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The Estonian Universal Enforcement Procedure^{*1} and the Bailiff as the Taker of Procedural Decisions

1. Introduction

After regaining independence, Estonia has experimented with compulsory execution by both the executive power and judicial power.^{*2} The enforcement procedure reform of 2001 decided in favour of freelance bailiffs and the system has proved to be effective — with the number of closed files doubling one year after the reform.^{*3}

The purpose of this article is to analyse how to classify enforcement proceedings in the Estonian legal system and what position and competence the legislature has given to the bailiff. The analysis also has relevance in the European context, as the European enforcement instrument introduced from 1 March 2002^{*4} as a reaction to “mobile debtors” has not, because of the great variety of enforcement procedure regulations in the Member States, made things much easier for creditors, and this is why attempts are being made to harmonise the legal orders of the Member States and identify the most effective procedure.^{*5}

The Estonian law of enforcement procedure is difficult to classify into a particular branch of law: it is separated formally from other areas of law by a specific law, and organisationally by a separate enforcement body — the freelance bailiff. As the matter of jurisdiction in disputes regarding enforcement proceedings has caused several

¹ The author of the article considers only singular execution, i.e., enforcement proceedings, not bankruptcy proceedings.

² In 1994–1997 the Ministry of Justice had an Enforcement Department; the enforcement bureaux under it enforced civil claims. In 1997, these enforcement bureaux were replaced by the enforcement departments of courts, i.e., bailiffs became a part of judicial power. For details see J. Ots. *Tsiviiltäitemenetluse ja kohtutäituri institutsiooni areng pärast Eesti Vabariigi taastamist. Magistritöö* (Development of Civil Enforcement Proceedings and the Institution of the Bailiff after Restoration of the Republic of Estonia. Master’s Thesis). Tartu 2002, p. 21–22, 91 ff. (in Estonian).

³ Ministry of Justice statistics, published in the conference compilation. *Kohtutäituriid ja riigivõimu jagamine* (Bailiffs and Delegation of Public Power), 1–2 March 2002, Tallinn (in Estonian).

⁴ Council Regulation (EC) No. 44/2001, 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. – OJ L 12, 16.1.2001, p. 1.

⁵ For details see, e.g., M. Andenas, B. Hess, P. Oberhammer. *Enforcement Agency Practice in Europe*. London: British Institute of International and Comparative Law 2005.

disputes in Estonia which have reached the Supreme Court, the first part of the article discusses the difficulty of classification and the reasons for the difficulty. The author also tries to answer the question of whether different procedural rules and principles are actually necessary for the enforcement of private and public claims.

Not only the issue of the procedural rules, but also the status of the bailiff, is often unclear to the parties to a proceeding. The bailiff is regarded as a representative of the claimant, similar to a trustee in bankruptcy, or a state official, depending on whether the claim being enforced is a private or public claim. According to § 2 (2) of the Bailiffs Act, a bailiff is neither an undertaking nor a state official; § 9 (1) of the Code of Enforcement Procedure requires a bailiff to remove himself or herself from enforcement proceedings if he or she is also the representative of the claimant. The term “freelance” raises the question of whether the profession of a bailiff should be accessible to everybody and whether there should be free competition between bailiffs within the meaning of the directive on services in the internal market.⁶ In the second half of the article the author analyses the position of a bailiff in the structure of the authority of the state, and a bailiff’s resulting competence.

2. Enforcement proceedings as civil enforcement?

2.1. Estonian universal enforcement procedure

In Estonia, enforcement proceedings are often called “civil enforcement proceedings”, as if they are only applied to private law relationships. This is how it is in many European countries; discussions on the harmonisation of European enforcement procedures usually concern only enforcement instruments arising from civil and commercial relationships and leave out the regulation of public law claims as an area closely related to the exercise of the authority of the state.⁷

If we view only the enforcement of private persons’ claims in enforcement proceedings, then the classification of enforcement proceedings as an area of private law is somewhat justified. Already at the beginning of the last century, the German jurist Friedrich Stein drew attention to the fact that enforcement proceedings begin and end in private law.⁸ It should be noted though that in Germany, enforcement proceedings are, first and foremost, seen as a follow-up to civil procedure, which enforces only private claims, and many legal theorists have reasoned the private law classification of enforcement proceedings with the theory of interest: proceedings are conducted in the claimant’s interests, and the relationship between the claimant and debtor is that of two equal parties.⁹

The Estonian Code of Enforcement Procedure¹⁰ (hereinafter: CEP) recognises various enforcement instruments arising from civil relationships: court decisions and rulings in civil matters, decisions of foreign courts in disputes between private individuals, decisions of extrajudicial bodies, notarised mortgage contracts and pledge contracts of buildings, and notarised agreements concerning financial claims. The same executive body also executes completely different enforcement instruments under the same Code: fines imposed in misdemeanour proceedings, fines applied as criminal punishments, tax decisions, etc.¹¹ In the list of enforcement instruments provided in CEP § 2 (1), public law liabilities significantly outnumber instruments issued for the enforcement of private claims. The enforcement procedure statistics published on the Ministry of Justice’s website also indicate a large proportion of public law claims. As of the end of 2007, the total of 201,834 open enforcement files included 36,541 files concerning private claims.¹²

The Estonian enforcement procedure thus covers various other proceedings: not only civil proceedings, but also administrative, criminal, tax, misdemeanour and extrajudicial proceedings. This varied list of enforcement instruments shows that in Estonian law, enforcement proceedings are not only a follow-up to civil proceedings, but also a follow-up to criminal, administrative court, administrative, misdemeanour and tax proceedings, labour dispute settlement and other procedures. Since appeals against the acts of a bailiff fall under the general jurisdiction (CEP § 218 *ff.*), every compulsory execution may at some point, via the “filter” of enforcement proceedings, become a civil proceeding.

