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The Law Aids the Vigilant, Not the Negligent:

The Obligation to Use Primary Legal Remedies under Estonian State Liability Law

In many national legal orders, state liability law includes only claims for compensation and elimination of damage against public authorities.[*1] Similarly, in European Union law, only claim for damages is covered under the liability of an institution or a member state of the European Union. In the Estonian State Liability Act[*2] (hereinafter 'SLA'), on the other hand, the definition of state liability law is significantly broader. In addition to the claim for damage, state liability claims include numerous other claims, enabling the person to request the restoration of rights from a public authority.[*3] Such legal remedies include, *inter alia,* primary legal remedies—that is, claims against unlawful administrative action as stated in Chapter 2 of the State Liability Act, by which the person may request the termination of a violation of his rights.[*4]

Primary legal remedies have a substantial role in Estonian state liability law. According to § 7 (1) of the SLA, a person can claim for damages caused by unlawful administrative action only when the damage could not have been prevented by the obligatory primary legal remedies provided by law. Therefore, the obligation to use primary legal remedies is of importance in cases involving the claim for damages.

In Estonian court practice, the scope of application and content of the obligation to use primary legal remedies has been significantly broadened in relation to the provisions stipulated in the State Liability Act. In this article, the author analyses whether the purpose, content and scope of application of the obligation to use primary legal remedies attributed by the judiciary to this obligation are consistent with the constitutional requirements and the provisions of the State Liability Act.

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1 About English or French law, for example, see D. Fairgrieve. State Liability in Tort. A Comparative Law Study. Oxford 2003, pp. 16–19; on German law, F. Ossenbühl. Staatshaftungsrecht. 5. Aufl. München 1998, p. 1; on Italian law, P. Nacimiento. Gemeinschaftsrechtliche und nationale Staatshaftung in Deutschland, Italien und Frankreich. Baden-Baden 2006, p. 100 *ff.*

2 Riigivastutuse seadus. – RT I 2001, 47, 260; 2006, 48, 360 (in Estonian). The English version of the State Liability Act is available at www.legaltext.ee/et/andmebaas/ava.asp?m=022.

3 Claims that can be raised under state liability law are listed in § 2 (1) of the SLA. See an overview of Estonian State Liability Law in E. Andresen. The Claim for Elimination of Unlawful Consequences and the Claim for Compensation for Damage under Estonian State Liability Law. – Juridica International 2005 (X), pp. 169–170.

4 An exceptional primary legal remedy is the claim for refrainment from administrative act or measure provided by § 5 of the SLA, which, according to the conditions stipulated in the law, can be filed before the violation of person's rights. Since the purpose of this legal remedy is not requesting for the termination of a violation of rights, this claim does not belong to among the so-called obligatory primary legal remedies and is left out of this paper. Besides primary legal remedies and claim for damages, one more separate state liability claim is a claim arising from unjust enrichment under public law.

Although this article focuses on analysis of the Estonian national law, it needs to be considered that the obligation to use primary legal remedies has a direct relationship with the European Union law. In relation to this, also the European Court of Justice decision in the *Danske Slagterier* case from 2009, in which the Court passed judgement on the admissibility of applying the obligation to use primary legal remedies in cases of member state liability, is examined in this article.*[5]

1. The nature of the obligation to use primary legal remedies

The right to effective judicial protection provided in §§ 13–15 of the Constitution of the Republic of Estonia has to guarantee protection from unlawful actions of public authorities.

If a person finds that a public authority has violated his or her rights under a public-law relationship, he or she can decide whether to protect his or her rights. In the case of opting for protection of his or her rights, the person, under the principle of the freedom to choose the legal remedy, may also determine at his or her discretion what legal remedy he or she wishes to use to protect his or her rights.*[6] However, state liability law sets some limits to this freedom of decision. If the person wishes to claim for damages caused by unlawful administrative action, he or she cannot previously have chosen whether to protect his or her rights or not. That is to say that under Estonian state liability law, there is an obligation to use primary legal remedies. In accordance with this obligation, the person who wishes to file a claim for damages caused by unlawful administrative action against a public authority must try to prevent such damage or to eliminate the damage already caused through timely contesting of the action of the public authority. The obligation to use primary legal remedies is provided in § 7 (1) of the State Liability Act:

> A person whose rights are violated by the unlawful action of a public authority in a public-law relationship (hereinafter 'injured party') may claim for damages caused to this person if the damage could not be prevented and cannot be eliminated by the protection or restoration of rights in the manner provided for in §§ 3, 4, and 6 of this Act.

The obligation to use primary legal remedies is not characteristic of Estonian state liability law only. For instance, a similar obligation is set forth in German and Austrian state liability law.*[7] However, the obligation to use primary legal remedies has some particular characteristics in Estonian law. Unlike the § 839 (3) of the German Civil Code (hereinafter 'BGB') and § 2 (2) of the Austrian Liability of Public Bodies' Act, which do not specify what kind of legal remedies should be applied to prevent damage, the Estonian State Liability Act specifically enumerates these primary legal remedies. From the obligatory primary legal remedies, a person can file a claim for annulment of an administrative act (under SLA § 3), claim for termination of a measure (SLA § 4), claim for issue of an administrative act (SLA § 6), or claim for taking of a measure (SLA § 6). These are the claims that enable to request the termination of a violation of rights by a public authority through elimination of unlawful administrative action.

2. The purpose of the obligation to use primary legal remedies under Estonian state liability law

The reason the above-mentioned primary legal remedies belong under state liability claims lies in the purpose of the obligation to use primary legal remedies. Explaining the purpose of this obligation is an inevitable precondition for determining the contents of the obligation.

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5 ECJ 24.03.2009, C-445/06: *Danske Slagterier*. – ECR 2009, p. I-2119.

6 SCALCd 29.10.2004, 3-3-1-35-04, paragraph 15. – RT III 2004, 28, 304; 9.03.2009, 3-3-1-94-08, paragraph 13. – RT III 2009, 13, 98 (in Estonian).

7 According to § 839 (3) of BGB, an official (and according to § 34 of the Constitution, the state as well) has no obligation to compensate for damages, if the injured party has intentionally or negligently failed to avert the damage by having recourse to appeal. According to § 2 (2) of the Austrian Liability of Public Bodies' Act (hereinafter 'AHG'), a claim for compensation does not arise if the injured party could have prevented the damage by any legal remedy (*Rechtsmittel*) or a complaint (*Beschwerde*) to the administrative court.

