Abstract

The necessity to protect debtors with regard to meeting their basic life needs, including ensuring a place of residence in epidemic emergencies, led to the introduction by the national legislator of new regulations (also in the field of real estate auctions), rules aimed at satisfying the debtor’s housing needs. The consequence of the aforementioned legislative actions is the addition of a new provision to the Polish Code of Civil Procedure – Art. 952¹ with effect from May 30, 2020.

The purpose of this study is a detailed presentation of the restrictions on enforcement against real estate introduced by the amendment to the Polish Code of Civil Procedure of May 14, 2020, aimed at satisfying the debtor’s housing needs, taking into account the problems caused by the application of new legal norms.

The solutions discussed are a response to the situations repeatedly found in practice, in which the submission by the creditor of an application for enforcement against real estate was used to harass the debtor and therefore undoubtedly deserve approval. The possibility of using enforcement measures aimed at real estate with the view to satisfy the debtor’s residential purposes in the enforcement of small claims, is clearly contradictory to the basic assumptions of the debtor’s protection against enforcement infringing his personal dignity.

The new rules on enforcement against real estate serving to satisfy the debtor’s housing needs, strengthen considerably the position of debtors in the course of the execution process. It is made at the cost of significant limitation of the possibility to satisfy the creditors with the use of this type of enforcement process and postponement of debt collection in time. The only valuable component of the debtor’s property is often the residential property, which makes property execution one of the most effective methods of execution itself. Limiting execution possibilities of these properties, may in practice mean for many creditors an inability to satisfy the claimed debt for a long time and the necessity to raise additional costs and lead to an increase in the number of unsuccessful executions.

However, the envisaged legal solutions, with respect to debtors remaining in a deteriorating economic situation caused by an epidemic threat, in the sense of an extraordinary and only temporary threat, should be assessed positively as a rule, subject to their episodic nature.

Key words: anti-crisis shield, epidemic state, real estate enforcement, parties to enforcement proceedings (debtor, creditor), enforcement restrictions, real estate auction, auction term, enforcement authority (court, bailiff), debtor protection, debtor’s housing needs, ineffectiveness of enforcement

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1. Introductory remarks

Economic crises with a broader scope, regardless of their basis and reasons, result usually in the deterioration of an economic situation of many social groups and individuals. Currently, the global crisis caused by the spread of SARS-CoV-2 is also like this. The legislator’s role is to adequately and quickly respond to such unfavourable phenomena, in particular within the scope of undertaken protective initiatives dedicated to entities and persons being a party to legal relations, particularly exposed to negative consequences of adverse economic phenomena. Such a group undoubtedly includes the entities against which executive proceedings are already instituted or who are at risk of such proceedings being initiated.

Taking into account a special and extraordinary nature of the situation caused by the epidemic being announced, within the framework of legal and economic shields introduced in stages, the state legislator has also adopted the Act of 14 May 2020 on the amendment of some acts within the scope of protective actions related to the spread of the SARS-CoV-2 virus.2

The significant objective of the entire package of acts being introduced, known as the Anti-Crisis Shield, including also the mentioned statutory regulation, was, according to its drafters, to prevent adverse effects of economic changes caused by the COVID-19 pandemic, as well as, in the long run, to prepare both the domestic economy and administrative structures to challenges resulting from phasing out of epidemic outbreaks. The act offers a series of actions, the performance of which shall assumedly be of an ad hoc nature (adjustable to the current pandemic situation) and of a long-term nature (package of further simplifications and facilitations aimed at the maintenance of and potential increase in investments at the stage of the pandemic recovery). Solutions proposed in this regulation constitute a follow-up to policies acting as catalysts and incentives for the Polish economy. They are to serve not only short-term purposes of limiting the adverse effects of SARS-CoV-2, but also to perform a role of instruments having a long-term impact on the economic development of Poland. Their aim is also to integrate into and continue the solutions included in acts from the so-called Anti-Crisis Shield as a series of subsequent actions supporting both Polish entrepreneurs and the entire society. A structure and an assumed purpose of the adopted legal regulations are to lead to the simplification of obligations resulting from administrative settlements and to constitute direct help both for citizens and enterprises.