⁶ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. – OJ L 376, 27.12.2006, p. 36–68.

⁷ See, e.g., M. Andenas. National Paradigms of Civil Enforcement, p. 7. – M. Andenas, B. Hess, P. Oberhammer. Enforcement Agency Practice in Europe. London: British Institute of International and Comparative Law 2005.

⁸ F. Stein. Grundfragen der Zwangsvollstreckung, 1913, p. 6, referred in: G. Lücke. Bausteine des Zwangsvollstreckungsverfahrens. – Juristische Schulung 1996, p. 185.

⁹ E.g., E. Wieser. Grundzüge des Zivilprozeßrechts: mit Zwangsvollstreckungs- und Konkursrecht. Köln: Carl Heymanns Verlag 1986, p. 73.

¹⁰ Täitemenetluse seadustik. – RT I 2005, 27, 198; 2007, 25, 130 (in Estonian).

¹¹ For the list of enforcement proceedings see CEP § 2 (1).

¹² Enforcement procedure statistics published by the Ministry of Justice. Available at http://www.just.ee/orb.aw/class=file/action=preview/id=35506/aruandlus_2007_n%F5uete+j%E4rgi.pdf (8.05.2008) (in Estonian).

In addition to the above, under CEP § 2 (1) a bailiff also enforces rulings on the securing of an action, which are acts of civil procedure, as well as investigators' rulings for collection of information about the property of an accused, and requests substitution by detention of fines for misdemeanours and monetary fines and fines to the extent of assets, which have been imposed as criminal punishments — these may be regarded as acts of criminal procedure. In addition, under the Immovables Expropriation Act^{*13}, a bailiff has the duty to participate in determining the price of an immovable.

Based on the above, the Estonian enforcement procedure can be regarded as a universal procedure, in which a bailiff performs acts in the course of which the bailiff may and can exercise duress and which are not in the competence of any other body. The author of this article considers that this universal procedure certainly belongs to public law and is positioned somewhere on the border between procedural law and administrative law.

The use of common procedural rules and a single central procedural body avoids a “race” for the debtor's assets by executive bodies acting under parallel compulsory execution proceedings, and renders the proceedings clearer and simpler for the debtor, who only has to communicate with one bailiff who is conducting the proceedings — this is certainly a strength of the Estonian regulation when compared to a multiplicity of compulsory execution proceedings. Simplicity and clarity, however, cannot serve as a goal on its own, and it is appropriate to ask at this point whether the procedure should for any reason be different for private and public law claims.

2.2. Procedural principles

When studying the universal procedure applicable in Estonia, one may ask whether the procedure rules and principles can really be the same for instruments produced as a result of a dispute between equal parties, on one hand, and for the enforcement of the state's obligations or criminal punishments, on the other.

The Code of Enforcement Procedure provides for a different procedure only for the enforcement of monetary fines and fines to the extent of assets which have been imposed in misdemeanour and criminal proceedings (CEP § 198 *ff.*). Firstly, these are the only types of claim for which the legislature has provided for *gradus executionis* for making claims against the debtor's assets, i.e. a claim for payment is first made on money, securities and claims, followed by other movables, and, in the last order, immovables, while preference is given to the debtor's separate property over the joint property of spouses. Secondly, these enforcement instruments allow for substituting the claim on the debtor's assets by detention, i.e. making a claim on the debtor's person. The third major difference is the limitation period for enforcement depending on the gravity of the misdemeanour: 18 months, three or five years, during which the proceedings must result in the collection of a fine or substitution of the punishment. The procedure for enforcement of other public claims, such as local taxes, is exactly the same as for private claims.

In comparison, in Germany the compulsory execution of public claims is subject to specific laws for each type of claim and is performed by different bodies. The enforcement of administrative acts is governed by *Verwaltungs-Vollstreckungsgesetz*^{*14}, tax decisions are subject to *Abgabenordnung*^{*15}, and fines in criminal matters are governed by *Strafprozeßordnung*^{*16} and *Justizbeitreibungsordnung*.^{*17} Public law claims are justified to be enforced by the entitled person, i.e. a relevant state agency, while the proceedings are not traditionally classified as enforcement proceedings; the compulsory execution of tax decisions and criminal fines is classified as a part of tax proceedings and criminal proceedings, respectively.^{*18} However, if we compare the procedures and principles of various enforcement proceedings, the procedure is essentially the same for all types of claim: the debtor is first given a deadline for voluntary compliance, after which a claim is made on the debtor's assets; the principle of proportionality applies, etc. In the Netherlands, enforcement actions are divided between different bodies (bailiff, court, notary), but compulsory enforcement is governed by a single law (*Rechtsvordering*).^{*19}

¹³ Kinnisasja sundvõõrandamise seadus. – RT I 1995, 59, 1006; 2007, 24, 128 (in Estonian). A bailiff's participation in the appraisal is regulated by § 16 of the Act.