2.1. Guaranteeing the primacy of the primary legal remedies under administrative law, and effectiveness of the system of legal protection

One of the main purposes in the elaboration of Estonian modern state liability law was to assign to the primary administrative legal remedies the primary role in relation to the claim for damages caused by unlawful administrative action.*[8] By virtue of the state's obligation to ensure protection of the fundamental rights of persons, the legislator has created an extensive system of legal remedies, enabling persons to file claims for restoration of rights violated by unlawful administrative action. By establishing the obligation to use primary legal remedies, the legislator aimed for a situation in which, under administrative law, restoration of a person's violated rights would take place first by elimination of unlawful administrative action, with compensation for the damages caused by violation of such rights being the last resort.*[9] Primary legal remedies have unquestionable advantages over legal remedies enabling purely monetary compensation, helping to stop the violation and to prevent even wider violation of rights in the future through actions based on an unlawful act or measure. Primary legal remedies enable restoring legality and avoiding future legal disputes. Therefore, obligatory primary legal remedies serve in the interest of the effectiveness of the system of legal protection.

Although the obligation to use primary legal remedies is, in a wider meaning, an expression of the obligation to prevent damage, it carries, as mentioned above, a narrower role that is specific to and characteristic of administrative law.*[10] However, the obligation to prevent damage that is recognised as a general principle of law has the same meaning in Estonian state liability law and delict law.*[11]

Regardless of the fact that, through the obligation to use primary legal remedies, restoration of a person's violated rights is supported, this obligation still proves burdensome for a person. The person has to decide in quite a short period of time whether to protect his or her rights, and to choose the primary legal remedy, in order to request the termination of the violation of his or her rights, and thereby drawing the public authority's attention to that violation. If the person does not consider the violation to be serious enough to decide to protect his or her rights with an appropriate primary legal remedy, he or she generally forfeits a later opportunity to file a claim for damages caused by violation of rights by the public authority concerned.

On account of the burdensome nature of the obligation to use primary legal remedies, it is important to emphasise the impact of this obligation on the exercise of fundamental rights. Section 7 (1) of the SLA provides, besides the obligation to use primary legal remedies, also a right of claim for damages. The right to file a claim for damages caused in a public-law relationship by a public authority is aimed at realisation of the fundamental right to compensation for damage stated in § 25 of the Constitution of the Republic of Estonia.*[12] However, the obligation to use primary legal remedies constitutes a restriction of the right to compensation for damage. At that, this is an intensive restriction of a fundamental right, because in the case of unjustified disregard for the obligation to use primary legal remedies, the claim for damages shall be dismissed. Since § 25 of the Constitution guarantees a fundamental right without reservation of law*[13], restriction of such a fundamental right is allowed only when the restrictions are justified by other fundamental rights or constitutional

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[8] In the letter of explanation to the draft legislation of the State Liability Act, it was stated: "Until now, most of the attention when talking about public authority's liability has been turned to monetary compensation of the damage caused under public-law relationship. However, in the future, the centre of state liability law has to lie mostly in termination of a violation of rights by claim for issue of administrative act or termination of measure, that is, so-called primary claims that are provided in Chapter 2 of the draft legislation." The letter of explanation (Eelnõu 480 SE I, Riigivastutuse seadus) is available at web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=003672916&login=proov&password=&system=ems&server=ragne11 (in Estonian).

[9] The claim for elimination of unlawful consequences also has a priority over the claim for damages. It enables to file a claim for elimination of the unlawful consequences of administrative action (§ 11 of the SLA). On the triple division of the state liability claims see E. Andresen. Riigivastutus (State Liability). Tartu: Supreme Court 2009, p. 15 (in Estonian).

[10] In private law, there is no such directory of primary legal remedies and setting of a similar target, wherefore the relations between the legal remedies and their influence on the claim for damages are different. See also H. Wißmann. Amtshaftung als Superrevision der Verwaltungsgerichtsbarkeit. – NJW 2003, p. 3457.

[11] The performance of the obligation to prevent damage is foreseen in § 13 (1) 4) of the SLA, according to which the restrictions provided in private law to the participation of the injured party in causing damage need to be taken into consideration when calculating the amount of compensation.

[12] Section 25 of the Constitution of the Republic of Estonia: "Everyone has the right to compensation for moral and material damage caused by the unlawful action of any person."

[13] The necessity of adding a clause of reservation of law to § 25 of the Constitution of the Republic of Estonia was emphasised by the Constitutional Expert Commission formed by the Government of the Republic of Estonia, in their report completed in 1998. See Eesti Vabariigi Põhiseaduse Ekspertiisikomisjoni lõpparuanne. Põhiseaduse § 25 kommentaarid (The Final Report of the Constitutional Expert Commission. Commentaries to § 25 of the Constitution of the Republic of Estonia). Available at www.just.ee/10716 (in Estonian). The similar suggestion was made by Professor R. Alexy in the analysis of the Constitution of the Republic of Estonia. See R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental Rights in the Constitution of the Republic of Estonia). – Special publication on Juridica, 2001, pp. 28 and 92 (in Estonian).

values.*[14] Whereas an effective operation of the system of legal protection is a constitutional value*[15] in the Estonian legal order, it can be considered a legitimate purpose of the obligation to use primary legal remedies.

2.2. Reduction of expenses in the public sector?

The Administrative Law Chamber of the Supreme Court, the highest administrative court in Estonia, has not expressed a clear view in its practice on what the purpose is, in its view, of the obligation to use primary legal remedies. In one of the earlier decisions, the Administrative Law Chamber of the Supreme Court noted that § 7 (1) of the SLA provides for the obligation to prevent damage.*[16] However, in a recent decision, the Administrative Law Chamber of the Supreme Court stated, in definition of the scope of application of the obligation to use primary legal remedies, that the Administrative Law Chamber's interpretation is in conformity with the purpose of reducing the costs of the public sector while guaranteeing the protection of a person's rights, as stated in the explanatory letter accompanying the draft of the State Liability Act.*[17] The decision does not specify whether the Court thinks that this general purpose of the State Liability Act is also a purpose of the obligation to use primary legal remedies.