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2 Journal of Laws of 2020, item 875 (further: “Shield 3.0”).
In the area of private law, the presented Act has led mainly to the compatible amendment to the Code regulations of the civil law of substance and of procedure, introducing special mechanisms ensuring extraordinary protection for natural persons – consumers – regarding liability trading and executive proceedings, the subject of which is an asset in the form of residential property used for the satisfaction of one’s own housing needs. Therefore, special protection was guaranteed to natural persons who, as a result of the above extraordinary events, may be particularly adversely affected by deterioration in the economic situation. The legislator decided to introduce additional protection for one of the basic life needs of such persons - the need for housing. In particular, pursuant to the Civil Code Act of 23 April 1964, the introduced amendment consists in adding Article 387 to the Code regulation, introducing the sanction of nullity of a contract under which a natural person undertakes to transfer the right of ownership to the real property serving its housing needs in order to secure claims resulting from this or other contract not related directly to business or professional activity of this person, in the case when: 1) property value is higher than the value of cash claims secured with this property, increased by the amount of maximal interest on delay from this value for the period of 24 months or the value of cash claims secured with this property is not designated, or 2) conclusion of this contract has not been preceded with the assessment of the property’s market value conducted by an assessor.

The indicated provision introduces a necessary measure to eliminate irregularities present in the contractual obligation, because regulations on defects of a declaration of will, which refer to such circumstances of agreement conclusion as trick, compulsion, threat, or regulations concerning exploitation (Article 388 of the Civil Code) in practice appear to be ineffective. Moreover, this provision, while covering also agreements concluded between natural persons (performing a legal action not directly related to their business or professional activity), protects against abuses which may appear in the ordinary trade, as well as prevents the conduct in fraudem legis through the indication of another natural person not conducting business activity as a party to this agreement.

The Act of 14 May 2020 on the amendment of some acts within the scope of protective actions related to the spread of the SARS-CoV-2 virus has also led to the amendment of the Civil Procedure Code Act of 17 November 1964 in a complementary manner. The need for protection of debtors within the scope

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3 Uniform text Journal of Laws of 2019, item 11465, as amended (further: “the Civil Code”).
of fulfilment of their basic life needs, including the provision of a place of residence, has led to the introduction of new regulations within the scope of auctions of real properties serving the debtor’s housing needs. The above-mentioned legislative actions result in the addition of a new provision of –Article 952¹ effective as of 30 May 2020 to the Civil Procedure Code.

Execution against real property constitutes one of methods of enforcement of cash benefits. In principle, real property is one of the most valuable assets of a debtor, that is why execution against this asset entails special requirements and limitations. Pursuant to Article 799 § 1 sentence 4 of the Civil Procedure Code, the executive organ applies an enforcement method the least onerous for a debtor. It is assumed that execution against real property is applied when other assets are not sufficient to satisfy the debtor’s claim. On the one hand, due to special rules concerning this enforcement method, selection of another enforcement manner may facilitate the recovery of debts for the creditor. Therefore, it is usually enough that the creditor submits the execution motion and then the bailiff’s obligation is to determine assets on which execution is to be conducted. So the creditor does not have to indicate the debtor’s assets, as the execution motion itself, even without determining assets, allows for execution with any available method. This principle does not apply to the execution against real property that requires an express request of the creditor (Article 799 § 1 of the Civil Procedure Code). Moreover, in the case of execution against real property, the creditor’s rights regarding selection of the bailiff are limited. Pursuant to Article 10 section 1 of the Act of 22 March 2018 on Court Bailiffs⁵, the capacity to choose the bailiff on the area of jurisdiction of an appeal court where a registered office of the competent bailiff’s legal office is located does not refer to the actions: for the execution against real property; for the issuance of real property; for the regaining possession of real property; for emptying premises, including residential premises, from persons or objects; where the provision concerning execution against real property shall apply mutatis mutandis.

In principle, execution against other asset than real property by an executive organ is more beneficial also for the debtor, particularly when a value of enforced claim is relatively low. In the case of execution against real property, this estate shall be finally sold by auction, thus permanently removed from the debtor’s assets. If its value exceeds the value of pursued claim and costs of proceedings, the debtor will only receive the equivalence of a difference between a price obtained during auction and a collected receivable. Such a manner of enforce-

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¹ Uniform text Journal of Laws of 2020, item 121, as amended (further: “Act on Court Bailiffs”).
ment may be particularly bad for the debtor, if the real property against which execution is conducted serves its housing needs.

