



Dear reader,

The first issue of *Juridica International* was published in 1996, meaning that we can now celebrate the journal's 20-year anniversary. Peep Pruks, dean of the Faculty of Law at that time and the editor and head of publisher Iuridicum Foundation throughout the years, started the foreword of the first *Juridica International* with the following words: 'The purpose of *Juridica International* is to give an overview of [the] Estonian legal system and report on the developments in legal reform'¹. The journal has fulfilled this purpose for the full 20 years of its existence thus far, while the objectives have become somewhat wider and more ambitious. In addition to the developments in justice in Estonia, *Juridica International* has addressed global legal problems, mainly those arising within the European Union.


In the mid-'90s, the main issue facing Estonian jurisprudence surrounded the creation of a new legal system in the wake of the 1991 re-establishment of Estonian national independence. After Estonia became a European Union membership candidate in 1995 and then a member state in 2004, harmonisation of Estonian legislation with that of the European Union, alongside the law of the European Union itself, gained increasing focus. The harmonisation of Estonia's law with the law of the European Union largely coincided with the intense work to create Estonia's new legal system. Therefore, in numerous cases, there was no need for harmonising an existing act with the law of the European Union – the EU law was taken into account in the preparation of the new acts. With the new legal system mostly completed as the 2000s rolled in, our objective was no longer so much to provide an introduction to Estonian law as to participate in international discussion of important legal issues. We are very glad that the authors contributing to *Juridica International* include many internationally recognised lawyers, which is why the main focus of the journal has shifted from expounding on Estonian law to addressing issues of greater international relevance. The primary emphasis has been on developments in the law of the European Union, including the possibilities for harmonisation across the various fields of law in the countries of Europe². However, Estonian law has not been neglected. Estonia's new legal system is special in that, in its creation, mainly for establishment of the new private law, international models, among them the Principles of European Contract Law and the Principles of Commercial Contracts, have been used as relevant sources. Therefore, the Estonian example can be utilised for monitoring the actual efficiency of the so-called sample provisions and principles – the effects in practice. The Estonian experience may, accordingly, prove interesting also for legislators in other countries. In a way, *Juridica International* has become a chronicle that reflects the 20 years over which a new legal system for a country has been built, in tandem with its combination with the legal system of the European Union. It enables one to observe that in today's Europe, increasing numbers of legal issues are similar between countries, and it shows how the law has become global in nature. I am extremely pleased that the international readership of *Juridica International* has increased steadily throughout the years. Since January 2002, our readers have had the opportunity to access the online version of the journal, with more

¹ See *Juridica International* 1996, p. 1.

² Let us note here that the first article in the first issue of *Juridica International* was the paper by Prof. Heiki Pisuke titled 'Estonia and the European Union: European Integration in Estonia' (*Juridica International* 1996, pp. 2–5).

than 120,000 page views in 2014 alone and 70,000 online users. The following countries represent the ‘top five’ for page views generated: the USA, Great Britain, Germany, the Netherlands, and India.

I thank all the authors who have published articles in *Juridica International* over these 20 years. I also thank the readers for expressing such great interest in the journal. I very much hope that the enthusiasm for both contributing to and reading *Juridica International* will never fade!

A handwritten signature in black ink, appearing to read 'Paul Varul', with a stylized, cursive script.

Paul Varul
Editor-in-Chief since 1996

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Julia Laffranque

Judge, European Court of Human Rights
Professor of European Law, University of Tartu

European Human Rights Law and Estonia: One- or Two-way Street?

1. Historical background: Ratification of the convention and its protocols by Estonia

After re-gaining its independence in 1991, Estonia was eager to confirm the country's historical belonging to Europe and opened itself up to a democratisation process. All efforts were taken in order to return Estonia to the family of democratic states governed by the rule of law and again join the international community, including the Council of Europe (on 14 May 1993) and later on the EU (on 1 May 2004). European human rights law as understood for the purpose of this article is above all the European Convention on Human Rights and Fundamental Freedoms (the Convention) and the case law of the European Court of Human Rights (the Court, the Strasbourg Court) in applying and interpreting it.

Lennart Meri, President of Estonia in 1992–2001, in the first years of the re-established Republic of Estonia (in the 1990s) pointedly warned that if we do not build a state governed by the rule of law, Estonia will be as lonely as the Moon rotating around the Earth.^{*1}

Estonia ratified the Convention on 13 March 1996 and it became binding for Estonia as of 16 April 1996. A reservation to the Convention was made by the Government of Estonia regarding Article 1 of Protocol No. 1 of the Convention as far as Estonian laws on property reform are concerned. The reservation turned out to be a pragmatic choice, because in Estonia some property-reform-related issues are many years later still not solved. In its decision in the case *Shestjorkin v. Estonia*,^{*2} which concerned the restitution of nationalised property, the Court examined Estonia's reservation and found that it satisfied the requirements of the Convention. The European Commission of Human Rights had already held the reservation applicable and the application inadmissible in another Estonian property reform case.^{*3} Despite this reservation, the case law of the national judiciary, especially of the Supreme Court and its Administrative Law Chamber, has followed the principles of rule of law and found them to be applicable also in often both factually and legally very complicated cases of privatisation. On the other hand, the Court has even without going necessarily into the substance of the Estonian reservation accepted that the national authorities enjoyed a wide margin of appreciation in regulating ownership relations that involved large-scale economic and legal reforms and that the national authorities succeeded in striking a fair balance between the proprietary interests of the persons concerned.^{*4}

¹ Available online at: <http://www.tsitaat.com/tsitaadid/teemad/%C3%B5igusriik>.

² *Shestjorkin v. Estonia*, [dec.] No. 49450/99, 15 June 2000.

³ *Vesterby v. Estonia*, No. 34476/97, 1 July 1998.

⁴ See *Poder and Others v. Estonia*, [dec.] No. 67723/01, 26 April 2005.

Protocol No. 6 to the Convention, concerning the abolition of the death penalty, was ratified by Estonia on 18 March 1998.^{*5} It was a big step towards democracy and an important milestone in the protection of human rights in Estonia because the death penalty was previously provided by national law, although it had for the very last time been executed in September 1991, when re-independent Estonia was only about a month old. The death penalty was then replaced by life imprisonment. Protocol No. 13 to the Convention, concerning the abolition of the death penalty in all circumstances (CETS No. 187), was ratified by Estonia on 12 November 2003.^{*6}

Estonia has so far not ratified Protocol No. 12 to the Convention, about the general prohibition of discrimination, although it signed the Protocol on 4 November 2000.

Protocol No. 15, adopted on 24 June 2013, was signed by Estonia on 22 October 2013 and ratified on 30 April 2014. Protocol No. 16, adopted on 2 October 2013 and aimed at enhancing the dialogue between the Court and national courts in the framework of non-binding advisory opinions, has been signed by Estonia (on 17 February 2014) but is not yet ratified as of January 2015.

2. Status of the Convention in the Estonian legal order

Formally, in Estonia the Convention is seen as a ratified international treaty. The Convention is an integral part of the Estonian legal order; it is positioned above any other legal act in the hierarchy of legal sources in Estonia except the Constitution of the Republic, adopted by the Estonian people on 28 June 1992. The status of an international treaty is regulated by §123 of the Estonian Constitution, which stipulates that Estonia shall not enter into international treaties that are in conflict with the Constitution. Furthermore, the same section emphasises that if laws or other legislation of Estonia is in conflict with international treaties ratified by the Estonian Parliament, the provisions of the international treaty shall apply.

In practice, the Convention and the Court's case law interpreting it are the standard, together with the Constitution, by which alleged violations of human rights are ascertained by the Supreme Court of Estonia. Moreover, at the same time the text of the second chapter of the Estonian Constitution ("Protection of fundamental rights, freedoms and obligations") is based to a large extent on the Convention, even though no direct reference to the Convention is made. According to §3 of the Estonian Constitution, universally recognised principles and rules of international law are an inseparable part of the Estonian legal system.

As early as in 1994, thus about two years before the Convention became binding for Estonia (and as much as 10 years before Estonia's accession to the European Union (EU)), the Supreme Court of Estonia had emphasised that the general principles of law developed by the institutions of the Council of Europe and the EU should be taken into consideration alongside the Estonian Constitution.^{*7}

The Criminal Law Chamber of the Supreme Court stressed in its judgement of 20 September 2002 the position of the Convention in the Estonian legal system, noting that, on the basis of §3 (2) and §123 (2) of the Constitution, the Convention and the rulings of the Court in interpretation thereof form an integral part of the Estonian legal system, having priority with regard to Estonian laws. The Chamber added that in certain cases the Convention can also provide assistance in furnishing the concept of the Estonian Constitution.^{*8}

On 6 January 2004 the Supreme Court *en banc* pointed out in its judgement in a criminal case that the Convention constitutes an inseparable part of the Estonian legal order and that to guarantee the rights and freedoms set forth in the Convention is, under Article 14 of the Constitution, also the duty of the (Estonian) judicial power.^{*9}

⁵ Inimõiguste ja põhivabaduste kaitse konventsiooni lisaprotokoll nr 6 ratifitseerimise seadus (Act Ratifying Additional Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms). Adopted on 18.03.1998, RT II 1998, 14, 22.

⁶ Euroopa inimõiguste ja põhivabaduste kaitse konventsiooni protokoll nr 13 surmanuhtluse igas olukorras kaotamise kohta ratifitseerimise seadus (Act Ratifying Protocol No. 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty in All Circumstances). Adopted on 12.11.2003, RT II 2003, 31, 156.

⁷ The Supreme Court stated in a judgement concerning the review of the constitutionality of Article 25, paragraph 3 of the Property Law Enforcement Act that the general principles of law developed by the institutions of the Council of Europe and of the EU form part of the sources of Estonian law, Decision of 30 September 1994 of the Constitutional Review Chamber of the Supreme Court, Case No. III-4/A-5/94. – RT 1 1994, 80, 1159.

⁸ Judgement of 20 September 2002 of the Criminal Law Chamber of the Supreme Court, Case No. 3-1-1-88-02.

⁹ Judgement of 6 January 2004 of the Supreme Court *en banc*, Case No. 3-1-3-13-03.

3. Impact of the Court's case law on the Estonian legislature, executive power, and judiciary

The first judgement of the Court concerning Estonia was delivered on 12 September 2000 in the case *Slavgorodski v. Estonia*^{*10} (there had been inadmissibility decisions before) and concerned opening by the prison administration of the letters from the European Commission of Human Rights to the applicant, who was a prisoner. The application was declared admissible^{*11}, but later the case was struck from the list due to the friendly settlement reached between the parties.

As of March 2015, in little less than 20 years under the Court's jurisdiction, 44 judgements in all have been rendered by the Court in respect of Estonia. The vast majority of them have been on criminal matters, few on civil and administrative cases (although one must specify that the issues of prison conditions are dealt with in Estonia by the administrative courts). Most of them have found a violation of the Convention by Estonia (violations have been found as far as Articles 3, 5, 6, 7, 8, and 13 and Article 1, Protocol No. 1 are concerned; most of the violations found are related to the right to liberty and security (Article 5 of the Convention), and to fair trial issues (Article 6 of the Convention) as well as to a certain extent to the length of proceedings.

The number of decisions finding that the application was inadmissible by a chamber of the Court in respect of Estonia is at the same time 28. Most of the applications are declared inadmissible by a single judge.

The average number of applications allocated per 10,000 inhabitants in respect of Estonia in 2014 was 1.42. This is well above the average of the whole Council of Europe, which in the same year was 0.68. The Council of Europe Member States had in 2013 a combined population of approximately 822 million inhabitants, whereas on 1 January 2012 Estonia had approximately 1.34 million of these.

Problems from the historic past

there are some questions related particularly to Estonia and perhaps to a certain extent also other Eastern European countries, on such matters as the bitter experiences and remnants from the Soviet occupations, including the issues emerging from the past in connection with the deportation of Estonians to Siberia and the retroactivity of a criminal punishment linked to a conviction for crimes against humanity; the presence of Soviet army pensioners and other Russian-speaking residents in Estonia; problems with the associated pension system, residence permit matters, and migration issues; and even to some extent the riots caused by the relocation of a monument representing a Soviet soldier (the Bronze Soldier) from the city centre of Tallinn to a military cemetery approximately 16 years after the end of the Soviet occupation of Estonia.^{*12}

In inadmissibility decisions in cases concerning the accordance with Article 7 of the Convention of the national criminal proceedings against applicants who participated in the deportation of the civilian population from Estonia to remote areas of the Soviet Union and in the case of an applicant who had planned and directed the killing of a person hiding in the woods from the repression by the Soviet authorities, the Court has *expressis verbis* recognised that Estonia was illegally occupied by the Soviet Union in 1940-1941 and in 1944-1991.^{*13} This constitutes an important stage in establishing the historical truth for which the Estonian people have waited for a long time.^{*14}

^{*10} *Slavgorodski v. Estonia*, No. 37043/97, 12 September 2000.

^{*11} *Slavgorodski v. Estonia*, final decision as to the admissibility, No. 37043/97, 9 March 1999.

^{*12} *Korobov and Others v. Estonia*, No. 10195/08, 28 March 2013. In this judgement a substantive violation in respect of one applicant and procedural violation (no effective investigation) in respect of four applicants of Article 3 of the Convention were found in connection with the actions of law enforcement officers during the riots following protests against the relocation of a monument commemorating the entry of the Soviet Red Army into Tallinn during the Second World War. However, the Article 5 (1) complaint of all applicants was declared inadmissible due to non-exhaustion.

^{*13} *Kolk and Kislyiy v. Estonia*, [dec.] Nos 23052/04 and 24018/04, 17 January 2006 and *Penart v. Estonia*, No. 14685/04, 24 January 2006.

^{*14} See also *Mälksoo, Lauri, Euroopa Inimõiguste Kohtu (suurkoja) otsus asjas Kononov v. Läti* (Judgment of the European Court of Human Rights (Grand Chamber) in the case *Kononov v. Latvia* (application No. 36376/04), *Juridica* 2011, No. 3, pp. 232-236, p. 235.

Deprivation of Liberty

The violations found in respect of Article 5 (1), (3) and (4) of the Convention are related to reasoning for pre-trial detention, excessive and unreasonable length of pre-trial detention^{*15} or detention in expulsion^{*16}, unjustified extensions thereof and lack of speedy examination of applications for release, matters related to the not bringing of a person before the national court immediately after his or her arrest, and lack of proper judicial control over deprivation of liberty, along with setting the requirements and standards for Estonian authorities' compliance with Article 5 (3) and (4) of the Convention. The Court emphasised that a person must be brought promptly before a judge also in cases where there existed an arrest warrant authorised by the court. These principles are now well enshrined in the respective current legislation in force in Estonia.^{*17}

There has been also a judgement of the Court finding a violation of Article 5 (1) of the Convention that concerned deprivation of an unsound person of liberty and where the Court did not agree with the Estonian authorities that the applicant was heard "promptly" after she had been signed up for compulsory admission.^{*18}

Presumably due to the constant case law of the Court upholding the values enshrined in Article 5 of the Convention, the Estonian regulation concerning pre-trial and pending-trial detention has become stricter – the new Code of Criminal Procedure of Estonia (*kriminaalmenetluse seadustik*) introduced time limits for the period of pre-trial detention and a regular review thereof.^{*19}

On the other hand, in *Ovsjannikov v. Estonia*,^{*20} the Court found no violation of Article 5, §3 (six months of pre-trial detention) but pronounced a violation of Article 5 (4) of the Convention on account of neither the applicant nor his counsel having been given access to the evidence in the criminal case file presented by the prosecutor on the basis of which the court decided the lawfulness of the applicant's remanding in custody and his continued detention.

Prison conditions

In respect of Article 3 of the Convention, violations have been found due to poor, degrading, and inhuman prison conditions, in particular pre-trial detention and arrest facilities' conditions, such as overcrowded cells. The Court has also emphasised the need for protection of human rights of prisoners, including the principle that the state's responsibility is not limited to premeditated inhuman treatment and not limited only to intentional harm caused.^{*21}

One can say that indeed so far one of the biggest impacts of the Convention, of the Court's case law, and also of the CPT (European Committee for the Prevention of Torture) reports to Estonia has been the improvement of the conditions in Estonian prisons; as well as contribution to the development of the system of state responsibility and compensation caused by the poor prison conditions (e.g., *Kochetkov v. Estonia*,^{*22} *Julin v. Estonia*^{*23}).

After the *Alver v. Estonia* judgement, new prisons were built, and after the *Kochetkov v. Estonia* judgement, the conditions in the arrest buildings were improved.

In the case *Tunis v. Estonia*^{*24}, the applicant suffered from back and neck pain, in an overcrowded cell he had difficulties doing the exercises prescribed by a doctor, and he had only limited out-of-cell activity of an hour of daily exercise in the outdoor exercise yard. He had spent more than two years and ten months

¹⁵ *Sulaoja v. Estonia*, No. 55939/00, 15 February 2005; *Pihlak v. Estonia*, No. 73270/01, 21 June 2005; *Harkmann v. Estonia*, 2192/03, 11 July 2006; *Bergmann v. Estonia*, No. 38241/04, 29 May 2008; *Ovsjannikov v. Estonia*, No. 1346/12, 20 February 2014.

¹⁶ *Mikolenko v. Estonia*, No. 10664/05, 8 October 2009.

¹⁷ See §131 of the Estonian Code of Criminal Procedure on the procedure for taking into custody, especially amendments made in 2008 and 2011, e.g., RT I, 23.02.2011, 1 – entered into force on 1 September 2011.

¹⁸ *S. v. Estonia*, No. 17779/08, 4 October 2011.

¹⁹ Sections 130 (the grounds for taking into custody and holding in custody); 131 (2); 136 and 137; and 275 (2) (detention pending trial) of the Code of Criminal Procedure adopted on 12 February 2003 and with the latest amendments as in force in January 2014.

²⁰ *Ovsjannikov v. Estonia*, No. 1346/12, 20 February 2014.

²¹ For example *Alver v. Estonia*, No. 64812/01, 8 November 2005.

²² *Kochetkov v. Estonia*, No. 41653/05, 2 July 2009.

²³ *Julin v. Estonia*, No. 16563/08, 40841/08, 8192/10, and 18656/10, 29 May 2012.

²⁴ *Tunis v. Estonia*, No. 429/12, 19 December 2013.

in those conditions, excluding short periods in other cells of the prison or the prison hospital. The Court considered that the conditions of the applicant's detention caused him suffering that exceeded the unavoidable level of suffering inherent in detention and found a violation of Article 3 of the Convention. Right after the judgement and inspired already by other, similar judgements of the Court in respect of other countries, new amendments to Regulation No. 72 of the Minister of Justice on the Internal Prison Rules (*vangla sisekorraeeskiri*) were made, which foresee at least 2.5 square metres of floor space per prisoner in a room and three square metres per cell.^{*25}

Nevertheless, on 20 June 2014 the Constitutional Review Chamber of the Supreme Court of Estonia decided that the 2.5 square metres of space foreseen for a prisoner neither as such nor together with other relevant legal stipulations contradicted the Estonian Constitution. However, at the same time the Supreme Court stressed that, all in all, the prison conditions of the applicant in that case could have violated the human dignity of the prisoner and in order to examine this it is important to look also at what were the real conditions of the prisoner and the out-of-cell activities at the time he spent in limited space.^{*26}

The right to public security and at the same time the need to guarantee fundamental rights has caused the Strasbourg Court to deal with cases concerning the proportionality of the use of force in prisons by the prison authorities against violent prisoners by means such as the restraint bed or tear gas^{*27}, and preservation of privacy during the strip searches^{*28}.

Fair trial and length of proceedings

another group of cases deal with the lessons to be learned as regards the fair trial and due process: access to the courts; equality of arms; lengthy proceedings and no effective remedy against this condition; questions of defence; and the right to a lawyer, including the right to the defence of one's own choosing; quality of the defence lawyer; questioning of witnesses, and presumption of innocence. Also the access of the defence to the investigation materials collected by covert surveillance measures has caused disputes (judgements such as those in *Metsaveer v. Estonia*^{*29}, *Andrejev v. Estonia*^{*30}, *Martin v. Estonia*^{*31}, *Vronchenko v. Estonia*^{*32} and *Rosin v. Estonia*^{*33}, *Taal v. Estonia*^{*34} and *Pello v. Estonia*^{*35}, as well as *Leas v. Estonia*^{*36} are worth mentioning). In one case, a violation was found due to lack of impartiality of a judge because her husband had been involved in the pre-trial investigation of the same case concerning the applicants.^{*37} Also a few problems of enforcement of national judgements have occurred; however, for reasons of friendly settlement by the parties or abuse by the applicant, the Court has never examined the merits of enforcement cases.

As far as the fair trial is concerned, the Court has found violations of Article 6 of the Convention because the applicants had been unable to question witnesses, be this during the pre-trial or in the court proceedings, due to the protection of victims of minor age (see the judgements in *Vronchenko v. Estonia* and *Rosin*

²⁵ Vangla sisekorraeeskiri, adopted on 30 November 2000, RTL (*Riigi Teataja Lisa*) 2000, 134, 2139, latest amendments of 23 December 2013, RT I, 29.12.2013, 36. It remains to be seen whether these measures are efficient. According to the Minister of Justice, in 2013 Estonia had 3100 prisoners, which is too high compared to other countries; see Pevkur: Kas inimõiguste kohtu otsuse järgimine on kellegi arvates väär? (Pevkur: Is it Wrong to Follow the Judgement of the Human Rights Court?), Postimees, 14 November 2013.

²⁶ Judgement of 20 June 2014 of the Constitutional Review Chamber of the Supreme Court, Case No. 3-4-1-9-1.

²⁷ *Julin v. Estonia*, Nos 16563/08, 40841/08, 8192/10, and 18656/10, 29 May 2012; *Tali v. Estonia*, No. 66393/10, 13 February 2014.

²⁸ As to the latter, see *Jaeger v. Estonia*, No. 1574/13, 31 July 2014, where the Court found that §3 of the Convention threshold was not met but the case fell within the scope of §8 of the Convention (right for respect for private life) and found in the circumstances of this case a violation of §8 because the applicant's body search (strip search) took place on his return from a walk to the prison's accommodation section in a stairwell having two doors with uncovered transparent glass windows.

²⁹ *Metsaveer v. Estonia* [dec.] no. 16343/07, 14 June 2011.

³⁰ *Andrejev v. Estonia*, No. 48132/07, 22 November 2011.

³¹ *Martin v. Estonia*, No. 35985/09, 30 May 2013.

³² *Vronchenko v. Estonia*, No. 59632/09, 18 July 2013.

³³ *Rosin v. Estonia*, No. 26540/08, 19 December 2013.

³⁴ *Taal v. Estonia*, No. 13249/02, 22 November 2005.

³⁵ *Pello v. Estonia*, No. 11423/03, 12 April 2007.

³⁶ *Leas v. Estonia*, No. 59577/08, 6 March 2012.

³⁷ *Dorozhko and Pozharskiy v. Estonia*, Nos 14659/04 and 16855/04, 24 April 2008.

v. Estonia). Today, these issues concerning the minors have been solved: according to the changes made in the Code of Criminal Procedure, §290¹ (1) stipulates that a court may under certain circumstances not summon a minor and allow submission of the testimony given by the minor in pre-trial procedure as evidence, provided that the testimony was video recorded and that the counsel has had the opportunity to pose questions to the witness in pre-trial procedure about the facts related to the subject of proof.

In *Leas v. Estonia* the applicant had complained that the proceedings had been unfair as he had not been given access to a covert surveillance file on him that had led to the charges being brought against him and, subsequently, to his conviction. The Court did not consider the procedure employed to determine the issue of disclosure of evidence to have complied with the requirements to provide adversarial proceedings and equality of arms and found a violation of Article 6 (1) of the Convention.

It is important to note that in most of these cases either the national law or the practice of the Supreme Court has been changed in the meantime. The trend towards more Convention-confirming domestic law is welcoming. Judgements of the Court have also helped to improve the reasoning of judgements of Estonian courts that take into account the European principles and the Court's case law. The quality of judgements is certainly a strong point for further independence of the judiciary.^{*38} On the other hand, the Supreme Court of Estonia has, in order to guarantee the independence of a judge, relied on Article 6 (1) of the Convention directly and has on its own initiative considered unconstitutional the absence of a legal regulation foreseeing the payment of salary or other compensation to a judge whose service has been stayed pending a criminal investigation.^{*39}

Concerning the length of proceedings, the Court has rendered the following judgements finding violations due to unreasonable time of national (all civil) proceedings (respectively, seven years and seven months; five years and ten months; more than seven years and two months; and six years, seven months, and 20 days): *Treial v. Estonia*, *Shchiglitsov v. Estonia*, (both only Article 6), *Saarekallas OÜ v. Estonia*, and *Missenjov v. Estonia* (both Article 6 and Article 13 of the Convention).^{*40} More recently, the Court found a violation of reasonable time in civil proceedings (division of joint property by divorcing) that lasted for nine years and nearly nine months for three levels of Estonian jurisdiction and, respectively, six years and three months for three levels of jurisdiction for civil proceedings concerning claim for alimony for the applicants' son in which special diligence was needed.^{*41} In an administrative law case, *Raudsepp v. Estonia*, Article 13 violation of the Convention only on account of a missing remedy and not of Article 6 (1) for complicated property reform proceedings of nearly five years and eleven months' duration was found.^{*42} In addition to that, there have been friendly settlements and one unilateral declaration in this area. In criminal cases the Court has not found a violation for length of proceedings but has acknowledged the Estonian courts' practice of reducing defendants' sentences in cases of unreasonably lengthy criminal proceedings^{*43} and concluded that to appeal within the criminal proceedings about the unreasonable length constitutes an effective remedy on national level that needs to be exhausted before addressing of the Strasbourg Court.^{*44}

On 27 January 2011, amendments to the Code of Criminal Procedure, §274¹ ("Request to expedite court proceedings") and §274², which foresees a possibility to terminate criminal proceedings in court sessions in connection with expiry of a reasonable time of processing, were adopted. In that connection, also a new §333¹ of the Code of Civil Procedure (*tsiviilkohtumenetluse seadustik*) was approved, establishing a whole set of measures directed at speeding up the proceedings on national level. These remedies were adopted under the clear influence of the judgements of the Court, as well as of the Supreme Court referring to the case law of the Court, and entered into force on 1 September 2011. Whether in the

^{*38} See Opinions of the Consultative Council of European Judges, in particular Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges and Opinion No. 11 (2008) on the quality of judicial decisions.

^{*39} Judgement of 14 April 2009 of the Supreme Court *en banc*, Case No. 3-3-1-59-07, para. 32.

^{*40} *Treial v. Estonia*, No. 48129/99, 2 December 2003; *Shchiglitsov v. Estonia*, No. 35062/03, 18 January 2007; *Saarekallas OÜ v. Estonia*, No. 11548/04, 8 November 2007; *Missenjov v. Estonia*, No. 43276/06. See also *Susi*, Mart, The Estonian Judicial System in Search of an Effective Remedy against Unreasonable Length of Proceedings, *Juridica International*, XVI, 2009, pp. 193–202, p. 202.

^{*41} *Kiisa v. Estonia*, No. 72999/10 and nos. 16587/10 and 34304/11 of 18 February 2014.

^{*42} *Raudsepp v. Estonia*, No. 54191/07, 8 November 2011.

^{*43} *Motsnik v. Estonia*, No. 50533/99, 29 April 2003; *Malkov v. Estonia*, No. 31407/07, 4 February 2010; *Mets v. Estonia*, [dec.] no. 38967/10, 7 May 2013.

^{*44} *Velleste v. Estonia*, [dec.] no. 67623/10, 4 January 2012 and *Andrejev v. Estonia*, [dec.] no. 64016/10, 4 January 2012.

future the non-exhaustion of these remedies could lead to inadmissibility by the Court^{*45} remains still to be seen.

Also §100 of the entirely new Code of Administrative Court Procedure (*halduskohtumenetluse seadustik*)^{*46}, which entered into force on 1 January 2012, bears the title: “Application to expedite court proceedings”. In addition, the Courts Act (*kohtute seadus*), as modified, in §45 (1¹) gives the president of a court the right to decide on the implementation of a measure organising the administration of justice, which presumably provides the opportunity to finalise the proceedings within a reasonable period of time.

Regrettably, the other remedy – compensation for proceedings that have lasted for unreasonable time – has not yet been introduced into the State Liability Act. The Supreme Court *en banc*, proceeding from the Court’s case law, in the judgement in the *Osmjorkin*^{*47} case declared unconstitutional the lack of a regulatory framework that does not allow compensation for non-pecuniary damage caused by an unreasonably extended pre-trial criminal proceeding. At the same time the Supreme Court applied the Constitution directly and said that the compensation can in the meantime be sought by seizing the administrative courts. The Strasbourg Court considered in its case law in respect of Estonia that the enactment of legislation clearly establishing grounds and speedy procedures for awarding compensation for excessively lengthy proceedings would contribute considerably to legal certainty in this field. However, since the Court’s task is not to assess a state’s legislation – or its absence – in the abstract the Court considered for the time being as sufficient the temporary remedy created by the Supreme Court according to which the applicants can turn, in action based directly on the Estonian Constitution, to the administrative courts to ask for compensation,^{*48} especially in view of the fact that in consecutive national judgements the Tartu administrative court granted the applicant’s claim in part and awarded him compensation for the non-pecuniary damage caused by the excessive length of his criminal proceedings.^{*49}

Pluralism and civil rights

although so far there have been no judgements concerning elections in respect of Estonia, the Court has nevertheless had to deal with pluralism of expressions as such in finding the right balance between the freedom of expression and the right to a private life in media and thus in deciding about the possible limits of freedom of expression. The latter was obviously important to the society waking up from the Soviet past and ideological pressure.

In *Tammer v. Estonia*^{*50} the Court had to balance between the journalist’s freedom of expression and the protection of the private life of a well-known politician’s wife. The journalist was convicted in Estonia for using insulting words. The Court found that there was no violation of Article 10 of the Convention because the use of terms by the journalist was not justified by considerations of public concern nor did they bear on a matter of general importance.

However, some time after the judgement decriminalisation in Estonian law of insult and defamation took place. Whether it is directly related to the proceedings in the case *Tammer v. Estonia*, which actually ended up with a judgement finding no violation of Article 10 of the Convention at the time the applicant was still criminally convicted for defamation, is difficult to conclude without going into deeper analyses of the preparatory legislative drafting materials, but it is definitely a welcoming development taking into account also the fact that the Council of Europe Parliamentary Assembly (PACE) calls for decriminalisation of defamation.^{*51}

⁴⁵ See Maris Kuurberg, Tõhusad õiguskaitsevahendid ebamõistlikult pika menetluse heastamiseks Eestis. Euroopa Inimõiguste Kohtus Eesti suhtes tehtud lahendid (Efficient Legal Remedies for Unreasonably Long Proceedings in Estonia: Judgements Made in the European Court of Human Rights in Respect of Estonia, *Juridica* (in Estonian), 2012, No. 9, pp. 677-683, pp. 681 and 683.

⁴⁶ RT I, 23 February 2011, 3.

⁴⁷ Judgement of 22 March 2011 of the Supreme Court *en banc*, Case No. 3-3-1-85-09.

⁴⁸ See *Raudsepp v. Estonia*, No. 54191/07, 8 November 2011.

⁴⁹ See *Mets v. Estonia* [dec.], 38967/10, 7 May 2013.

⁵⁰ *Tammer v. Estonia*, No. 41205/98, 6 February 2001.

⁵¹ Resolution of the Council of Europe Parliamentary Assembly of 4 October 2007, No. 1577(2007): “Towards decriminalization of defamation”.

On the other hand, as Estonia has moved along its path to becoming a modern and democratic country, the right to a private life is also essential when it comes to such matters as emergence of new technologies and progress in the realm of the Internet. Media technology can threaten our privacy: in such context, individuals who are confronted with interference in their private life or freedom of expression turn to Estonian courts and then to the Court to decide on these novel issues.^{*52}

Furthermore, the consequences of new dimensions in cross-border human relations and free movement of persons in Europe, especially in the European Union, has, among many positive aspects, also created unfortunate cases concerning, for example, problems of family life such as child abduction^{*53} and change of a child's father in the entry in the birth register^{*54}.

Retroactivity and lack of foreseeability of criminal law

there are so far three judgements wherein Estonia was found to be in violation of Article 7 of the Convention: *Veeber No. 2 v. Estonia*^{*55}, *Puhk v. Estonia*^{*56}, and *Liivik v. Estonia*.^{*57} In the first two cases, the retroactive application of criminal law as well as the lack of clarity and foreseeability in the relevant criminal legislation amounted to a violation of Article 7 (1) of the Convention. Similarly, in the third case, the Court found that the interpretation and application of §161 of the Criminal Code, the criminal law applicable at the relevant time and the legal basis for the applicant's conviction, had involved the use of such broad notions and vague criteria that the clarity and foreseeability required of law under Article 7 of the Convention had not been met. As only a few of the Court's judgement deal with Article 7 of the Convention, the Estonian cases are quite significant in that respect.

Re-opening of a case on national level after the Court's judgement

The relevant articles of the procedural codes for including the possibility of re-opening a case after a violation has been found by the Strasbourg Court (§366 (7) and §367 of the Code of Criminal Procedure;^{*58} Article 702 (8) of the Code of Civil Procedure; Article 240 (8) and 241 (2) of the Code of Administrative Court Procedure) were introduced after the Supreme Court had already ruled it possible to re-open a case where a violation was found by the Strasbourg Court by applying the Convention and Court case law directly.^{*59} The legislature followed the Supreme Court and introduced the relevant change, bringing with it the new grounds and legal basis for re-opening. This is why the explanatory letter on the law amending the procedural codes in order to foresee the revision (re-opening) stated *expressis verbis* among the grounds for the legislative amendments the need to comply and implement the decisions of the Court.^{*60}

⁵² *Delfi v. Estonia*, [GC] no. 64569/09, 16 June 2015, where the Grand Chamber found no violation of Article 10 of the Convention.