Without doubt, in state liability law—unlike delict law under the law of obligations—it has to be taken into consideration in implementation of the norms for the compensation of damage that public authorities, the state first and foremost among them, have to perform very different duties and often under very complicated conditions. In the case of satisfaction of a claim for damages caused under a public-law relationship, the compensation to the injured party has to be paid from the budget funds of the state, local government, or other public authority. Since creation of such monetary obligations is usually unpredictable and cannot be foreseen in establishing of the budget, recovery of extensive compensation may place the public authority in a complicated situation in which it will lack funds for performance of public duties. To take into consideration the risks related to performance of public duties and to distribute them fairly in the society, § 13 (1) of the SLA provides an extensive directory of the restrictions of liability of the public authorities. For example, in determining the amount of compensation, the unforeseeability of damages and the objective obstacles to prevention of damage have to be taken into consideration.*[18] The basis of restriction of liability justifiably lacks the possibility to reduce the liability of the public authority or to discharge that authority from liability merely in an attempt to keep down expenses in the public sector.*[19] Such a target would ignore the fact that the public authority is obliged to act lawfully in consequence of the principle of lawfulness, and, as any other person, it has to take responsibility for its unlawful actions. It would be equally inadmissible if a person would be required to use primary legal remedies only for relieving the public authority from liability by ignoring this obligation. It has been said quite aptly in the literature that the meaning of the primary legal remedies is to show a person the right way for protecting his or her rights, rather than to force him or her to sustain losses for the benefit of a public authority.*[20] Therefore, it would be erroneous to consider the reduction of expenses in the public sector to be a purpose of the obligation to use primary legal remedies.

3. The influence of the obligation to use primary legal remedies on the claim for damages

According to § 7 (1) of the SLA, the obligation to use primary legal remedies has a function of precluding liability, not only restricting it. Hence, § 7 (1) of the SLA does not make provisions for sharing liability or weighing the person's participation in the causing of the damage. However, a directory of exceptions has

[14] The lack of this reservation should be considered a shortcoming of § 25 of the Constitution; however, it has an explanation relating to how it came into being. Referring to the law regulating compensation for damage was abandoned on compiling the Constitution, because adding this reservation to the Constitution would have made satisfying claims for damages impossible for courts until the corresponding legislation has been passed. See Estonian Ministry of Justice (publisher). Põhiseadus ja Põhiseaduse Assamblee (Constitution and Constitutional Assembly). Tallinn 1997, p. 985 (in Estonian).

[15] SCALCr 28.04.2004, 3-3-1-69-03, paragraph 29. – RT III 2004, 12, 143 (in Estonian).

[16] SCALCd 18.11.2004, 3-3-1-33-04, paragraphs 15 and 16. – RT III 2004, 32, 335 (in Estonian).

[17] SCALCd 20.11.2008, 3-3-1-47-08, paragraph 22. – RT III 2008, 48, 336 (in Estonian). The explanatory letter of the draft of the State Liability Act (Note 8) states: "One of the purposes of this draft is to reduce the costs of the public sector for protecting the rights of individuals."

[18] In addition to that, a public authority shall be relieved of liability for damage caused in the course of performance of public duties if the damage could not have been prevented even if diligence necessary for the performance of public duties had been fully observed (§ 13 (3) of the SLA).

[19] For example, the argument of limited budget funds is not used in the German court practice as well. See J. Fedke. State Liability in Times of Budgetary Crisis. – H. Koziol, B. C. Steininger (eds.). European Tort Law 2005. Wien 2006, p. 47.

[20] H. Maurer. Allgemeines Verwaltungsrecht. 17. Aufl. München 2009, § 27, margin No. 99.

been developed in the case-law, enabling application of the so-called criterion of reproachability: the claim for damages shall lapse only when the injured party can be reproached for not using the obligatory primary legal remedies.*[21]

The Administrative Law Chamber of the Supreme Court also followed this concept of the obligation to use primary legal remedies in its initial case-law.*[22] On the other hand, in its last topical case, the decision on the *Mugra* case from November 2008, the same Chamber took the stance that § 7 (1) of the SLA can be interpreted in such a way that not using the primary legal remedies does not exclude ordering compensation completely but can be a basis for reduction of the compensation.*[23] Thereby, the Supreme Court gave a function of restricting liability to the obligation to use primary legal remedies. Leaving aside other important circumstances of this difficult case, it has to be asserted that by that decision, the Court attributed the same function to § 7 (1) of the SLA as in § 13 (1) 4) of the SLA. Naturally, the Court knew that there already was a normative restriction of liability: According to § 13 (1) 4) of the SLA, the injured party's role in causing of the damage has to be taken into consideration among other circumstances restricting liability when one is determining the amount of compensation.*[24] However, an important problem arises from this decision: by assigning § 7 (1) of the SLA a meaning that already exists in another provision, the Court renders § 7 (1) of the SLA meaningless. In that case, the purpose of the obligation in this provision would inevitably be unperformed as well.

This problem points up the need to differentiate between the obligation to use primary legal remedies and the injured party's obligation to prevent the damage. Both § 7 (1) and § 13 (1) 4) of the SLA provide for the injured party's obligation to prevent damage, but, as already mentioned, only the narrower purpose of § 7 (1) of the SLA has to be taken as guidance when § 7 (1) of the SLA is applied. Unlike § 13 (1) 4) of the SLA and all other provisions on restriction of liability, the purpose of the obligation to use primary legal remedies is not to assure the establishment of fair compensation. The absence of such a purpose also becomes evident by examining the legal consequence of violating this obligation. If the injured party has not used the obligatory primary legal remedies and it can be reproached, § 7 (1) of the SLA shall not acknowledge the claim for damages that is based on the same violation of law. Hereby, it is important to emphasise that the claim for damages will lapse only in the extent to which the non-use of the primary legal remedy is reproachable. Therefore, the criterion of reproachability enables reaching a fair decision also in cases in which the only problem is the non-use of the primary legal remedies and in which it would be unfair to leave the injured party without compensation or to order full compensation.

4. The scope of application of the obligation to use primary legal remedies

Since use of the primary legal remedies has a narrower purpose than do the provisions for restriction of liability, the scope of application of the obligation to use primary legal remedies is also narrower.

4.1. The range of obligatory primary legal remedies

It follows from the purpose of the obligation to use primary legal remedies that not all kinds of activities of an injured party to prevent the damage would be enough for performance of this obligation. At the same time, § 7 (1) of the SLA does not impose on the injured party an obligation to do everything in his or her power to prevent the damage.