Special protection of the debtor in the case of execution against real property refers also to the sales procedure. In the light of previously applicable provisions, in the course of execution against real property, the seized property is, in principle, subject to sale by public auction, while the auction date itself may not be determined earlier than after two weeks from the validation of description and estimation and not before the validation of a judgement enforceable as executable or with a writ of immediate execution, based on which execution was initiated (Article 952 of the Civil Procedure Code). This does not refer to the case when the executive organ carries out execution against real property jointly for several creditors and at least one enforceable title is valid or does not come from the court. The legislator’s reservation of the real property sale by auction aims at the prevention of abuse at sale, as well as at ensuring that creditors and debtor may obtain the highest possible sales result, which is not guaranteed in free sale. A public nature of the auction is ensured by publishing an announcement thereof and by the right to participate in the auction – as the public – for every interested person. Violation of the principle of auction being public always constitutes a prerequisite for revoking a bailiff’s operation consisting in the auction determination, as well as for contesting the matured decisions on knocking down or adjudication of ownership⁶. The legislator provides for the following exceptions from the rule of sale of seized real property in public auction in executive proceedings: referring to the takeover of agricultural property by a co-owner other than personal debtor, before the auction or after the first auction (Article 958, 959 and 982 of the Civil Procedure Code); referring to the takeover of agricultural property by enforcement creditor and mortgagee and a co-owner of every real property after the second auction; referring to the simplified execution against real property (Article 1013¹ of the Civil Procedure Code).

2. New rules referring to execution against real property when the real property serves the debtor’s housing needs

Article 952¹ newly added to the Civil Procedure Code introduces significant limitations as to execution against real property, when the real property serves the debtor’s housing needs. Undoubtedly, this provision is to strengthen the debtors’

⁶ See: G. Julke, Licytacja w toku egzekucji z nieruchomości (część I) [Auction in the Course of Execution Against Real Property (Part 1)], „Przegląd Prawa Egzekucyjnego 2007”, issue 10–11, p. 43.
position in executive proceedings, where execution concerns the real property serving its residential purposes.

Pursuant to the wording of § 1 of the discussed provision, an auction date for residential premises or land property developed with a residential building serving the debtor’s housing needs should be determined at the creditor’s request.

As to the manner of determining the property’s auction date, pursuant to the general regulation in the form of Article 952 of the Civil Procedure Code, the literature has already observed some irregularities as to whether the auction date should be determined ex officio or solely at the creditor’s request. Although in Article 952 of the Civil Procedure Code the legislator does not decide directly on the creditor’s request, as it did explicitly in other provisions governing execution (in particular in Article 923, 942 or in Article 983 of the Civil Procedure Code), it is stated in the literature that the bailiff should not determine an auction without the creditor’s request. The argument that determination of an auction is not a part of other proceedings stage, thus a request for preparing a description and valuation cannot be treated also as a request for determining an auction may also be deemed significant for this view. Therefore, in the doctrine, the possibility to implement exception in this area has been rejected, while a doubt as to the necessity of submitting a request by the creditor has been settled to the satisfaction of the principle of operation of an executive organ at request. In addition, it has been emphasised that it would not be justified for the bailiff to determine the first auction ex officio, while the second one would require the creditor’s request. However, in practice, determination of the first auction date for real property has usually not required the creditor’s initiative and only in the case of ineffective expiration of the first auction’s date the second date could be determined solely at the creditor’s request.

New regulation removes previous doubts, providing for an obligatory request of the creditor as a necessary prerequisite for determining the auction date for residential premises or land property developed with a residential building serving the debtor’s housing needs. This is another formal requirement that must be met by the creditor in the course of executive proceedings to lead consequently to a subsequent execution stage, apart from the debtor’s

8 See:. G. Julke, Egzekucja z nieruchomości [Execution Against Real Property], Sopot 2006, p. 204-205.
9 See: H. Ciepła, op. cit.
obligation to make a request for the initiation of executive proceedings and for the description and estimation. An auction date shall not be determined without the mentioned request.