¹⁴ Verwaltungs-Vollstreckungsgesetz. Passed 27.04.1953, last amended 17.12.1997 I 3039. – BGBl I 157. Available also at <http://bundesrecht.juris.de/vwvg/index.html> (8.05.2008).

¹⁵ Abgabenordnung. Passed 16.03.1976, last amended 23.10.2008 I 2026. – BGBl I 3198. Available also at http://bundesrecht.juris.de/bundesrecht/ao_1977/gesamt.pdf (8.05.2008).

¹⁶ Strafprozeßordnung. Passed 12.09.1950, last amended 31.10.2008 I 2149. – BGBl I 306. Available also at <http://bundesrecht.juris.de/bundesrecht/stpo/gesamt.pdf> (8.05.2008).

¹⁷ Justizbeitreibungsordnung. Passed 11.03.1937, last amended 17.12.2006 I 3171. – BGBl III 365-1. Available also at <http://bundesrecht.juris.de/jbeitro/BJNR002980937.html> (8.05.2008).

¹⁸ H. Hofmann, J. Gerke. Allgemeines Verwaltungsrecht. Stuttgart: Kohlhammer Deutscher Gemeindeverlag 2002, p. 444 *ff.*

¹⁹ T. Jongbloed. National Reports. The Netherlands, p. 208. – M. Andenas, B. Hess, P. Oberhammer. Enforcement Agency Practice in Europe. London: British Institute of International and Comparative Law 2005.

This means that the legislature has not seen any need for different procedural principles when dividing compulsory execution proceedings between different branches of law and different enforcement bodies. This is understandable because in both cases claims are based on instruments sanctioned by the state. Important from the debtor's viewpoint are the clarity and indisputability of the claim and its foundation on a legally certain source. Once a claim has been accepted, the means of enforcement are, in any case, firstly influencing the debtor by an enforcement body, and if this fails, then compulsory execution. A meaningful question in this context is: which public instruments should be or should not be recognised as enforcement instruments? However, this should be a legal policy decision, which is beyond the scope of this article. It is important to note that there is no practical need for different procedure rules. Special provisions, which are necessary for some types of claims, e.g., the Estonian possibility of substituting fines by detention in criminal matters, can always be added to the regulation.

2.3. The issue of jurisdiction

The classification of enforcement proceedings as an area of law has caused disputes in Estonia as to the jurisdiction of appeals against a bailiff's acts. Already in 1998, when bailiffs were officers of the courts, the Supreme Court had to stress that appeals in enforcement proceedings were subject to settlement according to civil procedure, because, despite the provision of the Code of Enforcement Procedure, the court of appeal considered the administrative court to be the competent court.^{*20} On 15 March 2002, the Special Panel of the Supreme Court had to adopt a position and found that courts of general jurisdiction are the competent courts.^{*21} The disagreements of the court on this issue were due to the ambiguousness of legal regulation, on the one hand, and different interpretations of the activity of bailiffs, on the other. The Supreme Court once again had to draw attention to the general jurisdiction of appeals against bailiffs, on 28 March 2002.^{*22}

Currently, disputes arising from enforcement proceedings are singularly in the competence of courts of general jurisdiction according to § 218 *ff.* of the CEP, which entered into force in 2006. General jurisdiction seems to refer to private disputes between equal parties.

In countries where compulsory execution is divided between different enforcement bodies, the legal remedies arise from the general regulation of the specific area, i.e. disputes arising from the enforcement of public law claims are generally in the jurisdiction of the administrative court. This is the case, for example, in Switzerland, where the entire enforcement procedure is considered to be an administrative procedure because of its predominantly law-making nature, characteristic of the administrative procedure, although it is usually private positions that are confronted in enforcement proceedings.^{*23}

The extension of general jurisdiction to all enforcement proceedings in Estonia may be regarded as tradition, because when bailiffs were state officials, they also enforced public claims, and as court officials, they were subject to the supervision of courts of general jurisdiction. On the other hand, there is the principle of efficiency, according to which disputes arising from the same procedure rules should not be settled by different courts. From the debtor's viewpoint, there could be a difference in the principle of competition between the parties, which is characteristic of the civil court, while in administrative court proceedings, the court would also be obliged to collect evidence on its own initiative. Appeals against the acts of a bailiff are reviewed in Estonia on petition, according to § 475 of the Code of Civil Procedure^{*24}, in which the court is not tied to the requests and assessments of the parties to the proceedings, and the court may also demand additional evidence or collect evidence on its own initiative. In the event of a substantive dispute, e.g., the establishment of ownership relations, decision on the validity of an auction, declaration of compulsory execution as inadmissible, etc., an action is prescribed, in which case the parties to the proceedings should reason their positions and present relevant evidence regardless of jurisdiction. Therefore, it cannot be said that the debtor's position is less protected by a single jurisdiction than it is by varying jurisdictions, although because of the confrontation of an individual with the authority of the state in enforcement proceedings, the author of this article believes that the jurisdiction of the administrative court would be a more logical choice. In any case, one may take the view that in the universal enforcement procedure, a single jurisdiction ensures the uniform application of law for the parties to the proceedings, as well as for the courts, better than the division of disputes between various courts.

²⁰ CCSCr 4 March 1998, 3-2-1-25-98. – RT III 1998, 9, 97 (in Estonian).