⁵³ The application was declared inadmissible, because the national courts found that there was no information that the child's return from Estonia to Italy would involve a risk of physical or psychological harm or otherwise place her in an intolerable situation. The Court reiterated that such an assessment is primarily the task of the domestic authorities, who enjoy a certain margin of appreciation in that regard. The Estonian courts had examined the risk, including the opportunities of the mother to join the child in Italy during the custody proceedings; see *M.R. and L.R. v. Estonia*, No. 13420/12, 15 May 2012.

⁵⁴ As to the latter, see the judgement of the Court in *Jussi (Jüssi) Osaue v. Estonia*, 63206/10, 31 July 2014. The applicant wished firstly to bring an action against her husband O seeking a declaration that the entry in the birth register concerning her child's descent from him was incorrect and secondly to bring an action against D, seeking the establishment of her daughter's descent from him. However, since the applicant did not use the remedies available to her in the first set of proceedings, the Court considered her access to a court in the second set of proceedings not to have been restricted in a disproportionate manner.

⁵⁵ *Veeber No. 2 v. Estonia*, No. 45771/99, 21 January 2003.

⁵⁶ *Puhk v. Estonia*, No. 55103/00, 10 February 2004.

⁵⁷ *Liivik v. Estonia*, No. 12157/05, 25 June 2009.

⁵⁸ RT I 2006, 48, 360 - entry into force 18.11.2006. However, it has not been clear how to apply this in practice; see Eerik Kergandberg, Background Paper at the Conference in Riga in 2012 about the Role of Supreme Courts in the Protection of Human Rights. The recent case law of the Supreme Court has, however, shed some light on this; see the Judgment of 3 December 2012 of the Administrative Law Chamber, Case No. 3-3-1-61-12 and of 14 March 2013 of the Criminal Law Chamber of the Supreme Court, Case No. 3-1-2-3-13.

⁵⁹ Judgement of 6 January 2004 of the Supreme Court *en banc*, Case No. 3-3-2-1-04.

⁶⁰ Explanatory letter 545 SE I of 13 December 2004.

These examples have proved the use of the Convention and the Court's case law as an argument in preparing the Estonian legislation, especially if it is drafted by the executive power, in particular by the Ministry of Justice.

Implementation of the Court's judgements by Estonia

The judgements finding a violation in respect of Estonia have in general overall been well executed; there are no particular problems with execution under Article 46 (1) of the Convention. As far as the supervision of the execution of the final judgements by the Committee of Ministers is concerned (Article 46 (2) of the Convention), in Estonia the Government agent of Estonia to the Court (a civil servant of the Ministry of Foreign Affairs) presents the action plans and reports to the Committee of Ministers. The execution of the judgements in substance lies, however, within the ministries that are responsible for the area in which the Court has found a violation and are obliged to take the required measures; for example, the introduction of new draft laws to modify the procedural codes is the task of the Ministry of Justice, and to change the judicial practice is in the competence of the courts. The Ministry of Finance is in charge of paying the damages awarded by the Court to the applicant.

In Estonia the Government's agent prepares annual reports about the international case law of human rights protection in Estonia, which includes the overview of the individual applications against Estonia to the Court.⁶¹ There is no special committee of the Estonian Parliament dealing with the Convention and Court case law; however, the members of the parliament who form part of the PACE are up to date about the latest developments concerning the Court.

Additional remarks on application by the Supreme Court of the Convention and the Court's case law

The first direct reference to a judgement of the Court was made by the Constitutional Review Chamber of the Supreme Court of Estonia on 20 December 1996. The Supreme Court referred to *Malone v. United Kingdom*⁶² to substantiate its own comprehension of the definition of legality.⁶³ Ever since, the Supreme Court has made references many times to the Court's case law and, of course, also to the Convention.⁶⁴ It has done so even in cases where a national legal regulation was absent by referring directly to the Convention and case law on it.⁶⁵ However, the most important examples in this respect are the possibility to re-open a case in which the Court has found a violation and the creation of a remedy for compensation for procedures of unreasonable length. As explained above, recently the legislator has more or less followed the Supreme Court and introduced necessary changes into respective laws.

⁶¹ These reports are public and available on the Web site of the Ministry of Foreign Affairs (www.vm.ee) as well as discussed at the Government's sessions and also reflected in press reviews.

⁶² *Malone v. United Kingdom*, No. 8691/79, Plenary of the Old Court, 2 August 1984.

⁶³ Judgement of 20 December 1996 of the Constitutional Review Chamber of the Supreme Court, Case No. 3-4-1-3-96, RT O 1997, 4, 28.

⁶⁴ According to an analysis conducted by the Supreme Court, most of the references of the Supreme Court to the Court's case law were made in criminal cases concerning the fair trial, including length of proceedings, but also in constitutional review (above all, about the issues of effective remedies and excessive court fees) and in administrative law cases concerning some expulsion cases but first and foremost the prison conditions, because the disputes arising from the applications of the inmates are the competence of the administrative courts. Besides the Convention and the Court's case law, also the soft law of the Council of Europe, as, for example, European Prison Rules, has been used actively in the reasoning of the judgements of the Supreme Court. In civil cases the reference to the Convention and the Court's case law has been more limited. The judgements of the Court referred to most often are: *Pélissier and Sassi v. France*, [GC] no. 25444/94, 25 March 1999; *Kudla v. Poland*, [GC], No. 30210/96, 26 October 2000; *Konashchuk and others v. Russia*, No. 3009/07, 3 June 2010; *Reinhardt and Slimane-Kaid v. France*, Nos 21/1997/805/1008 and 22/1997/806/1009, 31 March 1998; *Kangasluoma v. Finland*, No. 48339/99, 20 January 2004; and *Sunday Times v. UK (No. 1)*, No. 6538/74, 26 April 1979. See Eve Rohtmet, Euroopa Inimõiguste Kohtu praktika Riigikohtu lahendites. Kohtupraktika analüüs (The case law of the European Court of Human Rights in the judgements and decisions of the Supreme Court: Analyses of the court practice), Legal Information Department of the Supreme Court, Tartu, 2012.

⁶⁵ See René Värk; Carri Ginter. Estonia, in: The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe, Leonard Hammer; Frank Emmert (eds), The Hague: Eleven International Publishing, 2012, pp. 183–196.

To a certain extent one could say that the Supreme Court of Estonia has given legitimacy to its decisions by citing the judgements of the Court and can therefore be considered to have in certain issues taken the lead in incorporating the Convention into the domestic legal system.

More usually the Supreme Court applies the provisions of the Constitution together with references to the Convention in order to support the proper interpretation of the Constitution. The Supreme Court has also referred to the Convention / Court's case law by way of *obiter dictum* for illustrative purposes. The Supreme Court has well grasped the *de facto* precedence value or even *erga omnes* application of the Court's judgements, because most of the case law of the Court that has been referred to by the Supreme Court is not related to the judgements rendered concerning Estonia. One problem in doing so seems to be that the relevant case law of the Court referred to in the Supreme Court judgements, except if it is in Estonian cases (these are all being translated), might not be available in the Estonian language.

On the other hand, the Supreme Court has maintained certain caution in finding, for instance, that the fact that the Court in another judgement has evaluated grounds for arrest in the national law of another state as Convention confirming does not create additional grounds for an arrest in Estonian criminal procedural law, which enumerates exclusively all the relevant grounds for taking into custody and holding in custody.^{*66}

The impact of the Court's case law goes far beyond the referral to the case law of the Court: it can also be said that some methodology used by the Court, for example, to assess the proportionality of a measure has been to a certain extent followed by the Supreme Court in deciding the cases.^{*67} It can also happen that the Supreme Court has even set higher standards than in the Convention system by stating, for example, that in comparison to Article 2 (1) of Protocol No. 7 of the Convention the right of appeal is guaranteed to a greater extent by §24 (5) of the Estonian Constitution.^{*68}

Furthermore, the national courts have improved their practice of informing the applicant about the lawyer appointed by the Bar Association as well as reminding the applicant to make contact with the lawyer. This has been done in order to fix the drawbacks pointed out in the case law of the Court. In subsequent cases, the Supreme Court has re-opened the proceedings with the reference to the *Andrejev* judgement of the Court because there as well the applicants had missed the cassation deadline due to the failure of legal-aid appointed lawyers.^{*69}

In another administrative law case, the Supreme Court analysed whether the finding of violation by the Court in a particular case influenced the outcome of the case and whether the situation can be remedied by other means than re-opening and agreed in substance with the Court that the applicant, a prisoner, did exhaust the pre-judicial remedy and his complaint to the prison authorities was sufficiently clear. Therefore, the Supreme Court decided that the re-opening was well-founded and remitted the case to the first instance court.^{*70}

However, sometimes the Supreme Court, although it does analyse in a detailed way whether there are grounds for re-opening, refuses to re-open a case, stressing that re-opening will be justified only if the violation found by the Court could influence the outcome of the criminal case.^{*71}

⁶⁶ Decision of 10 January 2013 of the Criminal Law Chamber of the Supreme Court, Case No. 3-1-1-127-12.

⁶⁷ See also *Triipan*, Martin, Proportsionaalsuse põhimõte Euroopa Liidu õiguses (The Principle of Proportionality in the EU Law), which focuses more on the EU law. *Juridica* 2006, No. 3, pp. 151-158.

⁶⁸ Judgement of 18 June 2010 of the Constitutional Review Chamber of the Supreme Court, Case No. 3-4-1-5-10.

⁶⁹ Judgement of 14 March 2013 of the Criminal Law Chamber of the Supreme Court, Case No. 3-1-2-3-13; Decision of 3 December 2012 of the Administrative Law Chamber of the Supreme Court, Case No. 3-3-1-61-12.

⁷⁰ Decision of 18 March 2013 of the Administrative Law Chamber of the Supreme Court, Case No. 3-3-2-2-12 (concerning the judgement of the Court in the *Julin* case).

⁷¹ For example, the Judgement of 11 April 2013 of the full composition of the Criminal Law Chamber of the Supreme Court, Case No. 3-1-2-1-13 (request to re-open the case after the violation was found in *Leas v. Estonia* was not accepted) and the Judgement of 29 September 2014 of the Criminal Law Chamber of the Supreme Court in Case No. 3-1-2-2-14 (request to re-open the case after the violation was found in *Martin v. Estonia* was not accepted).

4. Impact of the Court's case law in relation to Estonia on general development of precedents at the Strasbourg Court

Despite the relatively low number of chamber cases concerning Estonia, the Court's case law regarding Estonian problems has still influenced the overall case law of the Court by generating a wider impact on human rights standards and continues to do so with the first Grand Chamber judgement in respect of Estonia in the *Delfi* case, involving rather new Internet elements.

Most of the references in the case law of the Court to the judgements of the Court made in Estonian cases concern the judgements in *Sulaoja v. Estonia* of 2005 (about the unjustified extension of pre-trial detention)^{*72}, *Tammer v. Estonia* of 2001 (balancing the Article 8 and 10 Convention rights)^{*73}, and *Alver v. Estonia* of 2005 (about the prison conditions)^{*74}. The Grand Chamber judgements^{*75} have used the principle developed in the *Tammer v. Estonia* decision stating that, although under Article 10 of the Convention the Contracting States have a certain margin of appreciation in assessing whether interference with the right to freedom of expression was "necessary in a democratic society", this margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those issued by an independent court.^{*76}

Some of the references to judgements in Estonian cases have become general principles in the constant case law of the Court, such as the Court's stressing that when deciding whether a person should be released or detained pre-trial, the authorities have an obligation under Article 5 (3) of the Convention to consider alternative measures of ensuring his or her appearance at the trial and that the absence of a fixed residence as such does not give rise to a danger of absconding.^{*77} In assessing whether the treatment inflicted on a prisoner went beyond the "inevitable element of suffering or humiliation" associated with the deprivation of liberty, the Court has, inspired by *Alver v. Estonia*, started to take into consideration *inter alia* the length of the period during which a person is detained in particular conditions.^{*78}

Judgement material in *Leas v. Estonia*, where shortcomings in the access to materials collected by means of surveillance were pinpointed, has served as a good source of inspiration in cases concerning similar problems in other countries, such as Latvia.^{*79}

Even an inadmissibility decision as in a child abduction case concerning Estonia^{*80} has been useful to elaborate on the duties of national judges under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and similar EU law: the "Brussels II bis Regulation".^{*81}

^{*72} For example, *Pichugin v. Russia*, No. 38623/03, 23 October 2012, para. 104; *Yevgeniy Kuzmin v. Russia*, No. 6479/05, 3 May 2012, para. 34; *Valeriy Kovalenko v. Russia*, No. 41716/08, 29 May 2012, para. 44; *Chumakov v. Russia*, No. 41794/04, 24 April 2012, para. 163; *Oreb v. Croatia*, No. 20824/09, 31 October 2013, para. 119; *Sergey Vasilyev v. Russia*, No. 33023/07, 17 October 2013, para. 86; *Segeda v. Russia*, No. 41545/06, 19 December 2013, para. 69.

^{*73} For example, *Aksu v. Turkey*, [GC], Nos 4149/04 and 41029/04, 15 March 2012, para. 65; *Mouvement Raelien Suisse v. Switzerland*, [GC] no. 16354/06, 13 July 2012, para. 59; *von Hannover v. Germany No. 2*, [GC], Nos 40660/08 and 60641/08, 7 February 2012, para. 104; *von Hannover v. Germany*, No. 59320/00, 24 June 2004, paras 58-60; *Mika v. Greece*, No. 10347/10, 19 December 2013, para. 32; *Cumpăna and Mazare v. Romania*, [GC.], No. 33348/96, 17 December 2004, para. 111.

^{*74} Just to give some more recent examples out of many: *Khodorkovskiy and Lebedev v. Russia*, Nos 11082/06 and 13772/05, 25 July 2013, para. 465; *Idalov v. Russia*, [GC], No. 5826/03, 22 May 2012, para. 94; *Horshill v. Greece*, No. 70427/11, 1 August 2013, para. 44; *Aksenov v. Russia* [dec.] no. 13817/05, 15 January 2013, para. 18; *Nieciecki v. Greece*, No. 11677/11, 4 December 2012, para. 48.

^{*75} E.g., *Von Hannover v. Germany*, No. 59320/00, 24 June 2004, para. 60.

^{*76} *Tammer v. Estonia*, No. 41205/98, 6 February 2001, para. 60.

^{*77} *Sulaoja v. Estonia*, No. 55939/00, 15 February 2005, para. 64. This judgement is mainly referred to in Russian cases, where the wrong application of Article 5 (3) of the Convention is a constant problem.

^{*78} *Alver v. Estonia*, No. 64812/01, 8 November 2005.

^{*79} *Baltins v. Latvia*, No. 25282/07, 8 January 2013, para. 47.

^{*80} *M.R. and L.R. v. Estonia* [dec.], No. 13420/12.

^{*81} *Nadolska and Lopez Nadolska v. Poland*, [dec.] no. 78296/11, 15 October 2013, para. 102 and also, for example, in the concurring opinion of judge Pinto de Albuquerque to the judgement in the case *X v. Latvia*, No. 27853/09, [GC.], 26 November 2013.

It has also happened that the Court has later departed from the earlier approach taken in an Estonian case and therefore a case has been referred to the Grand Chamber.^{*82}

On the other hand, the Court has in Estonian cases not really made use of comparative law and research into the situation in the other Contracting States about the issue of the case under examination. The same can be said about the third-party interventions in Estonian cases, which are not at all common^{*83}, with *Delfi v. Estonia* being an exception that has attracted many third-party interventions. Estonia itself has intervened only few times.^{*84}

5. Conclusions

In relation to the Court's case law, it is important to understand that finding by the Court of a violation of the Convention in respect of Estonia is not so much a condemnation "against" the country, but it constitutes in a sense a learning lesson for Estonia's democracy, rule of law, and human rights protection system. However, at the same time, it is quite natural that some of the Court's judgements are more easily accepted than others.

Furthermore, there could well be other difficulties in Estonia that the Court has for various reasons had no chance to deal with. This can be seen in areas where the Court has found a violation against another state but where a similar problem still exists in Estonia – e.g., in relation to prisoners' voting rights. It is important to look at a more global picture of the human rights situation. It is unfortunate that in Estonia, especially in the media and in wider public, still little attention is paid to the case law of the Court concerning other states.

In general, European law has been well accepted in Estonia, especially the Convention and the case law of the Court. This acceptance has, however, emerged gradually: the shift in mentality sometimes has difficulties in keeping up with the democratisation of legislation.

Working from the Estonian examples, one can confirm that the legislature and even more so the executive power and above all the judiciary of Estonia have well realised that the Convention is an inseparable part of Estonia's legal and democratic culture. It has been a logical and self-evident development in the society at large. The Estonian legal environment has been open-minded towards the Convention, although, especially since the Charter of the Fundamental Rights of the European Union (the Charter) became legally binding, in December 2009, it is not always easy for an Estonian lawyer, let alone a common person, to orientate in the framework of the three main and yet so different sources of human rights protection in Estonia: the Constitution; the Convention, and the EU law (the Charter).^{*85} Estonian courts need to feel that they also are human rights courts, especially in dealing with the facts and Estonian law: domains where the Court cannot and should not act as a fourth or first instance. But the Court should be able to speak not only to the courts as counterparts but also to Estonian people. They as well need to understand the European human rights law.

All in all, Estonia is quite lucky: it does not have particularly worrying human rights problems; not many violations of the Convention are found in respect of Estonia by the Court.

Estonia has also been fortunate to be "saved" from major cases concerning the Soviet past and transformation process, unlike perhaps some others from the East. The case law of the Court in relation to Estonia

⁸² For example, in *Martin v. Estonia*, the Court found a violation under Article 6 (1) and (3) of the applicant's defence rights on account of the lack of access during the pre-trial proceedings to the lawyer chosen by the applicants' parents. However, in a similar case, against Croatia, the Court at the Chamber level did not find a violation of Article 6 (1) and (3) and did not follow the approach adopted unanimously in *Martin v. Estonia*. This case has been brought, and is as of January 2015 pending, before the Grand Chamber.

⁸³ The Government of Russia has intervened when the cases have concerned Russian nationals with politically more sensitive issues, as in *Korobov and Others v. Estonia*, rather than in cases concerning criminals of Russian nationality as such, e.g., *Vronchenko v. Estonia*.

⁸⁴ In *Agim Behrami and Bekir Behrami v. France*, No. 71412/01 and *Saramati v. France, Germany and Norway*, No. 78166/01 [GC], 2 May 2007, see para. 102, about the Estonian Government's intervention, and in *Avotiņš v. Latvia*, No. 17502/07, pending before the Grand Chamber.

⁸⁵ See Laffranque, Julia, Who Has the Last Word on the Protection of Human Rights in Europe? *Juridica International* XIX, 2012, pp. 117–134. Laffranque, Julia, Who has the Last Word on the Protection of Human Rights in Europe? in *Cohérence et impact de la jurisprudence de la Cour européenne des droits de l'homme. Liber amicorum Vincent Berger* édité par Leif Berg, Montserrat Enrich Mas, Peter Kempees, Dean Spielmann, Oisterwijk: Wolf Legal Publishers, 2013, pp. 223–244. (Melange)

reflects a gradual move towards a rule-of-law-based independent and modern country with all its problems and struggles from the past to present. The recent Estonian cases have been dealing with more or less the same issues every ordinary democratic country faces, even to a certain extent with problems of a modern, well-advanced society, such as freedom of expression and privacy rights on the Internet.

Also the Court has been lucky to have Estonia as an exemplary country where the Convention system and the Court's case law have been to a large extent respected and well complied with. But this mutual "happiness", this quite nice two-way street, should not be taken for granted.

The overall image of the Court is a mosaic of images of the Court in all respective countries of jurisdiction: therefore, it is vital that in Estonia the Court is seen as able to manage its workload and that the Court's case law is coming at the right time and place, dealing with the actual and relevant issues. Thus, the Court cannot take the risk of treating the smaller and less problematic countries as less important for the impact of the overall case law and the image of the Court: every person and every case counts.

Instead of conclusions, it is important to look at the future, to move on. The Court's case law is a moving target: it is impossible to make any final deductions, because already between the time when these lines are written and when they are read many new judgements have been made by the Court. Hopefully, all future developments regarding the Court will contribute to the improvement of the protection of human rights, democracy, and the rule of law around Europe. Estonia or any other European country cannot apply the generally recognised principles by choice in its "own way".^{*86} One needs a good means of transport in order to move on the two-way street. President of Estonia Toomas Hendrik Ilves, at Estonian Lawyers' Days, on 30 September 2010 spelled out that the rule of law is like a good car that needs constant care, tightening of the loose screws, and replacement of worn parts.^{*87}

I hope that Estonia not only takes good care of its rule of law vehicle but also encourages others to do so: in fact, Estonia's trump in Europe and beyond could be to serve as a model in the protection of human rights. Taking into consideration its experience, geopolitical location, and size, as well as investments in education and historically rooted importance of nurturing intellectual and cultural values, Estonia could be in a very good position to achieve this ambitious goal.

⁸⁶ See also *Glikman*, Leon, Häbistamine kogu Euroopa ees (Shame in Front of All Europe), *Postimees*, 10 April 2012.

⁸⁷ President Ilves: Õigusriik on nagu hea auto (The State Based on Rule of Law is Like a Good Car), *Postimees*, 30 September 2010.



Tuuli Hansen

Judicial clerk

Tartu Administrative Court

Case Law of the European Court of Human Rights and the Supreme Court of Estonia on Disclosing Personal Data in Court Judgements

1. Introduction

Increased interest of the public in the protection of personal data is manifested in the increasing number of applications to courts dealing with the rights of a data subject to contest further data processing and be forgotten.^{*1} The concept of personal data undoubtedly involves the name of a person in association with his or her procedural position and the details on his or her activities revealed in judgements.^{*2}

The object of the article is to compare the case law of the Administrative Law Chamber of the Supreme Court of Estonia (ALCSC)^{*3} and the European Court of Human Rights (ECtHR) in publishing judgements on the merits of individual petitions in 2013 and 2014^{*4} in Internet-based judgement databases.^{*5} The objective is to find regularities in the protection of the applicants' personal data in the publishing of decisions.

The article examines the provisions regulating the disclosure of personal data in the judgements of the ECtHR and the ALCSC and analyses how parties to proceedings are informed of the possibilities for protecting their right to privacy. The case law analysis focuses on determining the fields in which anonymity is ensured for applicants by request of a party to a proceeding or at the court's initiative.

¹ Internet: Case-Law of the European Court of Human Rights. Council of Europe; European Court of Human Rights 2011, p. 10. Available at http://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf (most recently accessed on 8.8.2015).

² Analogously, the Court of Justice has found that the concept of personal data undoubtedly covers the name of a person in conjunction with his telephone coordinates or information about his working conditions or hobbies. ECJ 6.11.2003, C-101/01, *Bodil Lindqvist*.

³ The author analyses the case law of the Administrative Law Chamber since the decisions of the Supreme Court and of the ECtHR are the most similar from the point of view of a party to a proceeding – a person has turned to court against the state in relation to violation of his or her rights or freedoms.

⁴ Decisions on cases declared admissible by the courts.

⁵ The author has also analysed the ECtHR's practice in applying anonymity over a shorter period in the earlier article T. Hansen. Euroopa Inimõiguste Kohtu praktika kohtuotsustes isikuandmete avaldamisel (Case Law of the European Court of Human Rights in Relation to the Disclosure of Personal Information). – *Juridica* 2014/4, pp. 313–324 (in Estonian).

2. Regulation of disclosure of personal data

2.1. Procedural law regulating the publication of judicial decisions

From a wider perspective, both the European Convention for the Protection of Human Rights and Fundamental Freedoms⁶ (the ECHR, referred to also as ‘the Convention’) and the Constitution of the Republic of Estonia⁷ incorporate contrasting legal values of the openness of administration of justice and the personal right to privacy. This article focuses on the collision of public pronouncement of judgements with the principles enshrining the protection of personal data.

Section 24 of the Constitution of the Republic of Estonia and the Codes of Procedure establish that judicial proceedings and decisions are usually public and the enforced judgements shall be published online at the prescribed location.

According to Rules 33 and 78 of the Rules of Court, adopted under Article 25 of the ECHR,⁸ the documents and decisions submitted to the ECtHR are usually public and available in public databases. According to Article 35 (2) (a) of the ECHR, the ECtHR shall not deal with applications that are anonymous.

Applicants can request anonymity from the Court. From the aspect of data protection, it is assumed that in case of anonymous data, the person cannot be identified because all identifying elements have been removed from the dataset. Anonymity can also be defined as any information relating to a natural person where the person cannot be identified, whether by the data controller or by any other person, taking account of all the means likely reasonably to be used either by the controller or by any other person to identify that individual.⁹ In the context of this article, the term ‘anonymity’ is used in its broad sense, taking into account the procedural provisions of the courts. Therefore, it includes non-disclosure of the name and the identity, alongside additional measures for the protection of the person’s right to privacy, including the possibility of not disclosing a judgement, either fully or in part.

In Estonian administrative court procedure, applying for anonymity is regulated by the following provisions of the Code of Administrative Court Procedure¹⁰ (CACP). Section 175 (3) of the CACP establishes that on the basis of an application by the data subject, or on the court’s initiative, the name of the data subject in the judgement to be published is replaced by initials or a sequence of letters, and the subject’s personal identification code, date of birth, registration number, address or other particulars that would permit specific identification of the data subject shall not be published. Section 175 (4) and (5) permit publishing a judgement without those particulars whose inclusion entails a risk of harm to the right to privacy or which are subject to other limitation of access provided in the law, publishing solely the operative part of the judgement, or not publishing the judgement, on the basis of an application by the data subject or an interested party or on the court’s own initiative.

According to Rule 47 (4) of the Rules of Court as now in force, applicants who do not wish their identity to be disclosed to the public shall so indicate and shall submit a statement of the reasons justifying such a departure from the normal rule of public access to information in proceedings before the ECtHR. The Court may authorise anonymity or grant it of its own motion.

Before the entry into force of the wording now valid for the Rules of Court on 1.1.2014, a similar provision was established by Rule 47 (3) – as the only difference, the party acceding to the application or granting it of its own motion was the President of the Chamber instead of the Court.¹¹ According to the current wording, the responsibility for finding the balance between the right to privacy and the public interest lies with the entire panel.¹² The author gathers from the above that deciding on the issue of disclosure of personal

⁶ Article 6 (1) and Article 8 (1). Rome, 4.11.1950.

⁷ Eesti Vabariigi põhiseadus. – RT 1992, 26, 349 ... RT I 2007, 33, 210 (in Estonian), §§ 24 and 26. English text available at <http://www.riigiteataja.ee/en/eli/530102013003/consolide> (most recently accessed on 8.8.2015).

⁸ Rules of Court. European Court of Human Rights; Council of Europe 2014. Available at http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (most recently accessed on 8.8.2015).

⁹ Opinion 4/2007 on the Concept of Personal Data (adopted on 20.6.2007 by the Data Protection Working Party established under Article 29), p. 21. 01248/07/EN, WP136. Available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136_en.pdf (most recently accessed on 8.8.2015).

¹⁰ Halduskohtumenetluse seadustik. – RT I, 23.2.2011, 3 ... RT I, 31.12.2014 (in Estonian). English text available at <http://www.riigiteataja.ee/en/eli/509022015001/consolide> (most recently accessed on 8.8.2015).

¹¹ Rule 47 (3) and Rule 1 (e). Rules of Court. European Court of Human Rights; Council of Europe 2008. Available at http://www.echr.coe.int/Documents/Library_2008_RoC_ENG.pdf (most recently accessed on 8.8.2015).

¹² Rule 47 (4) and Rule 1 (h). Rules of Court, 2014 (Note 8).

data is deemed more substantial nowadays, requiring an assessment by all the judges of the Chamber. The article is based on the Rules of Court in their current form and refers to the Court as the applier of anonymity without differentiating between the President of the Chamber and the entire panel as the authority making the decision.

The procedural aspects are specified in the practice direction on requests for anonymity,^{*13} according to which the ECtHR may take any measure to ensure the inviolability of private life.

2.2. Informing parties to a proceeding of the possibilities for protecting their right to privacy

In several documents of the Committee of Ministers of the Council of Europe,^{*14} the Member States are directed to ensure fast dissemination of the ECtHR practice to everyone and in all forms, electronic and on paper. Considering the widespread nature of judicial decisions, both applicants and the court should take the protection of personal data into account before publication of a decision.

The potential applicants are informed of the possibilities for protecting their right to privacy and the obligation to provide argumentation for the request in Rule 47, which has been translated to all languages of the member states of the Council of Europe and establishes the requirements for the content of individual applications. The practice direction on institution of proceedings^{*15} and the practice direction on requests for anonymity^{*16} thoroughly explain the form and content of submitting the application.

These materials on the possibilities for protecting the right to privacy are publicly available on the website of the ECtHR. Thus, potential applicants can see that the possibility of requesting anonymity exists and read the instructions on its formulation before actually filing an application.

In Estonia, there are no official practice directions on submitting an application to the courts. Instead, the official websites of the courts of first and second instance^{*17} contain general descriptions of the requirements for actions under the valid Code of Procedure, by type of procedure, including administrative matters. The possibility of protecting the privacy is not explained in the descriptions of bringing an action found on the websites of the courts, nor in §§ 37–39 of the CACP, which describes the requirements for actions. It is not until §175 of the CACP that the right of a data subject to apply for non-disclosure of data is addressed, so an average applicant without legal education and a representative will probably not find that provision. Also online, the content of §175 of the CACP regarding non-disclosure of data in a published judgement is referred to briefly and separately from the requirements related to an action – on the website of the courts of first and second instance, it is in the section for publication of judgements,^{*18} and on the website of the Supreme Court it is addressed under processing of personal data.^{*19} Yet there is no description of how to submit the application in question.

Therefore, one can conclude that it is quite difficult for an applicant to find information on applying for anonymity in the context of Estonian administrative court procedure.

Regardless of the above, both courts have concealed the data in publication of approximately six per cent of the decisions. Therefore, the characteristics of informing about the possibility of applying for anonymity cannot be seen to have had a direct impact on these courts' practice in disclosing personal data.

¹³ Practice direction: Requests for anonymity. President of the European Court of Human Rights 2010. Available at http://www.echr.coe.int/Documents/PD_anonymity_ENG.pdf (most recently accessed on 8.8.2015).

¹⁴ Resolution Res(2002)58 on the publication and dissemination of the case-law of the European Court of Human Rights. Council of Europe, Committee of Ministers, 18.12.2002; Recommendation Rec(2002)13 of the Committee of Ministers to member states on the publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights. Council of Europe, Committee of Ministers, 18.12.2002.

¹⁵ Practice direction: Institution of proceedings. President of the European Court of Human Rights 2013, Section 8. Available at http://www.echr.coe.int/Documents/PD_institution_proceedings_ENG.pdf (most recently accessed on 8.8.2015). The same rule has been established in the earlier wordings since 2003.

¹⁶ Practice direction: Requests for anonymity (Note 13).

¹⁷ Available at <http://www.kohus.ee/> (most recently accessed on 8.8.2015) (primarily in Estonian).

¹⁸ Available at <http://www.kohus.ee/et/kohtuotsus/haldusajajades> (most recently accessed on 8.8.2015) (in Estonian).

¹⁹ Available at <http://www.nc.ee/?id=1363> (most recently accessed on 8.8.2015) (in Estonian).

3. Case law of the European Court of Human Rights and the Administrative Law Chamber of the Supreme Court on disclosure of personal data

Below, the case law of courts on disclosure of personal data in decisions published in Internet-based databases of judicial decisions is examined.^{*20} The period under consideration is 2013–2014, when 1,806 judgments were rendered by the ECtHR and 203 administrative matters settled by the ALCSC.^{*21} The analysis focuses on determining the fields in which anonymity is ensured for applicants.

The discussion below is organised in terms of the initiative for the issue of anonymity being addressed by the court.

3.1. Ensuring anonymity by request of a party to a proceeding

3.1.1. When all applicants have requested anonymity

In the period under consideration, the case law of the ALCSC features two cases giving a direct indication that the applicant has requested anonymity from the Court.

In *O. S. v. Justiitsministeerium*,^{*22} the applicant filed an application to the Supreme Court to replace his name with initials in the court ruling to be published and not to disclose his personal identification code, date of birth, or address. According to the operative part of the judgement, only the applicant's name was replaced with initials, but actually the personal identification code, date of birth, and address of the applicant were not published in the document either. The case pertained to unjust deprivation of liberty in involuntary admission to care, which is covered by Article 5 of the ECHR. Ensuring anonymity may be related to references to the medical data of the applicant.

The ECtHR acceded to the applications not to disclose the names in analogous cases referring to violation of Article 5 of the ECHR in relation to unfounded detention in a psychiatric hospital^{*23} or upon assessment of mental health.^{*24} In addition, the ECtHR has acceded to the applications for non-disclosure of names in litigation concerning various medical data, in which violation of Article 8 of the ECHR was found.^{*25}

In the case *V. L. v. Maksu- ja Tolliamet*,^{*26} the applicant applied for replacement of name with initials and for non-disclosure of other data that could enable identifying the applicant. According to the operative part, only the applicant's name was replaced with initials, but at the same time, there are no other direct data in the decision as would enable identification. In this case, an application of a taxation official was accepted in relation to removal of the applicant from the official post, repeal of the order to impose a disciplinary penalty, reinstatement in the office, and ordering of compensation. Removal from one's post and disciplinary proceedings could continue to impact a person, due to prejudice, even when the decision is positive for the applicant. An analogous example exists from the earlier case law of the Supreme Court, wherein a reference to termination of a criminal proceeding and unfounded removal from the relevant post in a published decision prevented the applicant from finding a job.^{*27} There are also cases of an opposite nature in the case law, in which an application to revoke an order to impose disciplinary punishment upon a police officer was satisfied but non-disclosure of data was not requested and the decision was thus published in full.^{*28} In general, in the Estonian case law, parties to proceedings have sensed the risk of prejudice-related problems in establishment of subsequent (service) relationships in the event of publication

^{*20} Available at <http://hudoc.echr.coe.int/> and <http://www.nc.ee/?id=11> (most recently accessed on 8.8.2015).