In § 7 (1) of the SLA, the set of obligatory primary legal remedies has been defined unambiguously: a person whose rights are violated by the unlawful actions of a public authority under a public-law relationship may claim compensation for damages caused to him or her if that damage could not be prevented and cannot be eliminated by the protection or restoration of rights in the manner provided for in §§ 3, 4, and 6 of this Act.

The Administrative Law Chamber of the Supreme Court also took guidance from the *numerus clausus* definition of the legal remedies stated in § 7 (1) of the SLA in its previous case-law. Thus, the Court stated in a decision from 2004 that § 7 (1) of the SLA 'enables to dismiss the claim for damages if the person could have

[21] See more in Chapter 5 of the article.

[22] For example, see SCALCd 19.03.2002, 3-3-1-11-02, paragraph 16. – RT III 2002, 12, 122; 3.04.2002, 3-3-1-14-02, paragraph 19. – RT III 2002, 12, 124; 11.03.2004, 3-3-1-8-04, paragraph 10. – RT III 2004, 9, 100 (in Estonian).

[23] SCALCd 20.11.2008, 3-3-1-47-08, paragraph 24 (Note 17).

[24] The Administrative Law Chamber of the Supreme Court has rightly considered in its practice to be admissible that if the injured party's participation in causing the damage is that extensive that the injured party has principally caused damage to him- or herself, the compensation may be reduced to zero. See SCALCd 15.04.2008, 3-3-1-6-08, paragraph 14. – RT III 2008, 18, 127 (in Estonian).

prevented the damage by filing a claim for annulment of an administrative act, termination of a measure, issuing of an administrative act, or taking of a measure.*[25] However, the Administrative Law Chamber of the Supreme Court changed its point of view later in the same year and took the view that the injured party can perform 'the requirement to prevent damage under § 7 (1) of the SLA' not only in challenge and judicial proceedings but also by using 'other appropriate legal measures'.*[26] In this case, the Administrative Law Chamber of the Supreme Court considered it to be enough for performance of the obligation arising from § 7 (1) of the SLA that the appellants had turned to the county governor with an application to initiate supervision proceedings, instead of contesting the decision of the administrative authority. In this case, no importance was attached to the fact that a person has no subjective right to request initiation of supervision proceedings in the public interest from a county governor and the county governor as a monitoring authority has no jurisdiction to declare the invalidity of administrative acts.*[27]

According to the above-mentioned information, it appears that the Supreme Court's practice indicates that a legal remedy does not necessarily have to be used to perform the obligation to use primary legal remedies, and any kind of 'appropriate legal measure' is enough to perform the requirements provided by § 7 (1) of the SLA.

So far, the decisions of the Supreme Court have looked with favour on the persons filing a complaint, since the Supreme Court has accepted that injured parties have used other legal measures than the ones provided in § 7 (1) of the SLA. Despite this, in the future, such practice may prove to be significantly more burdensome to an injured party than the one stated in § 7 (1) of the SLA. Namely, a question arises as to whether the injured party can be reproached if he or she did not exercise other legal measures, in addition to not using the ones stated in §§ 3, 4, and 6 of the SLA. Such a situation arising is inevitable when, for example, one of the two injured parties in the same case has turned to the county governor with an application to initiate supervision proceedings and the other injured party has not. That is why the legal measures allowed may also turn out to be requisite legal measures.

The legitimacy of the broad interpretation of § 7 (1) of the SLA depends largely on whether this is a way to broaden or restrict the person's right to file a claim for damages. Since the obligation to use primary legal remedies constitutes a restriction of the fundamental right to compensation for damage, this obligation has to be interpreted restrictively. Legal measures that do not give a person a right to request termination of a violation of rights do not facilitate the primacy of the primary legal remedies. That is why the above-mentioned broadening interpretation of § 7 (1) of the SLA is not in line with the purpose of the obligation to use primary legal remedies and would inadmissibly restrict the fundamental right to compensation for damages.

From the wording of § 7 (1) of the SLA it can be seen that the legislator aimed to determine both the minimum and maximum operational responsibilities of an injured party. Undoubtedly, various applications, petitions, inquiries, and other 'appropriate legal measures' or informal measures (for example, suggestions and negotiations) aid in preventing damage or its expansion, but they cannot be considered legal remedies in the meaning of § 7 (1) of the SLA. That is mostly because they do not constitute a claim under substantive law against the public authority, helping to achieve the purpose of primacy of primary legal remedies.*[28] The same applies for requests that can be presented in public-law proceedings that are meant not for the protection of the person's subjective rights but for serving public interests.

Only those legal remedies that give an injured party a subjective right to request the elimination or correction of the unlawful action by the public authority to prevent damage or extension of damage can fall under the obligatory primary legal remedies. For example, the claim for establishment of the unlawfulness of an administrative act or measure is not an obligatory primary legal remedy (see § 6 (3) (1) of the Code of Administrative Court Procedure), because this claim enables only establishing the unlawfulness of an administrative action, not eliminating it. A claim for refraining from issuing of an administrative act or taking of a measure as provided for in § 5 of the SLA does not belong among the obligatory primary legal remedies either, because during filing of this claim, there is not yet an unlawful action violating the rights of the injured party against

[25] SCALCd 11.03.2004, 3-3-1-8-04, paragraph 10 (Note 22).

[26] SCALCd 18.11.2004, 3-3-1-33-04, paragraph 15 (Note 16). It is remarkable that the Supreme Court does not use the term 'primary legal remedies' any more after this decision (still used in SCALCd 11.03.2004, 3-3-1-8-04, paragraph 11 (Note 22)), that would indicate the primacy of such legal remedies, but uses the terms 'appropriate legal measures' or 'appropriate legal remedies'.

[27] Subsection 85 (4) of the Government of the Republic Act gives a county governor only a jurisdiction to make a proposal to a subject to bring the legislation of specific application into conformity with the higher legislation. If the administrative authority does not follow the county governor's suggestion, the county governor may turn to administrative court with a protest.

