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**Establishing Common European Standards of Enforcement:
Recent Work of the Council of Europe as regards Enforcement Procedures
and Bailiffs**

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1. Introduction

This paper is divided into two parts. The one is devoted to the issues of enforcement in the context of Art. 6. of the European Convention on Human Rights and Fundamental Freedom, i.e. to the link between efficient enforcement and the human right to a fair and efficient trial. We intend to demonstrate that, both in the recent case law of the Strasbourg Court, and in the activities of the Council of Europe (hereinafter: CoE), the enforcement plays an increasingly important role. It has been recognized that, in order to prevent violations of human rights and actively contribute to the ideal of a democracy based on the rule of law and human rights, contemporary European states should pay particular attention to the efficiency of the enforcement process. In consideration of this, the importance of proper and efficient enforcement was recently emphasized in the new draft instrument of the Council of Europe, the Recommendation on Enforcement and in the basic documents on establishment of a new body of the CoE, the European Commission on the Efficiency of Justice (hereinafter: CEPEJ).

The second part deals with a more specific issue, i.e. to the role of enforcement agents, in the first place bailiffs, in the fulfilment of the ideal of speedy, accessible and proper enforcement of court judgments and other appropriate instruments. We will briefly present the most important features of the Draft CoE Recommendation on Enforcement (hereinafter: dRE), paying attention in particular to the place that bailiffs play within the framework of this potentially very important draft instrument of the Council of Europe.

2. Proper enforcement as an integral part of the right to a fair trial - the evolvement of a new understanding of an “aftermath” of the judicial process

The traditional European approach to legal process was, until recently, almost exclusively court-oriented and adjudication-oriented. In other words, the focus of all those who were dealing with the ideals of a just and efficient judicial system was to a large part closed within the borders of the process of adjudication, i.e. the process in which, in the court proceedings, the existence of rights and obligations of the parties was determined. This process typically starts with initiation of the process (filing a suit), and ends with a final and binding judgment. What happened before, and - especially - what will happen after, was frequently left outside the scope of the legal discussion.

This approach could be found in the wording of many legal documents that dealt with the quality and efficiency of legal process. As perhaps a most prominent example, the wording of Art. 6 of the European Human Rights Conventio

Court has found that the guarantee of the right to a fair trial from Art. 6 ECHR also applies to enforcement, as “[i]t would be inconceivable that Article 6 § 1 should describe in detail procedural guarantees afforded to litigants - proceedings that were fair, public and expeditious - without protecting the implementation of judicial decision”. Therefore, as the Court has emphasized ever since, **“execution of a judgment given by any court [...] has to be regarded as an integral part of the ‘trial’ for the purposes of Article 6”**.

The importance of enforcement has become even greater in the further ECHR cases. In a 1998 case *Estima Jorge v. Portugal* the Court has recognized that enforcement has an independent value, irrespective of the nature of the enforcement writ, and even irrespective of the prior existence of a court proceedings. In the cited case that dealt with the enforcement of a notarial deed received as a security for mortgage, the Court held that “Article 6 § 1 of the Convention required that all stages of legal proceedings for the ‘determination of ... civil rights and obligations’, not excluding stages subsequent to judgment on the merits, be resolved within reasonable time”. But, in *Estima Jorge* case there was neither dispute, nor prior court proceedings for “determination of rights”, since the sole object of the proceedings was recovery of debt. However, the Court found that “conformity with the spirit of the Convention required that the word ‘contestation’ (dispute) should not be construed too technically and that it should be given a substantive rather than a formal meaning. Therefore, even in the absence of a pre-existent (fair) trial, the Court found violation of the reasonable time provision under Article 6 § 1 of the Convention.

