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ANNEX 5

A D V I C E

Assembly of EULEX Judges

Pristina, [Date] [Month] 2009

To: The President of the District and Municipal Courts of Kosovo

From: Assembly of EULEX Judges, EULEX Justice Component

Subject: Advice to the Courts of Kosovo on the handling of execution cases upon appeal

1. Executive Summary

As foreseen by article 3 of the joint Action of the Council of the European Union of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, this has the task to “(a) monitor, mentor and advice the competent Kosovo institutions on all areas related to the wider rule of law (including a custom service), whilst retaining certain executive responsibilities”.

Article 2.4 of the Law on jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo of 13 March 2008 (Law no. 03/L-053) provides that: “besides exercising their judicial functions pursuant to the provision of articles 3, 5 and 5 of this law, EULEX judges will monitor, mentor and advice the Kosovo judges, in the respect of the principle of independence of the judiciary and according to the modalities as established by the present law and by the EULEX KOSOVO”.

In particular, advising consists of formal and official positions taken by the EULEX Judges collectively in the Assembly of EULEX Judges and directed to the national judicial, legislative or government authorities to stimulate their actions in the respective fields of competence. In other words, advising is intended to provide professional counseling to the competent authorities (MoJ, KJC, KJI, Presidents of the Courts, Supreme Court, Parliament, Law Faculties) on each topic raising from the monitoring and mentoring experience. The advising provides the Kosovan stakeholders with the necessary insights to intervene in those areas of the justice system that need general and structural improvements to be implemented for all the judicial system and that cannot be performed by the mentoring activity of single EULEX Judges.

The present advice to the Presidents of the Courts of Kosovo on the handling of execution cases upon appeal represents the result of the monitoring and mentoring activities of EULEX Judges, in close consultation with the Kosovo

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counterparts. These activities have revealed that first instance courts in practice put a halt to the proceedings when an execution case is appealed and does not continue the execution until the appellate court has reached a decision. This practice is not in accordance with Kosovo law and European Best Practice. These findings demonstrate the urgent need to change the current practice of these cases, which would also increase the efficiency of the executive procedure in Kosovo.

2. Introduction

There is a serious problem with the backlog of the execution cases all over Kosovo. According to the statistics in the KJC report for 2008 (“Report for 2008 – Statistics on regular courts”), a total number of 74.679 civil execution cases at the Municipal Courts were uncompleted at the end of 2008, which represented about 41 per cent of the total number of uncompleted cases at the Municipal Courts of Kosovo.

The timely execution of execution titles on behalf of entitled creditors forms an important part of a justice system based on the Rule of Law. Without execution, the preceding judicial proceedings are of no value to the creditor. This last step of the procedure must therefore be efficient in order for the creditor to get their entitled outcome of the proceedings and for the judicial proceedings to reach a final end.

The prompt execution of execution titles is essential for the society’s respect for the courts and the judicial system. If the parties do not have the assurance that judgments will be carried out in due time, they lose faith in the system and might seek other means of ensuring payments. Furthermore, execution is important as it fosters a respect for monetary obligations. Lastly, for the parties involved it is no doubt important to be able to move on from a dispute, which can only be done after it has finally been settled.

3. The present situation

When performing MMA functions and meeting with the judges of the Courts of Kosovo, the standard practice of the Courts when an execution case is appealed has been clarified. When an appeal against an execution case is filed, the whole execution case is sent to the appellate court for the appeal to be decided upon. No copy of the case is kept by the first instance court and the procedure is therefore stayed awaiting the decision regarding the appeal. In contrast to this practice, the Law on Executive Procedure (Law No. 03/L-008) article 12.6 states that the appeal does not halt the executive procedure.

Generally, an appeal against an execution case does not halt the execution in the practice of European States. The first instance court will in the case of an appeal either send the original case file to the appellate court and keep a copy of it to be able to continue the execution or keep the original of the case file

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and send a copy to the appellate court. In this way the execution can continue despite the appeal.

Consequently, the present practice of the first instance courts in Kosovo is neither in accordance with Kosovo law nor with European Best Practice.

The present practice in Kosovo Courts is no doubt a factor that slows down the execution procedures and thus creates backlogs as regards these cases. If the judges at the first instance would instead proceed with the execution despite the appeal the execution process would become more efficient. By simply making a copy of the appealed execution case file before sending the original case file to the appellate court, the first instance judge would be able to continue the execution despite the appeal, thus proceeding in accordance with the law and with European Best Practice.

4. Recommendation

In the light of the conclusions above, the present recommendation is presented to the Courts of Kosovo:

When an appeal is filed against an execution case, a copy of the case file should be kept at the first instance Court and the execution procedure should continue even though the appeal is pending at the appellate court.

5. Conclusion

Improving the backlogs of execution cases is an important task for the Courts of Kosovo. An important step would be to follow the advice provided in this text, which is based on Kosovo law and European Best Practice. This would help the courts to better tackle the present backlog and the affected parties would be provided with a more efficient execution of judgments.

For the above mentioned reasons, the Assembly of EULEX Judges

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The Presidents of the Courts of Kosovo to adopt routines in their respective courts that will ensure that a copy of the case file is kept at their court when an execution case is appealed and to draw the attention of the judges of their Court to the provisions of article 12.6 of the Law on Executive Procedure (Law No. 03/L-008) in order for them not to halt the execution procedure because of an appeal.

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