^{*21} Including administrative matters settled *en banc* or via the Special Panel.

^{*22} ALCSCr 22.12.2014, 3-3-1-21-14.

^{*23} ECtHR 23.9.2014, 67725/10, *C.W. v. Switzerland*; ECtHR 23.9.2014, 66095/09, *O. G. v. Latvia*; etc.

^{*24} ECtHR 22.10.2013, 11577/06, *M. H. v. UK*.

^{*25} ECtHR 23.9.2014, 24453/04, *S. B. v. Romania*; ECtHR 24.6.2014, 33011/08, *A. K. v. Latvia*; etc.

^{*26} ALCSCd 10.4.2013, 3-3-1-14-13.

^{*27} SCd *en banc* 26.3.2012, 3-3-1-15-10, *K. M. v. Riigiprokuratuur*.

^{*28} ALCSCd 15.5.2013, 3-3-1-76-12, *Rätsep v. Politsei- ja Piirivalveamet*.

of their personal data in a decision regarding unfounded criminal or disciplinary proceedings, suspension from work, or removal from service.

Analogously, the ECtHR has also acceded to applications for non-disclosure of a name in a hearing addressing a service dispute^{*29} and in cases involving infringement proceedings against people in relation to unjust criminal proceedings^{*30} and wrongful arrest.^{*31} Mere publication of the data on the infringement proceedings together with personal data may cause prejudice and stigmatisation of the persons. For instance, in case of a dispute related to deletion of data from the criminal-records database,^{*32} the objective of the applicants in having recourse to the Court was to clear their names of the earlier charges, which is why the non-disclosure of their names helped to avoid their additional association with being criminally convicted and, hence, the escalation of the violation of their rights.

For a uniform overview of the case law, the ECtHR decisions in which the requests for anonymity have been accepted are examined below; there are no comparable decisions in the Estonian case law. This can be explained by the fact that the case law on Estonian administrative matters is substantially less voluminous.

In the case *Sindicatul 'Păstorul cel Bun' v. Romania*^{*33}, the ECtHR acceded to the request of the applicants not to disclose their identity. As a rule, upon authorising anonymity, the Court does not disclose the justification of the decision. In this case, non-disclosure of the data of the applicants was explained by way of exception, probably because the respondent country contested the validity of the applicants' anonymity. The ECtHR explained that the purpose of authorising the anonymity of applicants under the Rules of Court 47 (3) is to protect those applicants who find that the disclosure of their data may damage them. Absence of such protection may hinder the free communication of applicants with the court. The case *Sindicatul 'Păstorul cel Bun' v. Romania* is exceptional also in that the Court did not disclose the identity of the applicants, referring to the intention of the Court to remove all data enabling the identification of the applicants from the court documents. Cases in which the court leaves only the names of the applicants undisclosed are more common in case law. The reason for providing more complete protection in this case probably lies in clear references to strong pressure on the applicants, which forced several of them to withdraw their applications in the course of the proceedings.

The ECtHR has accepted applicant's application for non-disclosure of his or her name in several cases involving the rights of children, in which violation of Article 8 of the ECHR^{*34} or some other article^{*35} by the respondent states was found. At the same time, the ECtHR has accepted an applicant's request not to disclose his or her name in cases related to the rights of children in which no violations of the Convention were found.^{*36} Thus, the need for protection of personal data is in practice often linked to the protection of the family and personal life of the applicant, especially the rights of children, regardless of whether violation of the Convention is found.

Often, the persons applying for non-disclosure of their name are asylum-seekers. This is seen especially often with applications in which it is stated that removal to the country of nationality imposes a risk to the life of the applicants or a risk of persecution and abuse that is in contradiction with Articles 2 and 3 of the ECHR. The ECtHR has acceded to applications for anonymity whether^{*37} or not^{*38} a violation by the State was found. Also, it has been stated in the literature that requesting anonymity is not exceptional when the applicants are afraid of abuse in the event of exile to their country of nationality. In some countries, a failed asylum-seeker may become a victim of persecution upon returning to their home country. Therefore, it is understandable for asylum-seekers who turn to the courts to be afraid that publication of the decision may bring them negative attention from the authorities in their home country.^{*39}

²⁹ ECtHR 26.11.2013, 73743/11, *N. K. M. v. Hungary*.

³⁰ ECtHR 4.4.2013, 30465/06, *C. B. v. Austria*.

³¹ ECtHR 19.9.2013, 17167/11, *H. W. v. Germany*; ECtHR 16.4.2013, 33292/09, *A. B. v. Hungary*; etc.

³² ECtHR 07.11.2013, 31913/07, 38357/07, 48098/07, 48777/07, and 48779/07, *E. B. and Others v. Austria*.

³³ ECtHR 9.7.2013, 2330/09.

³⁴ ECtHR 8.7.2014, 3910/13, *M. P. E. V. and Others v. Switzerland*; ECtHR 23.10.2014, 61362/12, *V. P. v. Russia*; etc.

³⁵ ECtHR 28.1.2014, 26608/11, *T. M. and C. M. v. Moldova*; ECtHR 19.2.2013, 23386/09, *A. H. v. Slovakia*; etc.

³⁶ ECtHR 18.12.2014, 27473/11, *N. A. v. Norway*; ECtHR 5.6.2014, 31021/08, *I. S. v. Germany*; etc.

³⁷ ECtHR 7.1.2014, 58802/12, *A. A. v. Switzerland*; ECtHR 11.12.2014, 63542/11, *AL. K. v. Greece*; etc.

³⁸ ECtHR 24.7.2014, 34098/11, *A.A. and Others v. Sweden*; ECtHR 8.7.2014, 58363/10, *M.E. v. Denmark*; etc.

³⁹ N. Mole, C. Meredith. *Asylum and the European Convention on Human Rights*. Council of Europe 2010, pp. 229–230. Available at http://www.echr.coe.int/Documents/Pub_coe_HFiles_2000_09_ENG.pdf (most recently accessed on 8.8.2015).

In addition, the ECtHR has accepted an applicant's request for non-disclosure of his or her name in cases involving payment of currency⁴⁰ or unfoundedly high taxation of severance payments⁴¹. The above refers to the circumstance of the applicants not wishing to associate their names with decisions describing their proprietary situation.

In the cases *W. v. Slovenia*⁴² and *N. A. v. Moldova*⁴³, rape victims contested, respectively, unreasonably long and ineffective criminal proceedings. In both cases, the Court found that Article 3 of the ECHR had been violated and accepted the request of the applicants not to disclose their names. Ensuring privacy can be justified with the need to protect the victim. In an analogous field, a contradictory example could be *O'Keeffe v. Ireland*,⁴⁴ regarding sexual abuse of the applicant. *Inter alia*, violation of Article 3 of the ECHR was found, but the applicant did not request non-disclosure of personal data and the Court did not deem this necessary on its own motion.

In cases of lesser violations in which the ECtHR did not find violations of the Convention, the applicant has submitted and the ECtHR acceded to an application for non-disclosure of the applicant's name where the disputes had to do with degrading treatment by police officers upon detention⁴⁵ and the prohibition to wear a full-face veil in public.⁴⁶

In the case *Söderman v. Sweden*⁴⁷, the circumstances described involved the applicant's stepfather having violated her security of person through attempting to secretly film the 14-year-old applicant naked in the bathroom. At first, the Court acceded to the applicant's application not to disclose her name, and the case was named *E. S. v. Sweden*. During the proceedings, the applicant changed her mind and the Court acceded to her reverse application by cancelling the anonymity granted.

The above illustrates how much of ensuring the privacy of an applicant is in his or her own hands. The following subsection also accentuates the importance of the subjective understanding of the applicant when one is authorising anonymity.

3.1.2. When some applicants have requested anonymity

In the period under consideration, there has been no situation in the case law of the ALCSC in which the Supreme Court acceded to the anonymity application of only some applicants.

The ECtHR joined two applications to form a single proceeding in *Z. and Khatuyeva v. Russia*,⁴⁸ acceding to the application of one applicant not to disclose her name while disclosing the name of the other applicant. Regardless of finding violation of Articles 2, 3, 5, and 13 of the ECHR, the Court does not indicate in its decision that the applicants sensed direct threat to their lives or a risk of torture during the proceedings – the fears had to do mainly with a missing relative. At the same time, it cannot be ruled out that persecution by authorities may carry over to those who have dared to file an application to reveal unlawful activities of authorities.

Correspondingly, applications were joined in the case *Vallianatos and Others v. Greece*⁴⁹; the names of six applicants were hidden at their request, and the rest of the applicants were named in the decision. In the case of the joined applications, it was found that Article 14 of the ECHR had been violated in conjunction with Article 8. The regulation of partnership of same-sex couples discussed in the case is a delicate topic and disclosure of personal data of same-sex partners could cause additional violation of privacy and discrimination against the applicants.

The above indicates that, upon the initiative of the person, the right to privacy is protected at the highest level. Therefore, the ECtHR has linked the need for substantial data protection with the applicants' own assessment of the potential harm to their rights upon publication of the decision.

⁴⁰ ECtHR 5.3.2013, 37571/05, *A. and B. v. Montenegro*.

⁴¹ ECtHR 14.5.2013, 66529/11, *N. K. M. v. Hungary*; ECtHR 23.9.2014, 18229/11, *P. G. v. Hungary*; etc.

⁴² ECtHR 23.1.2014, 24125/06.

⁴³ ECtHR 24.9.2013, 13424/06.

⁴⁴ ECtHR 28.1.2014, 35810/09.

⁴⁵ ECtHR 21.10.2014, 61183/08, *Y v. Latvia*.

⁴⁶ ECtHR 1.7.2014, 43835/11, *S.A.S. v. France*.

⁴⁷ ECtHR 12.11.2013, 5786/08.

⁴⁸ ECtHR 30.1.2014, 39436/06 and 40169/07.

⁴⁹ ECtHR 7.11.2013, 29381/09 and 32684/09.

At the same time, disclosure of data on some of the applicants may make it easier to identify another applicant who may wish to conceal his or her identity – for instance, in the *Z. and Khatuyeva v. Russia*⁵⁰ case, wherein the name of the sister of the missing person was hidden but the data on the missing person and her husband disclosed. Therefore, anonymity applications by some applicants should lead the Court to deliberate on the potential consequences of publication of the decision for the other applicants and whether the protection of personal data should be extended to all applicants in the case at issue.

3.2. Ensuring anonymity on unspecified incentive

Enabling anonymity on unspecified incentive may take place in consequence of the fact that anonymity is granted for some applicants under a corresponding application and for the rest at the court's initiative. Alternatively, it is possible for the court either not to deem it necessary or to forget to specify whether the issue of non-disclosure of data has arisen on the motion of the applicants or, instead, the court.

The ALCSC has stated in four cases in 2013–2014 that, according to the ALCSC, the names of the applicants (and, in one instance, also a person not participating in the proceedings) shall be replaced by initials upon publication of the decision while not explaining the incentive for this decision.

The Supreme Court replaced the applicants' names with initials in a set of cases involving compensation for damage caused by actions of the Police and Border Guard Board in relation to unlawful detention due to incorrect assessment of the applicant's state of health⁵¹ and involving unlawful compelled attendance, use of means of restraint, and indecent conditions in the place of detention.⁵² The prisoner's application for compensation for damage caused by the prison was upheld in part since the carelessness of the respondent enabled a fellow prisoner to attack the applicant with scissors.⁵³ Both the applicant's and the other prisoner's name in the decision were replaced with initials. The applicant's name was replaced by initials also in the decision referring to the psychological and psychiatric problems of the applicant as a prisoner.⁵⁴ In general, it can be stated that ensuring anonymity was necessary in these four cases in relation to protection of health records, unlawful deprivation of liberty, and references to criminal or misdemeanour proceedings.

The ALCSC has decided to substitute letters for names in two cases without specifying whether this took place on the motion of the parties to the proceedings or, instead, the court.

The Supreme Court replaced the names of the applicant and the prison doctors with the letters 'A', 'B', and 'C' in a case of a prisoner's application to revoke a prison's job assignment order in relation to the applicant's state of health.⁵⁵ In a case involving custody of a child, the Supreme Court replaced the names of the applicant (the father), the mother, and the three children with 'A', 'B', 'C', 'D', and 'E' and published the decision without the case numbers referred to in the decision, showing only the years of the referred decisions and of other documents.⁵⁶ Although application of anonymity was not justified, it can be concluded from the scope of the defence that the Supreme Court has deemed the protection of health records and one's private and family life, when children are involved, important legal rights that require more effective protection.

Equivalently, several ECtHR decisions state that the Court decided to grant anonymity to applicants but do not specify whether this decision was taken upon the request of the applicants or at the Court's own initiative. Thus, anonymity has been granted to applicants in cases of delayed medical care to a prisoner,⁵⁷ deprivation of parental rights and placement of a newborn in a foster home⁵⁸, and the incapability of the State to guarantee a parent a meeting with his or her children.⁵⁹ Clearly, also in ECtHR practice, non-disclosure of personal data is seen in relation to health records and protection of personal and family life, especially when children are involved.

⁵⁰ ECtHR 39436/06 and 40169/07 (Note 48).

⁵¹ ALCSCr 4.12.2014, 3-3-1-23-14, *L. S. v. Politsei- ja Püriivalveamet*.

⁵² ALCSCd 17.12.2014, 3-3-1-70-14, *R. R. v. Politsei- ja Püriivalveamet*.

⁵³ ALCSCd 11.12.2014 and ALCSCr 15.12.2014, 3-3-1-64-14, *V. T. v. Viru Vangla*.

⁵⁴ SC Special Chamber 27.11.2014, 3-3-4-9-14, *I. A. riigi õigusabi taotlus*.

⁵⁵ ALCSCd 13.11.2014, 3-3-1-44-14, *A. v. Viru Vangla*.

⁵⁶ ALCSCd 3.6.2013, 3-3-1-13-13, *A. v. Harju Maavalitsus*.

⁵⁷ ECtHR 22.4.2014, 73869/10, *G. C. v. Italy*.

⁵⁸ ECtHR 8.1.2013, 37956/11, *A. K. and L. v. Croatia*.

⁵⁹ ECtHR 10.6.2014, 43123/10, *P. K. v. Poland*; ECtHR 16.9.2014, 2210/12, *P. F. v. Poland*.

In the period under consideration, the ECtHR has made more than 100 decisions regarding asylum-seekers, often granting them anonymity upon application^{*60} or without specifying the incentive.^{*61} At the same time, the Supreme Court has dealt with very few cases involving asylum-seekers and on those rare occasions has not hidden personal data. However, in early 2015, the Supreme Court issued several decisions in which the name of the asylum-seeker is replaced with initials.^{*62} Therefore, it can be concluded that the Estonian case law with regard to disclosing the data of asylum-seekers is consistent with the case law of the ECtHR.

There are some decisions in both bodies of case law (i.e., that of the Supreme Court and of the ECtHR) in which the applicants' names have been replaced with initials or letters but there is no comment as to the relevant court's decision not to disclose the names.

The Supreme Court has replaced the name of the applicant with an abbreviation that is likely to reference initials in cases related to qualifying an illness as an occupational accident,^{*63} issuing medications to a prisoner,^{*64} giving a disabled person an assistive device,^{*65} and damaging the mental health of a prisoner.^{*66} These four examples are more or less related to the protection of medical data that fall within the scope of Article 8 of the ECHR. In addition, the Supreme Court has replaced the name of the applicant with an abbreviation that probably denotes the initials in the case of a police officer applying for revocation of the order to remove him from service, his reinstatement in employment, and ordering of a compensation, whereat the decision includes references to misdemeanour proceedings against the applicant.^{*67} The latter example is related to the right to choose a profession, and the need for data protection arises from the risk of having difficulties in finding a subsequent job or position, addressed in more detail in subsection 2.1.1.

The ECtHR has left the applicant's name undisclosed without referring to the legal basis in a case in which violation of Article 5 of the ECHR was found in relation to forced placement in a social-welfare institution^{*68} and in several cases in which, *inter alia*, violation of Articles 3 and 5 of the ECHR was found in relation to unfounded deprivation of liberty.^{*69} The ECtHR has also left an applicant's name undisclosed without referring to a decision on maintaining anonymity in cases in which violation of Articles 3 and 8 of the ECHR was found^{*70} and in cases of violation of Article 8 of the ECHR.^{*71}

The above demonstrates that the courts have often applied anonymity without stating the incentive in cases that involve the applicants' wish to protect the inviolability of private and family life under Article 8 of the ECHR and when there is a real possibility of their right to privacy being violated even further in the absence of anonymity. In addition, the applicants in the cases referred to in this subsection of the paper have often referred to violation of legal values established in Articles 3 and 5 of the ECHR. The courts probably ensured anonymity in these cases because there existed a risk of violation of the same rights in the future.

3.3. Ensuring anonymity at the court's initiative

Ensuring anonymity at the court's initiative reflects the most objective consideration of the need for protection of personal data, since the protection takes place upon assessment by an impartial court, not on the basis of the subjective understanding held by the data subject.

Although in §175 (3), (4) and (5) of the CACP, an application by the data subject and the court's initiative have both been established as grounds for publishing a judgement without the particulars, there are no

⁶⁰ See Subsection 2.1.1.

⁶¹ ECtHR 18.11.2014, 52589/13, *M. A. v. Switzerland*; ECtHR 22.4.2014, 6528/11, *A. C. and Others v. Spain*; etc.

⁶² ALCSr 3.2.2015, 3-3-1-56-14, *M. A. M. v. Politsei- ja Piirivalveamet*; ALCSr 29.1.2015, 3-3-1-52-14, *A. S. v. Politsei- ja Piirivalveamet*; etc.

⁶³ ALCSd 27.11.2014, 3-3-1-66-14, *E. R. v. Sotsiaalkindlustusamet*.

⁶⁴ ALCSr 8.10.2014, 3-3-1-50-14, *A. B. v. Tallinna Vangla*.

⁶⁵ ALCSr 26.5.2014, 3-3-1-22-14, *P. K. v. Võru Maavalitsus*.

⁶⁶ ALCSd 21.4.2014, 3-3-1-17-14, *E. T. v. Viru Vangla*.

⁶⁷ ALCSd 19.6.2013, 3-3-1-22-13, *K. L. v. Politsei- ja Piirivalveamet*.

⁶⁸ ECtHR 25.11.2014, 31199/12, *K. C. v. Poland*.

⁶⁹ ECtHR 27.11.2014, 46673/10, *A. E. v. Greece*; ECtHR 21.10.2014, 47146/11, *T. and A. v. Turkey*; etc.

⁷⁰ ECtHR 16.7.2013, 61382/09, *B. v. Moldova*; ECtHR 3.10.2013, 552/10, *I. B. v. Greece*.

⁷¹ ECtHR 17.7.2014, 19315/11, *T. v. Czech Republic*; ECtHR 25.4.2013, 36337/10, *M. S. v. Croatia*; etc.

cases in the case law of the ALCSC with an *expressis verbis* explanation that the non-disclosure is due to the court's own initiative.

The ECtHR has been active in protecting the data of parties to proceedings on its own motion, as seen in four cases wherein the applicants or other persons concerned were children – in three of them, no identity was disclosed and violation of Article 8 of the ECHR was found,^{*72} and in the other, anonymity was granted regardless of no violations having been found.^{*73} Thus, the activeness of the Court in ensuring anonymity is clearly related to protecting the rights of children and ensuring the inviolability of one's private and family life.

Of its own motion, the ECtHR has not disclosed the name of the applicant in three cases in which violation of Article 3 of the ECHR was found, separately or in conjunction with other provisions.^{*74} Ensuring anonymity was probably necessary to avoid further torturing of the applicants.

Somewhat exceptionally, the ECtHR has ensured anonymity at its own initiative in the case in which violation of Article 10 of the ECHR was found in relation to restriction of the freedom of expression of a journalist.^{*75}

The activity of the ECtHR in protecting personal data has been rather modest. Since there were only eight cases in the period under consideration in which it has been expressed clearly that the applicant's anonymity was ensured at the ECtHR's initiative, no exhaustive conclusions can be drawn. Still, it is more likely for the Court to ensure anonymity of its own motion in cases wherein violations of Article 3 or 8 of the ECHR are found. Since the risk of torture or violation of one's private or family life may continue or even increase in a situation in which a person's data are associated with a respective decision, it is clearly necessary to consider ensuring anonymity to protect the applicant's rights and mitigate the risks.

4. Conclusions

Although the provisions regulating anonymity have been set forth differently in the Rules of Court and the CACP, the procedural possibilities given to the courts for applying anonymity are similar between the two. However, informing potential applicants of the possibility of applying for anonymity is different. In the case of the ECtHR, the practice directions on institution of proceedings and applying for anonymity, along with the Rules of Court (Rule 47), inform potential applicants of their right to request anonymity, and the respective application process is explained. In Estonian administrative court procedure, it is rather difficult for an applicant to find information on requesting anonymity.

Although the Estonian case law examined was of smaller volume, the general direction in the protection of the data of parties to the proceedings was still evidently consistent with the case law of the ECtHR with respect to ensuring anonymity. In to the case law, ensuring the privacy of applicants depends largely on the applicants themselves. The courts are quite passive in the protection of personal data, as they have linked the need for substantial data protection mainly with the applicants' own assessment of the potential violation of their rights upon publication of the decision.

Anonymity is more likely to be granted upon an application by the applicant, with unspecified incentive, or on the Court's own motion in cases regarding violations of Articles 2, 3, 5, and 8 of the ECHR. The scope of these articles covers the right to life, prohibition of torture, the right to the integrity of the person, and respect for private and family life. How a request for anonymity is settled does not depend on whether the Court finds a violation by the State in deciding on the merits of the case. However, anonymity is granted at the Court's initiative mainly in the event of finding violation of Article 3 or 8 of the ECHR.

The need to ensure anonymity can be justified, firstly, with ensuring the right to privacy and, secondly, with the risk of escalation of the violations contested in the application if the data of the applicant is associated with the decision.

⁷² ECtHR 19.2.2013, 1285/03, *B. v. Romania*; ECtHR 18.6.2013, 28775/12, *R. M. S. v. Spain*; ECtHR 26.11.2013, 27853/09, *X v. Latvia*.

⁷³ ECtHR 29.4.2014, 60092/12, *Z. J. v. Lithuania*.

⁷⁴ ECtHR 12.2.2013, 45705/07, *D. G. v. Poland*; ECtHR 23.7.2013, 41872/10, *M. A. v. Cyprus*; ECtHR 29.10.2013, 11160/07, *D. F. v. Latvia*.

⁷⁵ ECtHR 1.7.2014, 56925/08, *A. B. v. Switzerland*.



Ragne Piir

LLM, Adviser to the Administrative Law Chamber
of the Supreme Court of Estonia, on secondment
to the Court of Justice of the European Union

Application of the Public Policy Exception in the Context of International Contracts – the Rome I Regulation Approach^{*1}

1. Introduction

Though constituting one of the cornerstones of the system of private international law rules on matters of contractual obligations, the parties' freedom to choose the law applicable to their contracts is not entirely unlimited. In addition to targeted protection in favour of those parties regarded as being weaker,^{*2} along with specific limitations for purely internal contracts,^{*3} the Rome I Regulation (Rome I)^{*4} includes an overall clause allowing the courts of EU member states the possibility to refuse to apply a provision of the foreign law either chosen by the parties or otherwise applicable to the contract on grounds of manifest incompatibility with its public policy (*ordre public*).^{*5}

Other than this general public policy exception, Rome I provides for a similar instrument – overall mandatory provisions of the law of the forum state.^{*6} Both serve the purpose of safeguarding the fundamental principles of the forum country whilst, however, operating differently. Overall mandatory provisions embody and protect the state's public interests in a 'positive' manner, inasmuch as they are to be applied regardless of the content of the law otherwise applicable to the contract. Therefore, they do not necessarily

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² Contracts in favour of passengers, consumers, insurance contracts' policy-holders, and employees – see Articles 5, 6, 7, and 8 of Rome I, respectively.

³ Contracts pertaining to situations wherein all elements relevant to the situation are located in one country – see Article 3 (3) and (4) of Rome I.

⁴ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). – OJ L 177, 4.7.2008, p. 6 ff. It replaces the Rome Convention on the law applicable to contractual obligations of June 1980. The consolidated text of that convention is found in OJ C 334, 30.12.2005, p. 1 ff.

⁵ Article 21 of Rome I. In this paper, the notions of public policy and *ordre public* are used in parallel in denotation of the public policy clause of Article 21.

⁶ Provisions of the forum state that are to be applied to the contract irrespective of the law otherwise applicable to the contract – see Article 9 (1) and (2) of Rome I.

constitute a barrier to the application of foreign law.^{*7} By contrast, the general public policy exception performs a negative function as it counteracts certain provisions of foreign law by excluding their application.^{*8}

Recent developments in the EU's second-generation regulations on the enforcement of judgements from other Member States seem to point to a certain decline in the importance of the public policy clause in private international law, by abolishing in part the public policy exception and the *exequatur* in general.^{*9} In addition, continuous harmonisation of substantive law related to the EU internal market indicates that the need for a public policy exception may be ostensibly diminishing.^{*10} These trends constitute incentive to investigate whether the role of an overall public policy clause in matters of contractual obligations should be reconsidered as well, particularly as these are not as value-sensitive as other areas of civil law and in account also of the existence of special rules on overriding mandatory provisions in Rome I. What is more, the wording of the public policy exception in itself is vague, thereby complicating its application while simultaneously entailing broad judicial discretion.

This article explores the employment of the public policy exception from the perspective of Rome I, which determines the law applicable to contractual obligations for 27 European Union member states.^{*11} Only the substantive-law aspects and not the enforcement-stage protection of public policy shall therefore be the focus of this paper. The article starts by examining the preconditions for applying the public policy clause. It then analyses the relativity of *ordre public*, developing three dimensions to be considered in the courts' use of the public policy exception in a particular case. In its conclusions, the article answers the question of why, notwithstanding its infrequent application, dispensing with the public policy exception would be unthinkable. Given that the essence of public policy differs from state to state, it should be stated here that the subsequent analysis and the examples provided are applicable in the context of Estonia's legal order and based on its fundamental values.

2. Prerequisites for recourse to the public policy clause

Rome I, in its Article 21, uses the 'standard' wording of the public policy clause. Ever since the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations toward children,^{*12} similar – if not quasi-identical – wording has been employed in numerous private international law cross-border instruments for the public policy clause, including other EU regulations, along with most Hague Conven-

⁷ For in-depth analysis of the concept of overriding mandatory provisions, see, for example, R. Piir. Eingreifen oder nicht eingreifen, das ist hier die Frage. Die Problematik der Bestimmung und des Anwendungsbereichs der Eingriffsnormen im internationalen Privatrecht. – *Juridica International* 2010/XVII, p. 199 ff.

⁸ More on the distinction between positive and negative functions can be found in such works as R. Hausmann. Art. 21 Rome I. – U. Magnus (ed.). *J. Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Einführungsgesetz zum BGB/IPR. Art 11-29 Rom I-VO; Art 46b, c EGBGB (Internationales Vertragsrecht 2)*. Berlin: Sellier 2011 (in later notes, 'Staudinger/Hausmann'), paragraph 2; D. Martiny. Art. 21 Rom I. – J. von Hein (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 10. Internationales Privatrecht I. Europäisches Kollisionsrecht. Einführungsgesetz zum Bürgerlichen Gesetzbuch (Art. 1-24)*. Munich: C. H. Beck 2015 (in later notes, 'Münchener Kommentar / Martiny'), paragraph 7.

⁹ See J. Kramberger Škerl. European public policy (with an emphasis on exequatur proceedings). – *Journal of Private International Law* 2011/7, p. 482. For a more in-depth analysis of the abolition of *exequatur* in the second-generation regulations in general, see, for example, S. Pabst. A.I.3 EG-Vollstreckungstitelverordnung. Einleitung. – T. Rauscher (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR*. Cologne: Verlag Otto Schmidt 2015, paragraph 12; M. Torga. Brüsseli I (uesti sõnastatud) määrus: kas põhjalik muutus Eesti rahvusvahelises tsiviilkohtumenetluses? ('The Brussels I Regulation (recast): A thorough change in the Estonian Civil Procedure?'). – *Juridica* 2014/4, p. 311 (in Estonian). The term 'second-generation regulations' is used here to indicate Regulation (EC) No. 805/2004 creating a European enforcement order for uncontested claims. – OJ L 143, 21.4.2004, p. 15 ff.; Regulation (EC) No. 861/2007 establishing a European small claims procedure. – OJ L 199, 31.7.2007, p. 1 ff.; Regulation (EC) No. 1896/2006 creating a European order for payment procedure. – OJ L 399, 30.12.2006, p. 1 ff.; Regulation (EC) No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. – OJ L 7, 10.1.2009, p. 1 ff.; and Regulation (EC) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). – OJ L 351, 20.12.2012, p. 1 ff. These are not considered in this article.

¹⁰ M. Stürner. Europäisierung des (Kollisions-)Rechts und nationaler ordre public. – *Grenzen überwinden – Prinzipien bewahren. Festschrift für Berndt von Hoffmann*. Bielefeld, Germany: Verlag Ernst und Werner Gieseke 2011, p. 482.

¹¹ Denmark, having an opt-out from implementing regulations under the area of freedom, security, and justice, still adheres to the Rome Convention, which was replaced by Rome I in 2009 and which provided almost the same rules on party autonomy as does Rome I.

¹² Convention of 24 October 1956 on the law applicable to maintenance obligations towards children, Article 4. Available at http://www.hcch.net/index_en.php?act=conventions.text&cid=37 (most recently accessed on 25 March 2015).

tions in this field. Because of the continuing need to formulate the preconditions for its application in a rather broad manner in order to preserve its universal character, the wording used by Rome I has remained unaltered in comparison to the predecessor of this provision – Article 16 of the former Rome Convention. According to the explicit stipulation of Article 21, the preconditions for recourse to the public policy clause are the application of a foreign law to the case and the manifest incompatibility of the result with the public policy of the forum.

2.1. Application of foreign law

The ‘safety net’ concept of the public policy exception in private international law (i.e., its aim of refraining from obliging the court to give effect to foreign-law provisions that are counter to the fundamental principles of the forum state) makes it clear that public policy constitutes reason for intervention only in cases wherein the law applicable to the contract (*lex contractus*) is not that of the forum (*lex fori*) but a foreign law.^{*13} Accordingly, whether the applicable law has been determined through a choice of law or by virtue of the general conflict rules makes no difference. Thus, in cases wherein a court has to apply its domestic law, EU law, or international treaties, it is not the public policy clause of Article 21 but the domestic law provisions that have to avoid possibly unfair results.^{*14} The public policy exception therefore applies only in cases in which the applicable law has been designated in accordance with the conflict rules in Rome I and it is not the *lex fori* that governs the case.

The applicable law itself is not criticised. Even though it is imaginable that a foreign law provision as such may seem contrary to the forum’s public policy, its inapplicability *per se* without further consideration is very problematic.^{*15} As a general rule, determination of the contents of the foreign law must always be carried out even before consideration of making use of the public policy clause.^{*16} Hence, it must be noted that intervention via the public policy exception can never be applied ‘upon suspicion’ or on grounds of simple assumption of a conflict between the public policy of the forum and a foreign law provision substantially deviating from the *lex fori*.^{*17}

Determination of the content and objective of the *lex contractus*, also called the preliminary examination phase,^{*18} serves as no more than an initial basis on which to decide whether or not to apply the public policy exception. The decisive factor here is the outcome as a whole of the application of the foreign law provision in specific circumstances, also called the thorough examination phase.^{*19} It could, for instance, be conceivable that the application of a provision that is seemingly contrary to the public policy of the forum leads to an acceptable result and that said provision could, therefore, nevertheless be applied.^{*20} By

¹³ P. Kaye, *The New Private International Law of Contract of the European Community*, Aldershot 1993, p. 345; A. Chong, The public policy and mandatory rules of third countries in international contracts. – *Journal of Private International Law* 2006/2, p. 30.

¹⁴ J. von Hein, Art. 6 EGBGB. – J. von Hein (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 10. Internationales Privatrecht I. Europäisches Kollisionsrecht. Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-24)*. Munich: C. H. Beck 2015 (in later notes, ‘Münchener Kommentar / von Hein’), paragraph 123.

¹⁵ Doctrinal literature points out that only foreign laws violating the core content of public policy – e.g., universally recognised human rights and the international *ius cogens* – should be held inapplicable regardless of the circumstances and results of their application. See C. Renner, Art. 21 Rome I. – G.-P. Calliess (ed.), *Rome Regulations: Commentary on the European Rules of the Conflict of Laws*. The Netherlands: Kluwer Law International BV 2011 (in later notes, ‘Calliess/Renner’), p. 320, paragraph 10; D. Bureau, H. Muir Watt, *Droit international privé/I*, 3rd edition. Paris: Presses Universitaires de France 2014, p. 535.

¹⁶ K. Thorn, Art. 6 EGBGB. – P. Bassenge, U. Diederichsen (eds.), *Palandt Bürgerliches Gesetzbuch*. Munich 2009 (in later notes, ‘Palandt/Thorn’), paragraph 5. See also R. Jankelevitš, Avalik kord ja imperatiivsed sätted rahvusvahelises eraõiguses (Public policy and imperative norms in private international law). – *Juridica* 2002/7, p. 481 (in Estonian).

¹⁷ Münchener Kommentar / von Hein (see Note 14), paragraph 118.

¹⁸ D. Bureau, H. Muir Watt (see Note 15), p. 533. D. Bureau and H. Muir Watt divide the application of the public policy into three phases – namely, examination, confrontation, and decision phases (*phases d’examen, de confrontation et de décision*), and the examination phase into preliminary and thorough examination phases.

¹⁹ See also Münchener Kommentar / von Hein (see Note 14), paragraph 118 ff.; G. Kegel, K. Schurig, *Internationales Privatrecht. Ein Studienbuch*. Munich: C. H. Beck 2004, section 16 II; P. Kaye (see Note 13), p. 347; Calliess/Renner (see Note 15), p. 320, paragraph 11.