The lack of proper enforcement (or administrative and/or legislative action that prevents enforcement) can have harsher consequences than simply excessive length of the proceedings. The case of 1999 was yet another case where there was no dispute - the only alleged violation was the impossibility to enforce an uncontested court order confirming termination of the lease and requiring the tenant to vacate the premises.⁴ As established in *Immobiliare Saffi*, a governmental regulation that postponed assistance to enforcement to the owner of immovable property to repossess his apartment for some eleven years⁵, amounted not (only) to violation of Article 6 with respect to the reasonableness of the time needed, but also to violation of the further aspect of the Art. 6 - the access to court right. Even further, the Court found that in this case “the balance that had to be struck between the protection of the right of property and requirements of the general interest” had been upset, and therefore established also a violation of the right to protection of property from Article 1 of the Protocol No. 1 to the Convention, i.e. the right to the peaceful enjoyment of possessions. Thereby, the failure to implement enforceable titles can amount not only to violation of procedural rights⁶, but also to violation of substantive human rights.

² *Estima Jorge v. Portugal*, 16/1997/800/1003, judgment of 21 April 1998.

³ *Immobiliare Saffi v. Italy*, 22774/93, judgment of 28 July 1999.

⁴ In this case the Court reiterated that “the right to a court would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.”

⁵ Compare similar effects of governmental actions that suspend enforcement with actions suspending the course of legal proceedings in *Estima Jorge* case, 48778/99, judgment of March 1, 2002 (dealing with legislation that suspended proceedings under the law on state liability for terrorist acts for more than 6 years).

⁶ Among the procedural rights that might be violated by the lack of enforcement, in addition to right to a fair trial, there is also a possible right to effective legal remedy from Article 13 of the Convention. The recent case *Estima Jorge* law of the ECHR, since *Estima Jorge* case (App. no. 30210/96, judgment of Oct. 26, 2000) often finds cumulative violations of Arts. 6 and 13.

2.2.2. Efforts of the Council of Europe - Conclusions of the 2001 Moscow Conference

Turning from legal to political arena, one could follow the same path of reasoning in the activities of European countries aimed at improving their legal systems. First activities of the Council of Europe in the area of enforcement coincided with the Hornsby case. Already in October 1997, the multilateral seminar held in Strasbourg at the Palais de l'Europe reaffirmed the legal and political importance of enforcement in the proper functioning of the judicial system in a State governed by the rule of law.⁷ Several bilateral and multilateral seminars, both regional and national, organized on the case-by-case basis under the auspices or with the participation of the Council of Europe followed (see at 2.2.4).

In October 2001, at the 24th Conference of European Ministers of Justice held in Moscow, the main topic was "implementation of judicial decisions in conformity with European standards". After discussing the current problems of enforcement in the light of the cited case law of the ECHR, the European Ministers of Justice in the adopted Resolution No. 3 unanimously agreed that "**proper, effective and efficient enforcement of court decisions is of capital importance for States in order to create, reinforce and develop a strong and respected judicial system**".

Thereby, activities in the enforcement area gained the status of the priority task among the principal bodies of judicial sector in the member countries of the Council of Europe. The Ministers of Justice at Moscow Conference decided to continue to explore the issues of enforcement, in particular by identifying **common European enforcement standards and principles**. This task was forwarded to the European Committee on Legal Co-operation (CDCJ) and its working bodies. It also included setting forth of the main principles related to the **role of enforcement agents** (bailiffs).⁸

2.2.3. The process of defining standards - the emerging of the Draft Recommendation on Enforcement

The concrete carrying out of the work as regards enforcement (with exception of decisions in the administrative field)⁹ was entrusted to the Committee of experts on efficiency of justice (CJ-EJ), one of the subcommittees of the CDCJ. A working party of the CJ-EJ (CJ-EJ-GT), consisting of representatives of 13 countries,¹⁰ chaired by German representative Eberhard Desch, held several meetings in the second half of the 2002 and finally produced the draft Recommendation on Enforcement that was adopted by the plenary meeting of the CJ-EJ on 13 November 2002. The text of the Draft Recommendation is scheduled to be adopted by the CDCJ in March 2003, and finally be enacted by the Committee of Ministers of the Council of Europe in May 2003.

The main features of the Draft Recommendation will be presented in the second part of this paper (at 3).

⁷ See Draft Explanatory Memorandum on Draft Recommendation on Enforcement, CJ-EJ(2002)14, p. 4.

⁸ 24th Conference of European Ministers of Justice, Moscow, 4-5 October 2001, Report of the Secretary General, CM(2001)168 and Addendum revised, CDCJ (2001)34, para 5.