[28] In Germany, where, according to the judicial practice, binding legal remedies include applications and inquiries in free form, this opinion has found increasing support in legal literature: F. Ossenbühl (Note 1), p. 95 with reference to low possibility of success of applications in free form; F. Schoch. Amtshaftung. – Jura 1988, p. 650; H.-J. Papier, comments to § 34 of the Constitution. – T. Maunz, G. Dürig. Grundgesetz. Kommentar. 55. Aufl. 2009, fn. 270; K. Windthorst. – S. Detterbeck, K. Windthorst, H.-D. Sproll. Staatshaftungsrecht. München 2000, § 10, margin No. 63. The German State Liability Act of 1981, which was not enacted due to problems of competence, also established merely an obligation to use 'formal legal remedies' (*förmliche Rechtsbehelfe*) (§ 6 of the German State Liability Act). See also A. Schäfer, H. J. Bonk. Staatshaftungsgesetz. Kommentar. München 1982, § 6, margin No. 13.

which the injured party can be requested to apply legal remedies. Even less do the private-law claims fit under the obligatory primary legal remedies, because they are not directed against issuing an administrative act or taking a measure under a public-law relationship. Claims under private law against private persons are also ruled out, because the obligatory primary legal remedies have to be directed against a person who can eliminate or correct an unlawful action.

4.2. The field-specific scope of application of the obligation to use primary legal remedies

Whereas the previously examined case was related to compensation of damage caused by administrative action, a few years later, the Administrative Law Chamber of the Supreme Court had to answer in the *Mugra* case, whether the obligation to use primary legal remedies applies only for a claim for damages caused by unlawful administrative action or this obligation pertains to all claims for damages filed against a public authority under the State Liability Act.

The first important message of the *Mugra* case was the Administrative Law Chamber of the Supreme Court's point of view that the State Liability Act is applicable to all cases of compensation for damages caused by a public authority under a public-law relationship, if there are no special rules.[*29] In this case, the court applied the State Liability Act in reviewing a claim for damages caused by a body conducting pre-trial proceedings for a criminal matter. In relation to the obligation to use primary legal remedies, the Administrative Law Chamber of the Supreme Court took the view that in a "teleological interpretation of § 7 (1) of the SLA a view can be taken that if the damage was caused not during administrative proceedings but nevertheless by a public authority and under a public-law relationship, one of the conditions of a claim for damages is also the use of appropriate legal remedies by an injured party to prevent damages"[*30]. The Supreme Court found that in such cases the appropriate legal remedies are, similarly to those set forth in §§ 3, 4, and 6 of the SLA, "requests and complaints that would help to prevent damage under such a legal relationship".[*31]

This decision by the Supreme Court can be accepted where it addresses the scope of application of the State Liability Act. Since the State Liability Act is a general law for the compensation for damages caused by violation of rights upon the exercise of powers of a public authority under a public-law relationship (§ 1 of the SLA), to guarantee the fundamental right to compensation for damages, that act has to be applied in reviewing all claims for damages caused by a public authority in a public-law relationship in cases where there are no special rules.

However, from this viewpoint it cannot be concluded that also the obligation to use primary legal remedies would be applicable to all claims for damages caused under a public-law relationship. The Supreme Court justified its approach by an argument that it can see no reason the prior use of legal remedies is a condition of claim for damages caused under administrative procedure but in the case of damages caused under other procedures of public authorities, the damage would be subject to compensation without regard for whether the person might have been able to prevent such damage with appropriate legal remedies.[*32] Again, we have to recognise that the Supreme Court's evaluation would have probably been different if the Court had been guided in interpreting § 7 (1) of the SLA from the fact that the purpose of the obligation to use primary legal remedies is to guarantee the primacy of the primary legal remedies under administrative law. In a case in which a claim for damages caused under criminal procedure has been filed, the injured party has no legal remedies under administrative law, from which it follows that this is not a case of obligation to use primary legal remedies in the meaning of § 7 (1) of the SLA. However, the function of the obligation to prevent damage on the part of the injured party in the case of claims for damages filed under the State Liability Act is fulfilled by § 13 (1) 4) of the SLA, according to which the injured party has to use all appropriate legal remedies.

Therefore, according to the current law, the injured party should not be requested to present any more or less claims than stipulated in §§ 3, 4, and 6 of the SLA, and the range of obligatory primary legal remedies could be broadened only by the claims that give a person a right to request restoration of rights violated by administrative action. The obligation to use primary legal remedies could be lawfully broadened to other domains

[29] SCALCd 20.11.2008, 3-3-1-47-08, paragraph 11 (Note 17). However, Tõnu Anton, justice of the Supreme Court who wrote a dissenting opinion, found that in adjudicating the claim for damages caused under criminal procedure it is not right to apply the State Liability Act, because this Act is not meant for regulating this area and compensation for damages caused under criminal procedure should be regulated by different laws.

[30] *Ibid.*, paragraph 22. Tõnu Anton, justice of the Supreme Court, remained of a different opinion also on this matter, stating that in his opinion, the obligation to prevent damage by using an appropriate legal remedy does not extend to criminal procedure without additional preconditions.

[31] *Ibid*.

[32] *Ibid*.

of public authority, if the injured party has clearly specified legal remedies that guarantee the primacy of the primary legal remedies at his or her disposal.

5. The principles of the implementation of the obligation to use primary legal remedies

The obligation to use primary legal remedies restricts the fundamental right to compensation for damages the more intensively the more inflexible are the principles of implementation of this obligation. Despite the legitimacy of the purpose of the obligation to use primary legal remedies, this obligation is materially constitutional only when the restrictions to the fundamental right to compensation for damages are proportional for achieving the purpose.

5.1. The scope of the obligation to use primary legal remedies

Firstly, it is worth examining whether the injured party has fulfilled the obligation to use primary legal remedies when he or she chooses an appropriate legal remedy to protect his or her rights—that is, a claim that enables him or her to protect his or her rights—or the injured party has to choose as effective a legal remedy as possible.

