enforcement agents exercise their authority under the supervision of the judge.<sup>10</sup>

Article 10 of the Global Enforcement Code, is relevant in this respect. It provides:

Article 10: Alternative or participatory enforcement

States must ensure that the professional instructed with the enforcement has the option of adopting a consensual enforcement procedure at the request of the debtor. In order to adapt the enforcement to the situation of the creditor and the debtor, States must allow the active participation of the parties to the enforcement.

Furthermore, in Article 21, amicable debt collection is mentioned as one of the enforcements agent's secondary activities (in the introduction above I referred to these activities as 'additional services of a commercial nature next to enforcement').

Article 21: Secondary activities

The professional status must allow judicial officers and enforcement agents to pursue secondary activities that are compatible with their position. In particular, they must be capable of being authorized to proceed with the amicable collection of debts.

The important role played by the judge in the enforcement stage is underlined in Article 22. This article seems only to leave limited room for post-judicial mediation by an enforcement agent, although an amicable procedure (participatory enforcement) leading to an amicable settlement may not be excluded.

Article 22: Role of judges

Only a judge can rule on disputes arising from the enforcement and order the measures necessary for its implementation at the request of one of the parties or of the enforcement agent. The judge to whom application is made by the debtor, an interested third party, the judicial officer or enforcement agent may suspend or cancel an enforcement measure should a sound reason justify such.

Further relevant articles are Articles 27 and 29 since proportionality and flexibility in enforcement may result in states opting for alternative forms of enforcement due to the shortcoming of ordinary enforcement. The relevant articles provide as follows:

9 CEPEJ (n 2) 2.

10 UIHJ Publication, 'Global Code of Digital Enforcement' (UIHI, November 2021) <<https://www.uihj.com/downloads/global-code-of-enforcement/>> accessed 10 February 2022.

#### Article 27: Proportionality of the measure of enforcement

The enforcement measure must be proportional to the amount of the claim. In the event of abuse, the creditor may be directed to make reparations.

#### Article 29: Flexibility of the measures of enforcement

States must organize their enforcement systems by adapting them to the interests of the creditor and the economic and social situation of the debtor. For this reason, they must diversify the enforcement measures so that the judicial officer or enforcement agent may choose among them in keeping with the circumstances.

As stated above, few international standards on post-judicial mediation understood as participatory enforcement can be found apart from the above standards related to amicable enforcement. It is telling that in the 2021 Draft World Code of Digital Enforcement of the International Union of Judicial Officers<sup>11</sup> no specific rules on post-judicial mediation or participatory enforcement can be found either.

### 3 ROLE OF ENFORCEMENT AGENTS IN DEBT COLLECTION

As stated above, enforcement agents may function as mediators in a selection of European states such as France, Belgium, Italy, the Netherlands, Portugal, Switzerland and Spain. However, examples of mediation by an enforcement officer in the enforcement stage have not been found so far. Enforcement disputes where the debtor's only aim is the postponement of enforcement are highly unlikely to be candidates for mediation, at least where mediation is meant to settle the dispute in a timely manner since the debtor wishes to delay the procedure as much as possible. Furthermore, no examples have been found where mediation is used in cases of disputes regarding disciplinary liability between the professional community of private enforcement agents and a state regulator. In these cases one may even ask whether mediation would be the right approach to matters since legal certainty is better served by a binding and public court decision on the matter which can serve as guidance in future cases (it should be remembered that unlike court proceedings mediation is private and not public).

Although examples of mediation in the enforcement stage cannot easily be found in Europe, what can be found are attempts to introduce amicable or alternative enforcement schemes. These are widely discussed in literature and interesting suggestions for the introduction of these models can be found. Here I will discuss the Dutch model as proposed in a recent research report since it provides a very advanced model.<sup>12</sup>

#### Procedure of Debt Collection in the Netherlands: A Recent Report

As stated in a recent report by Nadja Jungmann and others, initial steps in the collection of debts in the Netherlands are often the activities of debt collection agencies or enforcement agents acting as debt collection agencies (i.e. one of the secondary activities of the enforcement agent mentioned above!) hired by the creditor. Neither a collection agency nor the enforcement agent acting as a collection agency (I will refer to both of them as collection agency hereafter) have legal authority to force debtors to pay their debts (the enforcement agent will only acquire this power after a judgment has been issued, but that usually only

<sup>11</sup> I have this draft in my possession. It has not been able to locate it on the Internet.

<sup>12</sup> The information that follows is based on N Jungmann et al., 'Betalingsregelingen: Bevorderen van haalbare betalingsregelingen bij private schuldeisers' WODC 2020 <<https://open.overheid.nl/repository/ronl-41ffb83-6b19-4fc6-9490-2277677fae0c/1/pdf/tk-bijlage-eindrapport-betalingsregelingen.pdf>> accessed 10 March 2022. Parts of this report are rendered in English translation below.

happens after amicable debt collection attempts through a debt collection agency have been terminated). Collection agencies mainly try to get in touch with the debtor and to convince the debtor that paying quickly prevents annoying procedures and collection costs. If a debtor is willing to pay, but cannot do so immediately for the full amount, most collection agencies will offer a payment arrangement if the creditor has allowed them to do this. It is here where the debt collection agency starts what may be called participatory enforcement.

It should be underlined that a distinction most debt collection agencies make is between debtors who cannot pay and debtors who do not want to pay. The first group qualifies for participatory enforcement, which may include referral to debt counseling, whereas the second group does not qualify for an amicable approach. Furthermore, agencies may advise their clients (creditors) that in the case of small claims it is wise to write off the amounts instead of starting enforcement, at least from a cost point of view. Obviously, it is the creditor who decides about the course of action that is to be taken.