⁹ The latter was part of the mandate of another working body, the Project Group on Administrative Law (CJ-DA).

¹⁰ Austria, Croatia, Cyprus, France, Germany, Hungary, Ireland, Lithuania, Netherlands, Norway, Portugal, Switzerland and UK.

2.2.4. Support for the countries in transition

There are two main aims of the CEPEJ. The first is defined as “improving the efficiency and the functioning of the justice system of member states, with a view to ensuring that everyone within their jurisdiction can enforce their legal rights effectively, thereby generating increased confidence of the citizens in the justice system”

3. Draft Recommendation of Enforcement and the role of the enforcement agents (bailiffs) under its provisions

3.1.1. Definition of enforcement

The dRE defines enforcement as “carrying into effect of judicial decisions, as well as of other judicial or non-judicial enforceable titles in compliance with the law which compels the defendant to do, to refrain from doing or to pay what has been adjudged”.¹⁷

This is a functional definition of enforcement, that delineates this process in contrast to other processes according to its basis, legal background and the content of the act that has to be enforced.

As to the basis of enforcement, it is defined in a comprehensive way, encompassing both enforcement of court decisions (as a core of enforcement activity) and enforcement of other enforceable titles of judicial and non-judicial nature. Such titles may include e.g. judicial settlements, notarial deeds and arbitral awards, insofar they are legally recognized as acts that may be directly enforceable (e.g. by providing that they have the same force as an enforceable court decision).¹⁸ The definition and scope of enforceable titles is left entirely to the national legal systems of member states.

Enforcement in the sense of this definition would encompass only the actions that are carried out in compliance with the law. In other words, instances of “private justice” and uncontrolled self-help would fall outside the scope of this Recommendation.

Finally, not all of the judicial decisions would need enforcement. As noted in the Draft Explanatory Memorandum, the dRE relates only to “those judicial decisions and enforceable titles that require action to be taken to enforce them”.¹⁹ Not all judicial decisions could be subject to enforcement. Some of them may be self-enforceable - e.g. the decisions that by themselves produce legal effects (change existing relationships, as in the case of divorce decisions or annulment of contracts), or would not require enforcement at all, as is the case with decisions of mere declaratory nature (establishment of existence or non-existence of parties’ rights and obligations). Therefore, the dRE relates only to enforceable titles that compel the defendant to do something (), or order him to refrain from undertaking a certain action (), or pay the adjudged sum (this being a specific, but very common instance of a positive obligation to undertake an action).

3.1.2. Definition of parties to proceedings

While certain documents on enforcement define parties as “creditor” and “debtor”, it has been recognized that those terms essentially relate to the parties to a legal relationship of substantive law. However, a party that initiates enforcement proceedings need not necessarily be a creditor in such a relation, and its opponent need not necessarily be a debtor in such a relation.

Therefore, parties to proceedings are defined procedurally, as “claimant” (party seeking enforcement) and “defendant” (party against whom enforcement is sought).

¹⁷ dRE, 3.1.1.

¹⁸ See also Draft Explanatory Memorandum on dRE, CJ-EJ(2002)12 (hereinafter: dEM), at 7.

¹⁹ Ibid.

3.1.3. Definition of enforcement agents

See infra under 3.4.

The dRE, although relatively wide in application, does not cover all instances of enforcement. Under p. 4.1 the two types of cases are outside of the scope of its application. First, the enforcement of administrative matters was planned to be covered by another recommendation, due to be prepared by a specific group of experts for administrative law. Second, it is certainly not applicable to enforcement of criminal matters that concern deprivation of liberty. However, in spite of some doubts expressed in the discussions of the CJ-EJ, the draft text submitted to other bodies of the CoE for consideration provided that the dRE may be applicable to enforcement of some other decisions in criminal matters, e.g. on the imposition of fines, confiscation of property or compensation for victims. Some uncertainties were expressed with respect to family law matters, but general view was that, although there are some specific concerns in enforcement of such decisions, the principles from the dRE are generally still applicable in such matters as well. Therefore, it has been stated that the dRE applies to practically the whole area of “civil matters”, including commercial, consumer, labour and family law matters. Such a comprehensive scope of application, irrespective of some uncovered areas, may justify that the name of Recommendation does generally refer to “enforcement”, rather than a specific type of it (e.g. enforcement in civil matters).