According to the administrative court procedure law of Estonia, a person has to choose a legal remedy that enables him or her to protect his or her rights violated by a public authority, but in other respects, the plaintiff has free hands in the choice of a legal remedy. Nevertheless, the administrative court has an obligation to draw the plaintiff's attention to the possibility of filing a more effective claim from the angle of achieving the purpose of the claim and to explain the consequences of leaving the claim unchanged or unspecified.[*33] However, the court may not arbitrarily choose to adjudicate a more effective claim in view of the plaintiff's rights instead of the legal remedy chosen by the plaintiff and has to accept the plaintiff's choice even if effective protection becomes impossible as a result of this.[*34] The Administrative Law Chamber of the Supreme Court, however, has proceeded in its practice from both criteria—that of appropriateness and that of effectiveness—in assessing the performance of the obligation to use primary legal remedies.[*35]

The rule of using an appropriate but not necessarily effective legal remedy in administrative law should apply for the obligation to use primary legal remedies. The purpose of the primary legal remedies is to request termination of a violation of a person's rights. Therefore, a legal remedy has to be first and foremost appropriate for protecting the person's rights. In consideration of the claim for damages, it is generally required that if a person can protect his or her rights with several legal remedies, he or she decide upon the claim that is also appropriate for preventing damage.[*36] However, the condition of appropriateness should apply only if the person has a reason to take account of the possibility of damage already when using the primary legal remedies. According to § 7 (1) of the SLA, it is not required that a person who can prevent damages by means of several appropriate legal remedies would choose the most effective legal remedy to prevent damage.

[33] According to § 11 (1) 3) of the Code of Administrative Court Procedure, during the preparation of a judicial review of the case the administrative court has to check whether all possible and relevant claims have been filed for achieving this purpose, and make a suggestion to change the complaint, if necessary.

[34] See SCALCd 17.11.2005, 3-3-1-54-05, paragraph 14. – RT III 2005, 41, 406; 14.12.2009, 3-3-1-77-09, paragraph 12. – RT III 2009, 60, 446 (in Estonian).

[35] While the Administrative Law Chamber of the Supreme Court used the term 'appropriate legal remedies' in a case in 2004 (SCALCd 18.11.2004, 3-3-1-33-04, paragraph 15 (Note 16)), then in a later decision made in the same month, the Chamber checked while adjudicating a complaint including a claim for damages, whether the plaintiff can use 'effective legal remedies' in order to prevent damage (SCALCd 30.11.2004, 3-3-1-56-04, paragraph 18. – RT III 2004, 35, 363; 30.11.2004, 3-3-1-64-04, paragraph 28. – RT III 2004, 36, 364 (in Estonian)). The Administrative Law Chamber of the Supreme Court has proceeded from the terms of using effective legal remedies in its later relevant decisions. See SCALCd 10.01.2007, 3-3-1-85-06, paragraph 12. – RT III 2007, 2, 18 (in Estonian). In the latest decision so far, the *Mugra* case, the Chamber found that according to § 7 (1) of the SLA, damage shall not be compensated if it could have been prevented by using the 'appropriate legal remedy'. See SCALCd 20.11.2008, 3-3-1-47-08, paragraph 22 (Note 17).

[36] It should also be noted in rendering opinion on the choice of claims that according to §§ 3 (1), 4 (1) and 6 (1) of the SLA, and § 7 (1) of the Code of Administrative Court Procedure a person can file a claim only when his or her rights have been allegedly violated.

5.2. The procedure of using obligatory primary legal remedies

The claims indicated in § 7 (1) of the SLA can be filed with both an administrative authority and a court.*[37] That raises the question of whether it suffices for fulfilment of the obligation to use primary legal remedies if the injured party has filed a claim listed in § 3, 4, or 6 of the SLA only with a competent administrative authority or, instead, that person has to turn to the courts after receiving an adverse reply from the administrative authority.

The extent of the injured party's obligation should not depend on whether the administrative authority will adjudicate his or her claim according to law or not and whether it will correct its mistakes or not. Therefore, the obligation to use primary legal remedies may be considered fulfilled if a person has tried to protect his or her rights by a legal remedy against an unlawful action of a public authority even just once and has not waived the claim in the course of the proceedings. The Administrative Law Chamber of the Supreme Court has also considered it to be sufficient if a person who filed claim had challenged the payment notice that caused him or her damage only under challenge proceedings.*[38] Similarly, a person who has filed a claim only with the administrative court does not have to use the channel of appeal to fulfil the obligation set forth in § 7 (1) of the SLA.

5.3. Directory of exceptions

As emphasised previously, the principles for the implementation of the obligation to use primary legal remedies have to be flexible enough to guarantee the proportionality of restriction of the fundamental right to compensation for damages, and the fair adjudication of individual cases. Implementing this obligation should not result in the persons having to use a legal remedy almost every time he or she has doubts about the legality of administrative action, in fear that the option to file claim for damages shall be lost otherwise. Filing too many claims would not be in the interests of effectiveness of the system of legal protection but would act against it.

Besides the conformity with the national Constitution, European Union law should also be taken into consideration in exercise of the primary legal remedies. If a claim for damages is filed against a state due to the violation of European Union law, the conditions determined in the case-law of the European Court of Justice have to be taken as a basis for the liability. The rest of the conditions, mostly the procedural matters, are decided by a national court on the basis of national provisions governing the state liability. Therefore, the obligation to use primary legal remedies is applicable also in the case of a claim for damage caused by violation of European Union law filed against a state. The procedural autonomy of a Member State is balanced by the principles of equivalence and effectiveness in European Union law.*[39] In the case of the obligation to use primary legal remedies, first and foremost a question arises as to the conformity of this obligation with the principle of effectiveness—that is, a question of whether the obligation to use primary legal remedies under § 7 (1) of the SLA would ensure the effective protection of the rights provided in European Union law.

In a recent case, *Danske Slagterier*, the European Court of Justice analysed the conformity of the obligation to use primary legal remedies under § 839 (3) of the German BGB with European Union law and took the view that such a national provision does not contradict European Union law, if the use of the legal provision can reasonably be required of the injured party.*[40] The Court of Justice emphasised that it would still be contrary to the principle of effectiveness to oblige the injured party to use all available legal remedies even if that

[37] According to § 3 (4) of the SLA, the annulment of an administrative act may be requested by a challenge in administrative proceedings or by a complaint in administrative court proceedings. A request to terminate the administrative measure may be filed to administrative authority or administrative court (§ 4 (3) of the SLA). A request to issue an administrative act or take a measure shall be submitted to a competent administrative authority. If a request is not granted or not reviewed on time, the person may file a challenge with an administrative authority or a complaint with an administrative court (§ 6 (3) of the SLA).