A contrario it should be assumed that the creditor will not have to make a request to determine the auction date if the executive proceedings concerning the real property continues against the debtor not being a natural person, but having the status of entrepreneur. Legal bodies other than natural persons do not have to satisfy their housing needs. The situation is different in the case of debtors conducting business activity that are subject to an entry in the Central Registration and Information on Business, as then this subject is still a natural person conducting business activity, as long as the real property serves its housing purposes. That is why distinction of the status of natural persons and of other legal bodies (legal persons and organisational units that do not have legal personality, but are equipped by the legislator with legal capacity and capacity to legal transactions) remains unjustified to this extent.

An attribute of a given real property as serving or not “the debtor’s housing needs” should be deemed significant to determine whether there has occurred the prerequisite in the form of requirement to submit a relevant request. The concept of real property “serving the debtor’s housing needs” is indefinite, as literally it shall mean only residential premises or land property developed with a residential building (retail or building property), inhabited by the debtor itself, not by other persons, including a member or members of its family. In the light of the previous presented position of the judicature, the attribute of a given real property as serving the specific entity being the debtor’s housing needs in the course of executive proceedings should mean that it performs a residential function (apartment where family life is concentrated) as at least the dominant one. It does not have to be a place of permanent residence, however there should occur some persistence or frequency of one’s stay in this place. Therefore, recognition of a given real property as having the indicated feature depends on a joint compliance with: objective premise – concerning the legal nature of real property itself (retail or building property) and subjective premise – referring to the real property’s intended use (residential purpose). An actual use of a given property shall determine its nature as the residential property.

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11 See: A. Bartosiewicz, R. Kubacki, Ustawa o zwrocie VAT w budownictwie – wybrane problemy [The Act on VAT Compensation in Construction. Selected Problems], „Przegląd Podatkowy” 2006, issue 3, p. 15. See also e.g. judgement of the Voivodeship Administrative Court in Bydgoszcz of 15 November 2016, file reference I SA/Bd
Applicable legal regulations do not determine when and how long the debtor should reside in given premises or building property so that the residential purpose would be accomplished. Moreover, the circumstance that the debtor’s housing needs will be fulfilled only at a future date should not exclude the existence of the discussed characteristic of a specific property.

Based on the case-law of the Supreme Court, it may be concluded that one’s own housing needs can also be satisfied periodically in various places. The Voivodeship Administrative Court in Wroclaw, in its judgement dated 15 November 2005, defined the concept of satisfying housing needs, within the meaning of the Tax Act, in an objective sense as the average taxpayer’s need. If, pursuant to Article 25 of the Civil Code, a place of residence of a given person is a site where it stays with an intention of permanent residence, its housing needs are satisfied in the permanent place of residence. For simple factual reasons, it is impossible to live in two places at the same time.

In turn, the Supreme Administrative Court, in its judgement dated 29 November 2016, claimed that temporary seizure of purchased residential premises in itself might not determine that the taxpayer would not meet its own housing needs in those apartments. The legislator did not reserve that one’s own housing needs had to be fulfilled uninterruptedly in the purchased premises from the date of its acquisition. The taxpayer’s declaration on fulfilling its own housing needs through the indicated purchase is not enough to decide that the relief eligibility conditions are met. Although the legislator has not referred exercising the right to tax exemption to the verbal declaration of such an intention upon acquisition, it has expressly stated that acquisition must be for one’s own residential purposes. Although satisfaction of one’s housing needs through the purchase of several apartments and their renovation, as determined by the Court, exceeds average standards, but the legislator has not reserved that one’s own residential purposes may be fulfilled only through the purchase of one apartment and its renovation. In the light of the position of the Supreme Administrative Court...
presented in the mentioned judgement, temporary, justified with objective circumstances rental of purchased residential premises should not per se determine that the taxpayer will not meet its own residential purposes therein. The legislator has not reserved in applicable tax law provisions that one's own residential purpose in the purchased premises should be fulfilled uninterruptedly since the purchase date.\textsuperscript{15}

In addition, there is no legal regulation limiting the possibility of satisfying the debtor's housing needs only to one real property. There is also no regulation limiting this possibility only to real properties located on areas intended in spatial development plans only for residential construction or subjecting the possibility of residence to the condition of reporting permanent residence\textsuperscript{16}.