²⁰ M. Voltz, Art. 6. – D. Heinrich (ed.), *J. Von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Einführungsgesetz zum BGB/IPR. Art 3-6 EGBGB (IPR – Allgemeiner Teil)*. Berlin: Sellier 2013 (in later notes, ‘Staudinger/Voltz’), paragraph 125.

way of example, the fact that a foreign law does not prescribe limits on interest rates would not justify its non-application on the grounds of public policy as long as the interest rate agreed upon in the case at hand would not be usurious according to the domestic public policy standard.^{*21} An inverse situation, wherein a foreign law in the abstract does not seem to contradict public policy yet its application produces an unfair result, could also be imaginable, although presumably only in highly exceptional cases.^{*22} What is more, in order to assess the outcome as a whole, one may have to take into consideration a wider legal context. Thus, even the absence of a legal provision in foreign law could lead to a result contradictory to the public policy of the forum.^{*23}

2.2. Manifest incompatibility with the public policy of the forum

2.2.1. Interpretative uncertainty as to the criterion ‘manifest’

The thorough examination phase brings us to the next expressly stated prerequisite to resorting to public policy – the manifest incompatibility of the result with the public policy of the forum. This second precondition, considered in what is called the confrontation phase, requires the court to find special grounds for upholding an objection to application of foreign law to the contract.^{*24}

The formulation used in Rome I does not itself give much assistance as to its application in a given case, although the appending of ‘manifest’ is supposed to impose a restrictive interpretation of the provision.^{*25} Indeed, when compared to an imaginable ‘simple’ incompatibility, its scope of application could theoretically be seen as somewhat more limited.^{*26} In practice, however, the provision does not provide any specific guidelines as to its application. In consequence, the interpretation of the criterion of manifest incompatibility remains subject to case-by-case analysis.

It is important to establish in this context that this precondition must be interpreted very restrictively if one is to ensure its high substantive threshold and to impose the condition that only serious breaches would justify intervention by way of this exceptional clause.^{*27} Illustrating this, the German Federal Court of Justice recently had reason to underscore the importance of this condition (referred to as *Offensichtlichkeitskriterium*) anew, explaining that the mere infringement of substantive law without a violation of the core principles of the state is not enough to justify recourse to public policy.^{*28} The European Court of Justice too has been strict on the matter, when interpreting the limits of a Member State’s right of recourse to public policy, judging that it can be ‘envisaged only where [the result of applying foreign law] would be at variance to an unacceptable degree with the legal order of the State [...] inasmuch as it infringes a fundamental principle’ and that ‘the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State [...] or of a right recognised as being fundamental within that legal order’.^{*29}

^{*21} See B. Audit. *Droit International Privé*, 4th edition. Paris 2006, paragraph 838; Calliess/Renner (see Note 15), p. 321, paragraph 11. See also M. Giuliano, P. Lagarde. Report on the Convention on the law applicable to contractual obligations. – OJ C 282, 31.10.1980, p. 1 ff., Article 16.

^{*22} D. Bureau, H. Muir Watt (see Note 15), p. 535.

^{*23} Palandt/Thorn (see Note 16), paragraph 47 ff.; Münchener Kommentar / von Hein (see Note 14), paragraph 120.

^{*24} M. Giuliano, P. Lagarde (see Note 21), Article 16.

^{*25} See, in this sense, the reasoning in the legislative proposal of the German Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuche). – BT-Drucks, 10/504, p. 42. See also Staudinger/Voltz (see Note 20), paragraph 128 ff.

^{*26} Nevertheless, in spite of it referring to **manifest** incompatibility, it has been called a largely declaratory statement. See R. Plender, M. Wilderspin. *The European Private International Law of Obligations*. Sweet & Maxwell 2009, paragraph 12-057; Calliess/Renner (see Note 15), p. 328, paragraph 36.

^{*27} *Ibid.*; P. Kaye (see Note 13), p. 348.

^{*28} Bundesgerichtshof, 28.01.2014. – III ZB 40/13, Rn. 3 und 4.

^{*29} Judgment of the Court of Justice of the European Communities of 28 March 2000, Case C-7/98, *D. Krombach v. A. Bamberski*, paragraph 37. – ECR 2000, I-1935, although given in the context of international civil procedure.

2.2.2. Problematics of determining the nature of the breach

The question of how to judge whether applying the *lex contractus* produces results manifestly incompatible with the forum's public policy is not an easy one to answer. It can be predicted, however, that, because the law of obligations is mainly of a dispositive nature, breaches of public policy should remain rather scarce in practice.^{*30} In this light, it can be argued that applying foreign law could not be considered contrary to public policy for instance in cases wherein domestic law would allow clauses in standard terms that produce similar results.^{*31} Or, by way of another example, a mere difference between statutes of limitations in two legal systems could not be considered intolerable and therefore manifestly in breach of public policy. In contrast, complete absence of a statute of limitations for certain claims or a limitation period so short that it would not allow a creditor to protect his interests in practice, or – inversely – so long that the debtor remains exposed to possible claims for an unreasonably long period could prompt recourse to the public policy exception.^{*32}

In determination of the manifest nature of the breach, 'test' questions such as whether the legislator of the forum country would ever consider regulating the case at hand in a similar way or whether such a regulation would be legal and compliant with constitutional rights in the *lex fori* might also prove helpful.^{*33} For instance, the execution of contracts involving corruption or deception of third parties, as well as contracts promoting sexual immorality, might be rejected by the forum for reason of breach of its core principles.^{*34} The same would apply for cases wherein the applicable law would lead to the expropriation of intellectual property rights when a licence contract for a trade mark is not renewed upon expiry of its term.^{*35}

As far as the point in time for evaluating the incompatibility requirement is concerned, the view is commonly held that the critical point when one is judging whether the result of applying a provision of the *lex contractus* is compatible with the public policy of the forum is, in principle, the date of the court decision^{*36}: 'Public policy is the policy of the day' (C.K. Allen).^{*37} An issue-by-issue approach, inherent to public policy, does, however, enable the particular circumstances to be taken into account, thereby allowing a deviation from this principle in, for example, the case of contracts with continuous obligations.^{*38}

3. Relativity of public policy

Interpreting the 'enshrined' prerequisites for employing recourse to public policy is challenging in its own right; however, the main difficulty in application of Article 21 of Rome I lies in its relativity. Because of the exceptional character of public policy and its reliance on the substantive outcome of applying foreign law to the case at hand, several interdependent factors are to be considered when one is deciding whether this provision should come into play (i.e., in the decision phase^{*39}). The public policy clause is indeed a provision that will never be complete. Therefore, in order to abrogate a conflict-of-law rule that designates a foreign law as the *lex contractus*, a certain connection between the specific case and the forum state is needed. This interdependency is best evidenced through analysis of the relative nature of public policy, which is most usefully discussed under three sub-categories, covering the temporal; material; and, most importantly, territorial relativity (proximity) of public policy.^{*40}

³⁰ See also Münchener Kommentar / Martiny (see Note 8), paragraph 2.

³¹ See, with this sense, also Münchener Kommentar / von Hein (see Note 14), paragraph 135.

³² Staudinger/Hausmann (see Note 8), paragraph 25.

³³ *Ibid.*, paragraph 26.

³⁴ Calliess/Renner (see Note 15), p. 323, paragraph 20, with further references.

³⁵ European Max Planck Group (editor: P. Torremans). *Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary*. Oxford University Press 2013, paragraph 3:902.C03.

³⁶ See, for example, G. Kegel, K. Schurig (see Note 19), section 16 V; Palandt/Thorn (see Note 16), paragraph 4; D. Bureau, H. Muir Watt (see Note 15), p. 543; Staudinger/Voltz (see Note 20), paragraph 144.

³⁷ C.K. Allen. *Law in the Making*, 7th edition. Oxford University Press 1964, p. 155.

³⁸ Staudinger/Voltz (see Note 20), paragraph 146.

³⁹ For the division of phases, see Note 15.

⁴⁰ Staudinger/Voltz (see Note 20), paragraph 155. In some doctrines, the concept of relativity has been divided into relativity in a narrower sense, proximity, and seriousness of the breach – see, for instance, A. Mills. The dimensions of public policy in private international law. – *Journal of Private International Law* 2008/4, p. 210 ff.

3.1. Territorial relativity or proximity

The forum proximity (*räumliche Relativität* or *Inlandsbeziehung*, as it is referred to in German legal writing) requirement follows already from the wording of Article 21, as the provision itself makes reference to the forum state. Therefore, only in cases wherein there is a sufficiently strong connection between the case and the forum's legal order can it be justified that the private international law rules and private autonomy shall be set aside in favour of domestic fundamental principles.

Article 21 does not, other than in mentioning the forum state, contain any reference as would aid in determining the degree of connection that is necessary for invoking the public policy exception.^{*41} In contrast, it is conceivable that the overriding mandatory provisions, as regulated in Article 9 of Rome I, include a reference to the necessary degree of the required connection in their proper wording, which would simplify their application.^{*42}

The various factors of help in determining the proximity of the forum state to the specific case include personal and factual circumstances, alongside the legal considerations. It seems justified to rely first and foremost on criteria that are, taken individually, used in private international law to designate the law applicable to contracts, such as the domicile or nationality^{*43} of the persons concerned. The existence of these factors should, in principle, suffice to establish *per se* the proximity requirement in a given case. Obviously, other important points of reference may either give weight to or, inversely, counterbalance those factors, with examples including the person's cultural and legal connections to the forum country or another country such as his language skills, registration of permanent address, place of birth, or company domicile.^{*44} In contrast, the jurisdiction of the court seised of the case is, by itself, insufficient to establish the proximity requirement. The latter could be envisaged only in exceptional cases of serious violations of fundamental rights or where internationally recognised principles are at stake.^{*45}

Consequently, in order to justify invoking public policy, an issue-by-issue approach is needed. Whether the existence of a particular criterion or several combined criteria is sufficient to establish the proximity requirement depends on the circumstances of the case and is to be determined *ad hoc*.^{*46} In addition, the material substance of the foreign legal norm involved and the seriousness of the breach are important factors in determination of the necessary degree of the connection – a blatant violation of domestic conceptions of justice requires a less intense link between the facts of the case and the forum state, and vice versa.^{*47} The question of establishing the sufficient-proximity requirement is even more multifaceted in the context of Europeanisation of the concept of public policy. Given that *ordre public* may also comprise principles derived from international sources, determination of the required substantive connection with the forum state may have to be treated differently when fundamental principles of cross-border origin are at stake. The latter apply, for example, in cases wherein the *lex contractus* is the law of a state other than an EU member state and a sufficiently strong connection with the EU forum state is not established. If European fundamental values constitute the public policy concern in the case, a substantive connection to the internal market should be considered sufficient for fulfilment of the proximity requirement.^{*48}

^{*41} A specific proximity requirement can, for instance, be found *expressis verbis* in the Belgian Code of Private International Law, according to which, in determination of any incompatibility with public policy, special consideration is given to the degree to which the situation is connected with the domestic legal order and to the significance of the consequences produced by the application of the foreign law. – Code de droit international privé du 16 juillet 2004 (Belgian Code of Private International Law of 16 July 2004), Article 21, II. English text available at <http://www.ipr.be/data/B.WbIPR%5BEN%5D.pdf> (most recently accessed on 25 March 2015).

^{*42} For in-depth analysis of the proximity requirement for overriding mandatory provisions, see R. Piir (see Note 7), paragraphs 3.1 and 3.2.2.

^{*43} Even though nationality as a determinant of the applicable law is losing its importance in the course of harmonisation of private international law in the EU, it could certainly be considered an important factor in establishment of the proximity requirement, given that the national has preserved connections to the state of his nationality.

^{*44} For more details, see Münchener Kommentar / von Hein (see Note 14), paragraph 186 ff.; Staudinger/Voltz (see Note 20), paragraph 158 ff.

^{*45} Calliess/Renner (see Note 15), p. 329, paragraph 38; Staudinger/Voltz (see Note 20), paragraph 155.

^{*46} Münchener Kommentar / von Hein (see Note 14), paragraph 190; G. Kegel, K. Schurig (see Note 19), section 16 II.

^{*47} A. Mills (see Note 40), p. 211; Palandt/Thorn (see Note 16), paragraph 6. For similar reasoning in German jurisprudence, see, for instance, this ruling of the German Federal Court of Justice, or *Bundesgerichtshof*: 4.06.1992. – BGHZ 118, 312/349.

^{*48} M. Stürner (see Note 10), p. 481; see also Münchener Kommentar / von Hein (see Note 14), paragraph 193; Staudinger/Voltz (see Note 20), paragraph 160.

3.2. Temporal and material relativity

The proximity requirement is supplemented by temporal and material considerations that are also intrinsic to public policy.

Temporal relativity (in German legal culture, *zeitliche Relativität*) means that in order for one to invoke public policy, the circumstances of the case must comprise a connection of a certain degree with the present time. In other words, it is necessary to evaluate the impact on the current legal and value system of applying foreign law to the case at hand.^{*49} Given that the concept of public policy is determined at the time of the court decision, it is also at this point that the evaluation of whether and to what extent the circumstances are connected to the present must be carried out. Under the interdependency discussed above, the stronger the impact of the result of applying foreign law on the present or future, the more likely public policy is to be invoked. In contrast, in cases wherein mainly past issues that have already been drawn to a conclusion are concerned, the public policy exception is to be applied only with due caution.^{*50}

In keeping with the material relativity (in German, *sachliche Relativität*) of public policy, the consideration of whether the undue result of applying foreign law is associated with the main issue of the dispute or, instead, only a preliminary matter is also to be taken into account.^{*51} In principle, as long as only preliminary matters are at issue, the application of the public policy exception should remain rather rare, as preliminary questions determine the existence or the single effects of legal relationships as opposed to establishing legal relationships in the forum state. Their material connection to the forum state is, therefore, considerably weaker, although, that having been said, it depends also on the type of preliminary question at hand and its significance for the whole case. It is quite imaginable, therefore, that even though the application of foreign law with regard to a preliminary question leads to an unacceptable result, the overall result of the dispute can be considered acceptable.^{*52}

4. Conclusions

It follows from the above analyses that, in consequence of imposing a high substantive threshold, Article 21 of Rome I is likely to come into play rather infrequently, as should be the case. Accordingly, it is submitted that the public policy clause continues to function more as a safety net for general conflict rules, also referred to as a relief valve^{*53} or even as an emergency brake before an *excursus* into the depths of a foreign law,^{*54} rather than a frequently invoked necessity. Nevertheless, on account of the continuous changes in society, this exceptional clause is expected to maintain its importance even within the domain of international contracts. It can therefore be predicted that the public policy exception will, no matter its very restrictive application criteria, retain its scope of application for matters of contractual obligations.

The public policy exception will remain essential particularly for reason of its relativity, allowing equitable results to be achieved even in cases unforeseen by legislators. The regulation of public policy in Rome I constitutes an abstract and flexible instrument, exactly as it should, in order to retain its applicability in exceptional cases, allowing for prevention of possible violations of domestic fundamental values and to respond adequately to a changing society. It is important to bear in mind, however, the exceptional nature of this clause, in order to guarantee that, in practice, it is 'only a fundamental clash of concepts [...that] can ignite the spark of public policy'.^{*55}

⁴⁹ Staudinger/Voltz (see Note 20), paragraph 165; Münchener Kommentar / von Hein (see Note 14), paragraph 202 ff.

⁵⁰ G. Kegel, K. Schurig (see Note 19), section 16 V.

⁵¹ Münchener Kommentar / von Hein (see Note 14), paragraph 191.

⁵² Staudinger/Voltz (see Note 20), paragraph 166.

⁵³ C. von Bar, P. Mankowski. *Internationales Privatrecht*, 1, 2nd edition. Munich: C. H. Beck 2003, p. 714.

⁵⁴ K. Siehr. *Internationales Privatrecht*. Heidelberg, Germany: C. F. Müller Verlag 2001, p. 490.

⁵⁵ M.S. Abdel Wahab. The law applicable to technology transfer contracts - Egypt. – *Yearbook of Private International Law* 2010/12, p. 467 DOI: <http://dx.doi.org/10.1515/9783866539488.457>.



Kärt Nemvalts
Mag. iur.
Adviser, Private Law Division
Ministry of Justice



Aleksei Kelli
Associate Professor
of Intellectual Property Law
University of Tartu

The Estonian Perspective on the Transposition of the Directive on Collective Management of Copyright and Related Rights

1. Introduction

The collective management of copyright and related rights in independent Estonia^{*1} has a relatively short history in comparison to many other European countries. The Estonian Copyright Act^{*2} contains a separate chapter on collective rights management (CRM).^{*3} Absence of state supervision of collective management organisations (CMOs) distinguishes Estonia from many other EU countries.^{*4} There has not been any substantial need to review this approach in the Estonian Copyright Act. The regulatory framework for CMOs' activities has functioned well; therefore, it has not been significantly amended.^{*5}

¹ Since it is not relevant in the context of this article, the authors do not address the collective rights management during the Soviet period. However, it should be mentioned that on 27 February 1973, the Soviet Union became a party to the Geneva version, of 1952, of the Universal Copyright Convention (UCC). The UCC entered effect in the USSR on 27 May 1973. In the same year (on 20 September), the All-Union Agency on Copyrights (Vsesoiuznoe agentstvo po avtorskim pravam, or VAAP) was established. This body managed copyrights on foreign works in the USSR and also the copyrights on Soviet works abroad. See M. Boguslavski. *Rahvusvahelise autoriõiguse kaitse NSV Liidus* (Protection of International Copyrights in the Soviet Union). Tallinn: Kirjastus "Eesti Raamat" 1976, pp. 16–17, 53–54.

² *Autoriõiguse seadus*. – RT I, 29.10.2014, 4 (in Estonian). English text available at <https://www.riigiteataja.ee/en/eli/531102014005/consolide> (most recently accessed on 20.2.2015).

³ Chapter IX of the Copyright Act.

⁴ This does not mean that CMOs are totally free in their activities from government interference and control. For instance, according to the Copyright Act, 'the Government of the Republic shall establish by a regulation the procedure for payment of remuneration to compensate for private use of audio-visual works and sound recordings of works and the list of storage media and recording devices' (§27 (14) 1)).

⁵ Actually, the whole Copyright Act currently in force has functioned relatively well, and we can acknowledge the high-quality work done by its drafters in the early 1990s. For further discussion of the history of the Estonian copyright system, see H. Pisuke. *Developments in Estonian Intellectual Property Law: Some Issues concerning Copyright and Related Rights*. – *Juridica International* 1999/IV, pp. 166–171.

Also, the Estonian collective management organisations can be characterised as stable and efficient organisations. The Estonian Authors' Society (Eesti Autorite Ühing, EAÜ)^{*6} was established on 8 October 1991 as the successor in title to a similar society established in Estonia in 1932. Some years later, in 1998, the Estonian Association of the Phonogram Producers (Eesti Fonogrammitootjate Ühing, EFÜ)^{*7} was established, with the Estonian Association of Audiovisual Authors (Eesti Audiovisuaalautorite Liit, EAAL)^{*8} following in 1999 and the Estonian Performers Association (Eesti Esitajate Liit, EEL)^{*9} in 2000. No major changes in the number of organisations have occurred during the time those organisations have represented the respective groups of rights-holders.

Only one minor incident took place, in 2001, when the Estonian Association of Music and Phonogram Producers (Eesti Muusika- ja Fonogrammitootjate Liit, EMFL) was established as an alternative organisation to represent producers of phonograms. This caused some confusion among stakeholders. However, the organisation was active for only a very short time and has been liquidated.

As a result, it can be said that both the regulation pertaining to collective rights management and CMOs themselves function quite well in Estonia and that there is no need for reviewing the underlying, basic principles of the CRM system. This does not mean that all possible changes are ruled out. For instance, a draft regulation is being prepared that introduces extended collective licensing.^{*10} This draft regulation is based on research conducted by Elise Vasamäe. Since her research results are presented in sufficient detail in her PhD thesis^{*11}, examining this proposed change is not our primary focus.

The main focus of this article is on the topical issues linked to transposition of the Collective Rights Management Directive^{*12} (or CRM Directive) into Estonian legislation. It is disputable whether the CRM Directive improves the Estonian copyright system. However, since Estonia is an EU member state, it has to transpose the directive. This complicated and demanding practical work is currently underway in the Estonian Ministry of Justice. The article has been written to share the Estonian experience with foreign experts who are facing similar challenges.

The transposition of the CRM Directive results in significant changes entailing at least some administrative burden on the state and stakeholders. In the following sections of the paper, the authors address the most challenging practical and theoretical issues, including cross-border rights management, competition and cultural issues, and the supervision of CMOs.

In dealing with the above-mentioned issues, the authors rely on traditional legal methods such as analytical and comparative approaches. Additional insights and contextual information related to CMOs' activities were obtained through communication with Kalev Rattus, from the Estonian Authors' Society.^{*13}

2. Cross-border rights management

One of the arguments for adoption of the CRM Directive was the liberalisation and clarification of issues of cross-border rights management. There is some confusion as to whether rights management constitutes a service that is subject to the Directive of the European Parliament and of the Council on Services in the Internal Market^{*14} (the Services Directive).

⁶ Additional information available at <http://www.eau.org/> (most recently accessed on 20.2.2015).

⁷ Additional information available at <http://www.efy.ee/> (most recently accessed on 20.2.2015).

⁸ Additional information available at <http://www.kinoliiit.ee/eaal> (most recently accessed on 20.2.2015).

⁹ Additional information available at <http://www.eel.ee/> (most recently accessed on 20.2.2015).

¹⁰ See Seletuskiri autoriõiguse ja autoriõigusega kaasnevate õiguste seaduse eelnõu juurde. Versioon: 21.7.2014 (Explanatory Memorandum to the Estonian draft Copyright and Related Rights Act, Version: 21.7.2014) (in Estonian). Available at <https://ajaveeb.just.ee/intellektuaalneomand/wp-content/uploads/2014/08/Autori%C3%B5iguse-seletuskiri-21-7-2014.pdf> (most recently accessed on 8.1.2015).

¹¹ E. Vasamäe. *Autoriõiguste ja autoriõigusega kaasnevate õiguste jätkusuutlik kollektiivne teostamine* ['Sustainable Collective Management of Copyright and Related Rights'], prepared under the supervision of Professor Heiki Pisuke. Tartu Ülikooli Kirjastus 2014, p. 113. Available at <http://dspace.utlib.ee/dspace/handle/10062/42432> (most recently accessed on 17.3.2015).

¹² Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Use in the Internal Market. – OJ L 84, 20.3.2014, pp. 72–98.

¹³ E-mail communications with Managing Director Kalev Rattus (9.4.2015; 13.4.2015; 14.4.2015).

¹⁴ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market (OJ L, 27.12.2006, 376/36).

Shortly after the adoption of the CRM Directive, the European Court of Justice (ECJ) rejected the European Commission's arguments for the applicability of the Services Directive to CMOs' activities (with the so-called OSA judgement).^{*15} The ECJ acknowledged that CMOs provide a 'service' within the meaning of the Services Directive but then excluded the applicability of the Services Directive to intellectual property by making a reference to Article 17 (11) of the Services Directive.^{*16} The ECJ further explained that legislation that grants a CMO a monopoly over the management of copyright in the territory of the Member State concerned should be considered suitable for protecting intellectual property rights, since it is liable to allow the effective management of those rights and effective supervision of their respect in the relevant territory. According to the ECJ, allowing users of works to obtain authorisation for the use of those works and pay the fees due through any collecting society established in the EU could lead to significant monitoring problems related to the use of those works and the payment of the fees due.^{*17} This judgement supports the approach of countries that have a high level of control over CMOs in their territory.^{*18} That control can be exercised through a set of requirements that collective rights management organisations are required to meet. Collective rights management organisations' activities are closely linked to their organisational form. Estonian copyright law does not provide legal definition of a CMO.^{*19} However, according to the Estonian Copyright Act, '[a] collective management organisation shall be a non-profit association which is founded, operates or is dissolved pursuant to the Non-profit Associations Act'.^{*20}

On the European Union level, the definition of a collective management organisation was initially provided in the cable and satellite directive.^{*21} At the same time, no compulsory organisational form was specified.^{*22} Therefore, any organisation, in any legal form, could operate as a collective management organisation. The CRM Directive sets forth more details regarding the definition and thereby narrows the category of organisations that can be considered to be collective management organisations.

Nevertheless, in comparison with what is specified in the Estonian Copyright Act, this definition is still broader. According to the legal literature, the local requirements being stricter obliges the EU Member State in question to stipulate such a broad definition in its relevant legislation as well. It is not in conformity with the Services Directive to require a certain legal form for collective management organisations in a Member State.^{*23} The current regulation, wherein strict requirement of a specific legal form exists, could lead to a situation in which collective management organisations established in other Member States that take different legal forms could not provide services. This might have been the case before the CRM Directive was adopted (local requirements in Member States contradicting the Services Directive).^{*24}

¹⁵ Case C-351/12, *Ochranný svaz autorský pro práva k dílům hudebním o.s. (OSA) vs Léčebné lázně Mariánské Lázně a.s.*, paragraph 65. Available at <http://curia.europa.eu/juris/documents.jsf?num=C-351/12> (most recently accessed on 5.3.2015).

¹⁶ Article 16 ('Freedom to provide services') shall not apply to copyright, neighbouring rights, and industrial property rights, according to Article 17 of the Services Directive.

¹⁷ Case C-351/12, paragraphs 63, 64, 72, and 77.

¹⁸ For instance, the Latvian Copyright Law foresees that 'only one organisation for collective management of economic rights without an authorisation from another organisation for collective management shall perform collective management of economic rights in relation to public lending, as well as reproduction and reprographic reproduction for personal use' (§63 (8)). English text available at http://www.genccs.eu/uploads/european_patent_trademark_registration/latvia/Copyright%20Law%20Latvia.pdf (most recently accessed on 24.3.2015). The Polish Copyright Law gives specific instructions for a case wherein, in a given field of exploitation, there is more than one collective management organisation (§107). English text is available at http://www.wipo.int/wipolex/en/text.jsp?file_id=129378 (most recently accessed on 24.3.2015). The Czech Copyright Law's Section 97 (2) requires that the 'collective rights manager [...] only be a legal person with its seat in the Czech Republic and associating, directly or through a third party, rightholders whom he represents in collective rights management'. Also, pursuant to Section 98, there should be authorisation obtained from the Ministry of Culture to execute collective rights management. English text of this law is available at http://www.wipo.int/wipolex/en/text.jsp?file_id=137175 (most recently accessed on 24.3.2015).

¹⁹ See also the Czech Copyright Law's Section 97 (3), which stipulates: 'Collective rights management is not a business enterprise'. English text available at http://www.wipo.int/wipolex/en/text.jsp?file_id=137175 (most recently accessed on 24.3.2015). In Hungary, the collective management of rights is subject to registration, pursuant to Section 86 (1) of the Hungarian Copyright Act. English text is available at http://www.hipo.gov.hu/English/jogforras/hungarian_copyright_act.pdf (most recently accessed on 24.3.2015).

²⁰ Copyright Act, §76 (2).

²¹ Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission (OJ L, 6.10.1993, 248).

²² Article 1 (4) of the cable and satellite directive (Directive 93/83/EEC).

²³ E. Vasamäe (see Note 12), pp. 113, 146.

²⁴ Under Article 16 (1) of the Services Directive, 'Member States shall respect the right of providers to provide services in a Member State other than that in which they are established'. Article 17 excludes certain fields from the scope of application of Article 16,

The authors of this article are of the opinion that conflict between a local legal-form requirement and Article 16 of the Services Directive is not evident in light of the recent CRM Directive. Pursuant to the CRM Directive, a collective management organisation 'means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one right holder, for the collective benefit of those right holders, as its sole or main purpose, and which fulfils one or both of the following criteria: (i) it is owned or controlled by its members; (ii) it is organised on a not-for-profit basis; [...]'. Recital 14 facilitates interpretation by clarifying that the CRM Directive does not require collective management organisations to adopt a specific legal form. In practice, these organisations operate in various legal forms in different Member States, such as associations, co-operatives, or limited-liability companies and in some exceptional cases as foundations^{*25}. The practice referred to does not violate the provisions of the CRM Directive. Nothing prevents a Member State from stipulating its own formalities for establishment of a collective management organisation. According to the CRM Directive, rights-holders have the right to authorise a collective management organisation of their choice to manage the rights, categories of rights or types of works, and other subject matter of their choice, for the territories of their choice, irrespective of the Member State of nationality, residence, or establishment of either the collective management organisation or the rights-holder.^{*26} With regard to the freedoms established in the Treaty on the Functioning of the European Union (TFEU)^{*27}, collective management of copyright and related rights should entail a rights-holder being able freely to choose a collective management organisation for the management of his rights.^{*28} As a result, Estonian authors are entitled to authorise, for instance, a French CMO to manage their rights in the whole EU (including Estonia). The legal form of the French CMO is irrelevant.

This approach is supported by the initial proposal of the CRM Directive.^{*29} Recital 3 of the proposal clarifies the issue of applicability of the Services Directive by asserting that collective management organisations as service providers should comply with the national requirements pursuant to the directive. The recital further explains that 'collecting societies should be free to provide their services across borders, to represent rightholders resident or established in other Member States or grant licences to users resident or established in other Member States'.^{*30} The final version of the CRM Directive, however, does not make similar reference to the Services Directive. Still it can be asserted that the Services Directive is applicable since Recital 8 of the CRM Directive refers to Article 62 of the TFEU, which deals with a sector offering services across the European Union as one of its legal bases.

A practical question to be answered in the drafting of the relevant provisions for the Estonian Copyright Act is whether the CRM Directive obliges Estonia to follow the wording of said directive in providing a requirement of a specific legal form for collective management organisations or whether it instead may be possible or even preferable to retain the existing definition for CMOs established in Estonia. The authors of this article support the adoption of a broad definition as provided in the CRM Directive. At the moment, the authors prefer to rely on the wording put forward by Vasamäe in her PhD thesis: 'A collective management organisation established in any legal form in another member state of the EU or a state that is a contracting party to the EEA Agreement and that conforms to the criteria for a collective management organisation

including copyright and neighbouring rights (Article 17 (11)). It has been disputed whether collective management services too are included in the scope of derogation in Article 17 (11) or not. If collective management is not exempted from the scope of Article 16 of the Services Directive, no restrictions could be introduced to entering the market of another Member State for provision of collective management services. See J. Drexel *et al.* Comments of the Max Planck Institute for Intellectual Property and Competition Law on the proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market COM (2012)372 (Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 13-04), pp. 17–18. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208971 (most recently accessed on 23.3.2015).

²⁵ Pursuant to §1 of the Estonian Foundations Act. Sihtasutuste seadus (Foundations Act). – RT I 1995, 92, 1604; RT I, 29.6.2014, 109 (in Estonian). English text available at <https://www.riigiteataja.ee/en/eli/529012015010/consolide> (most recently accessed on 20.2.2015).

²⁶ Article 5 (2) of the CRM Directive.

²⁷ Consolidated version of the Treaty on the Functioning of the European Union (OJ C 115/47). Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT> (most recently accessed on 9.4.2015).

²⁸ Recital 19 of the CRM Directive.

²⁹ See Proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market. Available at http://ec.europa.eu/internal_market/copyright/docs/management/com-2012-3722_en.pdf (most recently accessed on 5.3.2015).

³⁰ Recital 3 of the proposal for a CRM directive.

in Estonia shall also be deemed to be a collective management organisation that is entitled to manage the rights of holders of rights collectively also in cases of compulsory and extended collective management'.^{*31} *This working definition could form a basis for a draft law.*

3. Competition policy and cultural diversity

The applicability of competition law to the activities of collective management organisations is a complex legal issue. According to some legal experts, the conventional wisdom is that competitive markets serve the interests of customers and consumers better than monopolies do. Whether, however, this also holds true for collective management organisations is highly disputable.^{*32}

The CRM Directive makes it clear that CMOs are not exempt from the competition rules provided by the TFEU.^{*33} This means that CMOs' activities should comply with the antitrust rules stipulated in Article 101 of the TFEU and collective management organisations should not abuse their dominant position (TFEU, Article 102)^{*34}. This has also been consistently held in the European case law.^{*35}

Since there are numerous collective rights management organisations in the EU, the European Commission has scrutinised the activities of CMOs in consequence of complaints pertaining to their transparency, governance, and the distribution of royalties collected on behalf of rights-holders.^{*36}

This approach is reaffirmed by Commission Recommendation 2005/737/EC, on collective rights management for music services on the Internet.^{*37} The European Commission confirmed the basic principles of this Recommendation document in the 2008 CISAC^{*38} decision.^{*39} On 16 July 2008, the European Commission adopted a decision prohibiting 24 European collective management organisations from restricting competition with respect to the conditions for the management and licensing of authors' public performance rights in musical works. The collective management organisations were found to have restricted the services they offer for authors and commercial users outside their domestic territory. The European Commission took the view that a series of measures taken, including membership and territorial restrictions incorporated into the reciprocal representation agreements concluded between the collective management organisations, constituted infringements of Article 81^{*40} of the EC Treaty and Article 53 of the EEA Agreement.^{*41} The International Confederation of Societies of Authors and Composers (CISAC) and the European societies launched an appeal against the Commission's decision on the alleged co-ordination of territorial restrictions. To show its support to the appealing European societies, CISAC also intervened on behalf of the societies in their own proceedings.^{*42} In a series of judgements dated 12 April 2013, the Court partly

³¹ E. Vasamäe (see Note 12), p. 254.

³² J. Drexler, *Collecting Societies and Competition Law*, 2007, p. 1. Available at http://www.ip.mpg.de/shared/data/pdf/drexler_-_cmros_and_competition.pdf (most recently accessed on 18.3.2015). See also L. Guibault, S. van Gompel, *Collective management in the European Union* (Amsterdam Law School Legal Studies Research Paper No. 2012-08, Institute for Information Law Research Paper No. 2012-08), p. 1. Available at <http://ssrn.com/abstract=1984015> (most recently accessed on 22.3.2015).