²¹ Ruling of the Special Panel of the Supreme Court, 15 March 2002, 3-3-4-3-02. Available at <http://www.riigikohus.ee/?id=11&tekst=RK/3-3-4-3-02> (8.05.2008) (in Estonian).

²² CCSCr 28 March 2002, 3-2-1-36-02. – RT III 2002, 12, 133 (in Estonian).

²³ Y. Iqbal. *SchKG und Verfassung – untersteht auch die Zwangsvollstreckung dem Grundrechtsschutz?* Zürich: Schulthess Juristische Medien AG 2005, p. 47.

²⁴ *Tsiviilkohtumenetluse seadustik*. – RT I 2005, 26, 197; 2007, 16, 77; RT III 2008, 16, 105 (in Estonian).

3. Legal position of a bailiff

3.1. The bailiff in the structure of the authority of the state

The institute of a freelance bailiff, established by the Bailiffs Act (hereinafter: BA) which entered into force on 1 March 2001, is similar chiefly to the French, Belgian, and Slovak systems, in which the bailiff is also a freelancer. BA § 2 (1) defines a bailiff as an independent person who holds an office in public law. Subsection 2 of the same section designates a bailiff's office as a liberal profession, stressing that a bailiff is neither an undertaking nor a state official. An Estonian bailiff is characterised by appointment by the Minister of Justice, *numerus clausus* of bailiffs' offices, restrictions related to office, and establishment of the rates of bailiff's fees by law. A bailiff is liable for his or her activities under BA § 6 (3) as a public authority on the basis of the law governing the procedure and extent of state liability.

It is appropriate to note in the European Union context that the status of a bailiff is defined in Estonia in the same way as a notary's status — as a liberal profession and a public authority. If the EU Commissioner for competition proposes to abolish the *numerus clausus* of the number of notaries²⁵, the same should essentially apply to bailiffs. We may argue over whether the use of the national coat of arms in the event of a notary refers to the exercise of the authority of the state or whether impartial and independent legal advice is possible under free market conditions, while in the event of bailiffs the exercise of the power of the state is much better manifested, and leaving the state's power of duress up to public competition seems unreasonable, even without a lengthy justification. Due to the above, restrictions on access to the profession and on the professional activities of a freelance bailiff are certainly justified.

In countries where enforcement proceedings are conducted by bodies of the executive power (e.g., Switzerland) or by bailiffs as officers of a court (e.g., Germany), the status of a bailiff is defined by the organisation to which the bailiff belongs — the bailiff is an officer of the executive or judicial power. Classifying a freelance bailiff as a public authority raises the question of which function of the authority of the state the bailiff indeed has. This question seems easiest to answer by way of exclusion. A bailiff does not create new law, neither does he or she take decisions toward settling disputes between parties; hence a bailiff has no legislative or judicial function. Taavi Annus has called the duty delegated to bailiffs as the state's executive function.²⁶ The executive function of a bailiff consists in the enforcement of single acts — administrative acts, court decisions, etc. — adopted on the basis of law. The Tallinn City Court has found that a bailiff performs the state's administrative function, which is why a bailiff's fee is a monetary obligation in the area of public law.²⁷ According to Kalle Merusk's models of delegation of public functions, a freelance bailiff has become the performer of administration as a part of indirect public administration, carrying out duties within the competence of public authority in his or her name.²⁸ The fact alone that the conduct of enforcement proceedings is covered by the right to recourse to the courts, as provided in § 15 of the Constitution of the Republic of Estonia²⁹, which the state has to guarantee, refers to the competence of public authority.

If a bailiff is defined as a performer of administration in Estonia, then considering the peculiarities of various types of claims, a bailiff still has to attempt to pursue a double role: being the impartial third between two private interests in the event of private claims, and acting as the tool of the state in the event of public claims.

The access of bailiffs to state registers is justified if they are regarded as public authorities, and so is the duty of private individuals to supply a bailiff with the information necessary for the proceedings (CEP §§ 22, 26) and criminal punishment for supplying a bailiff with incorrect information (§ 281 of the Penal Code). A bailiff's limited access to information about debtors' assets has been pointed out as a factor hampering the efficiency of proceedings in the case of, e.g., English and Welsh bailiffs, who may or may not be state officials³⁰, and in the case of French freelance bailiffs.³¹

²⁵ A. Oja, T. Arnover. Volinik surub notareid ja panku vabaturule (Commissioner Pushes Notaries and Banks to Open Market). – Äripäev, 21.06.2007, pp. 1, 4–5 (in Estonian).

²⁶ T. Annus. Riigi funktsioonide delegerimine eraõiguslikele isikutele kohtutäiturite näitel (Delegation of State Functions to Persons in Private Law). – Juridica 2002/4, p. 225 (in Estonian).

²⁷ Ruling of the Tallinn City Court, 9 October 2003, 2/33-3238/03 (in Estonian).

²⁸ K. Merusk. Avalike ülesannete eraõiguslikele isikutele üleandmise piirid (Limitations to the Transfer of Public Functions to Persons in Private Law). – Juridica 2000/8, p. 505 (in Estonian).

²⁹ M. Ernits. Kommentaarid EV põhiseaduse paragrahvile 15 (Commentaries on § 15 of the Constitution of the Republic of Estonia). Eesti Vabariigi põhiseadus: kommenteeritud väljaanne (Constitution of the Republic of Estonia: Commented Edition). Tallinn: Juura, Õigusteabe AS 2002, p. 138 (in Estonian).