Therefore, while making a relevant assessment of the term of “serving housing needs”, one should describe a specific subject, here a real property, in combination with its function performed for the benefit of the debtor – satisfaction of its unfulfilled \textit{housing needs}. In the light of such an explanation, a person who has its own place of residence and acquires another properties for the purposes of capital investment, realisation of investment in the form of tenancy, renovation for purposes of further resale of real property with profit or satisfaction of housing needs of other persons, in particular other members of the debtor’s family, does not satisfy its own \textit{housing needs}.

Leaving in the discussed Article 952\textsuperscript{1} § 1 of the Civil Procedure Code of such an indefinite term shall actually raise doubts as to its interpretation, while the lack of definition of legal satisfaction of housing needs constitutes quite a significant defect of the new solution. In practice, it may appear that the debtor will intentionally change its place of residence to make execution difficult for the creditor. Maybe the legislator, instead of using the concept of serving the housing needs, should use the concept of a place of residence.

\textit{De lege ferenda}, it seems to be justified, in case of leaving the term of “housing needs” in the regulation, to complete it with an instance “own”. The expression “own housing needs” concerning the debtor would mean that it is about satisfying the needs specific only for it, i.e. particular debtor, not a non-specific, general circle of entities. Thereby, this would mean that it relates to the needs of an individual entity. The criterion of using the given real property for one’s “own housing needs” would be met if the real property was serving the

\textsuperscript{15} See: judgement of the Supreme Administrative Court of 29 November 2016, file reference II FSK 3126/14, LEX no. 2156639.

\textsuperscript{16} See: judgement of the Supreme Administrative Court of 24 September 2003, file reference I SA/Wr 1214/01, LEX no. 101466.
debtor’s basic housing needs, instead of the housing needs of other persons, purposes of capital investment, leisure, recreation, etc.  

Disposition of added Article 9521 § 2 of the Civil Procedure Code specifies in turn the circumstances under which the creditor will be able to submit a request to determine the first auction date for the real property serving the debtor’s housing needs. Pursuant to the express wording of this provision, the creditor may submit a request to determine the auction date only when the amount of main receivable enforced by the creditor is at least an equivalent of one twentieth of the sum of estimation. It means that the creditor, already when submitting the request for execution against real property, will have to estimate a potential value of the real property and determine a relevant proportion between this value and the amount of the debt claimed. In practice, the possibility of submitting a request for the auction date will be determined by the real property value that shall be established only in an appraisal report charged to the liability amount. Finally, the creditor will find out if it is entitled to submit a request for auction only after a long and expensive initiation of proceedings, which - apart from expenses related to correspondence - entails the necessity of paying for an application to make an entry in the land and mortgage register, and then of paying an advance for an opinion of the court expert and of making announcements. Therefore, in order to determine if it is possible to conduct execution against real property, the creditor must incur specified costs and still is not certain whether privileged creditors will not appear throughout the proceedings and will be given priority with regard to the claim settlement, or whether finally the real property under execution will be sold. If upon the initiation of executive proceedings the creditor erroneously assesses the real property’s value and “capacity of being disposed of” (disposability), it will expose itself to incurring expenses that will not be covered. It seems that under these conditions debts of low value will not be collected in the above-mentioned way. Moreover, in practice it should be deemed probable that a number of complaints about appraisal reports filed by debtors in the course of executive proceedings will significantly increase, because debtors may be interested in “artificial” increase in value of their property and in intentional obstruction of proceedings. The discussed regulation may also be pedagogically dysfunctional, as it induces debtors to take up a reprehensible stance in the light of the basic principle of executive proceedings (loyal cooperation of parties to executive proceedings with each other and with an executive organ) – intentional failure to satisfy claims of lower

17 See: judgement of the Supreme Administrative Court of 12 July 2002, file reference I SA/Lu 20/02, LEX no. 77863.
value, because cooperation of many creditors who will achieve the required level of the principal, is in practice hard to be coordinated. Probably this will lead to an increase in trade in ineffective claims of low value, as well as may cause the establishment of debt exchange, where creditors will look for enforceable titles against specific persons in order to direct execution to a specific real property.