³³ Recital 11 of the CRM Directive emphasises the need for compliance with the competition rules.

³⁴ See also L. Guibault, S. van Gompel (see Note 33), pp. 4–5.

³⁵ See, for instance, Case C-351/12, Case C-7/82, and Case C-127/73.

³⁶ C.B. Craber, *Collective rights management, competition policy and cultural diversity: EU lawmaking at a crossroads* (i-call Working Paper No. 2014/04, October 2012). Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2161763 (most recently accessed on 18.3.2015).

³⁷ Commission Recommendation 2005/737/EC of 18 May 2005 on the collective cross-border management of copyright and related rights for legitimate online music services (OJ L, 21.10.2005, 276).

³⁸ Further information on CISAC, the International Confederation of Societies of Authors and Composers, is available at <http://www.cisac.org/> (most recently accessed on 22.3.2015).

³⁹ Commission Decision COMP/C2/38.698 – CISAC, of 16 July 2008, 'relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement', C(2008) 3435 final. See also C.B. Craber (see Note 37), pp. 8–9; L. Guibault, S. van Gompel (see Note 33), pp. 2–3.

⁴⁰ Now Article 101 of the TFEU.

⁴¹ A. Andries, B. Julien-Malvy, *The CISAC decision – creating competition between collecting societies for music rights*, *Competition Policy Newsletter* 2008/3, p. 53. Available at http://ec.europa.eu/competition/publications/cpn/2008_3_53.pdf (most recently accessed on 18.3.2015).

⁴² Case T-442/08, *CISAC v. European Commission*. These judgements were given in parallel cases brought by most of the collection societies in the EU, and by the International Confederation of Societies of Authors and Composers. See, for instance, the judgement in case T-416/08, *Eesti Autorite Ühing v. European Commission*.

annulled the referred European Commission decision. However, the majority of the Commission's arguments in favour of establishing a new cross-border licensing system were not actually rejected by the Court.

The central issue here has to do with the potential impact of this decision in the context of transposition of the CRM Directive. It was definitely relevant in the formulation of the basic principles underlying the CRM Directive and for collective management organisations' activities before the adoption of the directive. Since the key findings stated in the decision have been incorporated into the text of the CRM Directive, the implementation of the CRM Directive directly addresses the competition-policy issues surrounding CMOs' activities.

The most relevant norms for licensing rights in the digital arena and competition policy are found in the CRM Directive's Title III, 'Multi-territorial licensing of online rights in musical works by collective management organisations'. According to the explanatory memorandum on the proposal of the CRM Directive, one of the aims of the new regulation is to change copyright licensing schemes on account of the development of a single market for cultural content online, 'notably in the licensing of the rights of authors in musical works as online music service providers face difficulties in acquiring licences with an aggregated repertoire for the territory of more than one Member State'.⁴³ In the CRM Directive, the contradiction between the principle of territoriality of intellectual property rights (IPRs) and the principle of an efficient internal market⁴⁴ is overcome by means of the concept of multi-territorial licensing, and it follows the licensing policy proposed by the 2005 Commission Recommendation.⁴⁵ Diverging from the contested CISAC model, this new approach does not allow Member States to restrict the allocation of multi-territory licences for musical works, referring to the territoriality principle. On the one hand, Title III of the CRM Directive is aimed at enhancing conditions to make them conducive to the most effective licensing practices of CMOs in an increasingly cross-border context. On the other hand, the cultural diversity factor and repertoires of smaller countries such as Estonia are also kept in mind.

Pursuant to the CRM Directive⁴⁶, Member States shall ensure that any representation agreement between collective management organisations whereby a collective management organisation mandates another collective management organisation to grant multi-territorial licences for the online rights in musical works in its own music repertoire is of a non-exclusive nature. It specifies further that the collective management organisation so mandated shall manage those online rights on a non-discriminatory basis. Recital 44 of the directive further explains that exclusivity in agreements on multi-territorial licences would restrict the choices available to users seeking multi-territorial licences and also restrict the choices available to collective management organisations seeking administration services for their repertoire on a multi-territorial basis. Currently, the Estonian Copyright Act does not restrict the freedom of contract such that reciprocal agreements among collective rights management organisations should be only of a non-exclusive nature. In consequence, the Estonian Copyright law has to be amended accordingly. As a result, all representation agreements between collective management organisations providing for multi-territorial licensing should be concluded on a non-exclusive basis.

In this context, it is also appropriate to make reference to the Estonian Competition Act⁴⁷, which contains specific regulation on refusal to grant access to an essential facility.⁴⁸ The essential-facilities doctrine

⁴³ See the proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, p. 3.

⁴⁴ See, for instance, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A single market for 21st century Europe (COM(2007) 724 final), pp. 3–4. Available at <http://aei.pitt.edu/45895/> (most recently accessed on 21.4.2015). The importance of an effective internal market has been pointed out in most documents issued by the European Union dealing with single-market issues. This is a starting point also for planned initiatives in the EU to have a functioning digital single market. Internal market issues have been listed as a priority field on the current European Commission Web site. Available at http://ec.europa.eu/index_en.htm#priorities (most recently accessed on 21.4.2015). See also, for instance, the background information for the Digital Single Market Strategy for publication in May 2015. Available at http://europa.eu/rapid/press-release_IP-15-4653_en.htm (most recently accessed on 21.4.2015).

⁴⁵ Recital 39 of the directive. See also E. Vasamäe (see Note 12), p. 70.

⁴⁶ Article 29 of the CRM Directive.

⁴⁷ Konkurentsiseadus. – RT I 2001, 56, 332; RT I, 30.12.2014, 2 (in Estonian). English text available at <https://www.riigiteataja.ee/en/eli/519012015013/consolide> (most recently accessed on 22.3.2015).

⁴⁸ According to the Competition Act, '[a]n undertaking in control of an essential facility is required to permit other undertakings to gain access to the network, infrastructure or other essential facility under reasonable and non-discriminatory conditions for the purposes of the supply or sale of goods' (§18 (1)).

is one framework for conceptualising a refusal to deal, including a refusal to license, as an abuse of market dominance.^{*49} The authors maintain that the provisions of the Estonian Competition Act can be considered broad enough to cover refusal to license an essential IPR also, as this refers to networks, infrastructure, and 'other essential facilities'. Since Recital 11 of the CRM Directive leaves the competition law intact, this regulation represents an additional possibility for weighing the appropriateness of the activities of a CMO.^{*50}

In addition to competition-policy issues, we have cultural diversity considerations. The TFEU^{*51} requires the European Union to 'contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore'. Recital 3 of the CRM Directive emphasises the function of CMOs in supporting cultural diversity: 'Collective management organisations play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public.' The CRM Directive articulates a framework to assure the dissemination of small repertoires and thereby enhance cultural diversity.^{*52} Collective management organisations have a right to require another CMO to represent them in multi-territorial licensing, which facilitates the licensing process and makes all repertoires accessible to the market for multi-territorial licensing. The framework described reduces the number of transactions that online service providers otherwise need perform to offer services. This should facilitate the development of new online services and lower the price that consumers have to pay.

Collective management organisations that are not willing or not able to grant multi-territorial licences directly in their own music repertoire should be encouraged on this basis to mandate other collective management organisations to manage their repertoire in a non-discriminatory manner.^{*53}

The CRM Directive has additional safeguard clauses for small CMOs and small repertoires. According to the directive, the CMO subject to the request should manage the 'new' repertoire on conditions identical to those it applies to the management of its own repertoire and the requested CMO should include the represented repertoire in all offers it addresses to online service providers.^{*54}

Despite some criticism in legal literature^{*55}, the authors of this article rather support those arguments that conceptualise the directive as a positive development.^{*56} It is justified for activities of organisations constituting *de facto* monopolies such as collective rights management organisations to be subject to some restrictions. The authors are of the opinion that the CRM Directive has struck a fair balance in the context of cross-border licensing of musical works.

4. Supervision of CMOs

The issue of supervision of collective management organisations is one of the most challenging topics in the context of the transposition of the CRM Directive into Estonian legislation. According to articles 36–38 of the CRM Directive, a Member State should guarantee that the compliance of CMOs established in their

⁴⁹ For further discussion, see M. Hagström, R. Rüütel. *Konkurentsioigus ja praktika* (Competition Law and Practices). – Äripäev 2010, pp. 88–102; J. Drexel et al. *Copyright, competition and development: Report by the Max Planck Institute for Intellectual Property and Competition Law*, Munich. 2013, pp. 69, 92, 260. Available at http://www.wipo.int/export/sites/www/ip-competition/en/studies/copyright_competition_development.pdf (most recently accessed on 17.3.2015).

⁵⁰ In Estonia, one case came before the Competition Board in 2009. After receiving a complaint from local users of works on the licence-fee structure, the Estonian competition agency tested the appropriateness of royalty rates of CMOs. Finally it was decided that the differentiated fees did not violate competition law. Decision available at http://www.konkurentsiamet.ee/public/MT_Eesti_klubide_Liit_Eesti_Fonogrammitootjate_hing_Eesti_Autorite_hing_Eesti_Esitajate_Liit_otsus_28_10_2009.pdf (most recently accessed on 15.3.2015).

⁵¹ TFEU, Article 167 (1).

⁵² Article 30 of the CRM Directive.

⁵³ Recital 44 of the CRM Directive.

⁵⁴ The CRM Directive's Article 30 (3) and (4).

⁵⁵ According to some critics, the implementation of the CRM Directive might lead to a lack of cultural diversity, since managing the main (popular) repertoire benefits a CMO more and thereby the niche repertoire could be left aside. It has also been pointed out that CMOs fulfil important non-economic functions and that leaving smaller CMOs facing the competition might lead to disappearance of such CMOs as manage mainly small (niche) repertoires. See J. Drexel. *Competition in the field of collective management: Preferring 'creative competition' to allocative efficiency in European copyright law.* – P. Torremans (ed.). *A Handbook of Contemporary Research*. Edward Elgar Publishing 2007, p. 272. See also C.B. Craber (see Note 37), p. 11.

⁵⁶ E. Vasamäe (see Note 12), p. 45.

territory with the provisions of the CRM Directive is monitored by competent authorities designated as having that responsibility. There has been no state supervision system established so far in Estonia.^{*57} Therefore, the implementation of the CRM Directive requires radical changes of the Estonian copyright law in this respect. A strategic decision should be made with regard to which authority in Estonia is the one to be notified of activities or circumstances that allegedly violate the provisions of the CRM Directive transposed into Estonian law.^{*58}

In general terms, Estonia has three main options with respect to the supervising institution. Firstly, Estonia could rely on the existing copyright committee, which, *inter alia*, resolves disputes related to copyright and neighbouring rights by way of conciliation of the parties.^{*59} The committee does not have any power to impose sanctions, and it consists of representatives of CMOs and of institutions that would initiate the supervision procedure. On account of these conditions, the committee is not suitable for the implementation of Article 36 of the CRM Directive.

With the second option, the supervisory tasks could be shifted to the Patent Board of Estonia, which is a government agency under the Ministry of Justice. This, however, requires structural changes to the Patent Board and considerable investments in capacity-building of its personnel with respect to copyright, related rights, and collective management thereof. The Ministry of Justice as a government entity responsible for intellectual property issues, including copyright and related rights^{*60}, could be considered as a third option. Although no official decisions have been made yet, the authors of the article consider the Ministry of Justice to be the appropriate institution for fulfilling the tasks of the competent authority since it already possesses the required competence.

In addition to designation of an institution supervising CMOs, it is necessary to choose a suitable form of control. The CRM Directive provides that competent authorities should have the power to impose appropriate sanctions or take appropriate measures where the provisions of national law adopted in implementation of the CRM Directive have not been complied with.^{*61} The CRM Directive does not restrict the choice of Member States as to competent authorities, nor with regard to the nature of the control over collective management organisations.^{*62} The CRM Directive does, however, require sanctions and other measures to be 'effective, proportionate and dissuasive'.^{*63}

These limitations notwithstanding, Estonia still has some room for manoeuvring. One way forward could be to supervise CMOs' activities within the legal framework established by the General Part of the Economic Activities Code.^{*64} The General Part of the Economic Activities Code enumerates two kinds of control measures: 1) *ex ante* (the entity should have an activity licence prior to commencement of its activities)^{*65} and 2) *ex post* (the entity is required to submit a notice to the registrar upon commencement of its activities).^{*66} A third option is not to apply any kind of *ex-ante* or *ex-post* supervision measures to

⁵⁷ Estonia is one of the very few countries where such a supervisory system has not been introduced yet. Many countries already have such measures in force. Examples are Latvia (the Latvian Copyright Law's Section 67 stipulates that collective management organisations should have a permit and that the permits for the administration of economic rights on a collective basis shall be issued and cancelled by the Ministry of Culture), Hungary (where the activities of collective management organisations are linked to prior registration of the organisations and their activities are monitored and supervised by the Hungarian Intellectual Property Office, pursuant to Sections 91–92P of the Hungarian Copyright Act), and the Czech Republic (pursuant to the relevant copyright law's Sections 98–99, there should be authorisation obtained from the Ministry of Culture to execute activities of collective management, and the Ministry of Culture also supervises the activities after giving authorisation).

⁵⁸ See Article 36 (2) of the CRM Directive.

⁵⁹ The Copyright Act's §87 (1) 4).

⁶⁰ Vabariigi Valitsuse seadus (Government of the Republic Act). – RT I 1995, 94, 1628; RT I, 5.11.2014, 2. Unofficial translation available at <https://www.riigiteataja.ee/en/eli/517112014001/consolide> (most recently accessed on 22.3.2015). Section 59 (1) of the Government of the Republic Act stipulates that the sphere of governance of the Ministry of Justice encompasses also co-ordination of the field of intellectual property.

⁶¹ Article 36 (3) of the CRM Directive.

⁶² Recital 50 of the CRM Directive.

⁶³ Article 36 of the CRM Directive.

⁶⁴ Majandustegevuse seadustiku üldosa seadus. – RT I, 25.3.2011, 1; RT I, 29.6.2014, 1 (in Estonian). English text available at <https://www.riigiteataja.ee/en/eli/522082014004/consolide> (most recently accessed on 22.3.2015). For the purpose of clarification, it should be mentioned that this code transposes the Services Directive into Estonian legislation. See also Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market. – ELT L 376, 27.12.2006, pp. 36–68.

⁶⁵ Sections 16–28 of the General Part of the Economic Activities Code Act.

⁶⁶ Sections 14–15 of the General Part of the Economic Activities Code Act.

CMOs. Instead, it could be stipulated that the competent authority (most likely the Ministry of Justice) is obliged to act when a CMO violates requirements transposed from the CRM Directive into the Copyright Act (general supervision).

Under this approach, CMOs should follow the requirements set forth in the Copyright Act. However, they are not required to submit a notice of their activities and do not need to obtain an activity licence. In the event that an interested party (e.g., a CMO member or a user) considers a CMO's activities to violate the Copyright Act, said interested party can notify a local competent authority and relevant proceedings based mainly on the Copyright Act shall follow.

The authors prefer a differentiated approach that considers the nature of a CMO. *Ex-ante* measures of any sort requiring prior authorisation should be deemed non-proportional and be excluded in all cases.

Collective management organisations granting multi-territorial licences to online rights in musical works^{*67} should be subject to *ex-post* supervision measures and submit the relevant data to the register of economic activities.^{*68} A higher supervision standard is justified by the fact that CMOs issuing multi-territorial licences have considerable market power. In addition, if the competent authority has prior information on the scale of CMOs' activities, the supervision task of the state can be fulfilled more efficiently. All other CMOs should be subject to general supervision. This means that they do not have to submit any data similarly to CMOs granting multi-territorial licences (an *ex-post* measure). The supervising institution shall investigate and impose sanctions if necessary only after receiving relevant notification from an interested party.

When one is establishing a regulatory framework to supervise CMOs' activities, it is necessary to consider the General Part of the Economic Activities Code, the Law Enforcement Act^{*69}, and the Substitutive Enforcement and Penalty Payment Act^{*70}. A conceptual issue to be decided upon is whether the provisions regulating supervision are to be in the Copyright Act or distributed among several acts. It is necessary to bear in mind that the General Part of the Economic Activities Code, the Law Enforcement Act, and the Substitutive Enforcement and Penalty Payment Act stipulate the general framework for supervisory activities in Estonia and that the specific provisions should be stated in a law regulating the particular field of law of relevance. This approach is supported by the wording and logic of the General Part of the Economic Activities Code, which stipulates that 'in the cases provided by law an undertaking is required to submit a notice to the registrar on commencement of economic activities in a relevant area of activity prior to commencement of economic activities' (emphasis mine)^{*71}. The collective management of copyright and related rights is regulated in the Copyright Act. Therefore, all specific norms regarding supervisory issues should be included in that act as well. The inclusion of the relevant provisions in the Copyright Act could facilitate legal clarity and awareness among the stakeholders.

5. Conclusions

The adoption of the CRM Directive and its transposition create several challenges. Estonia has to identify the most appropriate way of transposing the directive. The problems can be divided into the following categories: 1) the legal form of collective management organisations, 2) compatibility of CMOs' activities with competition regulations (with respect to abuse of dominant position), 3) cultural diversity, and 4) supervision of collective management organisations.

The Estonian Copyright Act requires a certain legal form (that of a not-for-profit association) for establishment of a CMO. After analysis of the final text of the CRM Directive in light of the European Court of Justice case law, it can be argued that Estonia could actually retain its definition of collective management organisations in its copyright law. Nevertheless, it might be reasonable to broaden the definition in

⁶⁷ Title III of the CRM Directive.

⁶⁸ For additional information on the register of economic activities, see <https://mtr.mkm.ee/> (most recently accessed on 22.3.2015).

⁶⁹ Korrakaitseadus. – RT I, 31.12.2014, 28 (in Estonian). English text available at <https://www.riigiteataja.ee/en/eli/528012015003/consolide> (most recently accessed on 23.3.2015).

⁷⁰ Asendustäitmise ja sunniraha seadus. – RT I 2001, 50, 283; RT I, 12.7.2014, 1 (in Estonian). English text available at <https://www.riigiteataja.ee/en/eli/522012015001/consolide> (most recently accessed on 22.3.2015).

⁷¹ Section 14 (1) of the General Part of the Economic Activities Code.

Estonian legislation, following the wording of the directive and guaranteeing the most effective implementation of relevant EU norms.

A collective management organisation's activities should not constitute abuse of dominant position. Since Estonia has a sufficient regulatory framework to address this issue, no changes are required at the moment in this quarter.

Although the proposal of the CRM Directive published in 2012 brought some criticism associated with its impact on cultural diversity, the final version has resolved some initially problematic questions. For instance, there can be found balancing norms for small CMOs and small, niche repertoires guaranteeing the equal treatment of such repertoires while represented by other CMOs. The directive also obliges CMOs to include the represented repertoire in all online service offers.

Establishment of supervision of collective management organisations is one of the most complicated issues for Estonia to be addressed during the transposition process. There has been no state supervision system established so far in Estonia. Therefore, the transposition of the CRM Directive requires important changes to the Estonian copyright system. Firstly, there is a need to designate an appropriate institution to supervise CMOs' activities. Secondly, a suitable form of control has to be chosen. The authors are of the opinion that the appropriate supervising institution could be the Ministry of Justice as government body responsible for the field of intellectual property. Considering various forms of control, in turn, the authors of this article prefer *ex-post* control measures for CMOs granting multi-territorial licences. For all other CMOs, general supervision is sufficient.

The general framework for supervision is provided by the General Part of the Economic Activities Code, the Law Enforcement Act, and the Substitutive Enforcement and Penalty Payment Act. The specific provisions pertaining to supervision of CMOs should be added to the Copyright Act. This is the approach that would enhance the legal clarity the most.



Dina Sõritsa

Doctoral student
University of Tartu

The Health-care Provider's Civil Liability in Cases of Wrongful Life: An Estonian Perspective

1. Introduction

Most parents expect their children to be free from any ailments and, accordingly, seek health-care assistance in order to eliminate risks to the health of their future child, especially where there exists a hereditary illness or the risk of the child being born with a disability.^{*1} In their choices, the parents are dependent on the information they receive from the health-care provider. However, it should be clear that not every birth of a disabled child can or should be followed by the health-care provider's obligation to compensate for the damages.

Unwanted pregnancy and the birth of a disabled child give rise to several claims that have been recognised in the case law. Perhaps the most controversial is the child's claim of wrongful life, wherein the child alleges the existence of damages through having been born disabled for reason of negligence by the health-care provider in failing to diagnose or warn about the disability or risk of disability.^{*2} Even if the presence of negligent conduct of the health-care provider is recognised, there are several obstacles to establishing the harming of an interest and establishing of causation, along with the existence and the extent of damage.

Courts in Europe do not generally satisfy claims of wrongful life.^{*3} The situation is similar in the US, except in some jurisdictions that allow these claims.^{*4} In Estonia, case law addressing cases of wrongful life (as well as claims made by parents that arise from unwanted pregnancy and the birth of a disabled child) is completely absent, which makes theoretical analysis of the possible outcome under the Estonian Law of Obligations Act^{*5} even more intriguing. This article examines various law systems' arguments as to the

¹ J.K. Mason *et al.* Law and Medical Ethics, 8th edition. Oxford University Press 2011, p. 338.

² Because the claims of wrongful life do not involve the disabled child's parents' claims, the latter are not analysed in the present article. Parents' claims arising from an unwanted pregnancy or the birth of a disabled child are regarded, respectively, as claims of wrongful conception (e.g., *Lovelace Medical Center v. Mendez*, 805 P.2d 603 (N.M. 1991)) and wrongful birth (e.g., *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978)). For discussion of wrongful conception and wrongful birth, see, for example, K. Wevers. Prenatal torts and pre-implantation genetic diagnosis. – *Harvard Journal of Law & Technology* 24 (2010) /1 (Fall).

³ Nevertheless, there have been successful wrongful-life claims, as in the Dutch case of Kelly Molenaar (Hoge Raad, 18.3.2005, Rechtspraak van de Week 2005, 42) and the French case of Nicolas Perruche (Cass. Ass. Plén., 17.11.2000, JCP G2000, II-10438, 2309).

⁴ In the US, claims of wrongful life are allowed in California (e.g., *Turpin v. Sortini*, 643 P.2d 954, 966 (Cal. 1982), New Jersey (e.g., *Moscatello v. Univ. of Med. and Dentistry of N. J.*, 776 A.2d 874, 881 N.J. Super. Ct. App. Div. 2001), and Washington (e.g., *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 495 Wash. 1983).

⁵ The Law of Obligations Act is available in English via <http://www.legaltext.ee/>.

possibility of a child's making of such a claim and surrounding its resolution, with a focus on the existing solutions offered by case law and literature in the US (as an example of solutions under common law) and Germany (whose legal order has greatly affected the development of Estonian civil law).

2. The damage suffered by the child – the non-existence paradox

The LOA's §127 (1) stipulates that the purpose of compensation for damage is to place the aggrieved person in a situation as near as possible to that in which that person would have been if the circumstances that form the basis for the compensation obligation had not arisen. In wrongful-life cases, were it not for the defendant's negligence, the infant plaintiff would never have existed. The central question here is whether the child has suffered any legally cognisable harm by being brought into existence with a congenital disease or trait. In Germany, the state constitution prohibits classifying the existence of a child as damage.^{*6} Most of the competent US courts have stated that the child has not suffered a legally cognisable injury.^{*7}

The so-called non-existence paradox is one of the main reasons to deny such a claim under the rubric of wrongful life.^{*8} As the US courts have stated, the law is not equipped to make such a comparison and there is no rational way to measure non-existence.^{*9} It is impossible to restore someone to the state of pre-existence, and there is no known comparator for assessment of the difference between the two states at issue.^{*10} Also, as the Federal Court of Justice of Germany (Bundesgerichtshof, or BGH) has stated, it is impossible to determine whether non-existence is preferable to a life with disability.^{*11} Undoubtedly, the quality of life of a disabled child is greatly dependent on the severity of the disability. B. Steinbock alleges that in certain cases of severe disability that deprives the child of his most basic interest, it could be said that the child's existence is a life that is not worth living.^{*12} In the opinion of N. Priaulx, in cases of wrongful life the child is harmed by being brought into existence.^{*13} Several solutions have been proposed to overcome the non-existence paradox, but none of them enables discounting the fact that absent the health-care provider's liability, the child would not have existed.

In Estonia, the Termination of Pregnancy and Sterilisation Act, in §6 (2) 2), provides for an abortion in circumstances wherein there exists the risk of the child being born with a severe physical or mental abnormality. By stipulating the possibility of making the decision to abort the pregnancy in cases of possible severe health problems of a child at a time when normally abortion is not permitted (i.e., after the 11th week), the possibility of choosing non-life over life in an impaired state could be recognised.^{*14} The proponents of liability for wrongful life state that if the preference for non-existence is permissible in one area of law (i.e., allowing abortion in case of the risk of disability), it may be permitted in another.^{*15}

In the author's opinion, the non-existence paradox is an obstacle that cannot be overcome by the existing legislation. Still, it should not be overlooked that the child's health condition entails extra expenses and

⁶ *Münchener Kommentar zum Bürgerliches Gesetzbuch. Schuldrecht. Allgemeiner Teil. 5. Auflage* (München Commentary to German Civil Code. Law of Obligations. General part. 5th Edition). Munich: Verlag C. H. Beck 2007; 'Kind Als Schade' 28.5.1993 BVerfGE 88, 203 Bundesverfassungsgericht (Second Division).

⁷ Examples: *Becker v. Schwartz*, 46 N.Y.2d 401 (1978); *Gleitman v. Cosgrove*, 49 N.J. 22 (1967) 227 A.2d 689.

⁸ *Gleitman v. Cosgrove* (ibid.).

⁹ Example cases: *Becker v. Schwartz* (see Note 7); *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984).

¹⁰ K. Wevers (see Note 2), p. 358.

¹¹ BGH decision BGHZ 86, 240, of 18.1.1983.

¹² B. Steinbock. *Life before Birth: The Moral and Legal Status of Embryos and Fetuses*. New York: Oxford University Press 1992, p. 146.

¹³ N.M. Priaulx. Conceptualising harm in the case of the 'unwanted' child. – *European Journal of Health Law* 2002/9, p. 343 – DOI: <http://dx.doi.org/10.1163/157180902773123969>.

¹⁴ Such a deduction is made also by S. Human and L. Mills on the basis of the South African Choice on Termination of Pregnancy Act (92 of 1996), which in their opinion also erodes the public policy argument in cases of wrongful birth and wrongful life. S. Human, L. Mills. The immeasurable wrongfulness of being: The denial of the claim for wrongful life. – *Stellenbosch Law Review* 21 (2010) /1, p. 69. In South Africa, the claim of wrongful life is not recognised; see *Stewart v. Botha*, 2007 6 SA 247 (C). Available at <http://www.saflii.org/za/cases/ZASCA/2008/84.html> (most recently accessed on 19.3.2015).

¹⁵ H. Teff. The action for 'wrongful life' in England and the United States. – *International and Comparative Law Quarterly* 34 (1985) /3 (July), p. 443 – DOI: <http://dx.doi.org/10.1093/iclqaj/34.3.423>.

the disabled child's birth could have been prevented by means of proper usage of diagnostic methods.^{*16} Therefore, it is relevant to assess whether the disabled child's expenses and the damage could in principle be compensated for under the Estonian Law of Obligations Act (LOA).

3. The delictual basis for the health-care provider's liability

In Estonia, the basis for non-contractual liability in Restatement (Second) of Torts, Section 920 is similar to that in the German Bürgerliches Gesetzbuch (BGB) §823 (1).^{*17} Under the LOA's §1043, a person (the tortfeasor) who unlawfully causes damage to another person (i.e., the victim) shall compensate for the damage if the tortfeasor is culpable for causing the damage or is liable for causing the damage pursuant to the law. Several lawyers have found that in cases of wrongful life the health-care provider's delictual liability should apply because the birth of a disabled child as a delict corresponds to the traditional meaning of negligence.^{*18}

There are several negligent acts or omissions prior to conception (e.g., the health-care provider negligently advising the parent before conception of the risk of the child inheriting a genetic disability), before implantation (e.g., the health-care provider negligently selecting a damaged embryo for implantation during infertility treatment), or during gestation (e.g., the health-care provider negligently failing to advise the patient that she is carrying a disabled child) that may give rise to a claim of wrongful life.^{*19} As generally the health-care provider can speak only about the probabilities of the child inheriting a disability, the necessary procedures of prenatal testing do not exclude the possibility of birth of a disabled child. Accordingly, the health-care provider's erroneous act (i.e., medical error or misdiagnosis) should be shown if there is to be a successful claim of wrongful life.^{*20}

In addition to the non-existence paradox, the existence of the child's cognisable interest that has been allegedly harmed by the misdiagnosis is another intriguing question in cases of wrongful life. Though the child's health is damaged, the health-care provider is not liable for the child's disability, a state that would give rise to unlawfulness under the LOA's §1045 (1) 2) (causing bodily injury to or damage to the health of the victim).^{*21} Also, there is no harm to the child's personality right (LOA, §1045 (1) 4) or violation of duty arising from the law (LOA, §1045 (1) 7).^{*22} Though the Termination of Pregnancy and Sterilisation Act's §6 (2) 2)

¹⁶ There are several methods and techniques of prenatal testing, including amniocentesis, ultrasonography, and genetic screening. More information is provided by J.K. Mason *et al.* (see Note 1), pp. 215–216.

¹⁷ Restatement (Second) of Torts, §920 states that when 'the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable'. The BGB's §823 (1) states: 'A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property, or another right of another person is liable to make compensation to the other party for the damage arising from this.'

¹⁸ W.F. Hensel. The disabling impact of wrongful birth and wrongful life actions. – *Harvard Civil Rights–Civil Liberties Law Review* 40 (2005), p. 143. Available at http://www.law.harvard.edu/students/orgs/crcl/vol40_1/hensel.pdf143 (most recently accessed on 19.3.2015).

¹⁹ I. Kennedy, A. Grubb. *Medical Law*. London; Edinburgh; Dublin: Reed Elsevier (UK) Ltd 2000, p. 1531. For example, in *Turpin v. Sortini*, the plaintiff alleged that the health-care provider failed to advise her parents that the deafness expressed by an elder sister was hereditary. In *Curlender v. Bio-Science Laboratories* (165 Cal. Rptr. 477 Cal. C.A. (1980)), the claim was issued on the grounds that the child suffering from Tay-Sachs disease was born in consequence of failure to conduct the relevant genetic tests.

²⁰ In respect of misdiagnosis, the Estonian Supreme Court has stated that, in addition to the claim falling under breach of the contract for provision of health-care services, the patient may have a claim as well under the law of delict, if the breach of contract has resulted in bodily harm or injury (CCSCd 3-2-1-171-10, of 8.4.2011, *E. B. v. SA Põhja-Eesti Regionaalhaigla* (in Estonian). However, the court has not analysed whether the misdiagnosis as such constitutes a delict. In the author's opinion, the legitimacy of regarding the misdiagnosis as a delict is debatable. It could be difficult to find a duty arising from the law (i.e., to establish unlawfulness under the LOA's §1045 (1) 7) that the health-care provider has breached, and it is debatable whether this could be a general duty to maintain safety. Also, the author doubts whether it is sufficient to establish unlawfulness under the LOA's §1045 (1) or (2) (i.e., causing death or bodily harm is presumably unlawful) or there should be additionally violation of duty derived from the law (statutory duty).

²¹ It should be noted that the LOA's §1045 is conditionally based on the BGB's §823, its §826, and the entire body of statements developed in German jurisprudence. P. Varul *et al.* *Võlaõigusseadus III*. 8. ja 10. osa (§-d 619–916 ja 1005–1067) *Kommen-teeritud väljaanne* (Law of Obligations III, Parts 8 and 10: A Commentary). Tallinn: Juura 2009, p. 641 (in Estonian).

²² Theoretically, the LOA's §1045 (1) 8) (on intentional behaviour contrary to good morals) sets forth other grounds for presuming the unlawfulness of the health-care provider's act. Therefore, presumably if the health-care provider possesses the essential information, he would disclose the information to the parents.

allows abortion on account of risk of disability, it does not entail a duty to the parent and cannot constitute a duty to the health-care provider. A woman's liberty to abort does not protect the interest of the foetus.^{*23} The prevailing view in Germany is that the mother may interrupt her pregnancy insofar as doing so is in her interest.^{*24} Therefore, it cannot create the foetus's interest in its own termination. As the Bundesgerichtshof has noted, there is no delictual obligation to prevent the birth of a disabled child; nor does the birth of a child violate the legal interests enshrined in the BGB's §823 (1).^{*25}

It could be concluded that failing to diagnose a child's disability cannot constitute an unlawful act in the meaning of the law of delict, because the law does not provide an obligation for a health-care provider to diagnose a child's disability. Neither can this kind of obligation be derived from the general duty of care. Also, parents cannot have a right protected by law to have a healthy child.

4. The contractual basis for the health-care provider's liability

4.1. The existence of duty to the child under a contract for provision of health-care services

The LOA contains special provisions regulating the contractual relationship between the patient and the health-care provider.^{*26} Therefore, it is clear that, for reason of non-existence, the child could not be party to the contract that created the duty of the health-care provider toward the child's mother (or the parents). The possibility of a claim of wrongful life on the basis of the contract for provision of health-care services presumes the existence of a duty toward the child that is derived from the above-mentioned contract.

In the US, a legal duty to a child not yet conceived but foreseeably harmed by the negligent delivery of health-care services to the child's parents has been affirmed – the contractual duty to exercise due care in providing health-care services to the mother confers a correlative right on the expectant mother and on the child who is ultimately born as a third-party beneficiary.^{*27} On the contrary, under German law, the contract for provision of health-care services concluded by a mother does not prevent the child from living with a disability if this disability could have been prevented only via termination of pregnancy.^{*28} Germany's Bundesgerichtshof has stated that an obligation arising from the contract between the defendant and the claimant's mother to prevent the birth of the claimant does not have a protective effect toward the child as a claimant.^{*29} At the same time, there is no duty enforceable by an action in tort to prevent the birth of a disabled child; therefore, any breach of duty could only be derived from the contract between the health-care provider and the mother.^{*30}

Under the Estonian General Part of the Civil Code Act (CCA), the capacity to have civil rights presumes the existence of passive legal capacity, which begins with the live birth of a human being and ends with that human being's death (CCA, §7 (1) 2)). However, under the CCA's §7 (3), in the cases specified by

²³ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁴ B. Steinbock (see Note 12).

