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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	1
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	2
2.1. <i>Where does a “fair trial” end?</i>	2
2.2. <i>New approach: enforcement as a key element in the efficiency of judicial system</i>	2
2.2.1. Recent case law of the ECHR.....	2
2.2.2. Efforts of the Council of Europe - Conclusions of the 2001 Moscow Conference	4
2.2.3. The process of defining standards - the emerging of the Draft Recommendation on Enforcement	4
2.2.4. Support for the countries in transition - bilateral and regional CoE activities.....	5
2.2.5. The establishment of the European Commission for the Efficiency of Justice (CEPEJ)	5
3. Draft Recommendation of Enforcement and the role of the enforcement agents (bailiffs) under its provisions	7
3.1. <i>Definitions</i>	7
3.1.1. Definition of enforcement.....	7
3.1.2. Definition of parties to proceedings	7
3.1.3. Definition of enforcement agents.....	8
3.2. <i>Scope of application</i>	8
3.3. <i>Principles related to enforcement procedure</i>	8
3.4. <i>Enforcement Agents - Bailiffs</i>	9
4. Conclusion.....	11

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 Freedoms, 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

2.1. Where does a “fair trial” end?

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 Convention (ECHR) could be cited insofar that it apparently focuses solely on the adjudicatory, contradictory part of the process. Namely, both English and French wording of Art. 6 speak of “*determination* of ... civil rights and obligations” (“*décider*” ... des contestations sur ... droits et obligations de caractère civil”). In plain language, the guarantee to a fair trial would, interpreted from these words, end there where enforcement would typically only start, i.e. when the content of parties’ rights has been established and one or more claims set forth in the process granted.

2.2. New approach: enforcement as a key element in the efficiency of judicial system

2.2.1. Recent case law of the ECHR

However, this understanding is changing. The approach to the issue of the efficiency within the system of justice has exceeded the narrow borders of the courtroom. Moved by practical and pragmatic considerations, faced with growing inefficiencies in the implementation of the court decisions and the needs of their citizens that justice be done not only on paper, but also in reality, the European countries have effectively realized that enforcement makes out one of the crucial parts of the legal process. “It is not over when it is over, it is over when it has been put into life” - this could be one of the slogans of the new approach, that starts from the assumption that the legal process does not end with pronouncing a final and just decision, but when such decision is, in fact, implemented. In this context, the old Latin saying: **ubi ius, ibi remedium** (there is no right without an effective remedy) has acquired a refreshed importance and meaning.

At least since 1997, this understanding has become a part of the well-established case law of the European Court of Human Rights. In the landmark case *Hornsby v. Greece*¹, the European

¹ Hornsby v. Greece, 107/1995/613/701, judgment of 19 March 1997.

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*², 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 *Immobiliare Saffi v. Italy*³ 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 *Kutić v. Croatia* 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 law of the ECHR, since *Kudla v. Poland* 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 *infra* 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 (see *infra* at 3).

⁷ See *inter alia* 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 - bilateral and regional CoE activities

Although the cited case law of the ECHR related to countries such as Greece, Italy and Portugal, perhaps potentially even more disturbing problems of efficiency and quality of enforcement process were noted in the countries in transition. Since 1997, the CoE organized several seminars devoted to support of effective enforcement in the countries of Central and Eastern Europe, and the countries of former Soviet Union. Some of these seminars were organized in the framework of the programs Demo-droit and Themis, and the activities for the development and the consolidation of democratic stability (ADACS).

These seminars included:

- multilateral seminar in Strasbourg in October 1997;
- multilateral seminar in Jurmala, Latvia, June 1998 (common seminar with the countries of Estonia, Latvia and Lithuania);
- multilateral seminar in Varna, Bulgaria, September 2002 (seminar with the participation of Albania, Armenia, Azerbaijan, Bulgaria, Georgia, FR Yugoslavia, FYROM, Moldova, Romania, Russian Federation, Turkey and Greece);
- bilateral seminars in Moldova, Albania, Russian Federation and Ukraine.

In addition the CoE also organized the programs of tailor-made evaluation resulting from bilateral assessment visits to various countries (Croatia, Georgia, Russian Federation) as well as legislative expertises (Federation of Bosnia and Herzegovina, Georgia, Lithuania, Moldova, Ukraine) and study visits (Russian Federation).¹¹

The CoE programs of support for the countries of transition in this area have been to a large extent connected to the assistance to enforcement professionals - bailiffs, enforcement judges, governmental enforcement services etc. In particular, the need for proper education and training, clear rules and sufficient resources has been recognized during virtually all of the aforementioned activities. Conclusions of various seminars and experiences from these events contributed to formulation of some of the provisions of the draft Recommendation on Enforcement of the CoE.

2.2.5. The establishment of the European Commission for the Efficiency of Justice (CEPEJ)

In addition to the Draft Recommendation, the CoE recently adopted another important instrument that will, in a broader context, contribute to future activities in the field of enforcement of judicial and other decisions. Namely, the same committee that elaborated the first draft of the Enforcement Recommendation (CJ-EJ) had another mandate entrusted by the European Ministers of Justice, i.e. to prepare an instrument that would enable member countries to improve the efficiency and functioning of their justice system. The CJ-EJ experts came up with the proposal to establish a new organ within the CoE in the form of a separate expert commission. This new body, the European Commission for the Efficiency of Justice, was established by the Resolution of the Committee of Ministers on September 18, 2002.¹² The body will become operational at its first meeting on February 3-5, 2003.

¹¹ See [http://www.coe.int/T/E/Legal_Affairs/About_us/Activities/DG-I\(2003\)1E.asp](http://www.coe.int/T/E/Legal_Affairs/About_us/Activities/DG-I(2003)1E.asp), doc. DG-I(2003)1E.pdf (the main results of the activities carried out by DG – I in 2002).