Pursuant to the newly added regulations, in the course of description and estimation the bailiff will have to control whether assessors do not come under influence of debtors and creditors regarding the opinions they draw up. A side effect of this solution may also be constituted by an increased interest of creditors in the institution of security for debts and thus in the proceedings to secure claims.

If execution against real property is conducted by several creditors, the auction date for a real property serving the debtor’s housing needs is determined also when requests in this regard are submitted by creditors, whose total value of settled principals comes to at least one twentieth of the sum of estimation (Article 9521 § 3 of the Civil Procedure Code). Implementation of such a conduct model requires from creditors the cooperation at submitting a request, and then at supporting execution. As it results from the common observation, in practice such a cooperation is usually absent in conducted executive proceedings. Claim cumulating requires cooperation of creditors. Creditors must respect their deal, as discontinuance of at least one of executions conducted jointly at a request of many creditors may lead to the situation when an aggregate value of claims falls below the required statutory limit. Repayment of even one of jointly settled claims by the debtor may in some situations lead to the nullification of execution against real property, as well as may generate higher costs of participation in executive proceedings for other creditors. In the indicated case, a potential risk may also be constituted by an intensified process of acquisition of ineffectively claimed debts of low value, with further orientation towards execution against specific real property.

In the execution conducted by several creditors it is important that the total value of receivables is established after summing up the value of all debts claimed individually – on the one hand, this solution may be helpful when real property constitutes the only valuable asset of the debtor and the value of claimed debt is not high, however, on the other hand, at the stage of submitting a request for execution, it is impossible to determine whether other creditors will join the execution against property and what is the value of their claimed
debts. Determination at the initial stage of proceedings whether the real property is a subject of mortgage may be some easing in this matter. Debts of mortgagees are ex officio taken into account at the breakdown of a sum obtained from execution against real property, therefore they should also be considered while determining the sum of debts to be settled in the case of effective auction of property, regardless of the fact whether a mortgagee carries out executive proceedings against the debtor.

The presented limitation referred to the conditions concerning a request of the creditor or creditors acting jointly does not refer to the debts due to the Treasury or arising from a criminal conviction, as well as when despite failure to meet these special conditions the consent to determine the execution date has been expressed by the debtor who owns the real property or by the court acting at the creditor’s request. It may surprise that alimony dues are not mentioned in this summary. Pursuant to Article 1025 of the Civil Procedure Code, alimony dues are satisfied before the Treasury receivables. Expression of one’s consent to execution by the court will be possible if it is supported by the amount and nature of claimed debts or if it is impossible to satisfy the creditor from other assets of the debtor. In practice, the statutory solution providing for the debtor’s consent to determine the auction date for real property serving its housing needs will probably be applied only exceptionally. Prima facie, the possibility of obtaining the court’s consent to determine the property’s auction date seems to be much more beneficial. However, subjecting such a consent to meeting not too precise prerequisites may lead to practical difficulties with use of this institution. An assessment of value and nature of vindicated receivable or the lack of possibility to satisfy the creditor from other assets leaves too much freedom of interpretation for the determining authority, which may lead to quite frequent appeal lodging in the case of refusal to determine the auction date. Art. 952 1 § 4 of the Civil Procedure Code stipulates that the court decision dismissing the creditor’s request for determination of the auction date for a real property serving the debtor’s housing needs may be complained against.

The last legislative amendment introduced pursuant to Article 952 1 § 4 of the Civil Procedure Code stipulates the prohibition of auction of a real property serving the debtor’s housing needs throughout the epidemic threat or the epidemic and 90 days after its end. The Act does not provide for any exceptions to this extent. However, it is only temporary. A direct consequence of the discussed provision being implemented is —and in the near future will be constituted by — the suspension of the majority of property auctions, taking
into account a total number of all properties covered by execution and distinction of categories of the properties serving the debtor’s housing needs in the entire structure. A short- and medium-term result of validity of the above-mentioned regulation may be constituted by deteriorated economic condition of the creditors themselves (domino effect), whose entitlement to recover their executable claims based on enforceable titles remains limited, as well as by the slowdown of cash and non-cash flows in economic turnover. Stimulation of the financial market may be a potentially positive consequence of adopting this regulation, because the current reduction in interest rates induces investors to look for alternative investment sources, here on the real property market. It may also be expected that requirements imposed on credit recipients by banking institutions will become stricter and stricter, if the auction prohibition is maintained for a longer period, because the institutions granting credits secured by mortgage are exactly the ones most interested in execution against real property.