³⁰ M. Andenas. National Reports. England and Wales, pp. 151–152. – M. Andenas, B. Hess, P. Oberhammer. Enforcement Agency Practice in Europe. London: British Institute of International and Comparative Law 2005.

³¹ M.-L. Niboyet, S. Lacssagne. National Reports. France, pp. 165–166. – M. Andenas, B. Hess, P. Oberhammer. Enforcement Agency Practice in Europe. London: British Institute of International and Comparative Law 2005.

3.2. Delimitation of the competence of bailiffs and courts

In the Estonian system, a bailiff is not the only one who settles enforcement cases, because certain acts can be decided only by a court; disputes arising from the proceedings and appeals against a bailiff's acts are also in the jurisdiction of the courts. The division of tasks between bailiffs and courts may be based on various principles, such as leaving the acts less impinging on a debtor's fundamental rights in the bailiff's domain, and letting the courts control those acts which impinge on fundamental rights more strongly. In the following, the author will look at how the Estonian legislature has divided these tasks.

According to the CEP, the bailiff's competence covers mainly routine or technical acts such as informing a debtor of the procedure, explaining to the parties their rights, seizure of property and entry of notations concerning prohibition in registers, receipt and delivery to the claimant of money from the debtor or of the sales proceeds of property, keeping record of receipts, etc. On the other hand, a bailiff also takes evaluative decisions on some issues. The most important decisions that a bailiff is competent to take in proceedings are: determination of the order of seizure of property (CEP § 53 (3)), appraisal of seized property (CEP § 74 (4), (5)), determination of ownership in certain cases (CEP § 64 (4), § 77 (2), § 181 (2)), determination of the method of sale of property outside auction (CEP § 101), identification of the debtor's dependants and economic status (CEP § 132 (2), § 133 (2)), preparation of a distribution plan for received money (CEP §§ 106–108, 174–177), and decision on the necessity of suspension of proceedings (CEP § 46 (2)).

Leaving these issues up to the bailiff is not the only option that the legislature has. For example, the Slovakian provisions on the appraisal of property prescribe expert appraisal of property which is to be put up for auction.³² In Estonia, in the absence of an agreement between the debtor and bailiff, it is the bailiff who usually determines the price under CEP § 74 (4) and (5), based on the market value and any rights encumbering the property. As regards property whose market value is relatively easy to determine, such as dwellings, it is probably expedient not to involve an expert, while in more complicated cases, a bailiff himself or herself should be able to decide that expert appraisal is necessary. In Germany, bailiffs are competent to appraise movables, unless the debtor or claimant requests the court to appoint an expert (ZPO § 813); for immovables, the court appoints an appraiser where necessary (ZVG³³ § 74a (5)). In Germany, filing a claim against assets is in the competence of the court, specifically the assistant judge organising the proceedings; in Estonia, the court's involvement is necessary only upon the appointment of a compulsory administrator for an immovable.

There are not many issues in CEP which should certainly be settled by a court in the course of enforcement proceedings. The courts are competent to grant a search warrant (CEP § 28), obtain from the debtor a sworn list of property (CEP § 61), grant permission for the seizure of a pet (CEP § 67 (2)), order an immovable to compulsory administration (CEP § 162), recover a debtor's transactions which damage the creditors' interests (CEP § 187 *ff.*), and substitute a fine or a fine to the extent of assets by detention (CEP §§ 201, 206). As regards other acts, the court's intervention depends on the request of the parties to the proceedings or their mutual dispute: removal of a bailiff (CEP § 9), suspension of proceedings (CEP § 45, § 109 (2)), as well as actions for declaring an auction invalid (CEP § 223), settlement of ownership disputes (CEP § 73 (2)), division of joint property (CEP § 14 (2)) or declaration of compulsory enforcement to be inadmissible (CEP §§ 220–222) and appeals against a bailiff's other acts according to CEP § 218. In the latter issues, the bailiff takes an initial decision and referring to the court is usually the response of a party to the proceedings if the party is not satisfied with the bailiff's solution. If none of the parties to the proceedings contests an act, a "wrong" or unfair solution may remain in force.

It is difficult to find a common denominator for the issues which are unconditionally placed under the control of the courts. Granting a search warrant and ordering the detention of the debtor are clearly limitations of the debtor's fundamental rights; seizure of a pet relates to the debtor's emotional ties to the pet. While in Germany, it is the court (assistant judge) which eventually decides on filing a claim against immovables or claims, in Estonia these issues are in the sole competence of a bailiff, the only exception being the little-used compulsory administration of an immovable. Compulsory administration does not impinge on the debtor's ownership rights as strongly as compulsory sale, and the court's role can be considered organisational. Swearing to the correctness of the debtor's list of property has to ensure the authoritativeness of the act and stress to the debtor his or her liability for the submission of incorrect information. The recovery of transactions is largely a legal assessment and the settlement of a legal dispute.