After determining the scope of application and the meaning of the used terms, the Recommendation sets forth in two main parts the joint principles and standards enforcement procedure (p. 5) and enforcement agents (p. 6) applicable to all member states of the CoE. The following rules and principles that should be followed in order for enforcement procedures to be effective and efficient as possible are stated:

- the need for a clear legal framework, i.e. establishment of procedures that are clear and easy to follow²⁰ (5.1.1.);
- actual compliance with legal requirements, resulting in foreseeability and transparency of the enforcement processes (5.1.2.)²¹;
- co-operation between the parties (5.1.3)²²;

²⁰ See also dEM, p. 16. Transparent and uncomplicated rules could also enable parties to understand their rights and obligations and comply with their responsibilities.

²¹ The dEM states with reference to this principle that it “highlights two recurrent problems in many states: (i) the misuse and abuse of enforcement procedures by the parties thereby delaying the process and justice as a whole, and (ii) the risks of private forms of justice emerging when the enforcement process is inefficient.” Further refining of requirements for enforcement procedures is contained under 5.1.9.

²² As stated in the dRE, parties should co-operate “appropriately”. This ideal is not absolute - the purpose of the co-operation is to facilitate voluntary enforcement and/or the appropriate choice of means of fulfilment of creditor’s claims. See dRE, p 19: 19., stating that “[t]he reference, in Principle III.1.c., to the duty of the parties to co-operate is necessary to increase compliance with, and reduce misuse of, the enforcement process (e.g. vexatious appeals). By co-operating and, therefore, by better communicating with each other, the vulnerability of the defendant and adverse reactions to the enforcement process (e.g. hiding assets) may be reduced. For example, a cooperative claimant may be more open to agreeing with the defendant on the assets to be attached or

- the obligation of defendants to provide relevant information on their income and assets (5.1.4)²³;
- misuses of the enforcement process should be prevented, in particular the attempts to turn enforcement process into re-adjudication of the case (5.1.5);²⁴
- postponement (delay) of enforcement process may be granted only for reasons prescribed by law, and, eventually, be subject to review by the court (5.1.6);²⁵
- there should be a fair balance of claimant's and defendant's interest (5.1.7)²⁶; therefore, for humanitarian reasons some essential assets and income of the defendant may have a privileged position (5.1.8)²⁷.

Some further principles deal specifically with the desirable characteristics of the enforcement procedures. They should be easy to administer; the enforceable titles should be exhaustively enumerated and defined in the legislation; rights of the parties should be clearly defined, in particular when the ranking of claims and entitlements to monies recovered is concerned. Measures to prevent procedural abuses and provide most effective and appropriate means of serving documents are desirable, too.²⁸ On the other hand, the costs of the enforcement, in particular the enforcement fees, should be reasonable and foreseeable. They should in principle be borne by the defendant.²⁹

While the first half of the draft Recommendation on Enforcement deals with the functional characteristics of “good enforcement proceedings”, the second half of it is organizational, i.e. devoted to those who effectively carry out enforcement. In the preparatory work related to dRE, the notion of “bailiff” was used, but during the discussions the attention was drawn to the fact that some legal systems virtually do not make use of bailiffs in the enforcement process (or have bailiffs that deal with very minor and technical tasks), and use some other

on payment arrangements (e.g. by instalments). Enforcement agents can therefore play a key role in facilitating such co-operation.”

²³ Defendants should not only avoid misuses, but also be obliged to assist enforcement process by providing information needed for the enforcement process, e.g. issue a solemn declaration of assets, including the data on bank accounts etc. At the same time, defendants' right to privacy and data protection standards should be observed, according to the principle of proportionality.

²⁴ One of the obstacles to effective enforcement that was encountered in the practice of some countries originated from the inclination to re-initiate discussion on the merits of the dispute during the enforcement process. The enforcement, as a rule, roots on a final findings of a - it is Therefore, there should be no re-adjudication in the course of enforcement.