As a side note, it should be added that throughout the epidemic threat or the epidemic announced due to COVID-19 the legislator has stipulated, in principle, the suspension of execution of enforceable titles ordering to empty residential premises, thereby additionally strengthening the protection of tenants – debtors (Article 15zzu § 1 of the Act of 2 March 2020 on Special Solutions Related to the Prevention, Counteraction and Eradication of COVID-19, Other Infectious Diseases and Consequential Crisis Situations18).

Importantly, a new regulation applies also to the proceedings initiated and not ended before the entry into force of the Act, if the creditor does not submit the request for determination of the property’s auction date before that date.

3. Problems in the practice of applying the new regulation

Pursuant to the wording of the explanatory memorandum to the Shield 3.0 draft act, the discussed amendment to the Civil Procedure Code is to eliminate the possibility of execution overuse by the creditor, only in order to harass the debtor when there is a considerable disparity between the value of vindicated claim and the value of real property against which execution is to be conducted. In the previous enforcement practice, the cases when execution against the debtor’s real property (worth of several hundred thousand zloty) was conducted in order to vindicate de minimis costs (several thousand zloty at most) have been common. The possibility of applying enforcement measures towards

18 Journal of Laws of 2020, item 374, as amended
real properties serving the debtor’s housing needs under the enforcement of small amount remains indisputably in obvious conflict with basic assumptions of the debtor’s protection against execution violating its personal dignity. In practice, the discussed regulations should actually contribute to the limitation of such malpractices, while it should be expressly emphasised that protection against such an enforcement has been possible even before, by the debtor’s complaint about the bailiff’s actions constituting a breach of the principle of proportionality of enforcement arising from Article 799 § 1 of the Civil Procedure Code. However, it should be emphasised that execution against real property constitutes, by definition, multi-stage and expensive proceedings, and above all it is conducted under the supervision of the court, which should respond appropriately also at the stage of determining the auction date in cases that require this, by issuing orders ex officio pursuant to Article 759 § 2 sent. 1 of the Civil Procedure Code, designed to ensure proper performance of execution and removal of observed defects. The court’s decision including the orders referred to in Article 759 § 2 of the Civil Procedure Code not only may not replace the parties’ motions, but also, obviously, may not be contrary to the parties' motions in all cases when, based on the Act, the decision on performing a specific enforcement action belongs solely to the party. Moreover, legal assessment expressed by the court under issued orders shall be binding upon the bailiff.

The introduced solution strengthens the debtor’s status in executive proceedings, transferring an obligation to demonstrate the acceptability of an execution against the debtor’s real property serving its housing needs to the creditor. Unfortunately, it must be noted that the explanatory memorandum to the Shield 3.0 Act lacks any data that could confirm in an objectively verifiable way the thesis that a significant number of initiated executions aims at the debtor’s harassment. Such a reprehensible action against the debtor through conducting execution against real property is decidedly a marginal issue. As practice shows, creditors use this execution method usually as a last resort due to the formalised and long-term stage of execution against real property.


20 See: H. Pietrzkowski, Nadzór sądu nad czynnościami komornika po zmianach wprowadzonych ustawą z 22.03.2018 r. o komornikach sądowych [The Court’s Supervision Over the Bailiff’s Actions After Amendments Introduced by the Court Bailiff Act of 22 March 2018], „Przegląd Sądowy” 2019, issue 6, p. 7–35.
It should be emphasised that only one of editorial units in Article 9521 of the Civil Procedure Code constitutes a protective measure directly referring to the situation related to the epidemic threat or the epidemic and it is constituted by the prohibition of execution against real property serving the debtor’s housing needs during the validity of such a condition and for 90 days after its end. Therefore, the legislator has established a very extensive protective mechanism referring to all debtors against whom execution was oriented towards specific categories of real properties, without stipulation of any exceptions from the adopted rule.