²⁵ *Ibid.*

²⁶ Chapter 41 of the Law of Obligations Act stipulates the definition of the contract, the parties' mutual duties, and the prerequisites for liability of providers of health-care services.

²⁷ R. Perry. It's a wonderful life. – *Cornell Law Review* 93 (2007) /2 (Nov.), p. 392. For instance, in *Walker v. Rineck* (604 N.E.2d 591 (Ind. 1992)), the court stated that, in addition to the physician's duty to the patient arising from the contract between physician and patient, the physician may owe a duty to a third party who benefits from the consensual relationship where the professional has actual knowledge that the services provided are partly for that person's benefit.

²⁸ P. Gottwald. Vertrag zugunsten Dritter. – F.J. Sackner, R. Rixecker (eds). *Münchener Kommentar zum Bürgerliches Gesetzbuch. Schuldrecht. Allgemeiner Teil*. 5. Auflage (München Commentary to German Civil Code. Law of Obligations. General part. 5th Edition). Munich: Verlag C. H. Beck 2007, p. 2068.

²⁹ Where the purpose of the contract is to reach a legally permitted goal (i.e., the birth of a child), the health-care provider has the duty of meeting the agreed aim. If the health-care provider commits a medical error, he has to compensate for all economic losses that the contract was intended to prevent (16.11.1993. BGHZ 124, 128 = NJW 1994, 788 VI. Civil Senate (VI ZR 105/92)).

³⁰ B. Steinbock (see Note 12). See also H. Heinrichs. *Verpflichtung zur Leistung*, in Palandt *Bürgerliches Gesetzbuch*. 56., neuarbeitete Auflage (Duty of Performance' in Palandt German Civil Code. 56., Updated edition). Munich: Verlag C. H. Beck 1997, p. 265.

law, a foetus has passive legal capacity from conception if the child is born alive. This means that the child obtains subjective rights in the state of foetus and these potential rights become actual rights when the child is born alive.^{*31}

It could be alleged that by undertaking prenatal testing parents attempt to protect the future child's interests as well as their own. The contract can be alleged to have a protective effect in the meaning of the LOA's §81 to the future child if the following prerequisites are met: 1) the interests or rights of the child are at risk to the same extent as those of the child's mother, 2) the intent of the child's mother to protect the child's interests can be presumed, and 3) intent to protect the child's interests is identifiable by the health-care provider (LOA, §81 (1) 1)–3)). In such a case, the child as a third party to the contract can in principle make a claim for compensation for the damage caused by the breach of contract (LOA, §81 (2)).^{*32}

Consequently, under the LOA, extension of the duty of care is possible and, in principle, a child could rely on the protective effect of the contract between his mother and the health-care provider. The fact that the child was not yet born at the time of formation of the protective duty does not exclude expanding the effect of the protective duty to the child.^{*33} However, it is doubtful whether the child's interests are linked to the contract with the same intensity as are the interests of the parents.

4.2. Breach of duties arising from the contract

In cases of wrongful life, failure to carry out the necessary tests or mistaken interpretation of the results may result in misdiagnosis. Also, the breach of duty might lie in failure to inform the patient, *inter alia*, of the risks and consequences associated with the provision of health-care service.^{*34} The breach of the duty to inform the patient is closely linked to the misdiagnosis – if the health-care provider fails, for example, to diagnose the foetus's health condition, he also fails to inform the parents of the future child's health condition. In the absence of sufficient information, the parents are deprived of the possibility to make an informed reproductive choice (i.e., to prevent the birth of a disabled child).^{*35}

Health-care services shall at the very least conform to the general level of medical science at the time the services are provided, and these services shall be provided with the care that can normally be expected of providers of health-care services (LOA, §762). This means that a negative outcome of provision of health-care services does not amount to a negligent act automatically. Section 770 (1) of the LOA stipulates that providers of health-care services are liable only for the wrongful breach of their own obligations, particularly for errors in diagnosis and treatment and for violation of the obligation to inform patients and obtain their consent. The Estonian Supreme Court has stated that performance of health-care services below the general level of medical science should be regarded as medical error and affirmed the health-care provider's liability under contract law in the case of misdiagnosis.^{*36}

The risk of physical or mental abnormality justifies termination of pregnancy even after the 11th week, according to the Termination of Pregnancy and Sterilisation Act, §6 (2) 2). The doctor should be aware of the risk that the initial diagnosis is mistaken and consider the option of referring the patient for specialist investigation. The LOA's §762 explicitly stipulates that the provider of health-care services shall refer a patient to a specialist or involve a specialist in the treatment of the patient if this is necessary. Whereas the protective effect on the child through the contract between his mother and the health-care provider can be

³¹ See P. Varul's comment 3.6 on §7 of P. Varul *et al.* Tsiviilseadustiku üldosa seadus (The General Part of the Civil Code Act). Tallinn: Juura 2010 (in Estonian).

³² On the doctor and patient's legal relationship in German law, see W. Uhlenbruck. Die Rechtsbeziehungen zwischen Arzt und Patient (The legal relationship between the doctor and patient) – A. Laufs, W. Uhlenbruck. Handbuch des Arztrechts (Handbook of Medical Law). Munich: C. H. Beck, 1992, pp. 221–271.

³³ I. Kull *et al.* Võlaõigus I. Üldosa Juura (Law of Obligations I: General part), 2004, p. 446 (in Estonian).

³⁴ Section 766 (1) of the LOA explicitly prescribes that the health-care provider shall inform the patient of the results of examination of the patient, the state of the patient's health, any possible illnesses and the development thereof, the nature and purpose of the health-care services provided, and the risks and consequences associated with the provision of such health-care services and of other available and necessary health-care services. Under the second section of the same provision, the health-care provider shall, at the request of the patient, submit the specified information in a form that can be reproduced in writing.

³⁵ *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 17 (Minn. 1986).

³⁶ *E. B. v. SA Põhja-Eesti Regionaalhaigla* (see Note 20).

affirmed (see Subsection 4.1, above), the child's claim can rely on misdiagnosis or on breach of the duty to inform the patient.

4.3. Causation

Even if it could be alleged that the child has been harmed by being brought into existence and has suffered the damage as a consequence, the question of causation poses another obstacle to affirming the claim.

The expectant parents' discretion is of great importance in the process of establishing causation. A causal relationship between the health-care provider's negligence and the birth of a disabled child is present if the parents would have decided to avoid procreation had they possessed the information about the future child's possible disability. However, it could be difficult or even impossible to show that the parents would have decided not to conceive the child.^{*37} It has been proposed that the action should be based on the health-care provider's unfulfilled promise that the child would be born without a certain defect. This solution leads to liability under contract law.^{*38} Therefore, it should be stressed that, as a rule, a provider of health-care services shall not promise that a patient will recover or that an operation will be successful.^{*39} The promise of a positive outcome is even more doubtful with regard to the question of the future child's health condition, which can generally be addressed only in terms of the probability of occurrence of a certain trait. In any case, evaluation of the standard of the health-care provider's performance is needed. The duty to carry out prenatal testing as such does not bring into being a promise to predict the future child's health condition.

Under the LOA (§127 (4)), a person shall compensate for damage only if the circumstances on which the liability of the person is based and the damage caused are related in such a manner that the damage is a consequence of the circumstances (causation must exist) (i.e., the *conditio sine qua non* test). In cases of medical error, causation between the damage and the medical error or misdiagnosis is presumed if the medical error is established and the patient develops a health disorder that probably could have been avoided by means of ordinary treatment (LOA, §770 (4)). In the author's opinion, the LOA's §770 (4) cannot be applied in cases of wrongful life, because the health disorder of the child (i.e., disability) cannot be avoided through ordinary treatment. In these cases, the only way to avoid the child's disability is abortion. Therefore, evaluation of the existence of a causal link necessitates juxtaposing the child's life inclusive of disabilities with the state in which the child would have been if the health-care provider had not erred in the prenatal testing – i.e., not having being born. As is stated above (in Section 1), such a comparison cannot be made. Consequently, it is debatable whether a causal relationship between the health-care provider's medical error or misdiagnosis and the damage caused by the birth of a disabled child could be established.

4.4. Fault

Fault is another prerequisite for the health-care provider's contractual liability; i.e., he must have breached the obligation culpably (LOA, §770 (1)). In a similarity to the BGB's §278 (2), §104 (3) of the LOA stipulates that a person is careless if he fails to exercise necessary care. The prerequisite for the health-care provider's negligence is met only if his performance is substandard (LOA, §762); the negative outcome as such should not be deemed to bring about liability. The health-care provider's standard of care is higher than the ordinary standard of care that is expected from a person in everyday life. This professional standard of care has also been affirmed in the US.^{*40} The Estonian Supreme Court has stated that the health-care provider's standard of care must be established as commensurate with the behaviour of an educated and experienced physician in the corresponding field in the same situation.^{*41} This means that the circumstances of the breach of contractual duty should be evaluated and if an educated and experienced physician in the

³⁷ R. Perry suggests that this situation may be resolved by a variation of the loss-of-chance doctrine. The likelihood that the parents would have decided to procreate without regard for the risk of the future child's disability would not disclaim the child's right of action under wrongful life, but it would affect the estimation of damages. See Note 27, above, p. 381.

³⁸ R. Perry refers to *Hawkins v. McGee*. *Ibid.*, pp. 381–382.

³⁹ Also explicitly stipulated in the LOA's §766 (2).

⁴⁰ D.B. Dobbs. *Torts and Compensation: Personal Accountability and Social Responsibility for Injury*, second edition (American Casebook Series). St. Paul, Minnesota: West Publishing Co. 1993, p. 362.

⁴¹ CCSCd 3-2-1-78-06, of 3.10.2006, *H. M. v. AS V.*, para. 12 (in Estonian).

corresponding field would have acted in the same way as the defendant, the medical error or misdiagnosis is excusable.^{*42}

The posterior evaluation of conformity to the professional standard of care should be based on the standard at the time of provision of the health-care services and not consider the development of treatment methods since.^{*43} Departing from the general treatment methods of the corresponding field does not necessarily constitute a negligent act, but in the event of a dispute the health-care provider should be able to justify the treatment method selected and prove its soundness.^{*44} According to the LOA's §763 (1), a method of prevention, diagnosis, or treatment that is not generally recognised may be used only if conventional methods are not likely to be as effective, the patient is informed of the nature and possible consequences of the method, and the patient has granted consent to the use of the method. Consequently, the law provides for the possibility of departing from the general standard of care of the health-care provider (LOA, §762).^{*45} If necessary, expertise may be called upon for evaluation of the soundness of departure from the general treatment methods.^{*46}

If doing so is necessary, a provider of health-care services shall refer a patient to a specialist or involve a specialist in the treatment of the patient (LOA, §762). This seems especially essential in cases of interpretation of genetic tests, in light of the possibility of speaking only about probabilities.^{*47} If unjustified departure from the professional standard of care is established, the health-care provider's fault is absent only in the event of *force majeure* (LOA, §103 (2)). In consideration of the rarity of cases of *force majeure*, the health-care provider's fault could generally be affirmed if medical error or negligent misdiagnosis is established.

5. The scope of the claim

5.1. Compensable damage

In the US, only extraordinary expenses related to the treatment and studies that follow directly from the child's disability are awarded in cases of wrongful life.^{*48} Non-pecuniary damages (e.g., damages for emotional distress) are not granted to the parents or the disabled child.^{*49} It should be noted that, unlike in, for instance, *Curlender v. Bio-Science Laboratories*, in *Turpin v. Sortini* the court rejected the claim for general damages (made on grounds of being deprived of the fundamental right of a child to be born as a whole, functional human being) and awarded the child compensation for the extraordinary expenses of special teaching, training, and hearing equipment.

In Estonia, if the above-mentioned prerequisites for the health-care provider's liability are met, the child's extraordinary expenses could be subject to compensation. Under the LOA, specifically §101 (1) 3), in the event of non-performance (i.e., failure to perform or defective performance) by an obligor, the obligee may file a claim for damages. According to the LOA's §130 (1), the person under obligation shall compensate the aggrieved person for the expenses arising from health damage or bodily injury, including expenses arising from the increased needs of the aggrieved person, total or partial incapacity to work, and the decrease in

⁴² I. Luik-Tamme, K. Pormeister. Kas süü tervishoiuteenuse osutaja lepingulise vastutuse eeldusena on iseseisev või sisutühhi kontseptsioon? (Is the Fault as a Prerequisite of the Health-care Provider's Liability an Independent or an Empty Conception?). – *Juridica* 2014/X, p. 772 (in Estonian).

⁴³ A. Nõmper, comment 3.1 on the LOA's §762, in P. Varul *et al.* (see Note 21), p. 300.

⁴⁴ J.V. McHale, J. Tingle. *Law and Nursing*, second edition. Edinburgh: Elsevier Science Limited 2002. Available at <http://books.google.com/books?id=79CKyGXkybQC&pg=PA40&dq=Loss+of+chance&lr=#PPA28,M1> (most recently accessed on 19.3.2015).

⁴⁵ A. Nõmper, comment 1 on the LOA's §763, in P. Varul *et al.* (see Note 21), p. 301.

⁴⁶ The evaluation of the quality of provision of health-care services in Estonia is provided by the expert committee on quality of health services (under the Health Services Organisation Act, §50² (1)). In a contrast to German quality-expert committees, the Estonian committees do not resolve the disputes between the health-care provider and the patient. For more information about German health-care service-quality expert committees, see M.S. Stauch. Medical malpractice and compensation in Germany. – *Chicago-Kent Law Review* 86 (2011) /3.

⁴⁷ The health-care provider's fault in the form of gross negligence was affirmed in case No. 2-05-2059, on the grounds that the general practitioner failed to refer the patient to a cardiologist (Harju County Court, *V.S. v. E.P.* 29.2.2008 (in Estonian)).

⁴⁸ K. Wevers (see Note 2), p. 266. See, for instance, *Turpin v. Sortini*, 182 Cal. Rptr. 377 (1982); *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 495 (Wash. 1983).

⁴⁹ J.T. Stein. Backdoor eugenics: The troubling implications of certain damages awards in wrongful birth and wrongful life claims. – *Seton Hall Law Review* 40 (2010), p. 1157.

income or deterioration of future economic potential. While non-pecuniary damage is difficult to measure, pecuniary damages can be established precisely. As the disability does not disappear when the child reaches adulthood, the disabled child's medical expenses should be recovered further upon reaching of the age of majority.^{*50}

In *Procanik v. Cillo*, the court emphasised that recovery of the cost of extraordinary medical expenses is possible for either parents or the infant, but not both. In *Turpin v. Sortini*, the court specified that if the parents have made a recovery via a wrongful-birth suit, the child should recover only special costs incurred during his adulthood through a wrongful-life suit, to avoid double-counting.^{*51} The aggrieved person should not be placed in a position better than that he was in before the infliction of damage, and compensation for the damage should not entail the unjust enrichment of the victim (LOA, §127 (5)). In the author's opinion, the argument that the child's damages are recovered under the parents' wrongful-birth claim does not exclude the child's claim made on the basis of wrongful life. The partial overlap of the claims affects the extent of the damage and not the grounds for compensation.

5.2. Limits to compensation for the damage

In a similarity to what is found in German civil law, the principle of complete compensation under §127 (1) of the LOA is limited. The purpose of the breached duty (LOA, §127 (2)) and the foreseeability of the damage (LOA, §127 (3)) should be taken into account.^{*52} Among the limits to the compensation for damage, those related to the benefits of life are the ones discussed most often in cases of wrongful-life claims. Any gain received by the injured party shall be deducted from the compensation for the damage unless deduction is contrary to the purpose of the compensation (LOA, §127 (5)). In the US, the value of the benefit conferred is also considered in mitigation of damages.^{*53}

In *Turpin v. Sortini*, the court stated that the fact that the child has obtained a physical existence with the capacity both to receive and give love and pleasure and to experience pain and suffering should be treated as a benefit that should be offset against compensable damage.^{*54} As W.F. Hensel has pointed out, while courts emphasise the inherent benefits of rearing a healthy child, many courts ignore these benefits if a child is born with a genetic defect.^{*55}

The Estonian Supreme Court has stated that if improvement of the health condition through compensation for the damages is not reasonably possible without raising of the aggrieved person's health condition to a better level than it exhibited before the infliction of damage, the case could be regarded as involving unsolicited enrichment. In such case, the benefit from improvement of the victim's health due to reimbursement cannot be counted off the compensation that the victim is entitled to. Otherwise, it would be inconsistent with the LOA's Section 130 (1) and the aim of eliminating the negative consequences for the victim.^{*56} Analogously, in the case of wrongful life, the life as a benefit cannot be deducted from the compensation for

⁵⁰ *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 495 (Wash. 1983).

⁵¹ M. Strasser. Wrongful life, wrongful birth, wrongful death, and the right to refuse treatment: Can reasonable jurisdictions recognize all but one? – *Missouri Law Review* 64 (1999) /1 (Winter), pp. 849–850.

⁵² The person who has breached the contract is not regarded as responsible for the kind of damage the arising of which the performance of the contract was not intended to prevent (*E. B. v. SA Põhja-Eesti Regionaalhaigla*, as cited in Note 20). Subsections 2 and 3 of the LOA's §127 therefore enable disregarding these negative consequences of the breach of contractual obligations that are in causal relation to the breach of the contract but are extraordinary in the view of a reasonable person (CCSCd 3-2-1-53-06, 26.9.2006, *A.S. v. AS E.* – RT III 2006, 33, 283 (in Estonian)).

⁵³ Restatement (Second) of Torts states, in §920 (1979), '[w]hen the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable. However, under the benefit rule, the damages to the plaintiff's interest can be offset only by benefits received by that same interest' (in comment b).

⁵⁴ *Turpin v. Sortini*, 643 P.2d 954, 966 (Cal. 1982).

⁵⁵ I. Kennedy, A. Grubb (see Note 19), p. 154. Also, S.R. Fueger has stated that the distinction between wrongful-life and wrongful-pregnancy claims is unjustifiable. She alleges that the focus should be on the duty owed to the plaintiff, rather than on the victim. For example, in *Hickman v. Myers* (632 S.W.2d 869, 870 (Tex. Ct. App. 1982)), it was discussed that the benefits of parenthood are one of the reasons to disallow claims of wrongful pregnancy. However, such a rationale is not used for refusing compensation for damages in cases of wrongful-life claims. For further discussion, see S.R. Fueger. The unexamined life is not worth living... or is it? Preserving the sanctity of life in American courtrooms. – *Southern Illinois University Law Journal* 33 (2009) /Spring, pp. 588–589.

⁵⁶ CCSCd 3-1-1-31-13, of 25.5.2013 (in Estonian).

the child's extraordinary expenses. For a disabled child, being alive could be regarded as unsolicited enrichment that he actually aimed to avoid.

6. Conclusions

While the Estonian Termination of Pregnancy and Sterilisation Act's §6 (2) 2) provides for an abortion in circumstances wherein there exists the risk of a child being born with a severe physical or mental abnormality, it could be concluded that the child himself is unlikely to have a successful claim under the wrongful-life rubric. The obstacles in overcoming the non-existence paradox as well as problems in establishing the prerequisites for the health-care provider's civil liability on a delictual or the contractual basis lead to the assertion that satisfying these claims in Estonian courts (similarly to German and US courts) would be unlikely.

Though cases of claims of wrongful life (and of wrongful conception and wrongful birth) have not yet reached the courtroom, there is a high probability that the courts would not regard the child's disability as damage that should be compensated for by the health-care provider, even if the health-care provider has acted negligently.



Annemari Õunpuu

Lawyer

Swedbank AS

The Shortcomings of Commercial-pledge Regulation and Need for Reform

1. Introduction

The roots of modern-day generic business security go back to 19th-century England, where the case law for the first time recognised a universal non-possessory charge over all present and future assets of a company¹. To this day, jurisdictions vary greatly in their approach to the ‘universal pledge’ of the company’s assets. There are countries, such as Austria, that require a high degree of creditor possession and specificity, thereby ruling out the possibility of a general pledge and a pledge on future assets². At the other end of the spectrum are common-law countries such as England and the United States. In England, the creditor has the possibility of a truly global security right for all assets of the company, both present and future, real and personal property³. The United States ‘floating lien’ is of identical nature, allowing for a security right over present and future movables, with the difference from its English counterpart being that the US version can be given by companies and individuals alike whilst the English floating charge may be granted only by companies. Also, in the United States there are separate state regimes for real property⁴. The availability of a general pledge on a company’s assets seems to go hand in hand with the availability of general debtor-indexed registries and notice-filing systems as opposed to strictly asset-title registries. The wider the scope of the general pledge on company assets, the greater the interest in minimising the possibility of the same asset being pledged via a specific fixed security right without the knowledge of the general pledge holder.

The Estonian Commercial Pledges Act took effect on 1 January 1997⁵ and in its core aspects has remained the same to this day. From the early days of its creation, the commercial pledge has received the treatment of a pledge *non grata*. It has been called a ‘threat to trade credit’⁶, a ‘peculiar phenomenon’ that exists in parallel with ‘decent securities’, and ‘an outsider’ to the specificity system for reason that it violates

¹ E. Ferran. *Principles of Corporate Finance Law*. Oxford: Oxford University Press 2008, p. 369.

² W. Faber, B. Lurger. *National Reports on the Transfer of Movables in Europe – Volume I: Austria, Estonia, Italy, Slovenia*, European Legal Studies. Munich: Selliers, European Law Publishers 2008, p. 182 DOI: <http://dx.doi.org/10.1515/9783866537019>.

³ P.R. Wood. *Comparative Law of Security Interests and Title Finance*, Vol. 2 in the *Law and Practice of International Finance Series*. London: Sweet & Maxwell 2007, p. 6-011.

⁴ *Ibid.*, p. 6-015.

⁵ *Kommerstpandiseadus*. – RT I 1996, 45, 848; RT I 21.06.2014, 31 (in Estonian). English text available at <https://www.riigiteataja.ee/en/eli/527012015013/consolide> (most recently accessed on 22.3.2015).

⁶ M. Wenckstern. *Ekspertiiis Eesti kommertspandi seaduse eelnõule* (Expert Assessment to Draft Act of the Estonian Commercial Pledge Law), 31.10.1995, via P. Varul *et al.* *Asjaõigusseaduse kommentaarid* (Law of Property Act, with Commentary). Tallinn: Juura, p. 368 (in Estonian).

the principle by which a security right can extend only to a specific asset or right⁷. No doubt, such views have been heavily influenced by the approach of the Germanic group of countries (Germany, Switzerland, and Austria) relying on the doctrine of specificity and using retention of title and fiduciary transfers as substitutes for non-possessory pledges⁸ – although, on closer examination, the latter legal mechanisms can be said to be a pure matter of form for escaping pledge possession⁹.

On 1 January 2015, the Commercial Pledges Act reached the age of majority. In light of criticism by academics, recent Supreme Court practice, and international developments, it is justified to ask whether the concept of the commercial pledge needs revision.

2. The scope of the commercial pledge

2.1. The aim of the ‘universal pledge’

International organisations such as United Nations Commission on International Trade Law (UNCITRAL) and European Bank for Reconstruction and Development (EBRD) recommend that the law provide for a security right that secures all types of debts and extends to any type of asset, present or future, whether individually or in a pool of assets¹⁰. In the broadest sense, it would mean a global security for a global debt – an idea bound to create resentment in Estonia, as the Supreme Court has questioned the reasonableness of providing security for a global debt, so far, in the context of mortgages¹¹. It is also recommended for the security right not to limit the use of assets, as any possessory security right in the modern market economy would be self-defeating, requiring the debtor to assign the assets necessary for conducting the entity’s business¹². The purpose of the above-mentioned recommendations is to suggest a system that could help companies to ‘maximize the extent to which they can utilize the value inherent in their movable assets to obtain credit’¹³.

The answer to the question about the scope of the commercial pledge depends on what one sees as the main aim of the universal pledge and its role in achieving the purpose envisaged by the UNCITRAL. It is possible to enumerate four main functions of the non-possessory universal pledge.

Firstly, it is a security right enabling future assets to serve as security for the credit, without the need to amend the pledge agreement once the assets are produced or obtained. Objection to this aim usually is related to two factors: security granted for a debt existing today on assets acquired tomorrow diminishes the assets available to unsecured creditors, and security on future assets is a preference as it is granted for past debt¹⁴.

Secondly, it is a security right enabling the creation of a ‘global pledge’ on a company’s assets by pledging the whole enterprise by means of a single agreement, without the need to pledge every group of assets or single item individually. Using a single security agreement instead of multiple individual agreements significantly reduces transaction costs. It has been claimed that in the event that the ‘global pledge’ can be enforced by an administrative possessory receiver (an official whose functions are similar to those of a bailiff or bankruptcy administrator), it allows the company to be managed as a going concern, preserving the

⁷ V. Kõve. *Varaliste tehingute süsteem Eestis* (System of Proprietary Transactions in Estonia), doctoral thesis. Tartu 2009 (in Estonian), pp. 246, 258, 333.

⁸ P. Varul *et al.* (see Note 6), p. 369.

⁹ P.R. Wood (see Note 3), p. 6-017.

¹⁰ UNCITRAL Legislative Guide on Secured Transactions, United Nations 2010, Recommendation 17; EBRD core principles for a secured transactions law, Principle 7.

¹¹ Along the lines of Germanic specificity doctrine regarding pledge objects, the Supreme Court has also emphasised that, although the law allows securing against both present and future debt, said right is not unlimited and an agreement by which a ‘global debt’ is secured by the pledge can be contrary to good morals in the extent that it fails to specify future debt or secures against all possible claims of the pledge holder, thereby limiting the pledgee’s economic freedom and ability to cope in the future (Supreme Court rulings 3-2-1-104-08, of 5.11.2008, paragraph 19 and 3-2-1-64-12, of 29.5.2012, paragraph 27). The Supreme Court refers directly to the harmful effect of overcollateralisation, admitting at the same time that, in cases of companies, agreements on security for global debt are allowed for purposes of securing the so-called credit lines (see Supreme Court ruling 3-2-1-64-12, of 29.5.2012, paragraph 29).

¹² EBRD core principles for a secured transactions law (see Note 10), Principle 2.

¹³ UNCITRAL Legislative Guide on Secured Transactions (see Note 10), p. 2.

¹⁴ P.R. Wood (see Note 3), pp. 6-007, 7-007.

maximum value until the sale and enabling eventual sale of the company as a whole rather than in a piecemeal fashion that would destroy its value^{*15}. Although such a possibility existed for floating charge holders in England for some time, the relevant law was changed in 2003 to limit the appointment of the receiver to fixed charges only^{*16}.

The third function is to enable a pledge over assets for which there are neither special asset-title registries nor possibilities for other non-possessory pledges.

Fourthly, assets may be left with the debtor, allowing him to continue the use of his assets in the ordinary course of business.

The main aim with the existing solution for a commercial pledge clearly serves the third purpose: of grasping in its scope bulk assets that it would be difficult to pledge in any other way. However, the legislator has not been consistent on the question of the scope, as until 1994 the universal-pledge provisions in the Property Act also encompassed immovable property. The amendments made in 1994 excluded from the scope immovable and intellectual property and vehicles. The reasoning behind the amendments was to rule out possible competition between pledges – i.e., a commercial pledge as the universal pledge against a specific pledge in an asset-title register^{*17}.

In 2013, the Supreme Court found that from 1 July 2003 to 30 June 2011 the Traffic Registry did not comply with the requirements for a public register and that, therefore, it was not possible to register valid pledges of motor vehicles in the Traffic Registry. The Commercial Pledges Act excludes from the scope of commercial pledges those assets for which there is a possibility of having another class of registered security. Accordingly, from 1 July 2003 to 30 June 2011, there was no such possibility for motor vehicles; the scope of the commercial pledge during that period also extended to vehicles registered in the Traffic Registry. As of 1 July 2011, the scope of the commercial pledge is again narrower, for by that time the legislator had dealt with the publicity issues related to the Traffic Registry^{*18}. The court practice confirms that the scope of the universal pledge is dependent on the existence and publicity of other ‘pledge registries’ available for movables. If the registry fails the publicity test, then, according to the opinion of the Supreme Court, the asset falls back to the scope of the commercial pledge.

The legislative developments and explanatory notes do not give clear guidance as to what the legislator has understood to be the main essence of the commercial pledge. The persons having the right to grant a commercial pledge have been limited to legal entities^{*19}, which indicates that the pledge should maximise the possibilities of companies to receive credit. However, legislative amendments and court practice give no evidence that the commercial pledge was ever meant to be used to pledge the enterprise as a whole, nor that any thought would have been given to the concept of its interconnectedness with a universal business pledge preserving the value of the business as a going concern and selling of the enterprise as a whole, especially within reorganisation proceedings. The lack of consideration given to such interconnectedness is of no surprise, as the concept of business reorganisation is a relatively new phenomenon on the Estonian regulative landscape, with the Reorganisation Act having been adopted only in late 2008^{*20}. In consideration of the approach taken in England in limiting the powers of floating charge holders, it seems that the previously advocated success in allowing the floating charge creditor to appoint an administrative receiver to manage the business and enforce the charge (thereby allegedly maximising the returns) has been controversial and subject to abuse and, in consequence, should not serve as a role model.

The ‘fluctuating scope’ of the commercial pledge, dependent as it is on the publicity ‘mistakes’ made by the Estonian state with regard to registries of certain movables (such as vehicles), leaves creditors with lack of legal certainty and proves that the question of publicity of non-possessory pledges needs a systematic

¹⁵ *Ibid.*, 6–008. See also M. Marinč, R. Vlahu. *The Economics of Bank Bankruptcy Law*. Berlin; Heidelberg, Germany: Springer 2012, p. 12 DOI: <http://dx.doi.org/10.1007/978-3-642-21807-1>.

¹⁶ Insolvency Act 1986 as amended by the Enterprise Act 2002. Text available via <http://www.legislation.gov.uk/ukpga/1986/45/section/72A> (most recently accessed on 24.3.2015). See also P. Hood. *Principles of Lender Liability*. Oxford: Oxford University Press 2012, pp. 564, 568–569.

¹⁷ P. Pärna, V. Kõve. *Asjaõigusseadus*. Kommenteeritud väljaanne (Law of Property Act, with Commentary). Tallinn: Juura 1996, p. 431 (in Estonian).

¹⁸ Supreme Court Civil Chamber ruling 3-2-1-133-13, of 11.12.2013, paragraphs 28–33.

¹⁹ In contrast to the United States, where a universal security right may be granted by both companies and individuals (subject to certain limitations set forth in consumer law).

²⁰ Saneerimisseadus. – RT I 2008, 53, 296; RT I 09.05.2014, 2 (in Estonian). English text available at <https://www.riigiteataja.ee/en/eli/510072014027/consolide> (most recently accessed on 23.3.2015).

approach. The fundamental question that the legislator needs to answer is whether the commercial pledge should continue serving the companies and their creditors as an additional security (a ‘crutch’ for situations wherein other pledge possibilities fall short) or should instead provide parties with flexibility in determining to what extent they want to utilise the assets for crediting purposes. In the latter case, the parties should be free to design the security package and decide on the scope of the pledge for each individual situation by limiting or extending the scope of the general pledge accordingly^{*21}.

2.2. Narrow scope versus wide scope

The question of scope cannot be separated from that of preference in cases of enforcement and insolvency, since the initial broad scope is said to be ‘of little value if the collateral is diminished in insolvency, either by the priority of unsecured creditors (such as employees, taxes, reorganization costs, contracts and new money) or by a percentage cut from the collateral, or by enforcement delays’^{*22}. The main argument for narrowing the scope of a commercial pledge is the protection of unsecured creditors against overcollateralisation of a single creditor. At the same time, limiting the use of future assets and assets that cannot be precisely identified as security for credit in one way or another increases the costs of the debtor, whether in the form of a higher interest rate or through costs related to cumbersome and legally uncertain schemes for use of future and bulk assets as security.

Although acknowledging its great importance, the present article does not deal with the issue of priority ranking in insolvency. It focuses, rather, on the initial scope of the commercial pledge. However, one general remark can be made on the interaction between the initial scope and its subsequent erosion within insolvency proceedings – namely, that the wider the initial scope, the greater the need for the priority and preference of other creditors. England, which has introduced one of the farthest-reaching universal security rights, has also introduced a system that would allow equalising the creditors in insolvency by creating the ‘ring-fenced fund’ as otherwise there would be nothing left for unsecured creditors. The mechanism basically takes some of the floating charge proceeds and distributes them to unsecured creditors^{*23}.

The scope of the Estonian commercial pledge at first glance appears rather wide, with the law stating that the pledge extends to all present and future movables. However, the law makes many exclusions from the scope: money (cash or on bank account); shares, stocks, promissory notes, or other securities; property on which it is possible to have another class of registered security over movables; property to which a mortgage established on the immovable before or after establishment of the commercial pledge extends; and property secured by a possessory pledge^{*24}. The real extent of the commercial pledge is thus mainly equipment, inventory, raw materials, livestock, and receivables. In theory, the practical value of the commercial pledge has been noted to lie in the possibility of pledging assets for which there are neither asset registries nor any other possibilities for a non-possessory security right, such as machinery and equipment^{*25}. In commercial practice in Estonia, the assets for which commercial pledges are used range from stock such as heavy metal components and fertilisers to food products, receivables, inventory, petroleum and petroleum products, and crops.

The reason for which the commercial pledge has not created that many problems in practice is seen in the fact that to this day its true nature and extent has not been understood and issues related to enforcement and bankruptcy are left open and unresolved^{*26}. The latter claim is supported by recent Supreme

²¹ According to the EBRD core principles for a secured transactions law, the law should support the operation of the secured credit market and provide the parties with flexibility to ‘adapt the security to the needs of their particular transaction’ without concentrating too much on the manner in which the transaction is structured (Principle 10).