¹² Res(2002)12, resolution adopted by the Committee of Ministers at the 808th meeting of the Ministers' Deputies.

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”¹³. The second aim is better implementation of the international legal instruments of the CoE concerning efficiency and fairness of justice. The list of applicable instruments is long, and encompasses a number of resolutions and recommendations related to issues such as access to justice, efficiency of judicial proceedings, status and role of the legal professionals, administration of justice and management of courts and the use of information and communication technologies.¹⁴

Already within the first aim of CEPEJ the importance of enforcement issues could be recognized. By stating that purpose of improving efficiency of justice is **to ensure effective enforcement of legal rights** of citizens, the scope of activities is clearly not linked solely to the stage of courtroom adjudication. Resolution that established the CEPEJ included several statements related to enforcement of court decisions. In the list of principles, at I.3., the Res(2002)12 contains the following provision:

“3. Execution of court decisions

- i. All judicial decisions shall be executed in an effective manner and within a reasonable time limit.
- ii. Bailiffs, where they exist, or any other execution agents, shall carry out their work according to the law, fairly, impartially, efficiently and transparently.”

Some other principles from Res(2002)12 may also indirectly or directly be applicable to enforcement matters. In particular, the reference to on-going training as “a right and a duty of all those involved in the judicial service” as “an essential requirement for justice to fulfill its functions”¹⁵ undoubtedly also refers to the need of well-trained and highly professional enforcement service. The principles of proper administration of justice and promotion of the use of information and communication technologies¹⁶ could also be extended to enforcement agents and their operation.

To conclude, the ample reference to enforcement contained already in the basic documents on the establishment of the CEPEJ may lead us to assume that, after final adoption of the Recommendation on Enforcement, it will certainly become among the more important legal instrument on the list of CEPEJ. In the next part of this paper, we will outline some basic features of the dRE.

¹³ Article 1 of the Statute of the CEPEJ (hereinafter: CEPEJ Statute).

¹⁴ See Appendix 2 to Res(2002)12 - Non-exhaustive list of relevant CoE recommendations.

¹⁵ Res(2002)12, at II.4.

¹⁶ *Ibid.*, at III.i. and IV.i.

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

3.1. Definitions

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 (*facere, dare*), or order him to refrain from undertaking a certain action (*non facere, pati*), 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.

3.2. *Scope of application*

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).

3.3. *Principles related to enforcement procedure*

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, *inter alia*, 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

3.4. Enforcement Agents - Bailiffs

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 *res iudicata* - it is *causa finita*. 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, not only in the procedural, but also in the organisational sense. Therefore, the very notion of a “bailiff” was somewhat controversial. Starting with the problem of translation into different European languages, the term “bailiff” is used for persons of rather different professional and social status. One typical demonstration of such differences relates to the social status and respect enjoyed by those who are called “bailiffs” in different legal systems. In some of the legal systems, the bailiff’s profession is a very desired, esteemed and attractive post, whereas in the others it is associated with hard, repelling and poorly paid jobs. Further differences exist in respect of education, knowledge, skills and authorities of bailiffs.

Therefore, a more comprehensive term was used in the dRE - the notion of **enforcement agent**, defined as “a person authorised by the State to carry out the enforcement process irrespective of whether that person is employed by the State or not”³⁰. This definition would, naturally, include the bailiffs in the narrow sense of the word. But, it also covers all other persons who would fall within the scope of the phrase “authorised to carry out enforcement”. As stated in the draft Explanatory Memorandum, such a definition comprises “a wide variety of persons responsible for carrying out the enforcement process (e.g. bailiff, huissier de justice, enforcement judge etc.)”³¹.

While formulating the recommendations on enforcement, the CoE also wanted to preserve a neutral standing with respect to various enforcement systems. Any general evaluation of benefits or disadvantages of a particular system of enforcement had to be avoided in order to escape appearance of desire to influence reform processes in member states. The draft Explanatory Memorandum therefore contains only descriptive statements such as observation that “in the majority of Council of Europe States, enforcement agents are classed either as civil servants subordinated to the Ministry of justice, judicial officers subordinated to the courts, self-employed persons acting independently or are employed as a combination of the above”³². It was therefore only noted that many states were presently re-examining their enforcement procedures and practices, but Recommendation emphasized the freedom of member states to determine the professional status of enforcement agents.³³ However, no matter what status is chosen, it should be clearly determined, and role, responsibilities and powers of the enforcement agents should be precisely prescribed by law “in order to bring as much certainty and transparency to the enforcement process as possible.”³⁴ In particular, the powers and responsibilities of the enforcements agents should be clearly distinguished from those of the judge.³⁵

Some principles related to enforcement agents were still fully applicable to every enforcement system. Perhaps the first of them is the need for professionals of high moral standards, and the need for their legal knowledge and training in relevant law and procedures. Such objective also requires objective criteria in the process of selection and recruitment of prospective enforcement agents. Thus, the requirement of examination for assessment of theoretical and

³⁰ dRE, at 3.1.2.

³¹ dEM., para 9.

³² *Ibid.*, para 10.

³³ dRE, at 6.2. This position is reiterated in the dEM, para. 43, stating that “no formal position is taken on the professional and institutional status of enforcement agents”.

³⁴ dRE, at 6.2.

³⁵ dRE, at 6.5.

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.).³⁶

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.³⁷

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”³⁸.

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,³⁹ 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.⁴⁰

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 *Ibid*, at 6.3.

³⁷ *Ibid*, at 6.8.

³⁸ *Ibid*, at 6.4.

³⁹ See *ibid* at 6.6.

⁴⁰ *Ibid*. 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.