Application of such a solution may lead to a considerable harm to creditors whose right to satisfaction of due debts will be significantly staggered in time. In practice, the problem may also be constituted by the necessity to update appraisal reports for real properties, prepared before the introduction of the discussed limitations that cannot be used to carry out an auction due to the lapse of statutory time limit (12 months) from the date of their preparation. In many cases it may also appear necessary to prepare a new appraisal report, which will also contribute to the extension of proceedings and will entail the creditor’s obligation to incur additional costs.

A definitely better solution de lege ferenda might be constituted by the provision of debtors with the right to submit, in the course of enforcement, a request for resignation from property auction if they demonstrated that due to the epidemic threat or the epidemic their financial position was significantly deteriorated (objectively verifiable condition), which might result in the exclusion or at least limitation of a possibility of finding a new property serving housing needs of such entities. It should be noticed that in many cases the epidemic threat has not resulted in a noticeable change in the debtor’s financial position, especially in an unemployed group.

In practice, serious doubts may also be raised by the issue of acceptability of expressing the court’s consent to the execution against real property serving the debtor’s housing needs when the value of claimed debt does not constitute at least one twentieth of a sum of valuation of this property. The legislator’s wording of prerequisites conditioning the court’s consent to such an execution, in particular the use of imprecise definition “value and nature of claimed debt” may result in the court’s rigorous assessment of the occurrence of each

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of these prerequisites in specific proceedings. Demonstration by the creditor of the prerequisite in the form of impossibility of satisfying claims from other assets of the debtor may also in practice be recognised as too complicated. Determination of such a condition is possible only subsequently in the course of executive proceedings, not at the stage of its initiation, and only through the performance of specific enforcement actions, such as, in particular, a search for the debtor’s assets. Therefore, submission by the creditor of a request to the court for the consent to the execution against real property serving the debtor’s housing needs will, by definition, have to be preceded with its submission of a request to the bailiff for the initiation of other enforcement actions against the debtor. The creditor’s request may be deemed legitimate only if it is stated that such actions are ineffective. Therefore, each time the assessment of a specific case and of occurrence of necessary prerequisites will be left to the court’s autonomous decision.

Reservation of the acceptability of appealing against the court’s decision on expressing its consent to determine the auction date for a real property serving the debtor’s housing needs, despite failure to maintain statutory prerequisites provided in Article 9521 § 2 of the Civil Procedure Code in the amended Act leads directly to a breach of the principle of equal rights of parties to the enforcement proceedings. Article 9521 § 4 sent. 2 of the Civil Procedure Code provides only for the possibility of the debtor’s appealing against the decision dismissing its request for a consent to determine the property auction date; a contrario the debtor has not been equipped with a relevant legal measure to question the court’s positive decision in this regard.

The presented amendment to the Civil Procedure Code does not lay down transitional provisions and, simultaneously, Article 9521 of the Civil Procedure Code may surely be applied also to pending enforcement proceedings, where the value of claimed debt is not equal to at least one twentieth of the estimate; consequently, this may lead to the total suspension of these proceedings and to the practice of questioning continuation of such enforcements by debtors, as well as to a radical increase in the pool of unsuccessful enforcement proceedings.

4. Conclusions

New rules introduced by the amendment of the Civil Procedure Code of 14 May 2020 referring to the execution against real properties serving the debtor’s housing needs undoubtedly result in a noticeable empowerment
of the debtor’s procedural position in executive proceedings, at the cost of significant limitation of possibilities to satisfy creditors with use of this enforcement method and delay of settling their debts due.

The discussed solutions are an answer to situations frequently experienced in practice, where submission of the creditor’s request for execution against real property used to be designed to harass the debtor and for this reason they should undoubtedly be accepted. In particular, the possibility of applying enforcement measures towards real properties serving the debtor’s housing needs under the enforcement of small debts remains indisputably in obvious conflict with basic assumptions of the debtor’s protection against execution violating its personal dignity.

Quite often residential property is the only valuable asset of the debtor, so execution against this property type constitutes one of the most effective enforcement methods. Therefore, the restricted capacity of execution against these properties may in practice mean for many creditors no capacity to satisfy claimed debt for a longer time and the necessity to incur additional costs, as well as it may lead to a total increase in a number of ineffective executions. However, in principle, the provided legal solution referring to debtors in worsening economic situation caused by the epidemic threat, thus extraordinary and only temporary in this sense, should be assessed positively, with a significant reservation of their episodicity.