One of the common characteristics in the issue of where the court's involvement is mandatory is the infrequent occurrence of the aforementioned acts and hence their rather exceptional nature in daily enforcement practices. Using the routine and more frequently used acts and measures of enforcement proceedings is up to the bailiff. Such a solution is certainly justified with regard to the efficiency of proceedings, as it allows for

³² B. Schönfelder. Courts, credit and debt collection in post-communist Slovakia. *Economic Annals* No. 167, October 2005–December 2005, p. 28. Available at <http://www.doiserbia.nbs.bg.ac.yu/img/DOI/0013-3264/2005/0013-32640567007S.pdf> (27.04.2007).

³³ Zwangsversteigerungsgesetz. Adopted on 24.03.1897, last amended on 23.11.2007. – BGBI I 2614. Available at <http://bundesrecht.juris.de/bundesrecht/zvg/gesamt.pdf> (8.05.2008).

quick proceedings, but may be problematic in the context of the protection of fundamental rights where the debtor is without legal knowledge and considers referring to a court to be complicated and expensive, or is otherwise psychologically ruined because of the events. This is why a bailiff's decisions must be procedurally ensured to be in line with the principles of impartiality, objectiveness and proportionality.

3.3. Bailiff's discretion

3.3.1. Existence of discretionary power

In order to preclude arbitrary action by a freelance bailiff where duress is exercised, the principle of formalisation of enforcement proceedings must be ensured; the Supreme Court has also drawn attention to it.^{*34} According to this principle, a bailiff does not settle substantive legal issues when conducting compulsory execution proceedings, but follows the enforcement instrument, and certain formal circumstances are required for both the commencement of proceedings and for the bailiff's acts. As enforcement proceedings mean the execution of a decision that has already been discussed and settled and hence the proceedings no longer entail a discussion of substantive issues, it seems inappropriate to speak about discretion and decision in this context.

However, the legislature has considered it expedient not to prescribe the exact rules of conduct in many provisions on enforcement proceedings, but to leave the appropriate solution up to the court or bailiff, thus making it possible to take into account the specific features of the case and achieve a fair solution. The right to decide and choose the suitable solution can be called discretion or discretionary power; these terms are mainly used in the context of administrative law.

As regards a bailiff's discretion, the Supreme Court, in decision No. 3-2-1-104-04, stated the view that when deciding on the suspension of proceedings, a bailiff has to consider, following the principle of formalisation, whether or not the appeal filed prevents the enforcement of the decision.^{*35} The Supreme Court thus links discretion to formalisation. The court apparently had in mind formalisation in deciding on the possibility of an offset which caused the dispute in this case, because in a number of issues where the bailiff's decision is required, the principle of formalisation is of no great help to a bailiff. In the conducting of proceedings, the application of formalisation is justified in the event of the question "whether", as the content of the enforcement instrument is not re-checked; while the formalisation of "how" would reduce the efficiency of proceedings.^{*36}

Namely, it is impossible to establish exhaustive rules of procedure for every possible situation without leaving any space for choice. For the event of unforeseeable and exceptional procedural acts resulting in disproportionately grave consequences for the debtor, it is reasonable for the legislature to provide for a bailiff's discretionary power and the obligation to refuse to perform an act or to conduct an act in a special manner in relevant circumstances. Similarly to the German regulation of enforcement proceedings, Estonian bailiffs essentially have the role resembling that of a German court in compulsory execution in certain cases. The question is whether the legislature has provided a bailiff with sufficient guidelines for deciding in order to ensure the proportionality of proceedings and protection of the fundamental rights of the parties to the proceedings?

The legislature has to define the limits and maximum extent of impingement on fundamental rights; a bailiff always has the freedom to impinge on rights to a lesser extent if that is justified considering the circumstances of the proceedings. A bailiff also has to consider that protection of the interests of one party to the proceedings is impingement of the rights of the other. A claimant's constitutional ownership right is, in this case, confronted with the debtor's ownership and fundamental social rights.

According to Merusk, discretion means the competence to freely assess the situation and take an appropriate decision.^{*37} According to § 4 of the Administrative Procedure Act, discretion is an authorisation granted by law to consider taking a decision or choose between different decisions, while taking into account the limits of authorisation, the purpose of discretion, general principles of justice, relevant facts and legitimate interests. In enforcement proceedings, such free assessment of the situation is thinkable upon the exercise of duress, for example, where a bailiff has to decide on the assets which according to CEP § 66 are not subject to seizure but remain at the debtor's disposal. It is therefore important to define the balance between formalisation and discretion in enforcement proceedings and the principles that a bailiff has to follow when exercising discretion, because absolute discretion is, of course, unthinkable.^{*38} The latter arises from § 3 (1) of the Constitution, which ties the entire exercise of the authority of the state to the Constitution itself and laws which are in conformity therewith. The classification of a bailiff as a public authority was already mentioned above.

³⁴ CCSCd 16 October 2002, 3-2-1-119-02. – RT III 2002, 27, 304 (in Estonian).

³⁵ CCSCd 8 October 2004, 3-2-1-104-04, item 11. – RT III 2004, 25, 277 (in Estonian).

³⁶ F. Baur, R. Stürner. Zwangsvollstreckungs-, Konkurs- und Vergleichsrecht. Heidelberg: C.F.Müller Verlag 1995, p. 88.

³⁷ K. Merusk. Administratsiooni diskretsioon ja selle kohtulik kontroll (Discretion of Administration and its Judicial Review). Tallinn: Juura, Õigusteabe AS 1997, p. 10 (in Estonian).

³⁸ *Ibid.*, p. 11.