²² P.R. Wood (see Note 3), p. 6-001. J.A. MacLachlan has referred to the bankruptcy test as the most fundamental tests for the strength of the security right, using the following words: ‘Any security that will not stand up in case of insolvency of the debtor is only a trap for the unwary creditor. Of all the tests to which a security transaction can be put, bankruptcy is the most exacting. This is as it should be.’ J.A. MacLachlan. The impact of bankruptcy on secured transactions. – *Columbia Law Review* 60 (1960) /5, pp. 593–609 DOI: <http://dx.doi.org/10.2307/1120040>.

²³ For the priority ranking in England, see P.R. Wood. Principles of International Insolvency, Vol. 1 in the Law and Practice of International Finance Series, 2nd edition. London: Sweet & Maxwell 2007, p. 11-040.

²⁴ Section 2 of the Commercial Pledges Act.

²⁵ V. Kõve (see Note 7), pp. 246, 333.

²⁶ *Ibid.*, pp. 246, 333.

Court judgements dealing with the issue of whether the extent of the commercial pledge encompasses vehicles^{*27} and whether a notarised commercial-pledge agreement qualifies as an enforcement document^{*28}.

Although ambiguity related to the exact extent of the pledge is said to cause problems to creditors^{*29} and, according to the Supreme Court, it is not possible to initiate enforcement proceedings under the commercial-pledge agreement, it has not prevented increasing use of the commercial pledge by creditors. Whether the cause is the aftermath of the financial crisis and creditors' need for greater protection, however illusory, or other, unknown factors, the registration of commercial pledges has increased in recent years, from 5,014 pledges in 2008 to 7,081 pledges in 2012^{*30} and then 17,086 in 2015^{*31}. For a comparison of magnitude, the corresponding number for Latvia was 144,976 in January 2010^{*32}.

How extensive the scope of the business pledge should be depends on many elements, all of which the legislator needs to consider. The first is limitations on the circle of persons entitled to grant a general pledge – should it consist of only companies or cover individuals also? For example, in the United States a general security right can be granted both by companies and individuals. Second is a limitation on the beneficiaries of a business pledge. In Belgium, only credit institutions were allowed to take a pledge over business, a limitation that was lifted by amendments to the law adopted in 2013^{*33}. Thirdly, one should consider whether the business pledge is the only possibility for having a non-possessory pledge over certain assets or other non-possessory pledges are available too. If so, what is their legal certainty? Fourthly, what is the ranking system under the relevant insolvency law, and how many preferential creditors does the insolvency law list?

3. Protection of third parties

3.1. Publicity

The EBRD core principles for a secured-transactions law contain a suggestion that there should be a possibility of publicising the existence of any security right. In the case of non-possessory security rights, this should be done via a public registry or notification system^{*34}.

For what purpose is it necessary to publicise who has pledged something, what and when, and to whom? Publicity of any existing security right and information on retention of title is necessary from the perspective of creditors, *bona fide* buyers, bailiffs, and bankruptcy administrators. From the perspective of creditors, publicity mitigates the risk of debtors' false wealth that could result in providing of unjustified credit – meaning that the debtor appears to possess many assets, while in reality most of them have been encumbered with security rights or sold to third parties, leaving the assets with minimal or no value^{*35}. Registration and publicity of encumbrances and retentions of title also minimises the risk of priority and validity disputes (e.g., fraudulent security agreements fabricated right before bankruptcy is declared). It also helps bailiffs and bankruptcy administrators decide whether or not to acknowledge the validity of the security right^{*36}. According to the Estonian Code of Enforcement Procedure, a bailiff shall take a claim of

²⁷ Supreme Court Civil Chamber ruling 3-2-1-133-13, of 11.12.2013 (in Estonian).

²⁸ Supreme Court Civil Chamber ruling 3-2-1-1-14, of 12.3.2014 (in Estonian).

²⁹ P. Varul *et al.* (see Note 6), p. 368.

³⁰ M. Haamer. Kommertspandi ulatus ja roll tagatisena pankroti- ja täitemenetluses (Scope and Role of the Commercial Pledge as Security in Bankruptcy and Enforcement Proceedings), research paper. Tartu 2013, p. 6 (in Estonian).

³¹ Electronic correspondence. L. Merkulova (with the Centre of Registers and Information Systems) and Annemari Õunpuu, 23.3.2015 (in Estonian).

³² E. Lodzins, L. Krumina. Bank finance and regulation: Multi-jurisdictional survey: Latvia. Text available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=23A9C27D-80E6-458B-8DFC-EE56563762E9> (most recently accessed on 22.3.2015).

³³ E. Janssens. New law on security over movable assets: Significant impact on financing transactions. – Linklaters Newsletter 2013/May, p. 4. Text available at http://www.linklaters.com/pdfs/mkt/brussels/Newsletter_Security_over_movable_assets_January_2013.pdf (most recently accessed on 20.3.2015).

³⁴ EBRD core principles for a secured transactions law, Principle 8.

³⁵ P.R. Wood (see Note 3), p. 7-007.

³⁶ Registration of security interests: Company charges and property other than land: A consultation paper, Law Commission Consultation Paper No. 164. London: The Stationery Office 2002, p. 26. The text of the consultation paper is available on the Internet via <http://www.lawcom.gov.uk/>.

a security right holder into account upon distribution of revenue if the right of security is evident from a publicly reliable register or a contract on which the security right is based is authenticated by a notary^{*37}. The same principle applies in the case of bankruptcy proceedings for which the Bankruptcy Act specifies that the validity of security rights entered in the land register, ship register; commercial-pledge register, or securities register is acknowledged without defence^{*38}.

In the absence of a general security-rights register and notice-filing, the existing regulation creates many problems, which can be illustrated by the example of a pledge on bank accounts or receivables. If the debtor has not fulfilled a tax obligation, the tax authority is entitled to seize the bank account of the debtor or order the bank to transfer the money from the debtor's bank account to the tax authority. The tax authority is also entitled to seize other proprietary rights^{*39}. Provided that the debtor has a pledge on the bank account in favour of the bank, in the absence of any publicity mechanism, the existence of said pledge is not transparent to third parties, including the tax authority. The priority between the seizure of the funds by the tax authority and the bank as the beneficiary under the account-pledge agreement should then be settled by means of court proceedings. Although in the Netherlands there is no general security-rights register, there is a possibility to use registration with the tax authority for publicity purposes. In order for the non-possessory pledge to be effective against third parties, it must be registered with the tax office, for fixing the date of the agreement. Alternatively, the agreement has to be notarised^{*40}.

Given that Estonia does not have a positive credit register, there is no retention-of-title register, and it is questionable whether asset-title registry data – such as those in the Traffic Registry – are public or not, Estonia is in need of a reform that would render the security-right system more transparent and predictable for creditors, the tax authority, bailiffs, and bankruptcy administrators, reducing unnecessary disputes over validity and priority of security rights.

3.2. Priority – asset-title registries and notice-filing

Over the years, asset-based financing (lending against receivables, inventory, equipment, and machinery) has increased, increasing also in turn, the need for a general security-rights registry creating transparency for lenders and third parties, instead of an incoherent system of non-registered fiduciary transfers and a multitude of specific asset-title registries^{*41}. The UNCITRAL remarks that registries for security rights in movables that are based on the type of the asset (equipment, receivables, inventory, ships, etc.) – i.e., asset-title registries – usually developed not as a well thought-through system but as a 'piecemeal recognition of individual non-possessory security devices in movable assets'^{*42}.

In England and the United States, the mitigation of priority disputes for a creditor secured by the universal pledge is achieved by means of sophisticated use of universal security rights (floating charges or floating liens) in combination with negative pledge clauses^{*43} and perfection^{*44} of pledge rights in debtor-indexed general security-right registries. The United States notice-filing system and functional approach to security rights (as opposed to a form-based approach) are more advanced than the English floating and fixed charge

³⁷ Täitemenetluse seadustik. – RT I 2005, 27, 198; RT I 05.03.2015, 5, §108 (4) (in Estonian). English text available at <https://www.riigiteataja.ee/en/eli/513032015003/consolide> (most recently accessed on 20.3.2015).

³⁸ Pankrotiseadus. – RT I 2003, 17, 95; RT I 21.06.2014, 20, §103 (4) (in Estonian). English text available at <https://www.riigiteataja.ee/en/eli/511072014018/consolide> (most recently accessed on 20.3.2015).

³⁹ Maksukorralduse seadus. – RT I 2002, 26, 150; RT I 17.03.2015, 10, §§ 130 (1) 4) and 131 (1) (in Estonian). English text available at <https://www.riigiteataja.ee/en/eli/519032015001/consolide> (most recently accessed on 20.3.2015).

⁴⁰ P.R. Wood (see Note 3), p. 9-035.

⁴¹ N.O. Akseli. *International Secured Transactions Law: Facilitation of Credit and International Conventions and Instruments*. New York: Routledge 2011, p. 176 DOI: <http://dx.doi.org/10.4324/9780203831618>.

⁴² UNCITRAL Legislative Guide on Secured Transactions (see Note 10), p. 154.

⁴³ In the case of the English floating charge, previous or subsequent fixed security right over a specific property always takes priority over the universal floating charge. Hence, creditors often use a negative pledge clause as a contractual restriction to prevent the company from creating any other security right 'ranking in priority to, or equally with the floating charge over the things which the floating charge could cover' (S.B. Marsh, J. Soulsby. *Business Law*. Nelson Thornes 2002, p. 266). The negative pledge does not prevent the debtor from pledging his assets and thereby creating competing or preferential security rights. However, the breach of the clause may be an event of default resulting in the termination of the loan agreement and enforcement of the floating charge.

⁴⁴ In Anglo-American jurisdictions, 'perfection' means that 'the security becomes effective against creditors of the debtor and the other third parties' and 'typically involves publicizing the security interest' (P.R. Wood (see Note 3), p. 7-001).

system. The United States has a ‘unitary’ security right, regardless of the form of the transaction (retention of title or pledge), with the security right made effective against third parties via a notice-filing system^{*45}. Central registry systems have so far not been widespread in Europe. One of the European countries recently adopting amendments along the lines of the regime in the United States is Belgium, which made substantial amendments to its Civil Code in May 2013. In its new form, the law allows for a pledge over any movable asset (present and future, as a pool or separately), with the possibility of publicising the pledge either by taking possession of the asset or by registering the pledge in the central National Pledge Registry. Ranking and priority in this system depend on the date of filing or the date of taking possession (with the latter possibility considered to cause disputes)^{*46}.

In England, registered fixed charges have priority over the floating charge, meaning that a general pledge is always subordinated to a specific pledge. This is a risk that the general pledge holder has to take into account as inherent risk deriving from the nature of a general pledge and is therefore considered to be ‘part of the ordinary course of business’^{*47} – a risk that the Estonian legislator and the Supreme Court have so far often refused to see as a natural part of the commercial pledge. Said risk could be significantly mitigated if Estonia had a central register for retention of title and non-possessory pledges, together with a priority system making the priority dependent on the date of publicity notice in the central register. Of course, the system needs to be combined with the existing public registries, such as the Traffic Registry and the central securities register. All in all, a central register for pledges over movables would significantly improve the chances of a commercial pledge holder being able to react to breach of a negative pledge clause (a clause also used in Estonian banking practice).

4. Enforcement

The Supreme Court has found that a notarised commercial pledge agreement cannot be an enforcement instrument within the meaning of the term’s usage in the Code of Enforcement Procedure. In order to enforce the pledge agreement and sell the assets, the creditor has to turn to the courts for the necessary approval. The main reason for limiting the out-of-court enforcement possibilities with the commercial pledge, in the view of the Court, is related to the floating nature of the pledge object. In the event of enforcement it would be unclear which assets are covered by the commercial pledge and subject to sale. Also, the debtor would have to bear the burden of disputing the rightfulness of enforcement, as the creditor does not need any pre-enforcement court approval^{*48}. In practice, before the Supreme Court gave its view in 2014, creditors and debtors often concluded notarised agreements containing enforcement clauses without any indication from the notaries or lower-instance courts that these agreements would not qualify as enforcement documents^{*49}.

The UNCITRAL guide refers to the fact that negotiations with the debtor company on a debt-restructuring plan take place against the backdrop of the secured creditor’s right to enforce the security right and initiate bankruptcy proceedings in the case of debtor default. Hence, when the enforcement right of the secured creditor is weak (entailing costly and time-consuming civil litigation to enforce the pledge agreement), the debtor is less likely to seek reorganisation solutions proactively and in the case of payment difficulties will stall as long as possible^{*50}. The EBRD Model Law on Secured Transactions emphasises that the right of enforcement relies first and foremost on self-help, meaning that the pledgee should have ‘broad but

⁴⁵ According to Law Commission Consultation Paper 164 (see Note 36), p. 11. The English Law Commission has underscored three main principles of the notice-filing system: ‘(1) filing is not necessarily in relation to a specific transaction, but is a notice that a person has taken or intends to take a non-possessory security over a designated asset or class of assets; (2) the secured party can file a notice to protect the security interest either before or after the security is created, with priority normally going back to the time of filing of the financing statement; (3) to reduce the burden of filing, transaction documents are not filed and particulars to be filed are kept to a minimum’, as it is left ‘to a searcher to get the information she wants from the company or charge’ (Law Commission Consultation Paper 164, pp. 61–62).

⁴⁶ E. Janssens (see Note 33), pp. 1–2.

⁴⁷ Law Commission Consultation Paper 164 (see Note 36), p. 33.

⁴⁸ Supreme Court Civil Chamber ruling 3-2-1-1-14, of 12.3.2014 (in Estonian).

⁴⁹ P. Varul *et al.* (see Note 6), p. 373.

⁵⁰ UNCITRAL Legislative Guide on Secured Transactions (see Note 10), p. 276.

clearly defined rights' to sell the pledged property^{*51}. The model law suggests that once 60 days have passed from delivering the enforcement notice to the debtor and registering the enforcement notice in the security registry, the security holder has the right to transfer title to the secured property by selling it^{*52}.

Common-law jurisdictions are more inclined to favour self-help remedies, while European jurisdictions require the enforcement to take place via a bailiff or by judicial pre-approval^{*53}. Following the lines of the EBRD suggestions and in conjunction with amendments adjusting the scope and registration of security over movable assets, Belgium adopted a simplified enforcement procedure in 2013. The essence of the enforcement is that in all cases of pledges over movables, the parties are free to determine in the security agreement the manner of enforcement, whether by sale, rental, or appropriation, with the debtor given 10 days' prior notice. The agreement is not an enforcement document, and, hence, the practical issues of creditor access to assets in the case of a non-possessory pledge still remain^{*54}.

It is recommended that common European rules either introduce expedited proceedings for judicial pre-approval of enforcement or allow for some form of self-help. The Estonian Code of Civil Procedure has a specific procedure for actions for compulsory enforcement arising from registered security over movables. The procedure is given the title 'documentary proceeding', with the idea being that all facts in proof of the claim can be supported by documents^{*55}. However, it is questionable whether such proceedings qualify as 'expedited proceedings', since there is no indication in the law as to deadlines within which the court should proceed with the compulsory enforcement claim. The plaintiff is left dependent on the work load of the court and without predictability of how long the proceedings could take.

5. Conclusions

From its creation, in the early 1990s, the commercial pledge has been a controversial pledge in the Estonian system of security rights, and one can only agree with the claim that its true nature and functioning has not been properly understood and discussed. It is clear from the statistics that there is a growing need for a pledge covering the assets currently within the scope of the commercial pledge. Before considering any detailed issues pertaining to the pledge, the legislator should answer the fundamental question of the purpose the commercial pledge serves in the Estonian security-rights system, along with whether Estonia needs a universal pledge and, if so, what should be its scope.

The reform and any amendments to the commercial-pledge regulation cannot be looked at separately from the question of whether Estonia should have a central register for pledges on movables, similar to the registry system introduced in Belgium in 2013. Considering trends in financing and the international arena generally toward debtor-indexed central registries with e-filing systems that serve the purpose of transparency for all third parties (existing and potential creditors, bailiffs, and bankruptcy administrators), Estonia should follow the international lead and introduce a central register for pledges on movables, which should also include entries on retention of title. The central register would help to minimise double pledging of a given asset and minimise disputes over priority of security rights, as the priority would be dependent on the publicity date of the non-possessory security right. It should be considered whether the central register should be based on a notice-filing system and precisely what information it should contain on the security agreement.

The strength of any security right depends to a large extent on the possibilities for enforcing it. Therefore, the enforcement possibilities for pledges over movable assets should be reconsidered, with possible amendments to the documentary procedure that involve extending the scope of pledges for which it is available (if all pledges on movables are to be registered), along with setting of specific procedural deadlines in the Code of Civil Procedure.

⁵¹ EBRD Model Law on Secured Transactions, 1994.

⁵² *Ibid.*, Articles 24–26.

⁵³ A. Veneziano. A Secured Transactions' Regime for Europe: Treatment of Acquisition Finance Devices and Creditor's Enforcement Rights. – *Juridica International* 2008/1, p. 94.

⁵⁴ E. Janssens (see Note 33), p. 2.

⁵⁵ Tsiviilkohutemenetluse seadustik. – RT I 2005, 26, 197; RT I 31.12.2014, 5, §406 (in Estonian). English text available at <https://www.riigiteataja.ee/en/eli/505022015002/consolide> (most recently accessed on 23.3.2015).



Andres Vutt
Associate Professor
of Commercial Law
University of Tartu



Margit Vutt
PhD
Adviser to the Civil Chamber
Supreme Court of Estonia

Shareholders' Individual Information Right:

Prerequisites and Boundaries

1. Introduction

Relations under company law are characterised by their multifacetedness – there are always numerous parties involved in such legal relationships, and these relations are also multi-layered. Therefore, creation of an appropriate system of all kind of remedies as well as creating an effective balance between the interests of the company and its shareholders is quite a challenging task.^{*1} The choice of measures to protect shareholders' rights is also related to the question of whether and to what extent shareholders as the providers of capital should have the right to check the use of the resources provided by them.^{*2}

Being a shareholder of a limited liability company is always linked to certain property rights and expectations – generally speaking, every shareholder is in the first place interested in gaining dividends from an investment he has made obtaining a share of a company. In addition to property rights, or, in fact, as a prerequisite to proper execution of them, the law provides shareholders also other types of rights, the most important of which is the right to obtain information.^{*3} Shareholders' right to information is considered to be the most important part, the very essence, of the so-called “membership rights”, because only an informed member of a company can sensibly exercise his voting rights.^{*4}

Optimal legal regulations therefore must provide proper balance between (sometimes malicious) minority shareholders requiring too much disclosure, which can either burden the company unreasonably or affect the confidentiality necessary to carry out business, and the actual need of the minority shareholders not involved in daily management to be properly informed. For a shareholder it is important to get information that allows one to exercise membership rights; for the company, on the other hand, it is important to block the claims that can be considered as harassment or that may otherwise cause significant damage to the company.

This article aims to investigate the shareholder's right to information from the point of view of a shareholder as well as from the point of view of the company and to analyse whether Estonian law provides

¹ About shareholder remedies in Estonia see also: M. Vutt. Systematics of Shareholder Remedies – Origins and Developments. – *Juridica International* 17/2010, p. 188

² T. Laurer. US – Corporate Governance während einer feindlichen Übernahme – oder “der Revlon Auslöser”. – *Zeitschrift für Vergleichende Rechtswissenschaft. Archiv für Internationales Wirtschaftsrecht.* 103. Band. August 2004, p. 317.

³ U. Hüffer. *Aktiengesetz. Beck'sche Kurzkommentare.* 9. Auflage 2010, § 131, Rn 1.

⁴ W. Goette, M. Habersack, S. Kalss (Herausg.). *Münchener Kommentar zum Aktiengesetz.* Band 2. 3. Auflage 2008, § 131, Rn 1; H. Fleischer, W. Goette (Herausg.). *Münchener Kommentar zum GmbH Gesetz.* 1. Auflage 2012, § 51a, Rn 5.

reasonable balance between the shareholders' interests and the interests of the company. The paper will also provide an assessment of the corresponding Estonian court practice.

2. General rules on shareholders' right to information

Shareholders are considered to be the most important stakeholders of the company.^{*5} It is also argued that shareholders are the "economic owners" of the company,^{*6} the so-called initial capitalizers, who have the ultimate right to control company's management and, if necessary, to interfere.^{*7}

Therefore, every shareholder has the indisputable right to receive some kind of information from the company. In addition to that, every shareholder has the right to get copies of some specific documents and to examine some documents of the company. Those specific rights are granted to the shareholders by mandatory rules, and a company therefore cannot refuse to provide such information or copies of such documents. For example, every shareholder has an indisputable right to receive a copy of the minutes of the general meeting or a copy of a part thereof if the minutes are not available on the homepage of the company (§171 (5) and § 304 (4) of Estonian Commercial Code^{*8}). The same applies to the voting record in a private limited company, when shareholders have adopted a resolution without calling a shareholders' meeting (§173 (3) of CC). According to §179 (2) and 332 (4) of CC, every shareholder also has the right to receive the annual report and the profit distribution proposal.

In addition to the above-mentioned information law provides for shareholders the possibility to claim other information about the activities of the company, but the borders of the information claim are designed differently in private and public companies and the management board can usually refuse to give information or to provide documents if the company's interests are to be preferred as compared to the shareholders' interests.

It is important to emphasise that the right to information is not a minority right but an individual right of a shareholder, and this means that each shareholder has this right and can execute it irrespective of the amount of his share and irrespective of the fact of whether he has voting rights or not.^{*9} A majority shareholder has the same information rights as the minority shareholder,^{*10} though he usually has better access to information, especially if he also has the necessary majority to control the management. According to German case-law, the shareholder's information right is considered to be a right that cannot be separated from the shareholding (from the so-called membership^{*11}) and therefore also not to be encumbered with the pledge. This is substantiated by the fact that large-scale information about the company's activities should be granted only to its shareholders and the shareholders are not allowed to pass this information to third persons.^{*12} The authors of the paper are of the opinion that the same applies to the information right of the shareholders of limited companies under Estonian company law.

According to Estonian company law, there are two types of limited liability companies – private limited company (*osajühing*) and public limited company (*aktsiaselts*) – and the statutory rules regulating the information right of their shareholders are different. The differentiation of rules derives from the German system and is based on the principle that the private limited company is considered to be a proper legal form for small closed companies and the public limited company, on the other hand, is suitable for bigger and open business entities. Swedish law, on the other hand, follows a different principle: the scope of shareholders' information rights depends on the number of shareholders of the company as there are special rules for companies with fewer than ten shareholders, providing for shareholders of such companies

⁵ About stakeholder theory see, e.g.: J. Heath, W. Norman. Stakeholder Theory, Corporate Governance and Public Management: What Can the History of State-run Enterprises Teach Us in the Post-Enron Era? – *Journal of Business Ethics* 2004, No. 53, pp. 247-265 DOI: <http://dx.doi.org/10.4324/9780203107621>.

⁶ H. Meilicke, T. Heidel. Das Auskunftsrecht des Aktionärs (Teil I). – *Deutsches Steuerrecht* 1992, S 72.

⁷ P. Ireland. Company Law and the Myth of Shareholder Ownership. – Hardy, S., Butler, M. (Eds). *International Themes in Business Law*. Vol. 2. London 2007, p. 42.

⁸ Commercial Code. Adopted on 15 February 1995. – RT I 1995, 26/28, 355; 2010, 9, 41 (in Estonian). Hereinafter 'CC'.

⁹ H. Meilicke, T. Heidel. Das Auskunftsrecht des Aktionärs (Teil I). – *Deutsches Steuerrecht* 1992, S 73.

¹⁰ H. Fleischer, W. Goette (Herausg.). *Münchener Kommentar zum GmbH Gesetz*. 1. Auflage 2012, § 51a, Rn 5-6.

¹¹ In German: *Mitgliedschaft*.

¹² G. Ring. Aktuelle Rechtsprechung des BGH zum GMmbH-Recht. – *Neue Justiz* 2014, S 353.

broadier rights (Swedish Companies Act^{*13} 7 kap. 36 §). As *de facto* relations in companies usually depend less on the type of the company (private or public) and more on the number of shareholders, the latter approach seems even more reasonable.

3. Information right of a shareholder of a private limited company

According to §166 (1) of CC, the shareholders of a private limited company have the right to receive information from the management board on the activities of the company and to examine its documents. The management board may refuse to provide information or to present documents if there is a basis for presuming that this may cause significant damage to the interests of the private limited company.^{*14}

If the management board refuses to provide information or refuses to permit a shareholder to examine the documents, the shareholder may demand that the legality of the shareholder's demand be decided at the shareholders' meeting or may submit, within two weeks after receiving the refusal of the management board or within four weeks after submission of the request if the management board has not responded to the request, an application to the court in a proceeding on petition in order to obligate the management board to give information or to allow documents to be examined.^{*15}

Though statutory regulations provide the shareholder of a private limited company with the right to examine the documents of the company, he is not, however, entitled to claim for the possession of those documents. Neither can he demand the right to examine the documents of the company without the presence of a member of the management board or other representative of the company. This is substantiated by the fact that only the members of the management board are to be held liable in case the documents are lost or destroyed. Therefore, in case the shareholder claims for delivery of the company's documents, the court may refuse to accept the claim because it can be considered a "legal dead-end": § 371 (2) 2) of Estonian Code of Civil Procedure^{*16} allows the court to deny to commence the proceeding in the event that the plaintiff's claim has not been filed, to protect his right or interest protected by law, or if the objective sought by the plaintiff cannot be achieved by that kind of action.^{*17}

If the relations between different members of the management board are for some reason complicated, it is the duty of the shareholders to restore the normal management. The most complicated is the situation in companies where there are two arguing shareholders with equal votes who are simultaneously members of the management board. Information claims are usually an inevitable part of such arguments – both shareholders usually have the ambition to achieve control over the company. The situation is even worse when the arguing shareholders have equal votes but only one of them is a member of the management board. Estonian company law lacks specific regulations that allow overcoming such a conflict^{*18} and the court can only persuade the arguing parties to compromise.

The following is an example of such a dispute from Estonian court practice. A private limited company had two arguing shareholders, but only one of them was also a member of the management board and therefore had access to the documents and information. The other shareholder – i.e., the one who was not a member of the management board – clearly had no access to any information or documents because of the dispute. Unfortunately, the claim he filed was aimed at obliging the member of the management board to

¹³ Swedish Companies Act: Aktiebolagslagen 2005:551. Available at: <http://www.notisum.se/rnp/sls/lag/20050551.htm>.

¹⁴ Section 166 (2) of CC.

¹⁵ Section 166 (3) of CC.

¹⁶ Code of Civil Procedure. Adopted on 20.04.2005. – RT I 2005, 26, 197; RT I, 31.12.2014, 1. Hereinafter 'CCP'.

¹⁷ According to Estonian case-law, it appears that choosing the wrong remedy is the main reason for courts to refuse to accept the action. See: M. Vutt. Hagi menetlusse võtmisest keeldumine või läbivaatamata jätmine õigusliku perspektiivituse tõttu (The Refusal to Accept Action or to Hear Action in Case of Legally Fruitless Claims), pp. 2-39. Available at: http://www.riigikohus.ee/vfs/1307/HagiOiguslikPerspektiivitus_MargitVutt.pdf (in Estonian).

¹⁸ Provisions that allow the arguing shareholders to apply to the court and to solve the problem before the company goes bankrupt as a result of the argument are available, for example, under Belgian law. In case there is a significant reason and other remedies have failed, a minority shareholder can apply to the court and claim that either he or the other shareholders should be bought out. See: A. Bertrand, A. Coibion. Shareholder Suits against the Directors of a Company, against Other Shareholders and against the Company Itself under Belgian Law. – European Company and Financial Law Review, August 2009, Vol. 6, No. 2/3, p. 290 DOI: <http://dx.doi.org/10.1515/ecfr>.

deliver the documents to him. The county court as well as the circuit court refused to satisfy his claim. The county court grounded the decision on implying the possibility of damaging the interests of the company.^{*19} The circuit court was of the same opinion and expressed the view that it is not possible to oblige the board member to hand over the documents under §166 of CC.^{*20}

The right of the shareholder of a German private limited company, GmbH (*Gesellschaft mit der beschränkter Haftung*), to receive information and to examine the documents is regulated quite similarly, under German law. According to §51a (1) and (2) of the Law on Private Limited Companies^{*21}, the management can refuse to provide the information only if one can assume that the shareholder may use the information for purposes in conflict with the company's interests or the interests of affiliated companies in the same group and cause herewith significant disadvantage to the company. Refusal needs to be stated in the shareholders' decision.

In German legal literature, it has been said that the information right of a shareholder must be understood in the widest sense: it involves all the legal and economic relations inside the company and also all the respective relations between the company and third persons. The information also involves knowledge about all kinds of contributions and expenses of the company and all the aspects of management and the distribution and use of profit.^{*22} It has been noted, though, that a mere curiosity cannot be considered proper grounds for an information claim.^{*23}

It has also been discussed that the vague legal regulation of the borders of a shareholder's information rights may grant shareholders of a private limited company quite an extensive right to inspect all the company's documents, which may not be the best solution from the point of view of the company, and German company law might actually need more detailed regulations.^{*24} The authors of this paper are of the opinion that the same characteristics describe also Estonian company law. The right to receive information is to be understood quite widely, but no specific regulation is probably necessary, as the case-law can shape the proper boundaries of the disclosure.

As the law provides the shareholder of a private limited company simultaneously with the right to demand information and the right to inspect the documents, one may ask which instrument should prevail in order to execute the information right. In German legal literature, the two possibilities for obtaining information are considered to be equal, but, as the inspection of documents tends to burden the company more than the simple distribution of information, one must choose, if possible, the distribution of information instead of the inspection of documents.^{*25} This means that if a shareholder claims for the examination of documents but the purpose of his information claim can still be achieved by the distribution of information, the distribution of information is considered to be sufficient to satisfy his claim. The court has the right to ascertain the scope of the actual interest of the shareholder and to establish the boundaries of the information distribution.

There is another instrument that may be considered an extension of the shareholder's information right. According to §191 (1) of CC, shareholders whose shares represent at least one-tenth of the share capital may demand a resolution on conducting of a special audit on matters related to the management or financial situation of the private limited company, and the appointment of an auditor for the special audit by a resolution of the shareholders. Though the Supreme Court has expressed a view that the special audit is an instrument that allows shareholders to inspect the documents,^{*26} this statement cannot be regarded as justified, as the aim of the special audit is different – it is conducted by auditors or advocates (§191 (3) of CC) who inspect the documents and find answers to certain questions on management or financial matters.

¹⁹ Ruling of Tartu County Court 5.2.2009, 2-08-64591.

²⁰ Ruling of Tartu Circuit Court 1.7.2009, 2-08-64591.

²¹ German Law on Private Limited Companies: Gesetz betreffend die Gesellschaften mit beschränkter Haftung in der im Bundesgesetzblatt Teil III, Gliederungsnummer 4123-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 27 des Gesetzes vom 23. Juli 2013 (BGBl. I S. 2586) geändert worden ist. Hereinafter: GmbHG.

²² M. Passarge, S. Kölln. Das Auskunfts- und Einsichtsrecht nach § GmbHG § 51a GmbHG bei der kommunalen GmbH. – NVwZ 2014, S 982.

²³ K. Kiethe. Das Informationsrecht des ausscheidenden GmbH-Gesellschafters. – Deutsches Steuerrecht 1993, S 1709.

²⁴ H. Fleischer, W. Goette (Herausg.). Münchener Kommentar zum GmbH Gesetz. 1. Auflage 2012, § 51a, Rn 4.

²⁵ H. Fleischer, W. Goette (Herausg.). Münchener Kommentar zum GmbH Gesetz. 1. Auflage 2012, § 51a, Rn 61.

²⁶ CCSCr 3-2-1-29-08, para. 13.

The authors of the paper take the view that the special audit, being a minority right^{*27}, cannot replace the shareholder's right to examine the documents of the company.

4. Information right of a shareholder of a public limited company

As regards the other type of Estonian corporate entities, the information right of the shareholders of a public limited company is more restricted. According to §287 (1) of CC, a shareholder has the right to receive information on the activities of the public limited company from the management board at the general meeting. The management board of a public limited company has a right to refuse to give information similar to that of the management board of a private limited company (§287 (2) of CC) and the shareholder has the same right to apply to the court in order to obligate the management board to provide information (§287 (3) of CC).

Consequently, the shareholder of a public limited company has a right to receive information only at the general meeting, which means that he has the right to ask the management board questions concerning the activities of the company, but he cannot examine the company's documents. The shareholder has the right to get a copy of the minutes of the shareholders' meeting (§303 (4) of CC), but he does not have the right to examine the minutes of the management board or supervisory board meetings. Yet a shareholder may ask the management questions about the issues discussed by the management board or at the supervisory board meetings. In addition to that, every shareholder has access to all the documents that have been disclosed through the commercial registry.

The Supreme Court of Estonia has several times ruled that a shareholder of a public limited company has limited access to company's documents^{*28} and referred to other possibilities for getting information about the company's activities – for example, demanding that the general meeting would adopt a resolution on conducting of a special audit on matters related to the management or financial situation and on appointing of an auditor for the special audit (§330 (1) of CC).^{*29} If the general meeting does not adopt the decision on conducting a special audit, shareholders whose shares represent at least one tenth of the share capital may request that a special audit be conducted and that an auditor be appointed by a court. The court shall decide on conducting of a special audit only with good reason. In practice, it is sufficient to substantiate that there is a need to inspect the actions of the management or to check the legality of contracts concluded by the company. The aim of the special audit is to ascertain whether the members of the management board have committed omissions that might give cause for claims against them. The request to conduct a special audit is also an appropriate remedy to inspect the circumstances of the foundation or alteration of share capital and other, similar issues.^{*30} If possible, the court shall also hear the members of the management board and supervisory board of the public limited company before deciding on the conducting of a special audit (§330 (2) of CC). As has already been mentioned, the opinion expressed by the Supreme Court is not fully correct – the special audit does not literally grant shareholders the access to documents but only foresees a different possibility for receiving answers to some specific questions.