[38] SCALCd 16.06.2008, 3-3-1-21-08, paragraph 12. – RT III 2008, 31, 214 (in Estonian). The Administrative Law Chamber of the Supreme Court provided for the option between challenge proceedings and judicial proceedings also in one of the earlier decision: SCALCd 11.03.2004, 3-3-1-8-04, paragraph 10 (Note 22).

[39] According to the principle of equivalence, the rules established by the national law on liability in the case of violation of the European Union law may not be less favourable than those relating to similar domestic claims. The principle of effectiveness requires that applying national law would not make it in practice impossible or excessively difficult to obtain reparation. See, for example, ECJ 26.01.2010, C-118/08: *Transportes Urbanos*, paragraph 31 (not yet published in the ECR).

[40] SCALCd 24.03.2009, C-445/06: *Danske Slagterier*. – ECR 2009, p. I-2119, paragraph 64. It has was not clear on the basis of the former court practice whether the function excluding the liability of the obligation to use primary legal remedies is in correspondence with the European Union law, since the Court had treated the problems relating to restriction of liability, that is, determining the amount of compensation. For example, see ECJ 05.03.1996, C-46/93, C-48/93: *Brasserie du Pêcheur and Factortame*. – ECR 1996, p. I-1029, paragraph 84. However, this opinion has been supported in literature. See, for example, T. von Danwitz. Europäisches Verwaltungsrecht. Berlin, Heidelberg 2008, p. 604; M. Dougan. National Remedies Before the Court of Justice. Issues of Harmonisation and Differentiation. Oxford 2004, pp. 264–267.

would give rise to excessive difficulties or could not reasonably be required of the injured party.*[41] However, only the likelihood that a national court will make a reference for a preliminary ruling, or the existence of infringement proceedings pending before the Court of Justice cannot, in itself, constitute a sufficient reason for concluding that the use of a legal remedy cannot be reasonably required of a person.*[42]

The rule that using the primary legal remedy must be reasonably expected from the injured party has been applied in Estonian court practice as well. The fact that the claim for damages is not always precluded as a result of non-use of the primary legal remedies was already drawn attention to by the Administrative Law Chamber of the Supreme Court a few months after the State Liability Act entered into force in 2002, and also a directory was created of the exceptions to the obligation to use primary legal remedies: the non-use of obligatory primary legal remedies is not reproachable and the claim for damages would therefore not be rejected if the use of a primary legal remedy would not have prevented the damage, its use was not understandable for the injured party, or some other good reason was involved.*[43]

5.3.1. The causation between the non-use of a primary legal remedy and cause of damage

The first exception follows from the principle that the injured party cannot be reproached for non-use of legal remedies that would not have prevented the cause of damage. For that, the existence of causation between the non-use of a primary legal remedy and cause of damage has to be ascertained. For example, if filing a claim for annulment of an administrative act would not have prevented or eliminated the damage, the claim for damage does not fail merely because the injured party did not file a claim for annulment.

Separate from this, an answer is needed as to whether the non-use of a primary legal remedy is reprochable according to § 7 (1) of the SLA only if it would have prevented or eliminated the whole of the damage, or whether it is also reproachable that the injured party has not used a legal remedy that would have enabled merely reducing the damage.

The wording of § 7 (1) of the SLA implies that the primary legal remedy has to enable preventing or eliminating damage. This could be interpreted so as to say that to perform the obligation to use primary legal remedies, a person only has to file such claim as enables prevention or elimination of damages in full. In that case, the non-use of those legal remedies suitable for reducing damages should be taken as a circumstance restricting liability. According to the other interpretation, by contrast, § 7 (1) of the SLA would include the legal remedies that enable preventing damage to the full extent, as well as the remedies that enable merely reduction of damage.*[44] In that case, the claim for damages fails to the extent to which the primary legal remedy that had been unjustifiably left unused would have helped to reduce the damage. Both interpretations enable reaching the same end result. However, the second version should be preferred, because it helps to better ensure the attainment of a purpose behind the obligation to use primary legal remedies. A person may not know during presentation of a legal remedy whether using the primary legal remedy would help to completely prevent the damage or only to reduce it. Nevertheless, an appropriate legal remedy should not be left unused unjustifiably. There is also no need to bring part of the regulation of § 7 (1) of the SLA within the scope of application of § 13 (1) of the SLA.

5.3.2. The understandability of the necessity of using primary legal remedies

The non-use of a primary legal remedy may become reproachable if the injured party should have understood the necessity of using the primary legal remedy. For this, the injured party has to understand both that the administrative authority has violated his or her rights with an unlawful action and that by using the primary legal remedy, it would be possible to prevent damage or its expansion.

A person's obligation of diligence in relation to the use of primary legal remedies is similar to the personal obligation to form an opinion on the legality of the administrative acts and measures related to his or her rights, and to adhere to the deadlines provided by law when filing claims under administrative law. That is why the criteria for these obligations are similar.

The extent of a person's obligation of diligence depends on both objective and subjective circumstances. The objective circumstances include, for example, the complexity of the relevant legal regulation but also general criteria concerning the legal knowledge of different groups of persons, and the conduct expected from them.

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41 ECJ 24.03.2009, C-445/06: *Danske Slagterier*, paragraph 62.

42 *Ibid*., paragraph 65–68.

43 SCALCd 19.03.2002, 3-3-1-11-02, paragraph 16 (Note 22).

44 Of the same opinion, I. Pilving. § 25 commentaries, paragraph 3.1.3 (p. 277). – E.-J. Truuväli *et al*. (comp.). Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. 2., täiendatud trükk (Constitution of the Republic of Estonia. Commented edition). 2nd edition. Tallinn 2008 (in Estonian).

The subjective criteria include the specific person's evaluation of the administrative authority's action and his or her attempts to find out the necessity of contesting this action.