Jellinek's approach to discretion as the furnishing of an undefined legal concept^{*39} makes it possible to describe a bailiff's activities under the CEP. As most other laws, the CEP cannot escape the use of undefined legal concepts. For example, in determining the order of seizure of assets according to CEP § 53 (3), a bailiff has to consider that the claimant's claim has to be granted in the fastest manner without damaging the debtor's legitimate interests. The content of "legitimate interests" has to be decided on a case-by-case basis.

The Supreme Court has noted that the legislature has to decide all issues relevant from the aspect of fundamental rights, and must not delegate such decisions to the executive power. The executive power may only elaborate on the restrictions established by law, but not impose additional restrictions.^{*40} Enforcement proceedings mainly impinge on the debtor's ownership rights, while the existence of non-seizable property impinges on the claimant's ownership right. The CEP does not authorise a bailiff to impose any restrictions of his or her own; the law defines non-seizable assets in detail (CEP § 66 — non-seizable assets; CEP §§ 131, 132 — income on which a claim for payment cannot be made). Anything not listed may be seized, subject to the prohibition on excessive seizure. In a bailiff's activities, discretion cannot mean a choice as to the objective of the proceedings, but only as to the means used, and even then subject to the measures prescribed by the legislature. Hence, we can speak about discretion in terms of expedience and efficiency.

The exercise of discretion may be divided into two: discretion of choice or the right to choose the most expedient outcome, and discretion of decision or a decision on whether or not to apply the legal consequence provided by law.^{*41} An example of the first is the order of seizure of property which a bailiff determines in the course of enforcement proceedings; discretion of decision is exercised when a bailiff has to decide on the need to suspend proceedings if an appeal is filed against the bailiff's acts.

Enforcement proceedings always entail a conflict of fundamental rights, the settlement of which is one of the legal limits to the exercise of discretion.^{*42} The bailiff has to consider the conflicting interests and take a decision without distorting the nature of any of the rights or freedoms being impinged on.

For a number of situations, the legislature has prescribed which fundamental right takes priority over another. For example, the debtor's right to a decent living and the aid of the state in the event of need are, as a rule, preferred to the requirement for the defence of the claimant's ownership, via the establishment of non-seizable assets and types of income. Certain items and income have to remain at the debtor's disposal even if this means the impossibility of meeting the claim or postponement of the final execution of the enforcement instrument into the distant future. However, as an exception to this rule, it is possible under CEP § 66 (2) to seize a debtor's necessary household effect if the item belongs to the claimant and a financial claim, which is ensured by ownership reservation, is being enforced concerning the same item. The legislature has not imposed a direct obligation on the claimant to support the debtor from the claimant's assets.

In certain cases, however, the choice is up to the bailiff, who has to exercise his or her discretion in line with the principle of proportionality and select which right to restrict in favour of what. For example, under CEP § 131 (2), a part of income which is usually not seized, may be seized in certain cases, considering the type of the claim, the amount of income and fairness, while the bailiff has to hear the debtor before taking the decision only if the bailiff has the possibility to do so. As regards compliance with the principle of proportionality, the Supreme Court has emphasised that when deciding on the manner of enforcing a claim, in addition to hearing the debtor, consideration should be given especially to the claimant's interests and the objective of efficiency of enforcement proceedings, and thus the expedience of the act has to be analysed.^{*43} These guidelines were given, however, to a court and not a bailiff. The Supreme Court has further found that discretion is necessary for ensuring the application of the principle of proportionality in proceedings. As a rule, a competent body has the duty to assess whether a person's interests are balanced with public interest, i.e. whether the restrictions on fundamental rights are proportional. The specific circumstances of the case have to be taken into account to assess the compliance of a decision with the principle of proportionality.^{*44}

³⁹ W. Jellinek. *Verwaltungsrecht*. Berlin, 1928, referred to in: K. Merusk (Note 37), p. 15.

⁴⁰ CRCSd 24 December 2002, 3-4-1-10-02. – RT III 2003, 2, 16 (in Estonian).

⁴¹ K. Merusk (Note 37), p. 25.

⁴² *Ibid.*, p. 31.

⁴³ CCSCr 22 December 2003, 3-2-1-147-03, item 12. Available at [http://www.nc.ee/?id=11&indeks=0,2,237,1397&tekst=RK/3-2-1-147-03\(8.05.2008\)](http://www.nc.ee/?id=11&indeks=0,2,237,1397&tekst=RK/3-2-1-147-03(8.05.2008)) (in Estonian).

⁴⁴ CRCSd 21 June 2004, 3-4-1-9-04, item 16. – RT III 2004, 20, 224 (in Estonian).

3.3.2. Discretionary errors

Maurer points out three types of errors in the exercise of discretion: exceeding the limits, non-use, and misuse of discretionary power.^{*45}

Exceeding the limits of discretionary power means that the decision is beyond the competence of the decision-maker. For example, a claimant may agree with the debtor that the claim will be paid in instalments according to a schedule. If a payment schedule is agreed between the debtor and bailiff without asking the claimant's opinion, the bailiff has taken a decision which is beyond his or her competence.