²⁵ This principle in particular addresses the practice in some countries that enables defendants to stall the proceedings by launching vexatious appeals and objections to the actions of enforcement agents etc. Such unnecessary postponement of enforcement should be prevented by effective legislation and by possibility to challenge the decisions on postponement in a court of law. See dRE, p. 24.

²⁶ This rule is related to the principle of proportionality. The aim of enforcement is not to promote interests of any party or third person. Enforcement should serve to the objectives of justice, i.e. to the final implementation of the enforceable titles that emerged, in principle, as a result of a fair judicial proceedings, while also maintaining the human right to respect for private and family life. Therefore, the legitimate needs of fulfilment of claimant's claims should not evolve into unnecessary pain caused to those defendants that may often be in a precarious and vulnerable position. See dRE, p.

²⁷ Such assets mentioned in the draft Recommendations are e.g. as basic household goods, basic social allowances, monies for essential medical needs and necessary working tools.

²⁸ See dRE 5.1.9.

²⁹ See dRE 5.2 to 5.6.

persons or services instead (e.g some countries, such as Austria, employ enforcement judges to undertake a significant portion of tasks that are in other countries given to bailiffs).

In formulation of recommendations that would apply to bailiffs, it had to be recognized that in the member states of the Council of Europe there are rather different systems of enforcement,

practical knowledge of candidates for enforcement services is also contained in the Recommendation (e.g. the testing of their knowledge of civil procedural law, the practical examination and case-study assessments etc.).

The need to maintain high standards of morality and professional ability and knowledge does not end with recruitment of enforcement agents. The Recommendation also provides that “the enforcement agents should be honourable and competent in the performance of their duties, and should act, at all times, according to recognised high professional and ethical standards.” Well-structured initial and continuous training should also be available for enforcement agents.

The relationship of enforcement agents and parties was a matter of extensive discussion. The position of enforcement agents is different from the position of judge, and therefore the requirements are also different. In many cases, the enforcement agents will be perceived as those who act on behalf of the claimants, and in some systems they are, at least initially, paid by them. However, they must not be simple agents of either party to the proceedings and they should not act exclusively in the interest of one party. Thus, the Recommendation provides that the enforcement agents should be “unbiased in their dealings with the parties and be subject to professional scrutiny and monitoring which may include judicial control” .

The issue of responsibility was reiterated in the Recommendation in respect of every occurrence of abuses of the enforcement agents’ position. For such abuses, it is absolutely necessary to provide adequate and efficient disciplinary, civil and/or criminal sanctions, since only effective prevention of abuses could be a guarantee of a strong, respected and well-esteemed profession.

Finally, enforcement process cannot proceed unless those who carry out enforcement have proper working conditions, adequate physical resources and support staff. Although such “logistical” problems appear differently when enforcement agents employed by the state and self-employed bailiffs are concerned, their ratio is the same. Availability of appropriate candidates for enforcement services and their motivation is also dependent on their remuneration, especially if the enforcement agents are working on a fixed salary paid by the state.

4. Conclusion

A proper and efficient system of justice is not imaginable without effective enforcement of acts that are legally recognized as enforceable. The case law of the European Court of Human Rights and the activities of the Council of Europe have contributed to the efforts to develop and strengthen the national systems of enforcement in European countries. However, the problem of quality, efficiency and speed of the enforcement process remains high on the

³⁶ at 6.3.

³⁷ at 6.8.

³⁸ at 6.4.

³⁹ See at 6.6.

⁴⁰ at 6.8. The need for proper remuneration was in particular noted in the countries in transition. Therefore, the conclusions of a regional seminar held in Varna, Bulgaria on 19 and 20 September 2002 provide a more detailed phrasing on remuneration: “10. In affirming their political commitment to developing and strengthening the enforcement process, States should ensure that there is adequate financing of their enforcement services. To this end, enforcement agents should be adequately remunerated through a system of tariffs and fees and have the proper working conditions and resources (e.g. premises, vehicles, telephones etc) necessary to carry out the enforcement process as efficiently as possible.”

agenda of many states. In this respect, the future adoption of the Recommendation on Enforcement and the activities of the newly established organ, the CEPEJ, will certainly encourage the necessary reforms and help reformers to steer them.