A person cannot be required to have greater competence than a competent administrative authority does. That is why a person does not have to doubt the legality of a public authority's actions without a reason. However, if a person knows the circumstances that point to the possible unlawfulness on the part of the public authority, he or she must show executable diligence, to form a legal opinion on the action of the public authority. The person's evaluation may be influenced by the prior conduct of the public authority.*[45] In determination of the scope of a person's obligation of diligence, one must proceed from consideration of the amount of information and court practice existing when the person should have used the primary legal remedy. In the case of legal disputes whose success prospects were difficult for the person to predict, there cannot be later reproach for his or her evaluation not corresponding to more recent administrative and court practice. The Administrative Law Chamber of the Supreme Court has rightly found in its case-law that a person cannot be expected to challenge the conformity with the Constitution of a piece of legislation of general application that is the basis of legislation of specific application. If a person understands the unconstitutionality of some legislation of specific application only after that legislation has been declared unconstitutional, the right to claim for damages does not fail.*[46] At the same time, a person lacking the legal knowledge necessary to evaluate the legal situation and the necessity of the use of primary legal remedies resulting from that legal situation has to turn to a qualified legal counsel within reasonable time.*[47]

5.3.3. Good reason for the non-use of a primary legal remedy

The exception of a 'good reason' assures that the obligation to use primary legal remedies can be implemented flexibly and in a manner taking the particularities of individual cases into account. The conduct of an injured party is reproachable only for the non-use of those legal remedies that would have helped to prevent the damage or its expansion and the use of which could be required from him or her in the case at hand. On their own, burdensome circumstances inevitably occurring with the use of the primary legal remedies, such as the duration of legislative proceedings and the procedure-related expenses, may not justify the non-performance of this obligation; rather, the risks and difficulties related to these still have to be evaluated separately for each case.

6. Summary assessment of the content of the obligation to use primary legal remedies in the current law of Estonia

Leges vigilantibus, non dormientibus, subveniunt. The law aids the vigilant, not the negligent. For a person not to transgress this maxim, he or she has to know what to do in order to be entitled to file a claim for damages caused by a public authority. That is why § 7 (1) of the SLA has to provide as clear directions as possible for an injured party on what kind of legal remedies should be used to protect his or her rights before filing of the claim for damages.

The legislator has determined the scope of application of the obligation to use primary legal remedies and the range of obligatory primary legal remedies explicitly and clearly in § 7 (1) of the SLA. Nevertheless, in court practice, both of these have been broadened. By the decisions of the Administrative Law Chamber of the Supreme Court, the obligation to use primary legal remedies has been extended to cover all cases of unlawful damage caused by a public authority under a public-law relationship, and, partially for that reason, the primary legal remedies are considered to be any kind of 'appropriate legal measures'—that is, requests and complaints that would help to prevent damage in the specific legal relationship in question. Thus the court has given a new meaning to the obligation to use primary legal remedies, wherefore we cannot speak of the interpretation of § 7 (1) of the SLA but must consider instead creation of a new regulation. These developments have probably been possible because of disregard for the purpose of the obligation to use primary legal remedies, which threatens the preservation of the obligation provided in § 7 (1) of the SLA and, consequently, the principle of primacy of the administrative primary legal remedies.

[45] For example, a person can generally rely upon the information provided by a public authority. The situation may prove opposite when the justifications, explanations and instructions provided by the public authority are contradictory, perfidious, or contrary to the established administrative or court practice, and the person has therefore reason to doubt in the legality of the actions of the administrative authority.

[46] SCALCd 11.03.2004, 3-3-1-56-04, paragraph 18 (Note 35).

[47] The Administrative Law Chamber of the Supreme Court has found the same in the cases of restoration of term for appeal. See SCALCd 16.01.2009, 3-3-1-75-08, paragraph 17. – RT III 2009, 4, 28 (in Estonian).

As a result of the current court practice, the boundaries between the condition excluding liability in § 7 (1) of the SLA and the condition restricting liability in § 13 (1) 4) of the SLA have faded. A person to whom damage has been caused under a public-law relationship cannot estimate with correct probability, even when relying on the help of a qualified legal counsel, whether filing an application or action not belonging to the claims provided for in § 7 (1) of the SLA would bring about only a restriction of liability or it instead would have an outcome that excludes liability. According to the principle of legal clarity guaranteed by §§ 10 and 13 of the Constitution of the Republic of Estonia, a person has to understand the meaning of legal provisions in order to reasonably predict the legal consequences of his or her activities. In this, the principle of legal clarity sets greater requirements in place for provisions that impose duties on a person and restrict his or her rights than it imposes on the other provisions.[*48] The obligation to preserve and assure the contents and understandability of the provisions on their interpretation is binding for the judicial power as well. Unfortunately, on the basis of the current court practice, persons cannot understand which primary legal remedies they should use and on what the legal consequence of the non-use of a legal provision depends, and, therefore, they cannot fully realise the right to compensation for damage stipulated in § 25 of the Constitution of the Republic of Estonia. A national law with unclear contents that is applied to adjudicate claims for damages caused by the violation of European Union law can neither guarantee effective protection of the rights provided by European Union law.

However, the directory of the exceptions to the obligation to use primary legal remedies that has been developed by the Estonian Supreme Court is urgently necessary. Since the claim for damages fails in the case of non-performance of this obligation, the directory of exceptions provides sufficient flexibility to achieve a fair result. Circumstances that excuse the non-use of the primary legal remedies can still be considered to be circumstances restricting liability with respect to implementation of § 13 (1) 4) of the SLA. Therefore, there is no need to replace the function of the obligation to use primary legal remedies that excludes liability with a function that restricts the liability.

The legislator can also help to improve the obligation to use primary legal remedies further. In § 7 (1) of the SLA, a specification is needed that using the primary legal remedies is obligatory only when, in addition to the possibility of preventing damage, the use of a legal remedy could be required of the injured party.

Understanding of the obligatory nature of the use of primary legal remedies has not yet had time to take root in Estonian society. This may be one of the reasons the content of the obligation to use primary legal remedies has been changed so extensively in court practice. To return the obligation to use primary legal remedies to its original meaning, a suggestion should be considered to set an obligation in place for an administrative authority, similarly to the reference to challenge of an administrative act[*49], to add to administrative act an explanation of the fact that by non-use of the primary legal remedies, one might find a later claim for damages dismissed according to § 7 (1) of the SLA.

[48] See SCALCd 20.03.2006, 3-4-1-33-05, paragraph 22. Available at www.nc.ee/?id=583.

[49] According to the § 57 (1) and (2) of the Administrative Procedure Act, an administrative act has to contain a reference to the possibilities, place, terms and procedure for the challenging of the administrative act. At the same time, the absence of the reference to challenge does not affect the validity of the administrative act, alter a term for challenging thereof, or bring about other legal consequences. The English version of the Administrative Procedure Act is available at www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X40071K3&keel=en&pgg=1&ptyyp=RT&tyyp=X&query=haldusmene.