#### When can Payment Arrangements be Made?

In the Netherlands, debtors do not have a right to a payment arrangement. There are, however, some statutory exceptions to this rule, namely where it concerns:

1. health insurance premium arrears;
2. energy and water debts;
3. mortgage debts.

A payment arrangement can be negotiated during the debt collection procedure. Creditors may not charge any costs for this. However, if after the summons has been served a payment arrangement is established, the creditor may charge court fees including the costs of serving the summons and of the lawyer's salary.

#### Why Do Payment Arrangements Fail?

As stated by Nadja Jungmann et al.,<sup>13</sup> payment arrangements often fail for the following reasons:

1. When determining the monthly amount of payment, the debtor's other existing obligations are not taken into consideration (these may even be unknown);
2. A change of circumstances, for example additional creditors starting debt collection procedures at a later stage.

In order to counter these problems, it has been suggested that a debt centralizing intermediary be appointed, (the debt collection agency or an enforcement agent may act as such) which would be given the task of creating a central repayment plan that should be submitted to a judge for approval. In addition, having a central register of debts is considered advisable.

#### Measures to Stimulate Payment Arrangements

It is felt in the Netherlands that attempts to reach an amicable agreement (i.e. a payment arrangement) before the case is brought to court should be intensified. Nadja Jungmann et al.<sup>14</sup> state that linking the creditor's right to be indemnified for collection costs to serious attempts to establish a payment arrangement may encourage such agreements. Increasing court fees to make it more expensive for creditors to litigate may also serve as an incentive to

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13 Ibidem.

14 Ibidem.

establish a payment arrangement. Furthermore, one may think about the introduction of a power for courts to issue costs orders when court action is initiated by the creditor too soon. Settling the debt for the principal amount and not for the collection costs may be an idea as well. In that manner an incentive for creditors is introduced to minimize collection costs and, as a derivative thereof, an incentive to establish payment arrangements.

#### **4 CATEGORIES OF CASES TO BE SUBMITTED TO PARTICIPATORY ENFORCEMENT**

As Nadja Jungmann et al. state, cases concerning the enforcement of monetary claims can particularly benefit from participatory enforcement, provided that the debtor is willing to pay but unable to do so at once for the full amount. In these cases, a feasible payment arrangement may be negotiated between debtor and creditor. In the absence of measures stimulating the creditor to agree with the establishment of a payment arrangement, much depends on the creditor's knowledge and willingness to attempt an amicable solution. It may be the task of the debt collection agent to provide the debtor and the creditor with the necessary information, including the provision of a centralized overview of the other debts and the identity of the other creditors before a payment arrangement can be attempted. All of this is of course not relevant where the debtor is able (i.e. the debtor is not overindebted but has sufficient assets) but only unwilling to pay. In those cases attempting an amicable settlement (participatory enforcement) may be a waste of time and money.

It should be noted here, that participatory enforcement is not necessarily the same as mediation. A mediator acts as a neutral facilitating the parties to settle their dispute themselves. Participatory enforcement is not about revisiting the court decision on the merits, but it is aimed at effective debt collection arrangements in which over-indebted debtors are helped to pay their debts, something that would be impossible or hard to achieve in ordinary enforcement proceedings. A payment arrangement is not only in the interest of the debtor, but also of the creditor who would like to receive as much of his claim as possible without incurring unnecessary debt collection costs. The debt collection agent (for example an enforcement officer acting as such) may be the right agent to facilitate the process, also by providing the necessary information, both as regards participatory enforcement and alternatives.

#### **5 APPLICATION OF MEDIATION BY ENFORCEMENT AGENTS IN COUNTRIES WHERE ENFORCEMENT AGENTS ARE NOT OFFICIALLY RECOGNISED AS MEDIATORS BY NATIONAL LAW**

Enforcement agents may be officially recognized as mediators by national law, but this is not necessarily the case. In countries where enforcement officers are allowed to initiate secondary, commercial activities, these secondary activities are often not regulated by the law but by codes of conduct (ethical rules). An example is the Netherlands where the relevant code of conduct allows additional activities as long as there is no conflict of interest with the official activities of the enforcement officer. It is hard to see why acting in the area of amicable enforcement could result in a conflict of interest, especially where enforcement officers are already allowed to act as debt collection agencies (i.e. debt collection agencies in the amicable stage before court action has been taken).



## 6 BENEFITS OF PARTICIPATORY ENFORCEMENT

The benefits of participatory enforcement are manifold. The following benefits may be listed:

- It allows creditors to obtain payment of larger proportions of their claims since it takes the financial position of the debtor into consideration as well as the debtor's willingness to cooperate in payment;
- It reduces the burden on courts who do not have to issue judgments ordering the debtor to pay, judgments that are often only of an administrative nature since the debtor does not make a court appearance in most of these cases (default judgments);
- It reduces enforcement costs, which is not only beneficial for the debtor who might not be able to pay these costs anyway, but also for the creditor whose claims will not increase due to high enforcement costs.

## 7 CONCLUSION

Participatory enforcement is not being discussed widely in international comparative literature. However, it is an important instrument in making debt collection more effective since it takes into consideration the financial situation of the individual debtor and allows the debtor to influence the enforcement procedure. Participatory enforcement should not be considered as 'mediation' during the enforcement stage, since this is not what the concept refers to, and also because it might give the wrongful impression that claims that have been adjudicated by a court of law can be mediated in the enforcement stage. Participatory enforcement is very different from this. It allows for the involvement of both the debtor and the creditor in the enforcement stage where it concerns the modalities of enforcement with the aim of making enforcement more effective. The example of the Netherlands as discussed by Nadja Jungmann et al. may serve as a best practice in this respect.

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