Non-use of discretionary power means that the possibility of taking various circumstances into account is not used. This is the case, for example, if a bailiff, at the claimant's request under CEP § 131 (2) seizes the entire parental benefit paid to the debtor without taking into account the special needs of the debtor's child and the existence or lack of other income of the debtor, and considers the claimant's request the only necessary prerequisite for seizing the parental benefit. Non-use of discretionary power also occurs if the bailiff is aware of all the debtor's assets, but instead of seizing these awaits the claimant's opinion as to which part of the debtor's assets the claimant wishes to be seized. The latter example is a major difference from the German procedure rules, according to which the claimant has to initiate each and every procedural act. An Estonian bailiff has the right, and hence the duty, to lead the proceedings to a successful end; the claimant has its means to influence the course of the proceedings, but the end of the proceedings does not directly depend on the use of these means. Therefore, it may be said that where the bailiff has discretionary power, he or she has to take a decision, while waiting or delaying infringes the claimant's rights.

Misuse of discretionary power is probably the most significant conflict with constitutional values that may arise in the course of discretion, and results in a breach of the principles of proportionality and equal treatment. Misuse may also be understood as discretion not complying with the objective of law, e.g., when a bailiff determines the order of seizure of assets not in view of the speed of meeting the claim and the interests of the debtor, but according to the method of sale requiring the least procedural acts. As a bailiff can, in principle, excessively impinge on the parties' fundamental rights, i.e. violate those rights, a bailiff can be considered the addressee of fundamental rights because of his authority to use the state's power of duress.^{*46}

When reviewing an appeal against a bailiff's decision or act, a court can establish a discretionary error and order the bailiff to review the matter again, or the court can take its own decision, for example, and cancel the decision to suspend the proceedings. However, a court can only review lawfulness, but not expedience, because by using undefined legal concepts, etc., the legislature has admitted to the competence of an applier of law.^{*47} The latter position is arguable in German legal literature^{*48}, but the Supreme Court has referred to this approach, stating that when an appeal is filed against a bailiff's acts, the lawfulness of the bailiff's activity will be checked, but the court is not competent to determine the price of the debtor's movables instead of the bailiff where a claim is made on these assets. Based on the duties of the bailiff as established by the CEP and the rights given to perform these duties, as well as the rights given to the debtor, a bailiff has a central role in the enforcement of claims and the objective of ensuring the protection of the claimant's interests by way of compulsory execution of the claim after the debtor has failed to perform his or her obligation voluntarily.^{*49}

4. Conclusions

As regards the legal status of the body conducting proceedings, the Estonian bailiff is the most similar to his or her French, Belgian, and Slovak counterparts. At the same time, the Estonian enforcement procedure is a universal procedure for the execution of enforcement instruments issued as a result of a large number of state proceedings.

From the viewpoint of enforcing a claim which has been recognised by the state, the nature of the claim — whether it is a private or public law claim — makes no difference. Therefore, in the European Union context, it would be reasonable to mutually recognise other enforcement instruments in addition to those arising from civil relationships, by addressing the so-called mobile debtors. Current European discussions are motivated purely by the protection of enterprise and private persons' interests and do not concern public interests.

⁴⁵ H. Maurer. *Allgemeines Verwaltungsrecht*. München: Verlag C. H. Beck 2004, pp. 140–141.

⁴⁶ B. Weber-Dürler. *Grundrechtseingriffe*. – U. Zimmerli (ed.). *Die neue Bundesverfassung. Konsequenzen für Praxis und Wissenschaft*. Berner Tage für die juristische Praxis 1999. Bern: Stämpfli Verlag 2000, p. 136.

⁴⁷ H. Maurer (Note 45), p. 144 ff.

⁴⁸ *Ibid.*, p. 147.

⁴⁹ CCScr 28 March 2000, 3-2-1-41-00, item 4. Available at <http://www.nc.ee/?id=11&indeks=0,2,237,1708&tekst=RK/3-2-1-41-00> (8.05.2008) (in Estonian).

When establishing minimum requirements for the organisation of compulsory execution in the Member States, uniform procedure rules should also be recommended for the compulsory execution of all claims. Enforcement of different claims by different bodies is a matter of habit and tradition rather than the efficiency of proceedings. A single body conducting the proceedings can avoid the race between duress procedures where several claims are being enforced against one person.

The aspect of being a freelancer together with a bailiff's great independence and a relatively broad decision-making competence renders the Estonian enforcement proceedings efficient, which is why the search for an efficient procedural system in Europe should certainly consider the option of a freelance bailiff, which allows for a saving for the state, while ensuring efficient compulsory execution for the claimant via the fact that the bailiff's fee depends directly on the work done. The efficiency of proceedings is supported by leaving as many individual procedural issues as possible up to the bailiff to decide, without forgetting the errors that may arise from and potential misuse of discretion. Protection of the debtor's fundamental rights should, in any case, be ensured in a uniform manner regardless of the results of classification of duress procedures. The claimant's benefit protected by the proceedings differs by type of claim; in the event of a private claim, the protected benefit is the right of ownership; where the claimant is a public entity, it has no fundamental rights and the impingement of the debtor's interests is based on public interest or something similar. In the conflict of interests arising from compulsory execution, it is often the bailiff who has to find the balance between the parties, based always on the particular circumstances of the case. The choice of legal remedies available to the parties to the proceedings is thus important and one should not forget that a function of the authority of the state is being exercised regardless of whether the enforced claim is a private or public claim. The latter has relevance to the scope of competence given to the body conducting the proceedings, supervision, and possible free competition.