When one compares the information rights of the shareholders of private and public limited companies, it is evident that the shareholder of a private limited company has a more extensive right to information than the shareholder of a public limited company. The reason for that is the fact that the private limited company is considered to be a closed corporation in which shareholders are normally more involved in daily business while shareholders of a public limited company, on the other hand, are usually just investors.

The basic principles of the information right of the shareholder of a German public limited company, AG (*Aktiengesellschaft*), are regulated in quite a similar way, but, as compared to Estonian general statutory rules, German regulations are more detailed. According to §131 (1) of German Law on Public Limited

²⁷ Only shareholders representing at least one-tenth of the share capital may demand a resolution on conducting of a special audit.

²⁸ CCSCr 14.12.2012 No. 3-2-1-133-11, p. 18; CCSCr 3-2-1-29-08, para. 13.

²⁹ CCSCr 7.5.2008 No. 3-2-1-35-08, para. 10.

³⁰ CCSCr 7.5.2008, 3-2-1-35-08, para. 10.

Companies^{*31}, every shareholder has a right to receive information on the activities of the public limited company from the management board at the general meeting. The management's right to refuse to provide information is regulated more thoroughly. In addition to the general provision that the management may refuse in case the disclosure of the information is likely to cause significant disadvantage to the company, the management may also refuse to provide information on certain taxation, accounting, and valuation matters, or if providing the information might lead to the criminal liability of the board members. The latter is an expression of the very basic legal principle that prohibits obligating a person to provide information that might imply that he has committed a crime. Estonian company law lacks such a clear regulation; nevertheless, as the principles of Estonian criminal law are the same, the boundaries of the management's obligation to provide information cannot be interpreted differently. The same principle is also expressed in Estonian Constitution.^{*32} Yet it has been expressed in German legal literature that the management is not, however, allowed to refuse to provide information if the information to be provided would imply that the member of the management board could be held liable for inside trading violations.^{*33}

When refusing to provide information the management board does not necessarily need to prove that the damage has been occurred but only to substantiate it which means that it has to give explanation that suffices to make such an allegation plausible.^{*34}

A shareholder who has been denied information may request that his question and the reason for which the information was denied be recorded in the minutes of the meeting (§131 (5) of AktG).

It is also important to note that, according to §131 (2) of AktG, the articles of association or the rules of internal procedure may authorise the chairperson of the meeting to limit the number of questions and the speaking time of shareholders as appropriate and to lay down general rules thereon.

Though it is stipulated by law that the management board has the right to refuse to provide information, it is at the same time the obligation of the board, because it is the management board's duty to avoid damage to the company.^{*35} Therefore the management's decision about the disclosure should be evaluated from the point of view of the general business judgement rule.

The authors are of the opinion that the same principle is applicable under Estonian company law for both types of companies.

5. Protection of a company's trade secret as a ground for refusal of a shareholder's information claim

As one can see, the basic rule that sets the boundaries for shareholders' information rights is quite simple – shareholders of both types of limited companies can demand information about the activities of the company, and the shareholders of private limited companies have an additional right to examine all the documents unless it may cause significant damage to the company. But the real scope of the information right as well as the meaning of "significant damage" can only be interpreted through case-law. Estonian case-law has given the very basic interpretation of this rule: in deciding whether the disclosure of the information may cause significant disadvantage (damage) to the company, all aspects and circumstances should be reasonably considered and the merely subjective opinion of the management board cannot substantiate the refusal. The refusal is grounded only in the case of there being an actual danger that the disclosure would lead to significant damage (which is not necessarily material damage) to the company. The refusal does not have grounds in case there is a danger that the disclosure would somehow harm third persons.^{*36}

³¹ German Law on Public Limited Companies: Aktiengesetz vom 6. September 1965 (BGBI. I S. 1089), das zuletzt durch Artikel 26 des Gesetzes vom 23. Juli 2013 (BGBI. I S. 2586) geändert worden ist. Hereinafter: AktG.

³² According to §22 (3) of the Constitution of the Republic of Estonia, no-one shall be compelled to testify against himself or herself, or against those closest to him or her.

³³ U. Hüffer. Aktiengesetz. Beck'sche Kurzkommentare. 9. Auflage 2010, § 131, Rn 31.

³⁴ C. Mense, M. Klie. HV-Saison 2015: Aktuelle Trends und rechtliche Entwicklungen für die Vorbereitung und Durchführung von Hauptversammlungen. – Gesellschafts- und Wirtschaftsrecht 2015, 45, S 49.

³⁵ U. Hüffer. Beck'sche Kurzkommentare. Aktiengesetz. 11. Auflage, 2014, § 131, Rn 23.

³⁶ CCSCd 21.3.2007, No. 3-2-1-22-07, para. 10; CCSCr 23.4.2008, No. 3-2-1-29-08, para. 11; CCrSC 8.6.2009, No. 3-1-1-46-09, para. 10.2.

As the law tends to be vague as regards the definition of significant damage, one can ask how Estonian case-law has interpreted this term. According to case law, the possible violation of a trade secret of the company can be considered the most common objection that management boards use to block the unpleasant information claims of shareholders.

Under Estonian case-law^{*37}, the meaning of "trade secret" is interpreted through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)^{*38}, Article 39 p. 2. According to the article in question, both natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information: (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. So in order to classify some kind of information as a trade secret, it is not enough to argue that it is not generally known; it must also have some kind of commercial value.

In a dispute between a private limited company and a minority shareholder thereof, the management board refused to provide access to the bank account statement, justifying the refusal by a prohibition on revealing the company's trade secret – the database of the company's customers. Neither the county court nor the circuit court found the refusal grounded.^{*39}

The Estonian Supreme Court has answered a question about whether a refusal to provide basic board remuneration information referring to a possible violation of the company's trade secret is justified.^{*40} The circumstances of the case were simple: A public limited company had a bloc of controlling shareholders (members of the same family) who were all either members of the management board or the supervisory board or employed by the company and therefore receiving either direct remuneration or another kind of compensation from the company. The company in question also had a minority shareholder (his share representing approx. 24% of the company's share capital), who was through its shareholders controlled by a competitor of the public limited company in question.

The minority shareholder applied to the director of the company (who was at the same time also the majority shareholder) and demanded information about the provisions of the contract concluded between the director and the company, specifically about the stipulations regarding remuneration and the actual amount of the salary paid to the director. The minority shareholder also requested information about the outlays to persons connected to the director (i.e., his relatives). At the shareholders' meeting, the director answered that the contract between him and the company was concluded in written form and that all the outlays had been made in the amount confirmed by the supervisory board. The only explanation the director gave to the shareholder was that there were contracts concluded between the related persons and the company, and he refused to disclose the provisions of such contracts. So the basic question was how transparent the relationships between the company and its management and the persons connected to the management should be and whether the minority shareholder should be granted information about management costs.

The main objection of the company was that, as the minority shareholder was controlled by the competitor of the company, the disclosure of the demanded information would cause significant damage to the company. Therefore, the director refused to disclose the above-mentioned information to the shareholder and the shareholder applied to the court.

The first two instances, the county court and the circuit court, refused to satisfy the shareholder's claim.^{*41} Both courts were probably influenced by the first impression that the aim of the minority shareholder was rather to harass the majority and to get some private information about the executives and their family members. The Supreme Court, on the other hand, found the information claim grounded and handled the case according to the rules that such a specific conflict between the majority and the minority should be handled.

³⁷ CCSCd 21.3. 2007, 3-2-1-22-07, para. 13.

³⁸ Available at: https://www.wto.org/english/tratop_e/trips_e/t_agmo_e.htm.

³⁹ Ruling of Harju County Court 1.12.2010, 2-10-31025 and ruling of Tallinn Circuit Court from 9.2.2011, No. 2-10-31025.

⁴⁰ CCSCr 17.9.2013, No. 3-2-1-86-13.

⁴¹ Ruling of Tartu County Court 20.11.2012 and Ruling of Tartu Circuit Court 18.3.2013; No. 2-12-26039.

The Supreme Court explained that, generally, every shareholder has the right to receive information about the basic conditions of the contracts concluded between the company and the members of its management board as well as about all aspects of their remuneration. The Supreme Court also emphasised that shareholders are the initial capitalizers, the investors of the company, and therefore must have knowledge about the costs of the management of their investment. The authors of this paper are of the opinion that the latter approach follows the trend, recognisable worldwide, of increasing the disclosure in public limited companies. It is still possible to argue that overly extensive disclosure can harm the privacy of the members of management boards. But this was certainly not the case. As for the German approach, for a long time the prevailing opinion has been that there is no obligation to disclose the salaries paid to the individual board members, but nowadays there are different points of view expressed on this matter as well.^{*42}

One must explain that a public limited company with a strong controlling shareholder who therefore also controls all the members of the management and supervisory board is quite representative of Estonian public limited companies.^{*43} Another distinctive feature of such companies is that they are inclined not to pay dividends to shareholders and minority shareholders therefore suffer long-term oppression.^{*44} So for the minority shareholder who does not want to or cannot sell his shares, the only possible way to act is to ask questions, to investigate, to find out what is actually going on – in a word, to “pick on” the majority. As it has been expressed in legal literature, in cases of conflict between the majority and the minority, the source of the conflict lies in the fact that the majority shareholder, on the other hand, is inclined to treat the company as if it was owned by him solely.^{*45}

Summarising the circumstances that justify the refusal to provide information implying presumed damage to the company's trade secret, one can conclude that the possible leak of a trade secret can, in fact, be grounds for the refusal, but the interpretation of the meaning of “trade secret” and therefore also the meaning of the possible damage is quite narrow in Estonian company law and such an interpretation should be considered well-grounded as it would otherwise be too easy for a company to avoid the minimum disclosure that shareholders need to execute their membership rights properly.

6. Right of a former shareholder to demand information

The question of whether a former shareholder has a right to receive information can only arise as regards the boundaries of the information rights of shareholders of private limited companies, as the shareholders of public limited companies can only receive information at the general meeting and only present shareholders and not former ones have the right to attend the general meeting.^{*46} But as a shareholder of a private limited company may demand both information and access to the documents also between meetings, one might ask what happens if the shareholder loses his share(s) before the company has managed to provide the necessary information.

The Supreme Court of Estonia has dealt with the above-mentioned problem. According to the circumstances of the case, a shareholder of a private limited company applied to the court and the court satisfied his information claim against the company and obliged the company to provide the shareholder with the bank statements of the company from a certain period. The court ruling entered into force in May 2011 and the bailiff commenced the enforcement proceeding. Then, in November 2011 the court made a decision in another

⁴² A. P. H. Wandt. Die Auswirkungen des Vorstandsvergütungs-Offenlegungsgesetzes auf das Auskunftsrecht gemäß § 131 Abs. 1 S. 1 AktG. – Deutsches Steuerrecht 2006, S 1460 ff.

⁴³ It is argued that such a shareholder structure is a general characteristic of European public limited companies. See, e.g.: T. Clarke. Theories of Governance – Reconceptualizing Corporate Governance Theory after the Enron Experience. – Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance. T. Clarke (Ed.). Oxon, 2004, p. 11.

⁴⁴ In its decision from 29th October 2014, the Estonian Supreme Court solved another dispute that had arisen between the majority and the minority of a public limited company, where a minority shareholder demanded that the majority should vote for the decision to pay dividends. It is important to note that the company in question actually had enough means to pay dividends. The Supreme Court expressed a clear viewpoint – a minority shareholder cannot claim the dividend unless shareholders have adopted such a decision and the adoption of such a decision is the majority's discretion (CCSCd 29.10.2014, 3-2-1-89-14).

⁴⁵ B. R. Cheffins. Company Law: Theory, Structure and Operation. Oxford: OUP 1997, p. 65.

⁴⁶ According to §297 (4) of CC, a shareholder in person or his representative may participate at a general meeting, unless otherwise provided by legislation and according to §287 (5) as a rule, the set of shareholders entitled to take part in a general meeting shall be determined as at seven days before the date of holding the general meeting.

civil proceeding and excluded the shareholder from the company.^{*47} The court decision in the latter proceeding also entered into force, and after that, in January 2012, the company applied to the court, claiming the enforcement proceeding to be inadmissible as the person claiming the documents of the company was no longer a shareholder and therefore no longer had a protected interest in receiving any information or documents.

The county court agreed with the company and was of the opinion that the former shareholder no longer had any protected interest and therefore, although there was a court ruling that had entered into force, the enforcement proceeding was inadmissible. The circuit court, on the other hand, decided that the initial ruling that gave the shareholder the right to receive the company's bank accounts should be enforced and that the company could not avoid the enforcement of the ruling. The Supreme Court agreed with the circuit court in the main but explained additionally that when deciding whether a former shareholder has the right to examine a company's documents, it is important to consider the time period foreseen in the court ruling that the company is obliged to provide information about. If the relevant period is the time when the person requesting the information was a shareholder, the former shareholder has the right to obtain information. The Supreme Court emphasised that the situation would be different, however, if the court ruling had declared the shareholder's right to get information about the future issues of the company (in this case, meaning the matters occurring after his exit).^{*48}

This statement leaves an open question of whether this was only a specific solution for a specific enforcement proceeding or Estonian courts have intentionally widened the information right of shareholders of private limited companies. The solution in this specific case is somehow understandable when we consider here two articles from Estonian Law of Obligations Act.^{*49} According to §1014 of LOA, a person who has a claim with respect to a thing against the possessor of the thing or a person who wishes to check the existence or absence of such a claim may demand that the possessor present the thing or allow the thing to be examined if the person has a legitimate interest therein. Section 1015 of LOA specifies the same rule for presenting documents, and, according to that, a person who has a legitimate interest in examining a document that is in the possession of another person may demand that the possessor of the document allow the document to be examined if the document has been prepared in the interests of the person who wishes to examine the document or if the document sets out a legal relationship between such a person and the possessor of the document or the preparation of a transaction between those persons.

So when one considers those two additional legal regulations, it can be concluded that a former shareholder of a private limited company who can still prove that he has a specific interest in examining a certain document of the company can probably present the claim in reliance on the above-mentioned general provisions of the LOA. This means that he must prove he has a legitimate interest in examining the documents. Present shareholders' claims, on the other hand, need no special substantiation.

According to German legal literature, a former shareholder of a private limited company has restricted access to the company's documents or other inside information. To receive information, he must prove he has a special lawful interest. For example, it has been opined that the only interest a shareholder who has been excluded from the company can have after his exclusion is the interest in receiving information about the value of his share in the company, to ascertain the fairness of the monetary compensation.^{*50}

7. Conclusions

Proceeding from the above, the authors of this article take the view that, in addition to statutory rules, Estonian courts have managed to form basic principles of shareholders' information rights. At the same time, it still seems to be difficult to draw conceptual conclusions about the clear boundaries of those rights on the basis of Estonian case law, as courts have solved separate cases and there is no *obiter dictum* in any of the Supreme Court's rulings on this matter. Despite this, general trends are noticeable.

⁴⁷ According to §167 (1), a court may, on the request of a private limited company, exclude a shareholder from the private limited company if the shareholder fails, without good reason, to perform the shareholder's obligations to a material extent or in any other way significantly damages the interests of the private limited company, or does not perform obligations or terminate damage regardless of a written caution from the private limited company.

⁴⁸ CCSCd 6.11.2013, No. 3-2-1-114-13, paras 12–13.

⁴⁹ Law of Obligations Act. RT I 2001, 81, 487; RT I, 11.4.2014, 1. Hereinafter: LOA. In Estonian.

⁵⁰ K. Kiethe. Das Informationsrecht des ausscheidenden GmbH-Gesellschafters. – Deutsches Steuerrecht 1993, S 1714.

First, it is essential that Estonian case law shows a clear trend toward wider disclosure. This means that grounds for denial of a shareholder's information claim are *de facto* limited. For example, a shareholder is entitled to receive from a company the basic information about management costs, including costs of transactions between the company and persons related to the management. Such information can't be considered a trade secret or sensitive personal information, and refusal to disclose such information is, as a rule, not justified.

It is also important that Estonian case law has recognised the information right of a former shareholder on quite a narrow foundation. The authors are of the opinion that it can, similarly to German law, be accepted only in the case that the former shareholder has a specific interest related to some of his property rights – for example, when a fair evaluation of his share is needed. Such an approach provides the company with proper protection against situations where a former shareholder makes a claim for information about the activities of the company after he has lost his membership rights and therefore has no legal interest in receiving detailed information any longer.



Anto Kasak

Mag. iur.

Attorney-at-Law

Partner, Kasak & Missik Law Office

Special Treatment of the Floating Charge in Insolvency Proceedings

1. Introduction

The principle of *pari passu*, or equal treatment of the creditors in insolvency proceedings, is widely recognised in many countries. This is one of the key objectives for insolvency proceedings. The World Bank has found that '[t]hough country approaches vary, effective insolvency systems should aim to provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors'.^{*1} This principle means that the creditors relevant to the insolvency proceedings should be treated equally in equal situations. Exceptions from the principle are as common as application of the principle itself, however. In most countries, a pledge-holder is preferred to other creditors with respect to the outcome of sale of the object of the pledge. This means that the outcome of the sold object of the pledge is not distributed among all creditors but received by the pledge-holder for the pledged object. Some authors go even further and say that this does not constitute a true exception to the *pari passu* principle, because the pledged object should not be part of the insolvency estate and satisfaction of the secured creditors should be regulated outside the realm of insolvency proceedings.^{*2} Nevertheless, business and society depend on an adequate system of credit and it is, therefore, necessary to ensure the adequate protection of secured creditors, to keep them lending. Consequently, the author considers it of utmost importance to avoid allowing other creditors to obtain dividends from the pledge sale before the secured creditor does.

The situation is more complex in the case of the floating charge, since it covers movable property of the debtor up to the amount of the charge. The author maintains that the floating charge is an easy, convenient, and flexible way to secure a claim while both protecting the creditor's interests and allowing the debtor to sell his property where necessary. On the other side, the floating charge covers almost all movable property of the debtor, which is sold in full to cover the claim. In such cases, the unsecured creditors end up left with nothing. Such a situation may amount to the unequal treatment of unsecured creditors. For this reason, the author concludes that, in contrast to regular secured creditors, less preferential treatment of the floating-charge holders may be justified. The author suggests creating a system for distributing a fair amount of money to the unsecured creditors on the account of the floating-charge holder's fund.

¹ World Bank. Principles and Guidelines for Effective Insolvency and Creditor Rights Systems. 2001, p. 76. Available at http://www.worldbank.org/ifa/ipg_eng.pdf (most recently accessed on 23.3.2015).

² R.M. Goode. Principles of Corporate Insolvency Law, second edition. London: Sweet & Maxwell 1997, p. 152.

Therefore, the aim for this article is to analyse whether the claim secured by a floating charge should be preferred fully in insolvency proceedings. If full preferential treatment of the claim secured by a floating charge is not justified, the question is this: to what extent should such claims be preferred?

Analysing the problem surrounding the priority limits of the floating charge in insolvency proceedings, the author presumes that the insolvency estate includes enough funds for the costs and expenses of the insolvency proceedings. The question of whether the secured creditor shall participate in covering the costs and expenses of the insolvency proceedings is another matter that is not covered by this article.

In addition to Estonian law, the author uses sources from English law, because the security instrument in question, the floating charge, has been widely analysed for a long time in the United Kingdom. German law does not recognise an instrument comparable to the floating charge encountered in English law.^{*3} Therefore, claims cannot be secured by a floating charge in Germany and claims so secured cannot have priority in insolvency proceedings. Obviously, if German law does not recognise the concept of the floating charge, there cannot be any special regulation pertaining to the floating charge in the Insolvency Statute of Germany.^{*4} The author will also analyse the laws of our neighbour states Finland and Latvia, because these states recognise the concept of the floating charge and our legal practice encompasses contact with these countries as our neighbours.

2. Justification for the priority of the secured claim

Secured claims are those secured by various pledges such as mortgage, lien and registered pledge, fixed charge, and floating charge. If the debtor fails to pay in time, the creditors are entitled to sell the pledged asset or have it be sold to cover the debt amount due. The pledge is highly important in the market economy, as it ensures satisfaction of a claim with a higher degree of probability. However, even having a secured claim does not relieve the creditor of all risks. For example, the market value of the pledge may be insufficient to cover the claim. The property encumbered by the pledge may suffer damage. Yet the author suggests that the pledge is the most reliable option for ensuring satisfaction of a claim.

All developed economies depend to a high degree on the availability of credit.^{*5} Many insolvency laws recognise the rights of secured creditors to have first priority for satisfaction of their claims.^{*6} Therefore, secured claims shall be satisfied before regular unsecured claims, which constitutes an exception to the *pari passu* principle. The infringement of one principle may be justified by other principles. According to another principle, security interests and other real rights created prior to the insolvency proceeding are unaffected by the winding up. This means that, in general, a creditor holding real rights, unaffected by the winding up, may proceed to realise his security or other right of property as if the company were not in liquidation.^{*7}

Pursuant to the English law in force, the liquidation of a company generally does not affect a creditor's rights. The secured creditor is free to realise its security without reference to the liquidator.^{*8} This means that the English insolvency system differs from the Estonian insolvency system in that the object of the pledge is not to be part of the insolvency estate and the pledged object is to be sold outside the insolvency proceedings. This is the reason Prof. Goode finds that preferring secured claims is not a true exception to the *pari passu* principle.^{*9}

³ A. Rahmatian. A Comparison of German Moveable Property Law and English Personal Property Law. Available at <http://www.iuscomp.org/gla/literature/rahmatian.htm#sdfootnoteosym> (most recently accessed on 21.3.2015).

⁴ Insolvency Statute of Germany. Available at http://www.gesetze-im-internet.de/englisch_inso/index.html#gl_p0007 (most recently accessed on 21.3.2015).

⁵ World Bank. Report of Working Group on Debtor Creditor Rights. Available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE/GILD/O,,contentMDK:20154449~menuPK:146222~pagePK:64065425~piPK:162156~theSitePK:215006,00.html#1>, material on debtor-creditor regimes (most recently accessed on 24.3.2015).

⁶ United Nations Commission on International Trade Law. Legislative Guide on Insolvency Law, p. 269. Available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (most recently accessed on 19.3.2015).

⁷ R.M. Goode. Principles of Corporate Insolvency Law, 4th edition. London: Sweet & Maxwell 2011, p. 96.

⁸ D. Faber *et al.* Commencement of Insolvency Proceedings. Oxford University Press 2012, p. 265.

⁹ R.M. Goode (see Note 2), p. 152.

According to §35 of the Estonian Bankruptcy Act,^{*10} the debtor's assets become part of the bankruptcy estate upon the declaration of bankruptcy. This means that all assets of the debtor, including encumbered assets, become part of the bankruptcy estate. Section 135 stipulates that a trustee shall sell the bankruptcy estate pursuant to the procedure provided for in the Code of Enforcement Procedure, taking into account the specifications prescribed by the Bankruptcy Act. Pursuant to §153 (2), the outcome of sold encumbered property shall be distributed only to the charge-holder, with one exception – a certain percentage, but not more than 15%, shall be allocated to cover the costs and expenses of the insolvency proceedings. Therefore, under Estonian insolvency law, the pledged assets are part of the insolvency estate, which shall be sold by the trustee. The dividend from the sale of the encumbered property shall be distributed to the secured creditors. Although English law differs from Estonian law, the two systems have the same purpose. No other creditor than the charge-holder is entitled to receive the outcome of the sale of an encumbered item of property.

In the event of the pledged object being sold in the insolvency proceedings and the outcome being distributed in accordance with *pari passu* among all the creditors, the pledge-holder will not have any use of the pledge. This would cause uncertainty as to the securities in the insolvency proceedings, which would have a negative impact on the credit institution. The Cork Committee Report stated a conclusion that there is a direct link between every credit transaction and the financial health of the society.^{*11} In consequence, the negative effect on the credit institution would harm the development of the market economy. The IMF has noted that, if a secured creditor is given the equivalent of first priority at the time of distribution (or directly receives the proceeds from the sale of collateral), the provision of secured credit is facilitated.^{*12}

Prof. Varul has summarised the problem as follows: 'Secured claims shall be preferred to unsecured claims, because otherwise the pledge as such would lose credibility, which would have a bad influence on the development and stability of the economic relations.'^{*13} Therefore, limiting the pledge-holder's rights would discredit the economic system. Accordingly, we cannot do it and must prefer secured creditors to unsecured creditors.

For the reasons described above, a claim secured by a floating charge is a secured claim and should be preferred over unsecured claims. On the other hand, the floating charge differs from other securities in that the object of the floating charge is more uncertain than the object of other securities. This position is supported in the literature, where Richard Calnan finds that '[a]lthough the basic principle is that a secured creditor is entitled to the net proceeds of sale of the secured assets in order to discharge his debt, where the charge constitutes a floating charge certain categories of unsecured creditor rank ahead of the floating charge'.^{*14} Therefore, a question arises as to whether the floating charge needs special treatment in insolvency proceedings.

3. The distinctness of the floating charge from other charges

Estonian insolvency law does not make any distinction between the floating charge and other charges with regard to the priority of the security in the insolvency proceedings. Secured claims, including the floating charge, have full priority under §153 (1) of the Bankruptcy Act of Estonia. The situation is the same in the Republic of Latvia. The floating-charge holder is a secured creditor under the Latvian Insolvency Law's Section 7, Subsection 1.^{*15} According to Sections 111 and 116, the administrator sells the pledged assets of the debtor and the holder of the floating charge has full priority in respect of the outcome of the realisation of the encumbered property.

¹⁰ Pankrotiseadus (Bankruptcy Act). – RT I 2003, 17, 95 (in Estonian).

¹¹ Insolvency Law and Practice: Report of the Review Committee. London: Her Majesty's Stationery Office 1982, p. 12.

¹² Orderly and Effective Insolvency Procedures: Key Issues. Legal Department of the International Monetary Fund 1999, p. 47.

¹³ P. Varul. Selgitavaid märkusi pankrotiseadusele (Explanatory commentary to the Bankruptcy Act). – *Juridica* 1994/1, p. 11 (in Estonian).

¹⁴ R. Calnan. Proprietary Rights and Insolvency. Oxford University Press 2010, p. 37.

¹⁵ Insolvency Law of the Republic of Latvia. Available at http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Insolvency_Law.doc (most recently accessed on 24.3.2015).

According to §4 (3) of the Floating Charge Act^{*16} of Estonia, the floating charge will be created after the corresponding entry is made in the floating-charge register. Section 2 (1) stipulates that the floating charge extends to all movable property of a company or movable property related to the economic activity of a sole proprietor. Section 2 (2) amends the above-mentioned and specifies that the floating charge extends to all encumbered property of an undertaking at the time the pledge entry is made and to the property acquired after the pledge entry is made. According to §2 (3), a floating charge does not extend to:

- 1) money in cash form or deposited with a credit institution; shares, stocks, investment-fund shares, contributions to co-operatives or participation in other companies belonging to an undertaking; promissory notes or other loan documents accepted in common usage; or other securities;
- 2) property that may be encumbered by a fixed charge, such as a possessory pledge or property that is encumbered by mortgage together with the immovable property with which it belongs to; or another type of pledge; or
- 3) property that, pursuant to the law, cannot be subject to execution.

Therefore, the floating charge covers almost all movable property of the debtor, with some minor exceptions. As the name 'floating charge' suggests and as described above, the object of the floating-charge assets fluctuates. In contrast, the objects of other charges are specified as certain properties or rights. The object of the floating charge shall finally be clarified in the process of the realisation of the floating charge, which is termed 'crystallisation'.^{*17} In England, for example, the floating charge crystallises if a receiver is appointed for the debtor's company.^{*18} Therein, the floating charge differs from other charges because of their object. In that case, the question arises of whether we have to treat the floating charge and other charges equally or not.

With respect to the difference, the floating charge encumbers all movable property of the debtor in its entirety, with the exception of certain minor assets. Consequently, the floating charge is regulated such that by covering the whole estate it causes other claims to be normally expected to remain fully unsatisfied.^{*19} The resulting outcome is that in any insolvency proceedings wherein at least one floating-charge holder is present, unsecured creditors are not going to have the slightest motivation to participate and contribute to the insolvency proceedings. In fact, this means that one creditor is preferred to all other creditors in relation to the insolvent estate and causes unsecured creditors to be treated unfairly, thereby violating the principle of equal treatment of creditors.

The Cork Committee reached the conclusion that, to a limited extent, the general body of creditors should participate not like preferential creditors in priority to the holder of the floating charge but *pari passu* with him in the distribution of the proceeds from assets comprised in the charge. Such change may be expected to have the following beneficial consequences:

- (a) by increasing the amount available in winding-up proceedings for the ordinary unsecured creditors, it should ensure a fairer distribution of the insolvent estate and encourage the ordinary creditors to play a fuller part in administration of the winding up.
- (b) By increasing the dividends payable in the course of winding up to ordinary unsecured creditors, including trade suppliers, it should reduce the risk of further insolvency among them and discourage their increasing tendency to resort to reservation-of-title clauses and other devices to escape the priority of the floating charge.^{*20}

Consequently, the floating charge differs from other types of charges. The floating charge is fluctuating in nature and covers almost all movable property of the debtor, with only a few, minor exceptions. In the case of any other charge, the unsecured creditors are aware of the assets that are secured, while the case of the floating charge involves the unsecured creditors being unaware of the extent. The unawareness on the part of the unsecured creditors causes injustice and discourages the unsecured creditors from participation in the insolvency proceedings.

¹⁶ Kommertspandiseadus (Floating Charge Act). – RT I 1996, 45, 848 (in Estonian).

¹⁷ P. Varul *et al.* Asjaõigusseadus II. Kommenteeritud väljaanne (The Law of Property Act II: Commented Edition). Kirjastus Juura 2014, p. 371.

¹⁸ J. Duns. *Insolvency Law and Policy*. Oxford University Press 2002, p. 349.

¹⁹ *Insolvency Law and Practice: Report of the Review Committee* (see Note 11), p. 32.

²⁰ *Ibid.*, p. 32.

In consideration of the above, the author finds that claims secured by a floating charge should be priority claims in the insolvency proceedings as other secured claims are but, because of the difference between the floating charge and other securities, the priority of the floating charge should be limited. Therefore, the floating charge needs special regulation applying to insolvency proceedings.

4. Methods of limiting the priority of the floating charge

The literature offers several opportunities for resolution of the issue of how to limit the priority of the floating charge in insolvency proceedings. For instance, the Cork Committee suggested a novel alternative to the existing regulation of the floating charge. In summary, the committee named 10% of the encumbered estate as 'a fund'. The idea of this fund is that a claim of a floating-charge holder is decreased by 10%, where the gain is distributed among the so-called regular creditors. The Cork Committee proposed that the debenture-holder himself should not participate with the unsecured creditors in the 10% fund, but, to prevent the unsecured creditors doing better than the debenture-holder, the committee recommended that an upper limit be imposed so that the percentage of their debts received by the unsecured creditors should not in any event exceed that of the debenture-holder.^{*21} The system would function in the manner described below.

Let us imagine that the assets encumbered by a floating charge were sold at the price of EUR 1,000,000, the claim secured by the floating charge is EUR 1,000,000, and the claims of the unsecured creditors come to EUR 200,000. Under the current law, the claim secured by the floating charge will be satisfied in the amount of EUR 1,000,000, which equals 100% of its face value, and no monies will be paid out to the unsecured creditors. In contrast, in the case of the above-mentioned 10%-fund system, the claims secured via the floating charge would be satisfied in the amount of EUR 900,000, or 90% of their face value, while the amount of EUR 100,000 will be retained for distribution among the regular creditors. The claims of the latter will be satisfied in the amount of 50%.

I would discuss how the so-called upper limit in the case of the 10%-fund system would apply by giving the following example: Assets of the insolvent debtor have been sold for EUR 1,000,000, the claim secured by the floating charge is EUR 2,000,000, and the claims of the unsecured creditors total EUR 100,000. Under the current law, the claim secured by the floating charge will be satisfied in the amount of EUR 1,000,000, which makes up 50% of their face value, and the unsecured creditors will not have any monies to share among themselves, which means 0% of their claims' face value. In contrast, under the 10%-fund system without upper limit, the unsecured creditors' claims will be satisfied in the amount of EUR 100,000, which comes to 100% of their face value, and the claim secured by the floating charge will be satisfied in the amount of EUR 900,000, or 45% of its face value. So without an upper-limit rule, unsecured creditors' claims will be satisfied in their full amount and the floating-charge holder will receive only 45% of their claim's face value. To avoid injustice here, the upper-limit rule applies, which means that the percentage of the unsecured claim being satisfied may not exceed the percentage of the secured claim satisfied. In that case, the claim of the floating-charge holder would be satisfied in the sum of EUR 952,381, which comes to 47.619% of the claim, and the claims of the regular creditors would be satisfied in the amount of EUR 47,619, which comes to the same 47.619% of the face value of the claim.

The Cork Committee argued that such a system would ensure fair pay-out from the insolvent estate and could also encourage unsecured creditors to participate actively in governing the process of insolvency. In addition, it has been argued that increasing pay-outs to the unsecured creditors helps them to remain in business themselves and also decreases the unfairness caused by the current^{*22} floating-charge regulation under English law.^{*23} The propositions of the Cork Committee were taken into account for changes to the insolvency law of England.

Beyond security claims, according to the insolvency law in effect in England, 'the order of priority of distribution of the monies available for the realisation of the assets is as follows:

- (1) the cost and expenses of the liquidation, including the liquidator's own remuneration;
- (2) preferential debts;

²¹ *Ibid.*, p. 347.

²² Here, the committee report referred to the law that was valid at the time of the report's composition.

²³ Insolvency Law and Practice: Report of the Review Committee (see Note 11), p. 347.

- (3) (if there is a floating charge relating to property of the company) the prescribed part of the company's net property, to be available for the satisfaction of ordinary, unsecured debts;
- (4) debts secured by a floating charge (to be paid using the balance of the proceeds of realisation of the property comprised in the charge);
- (5) ordinary, unsecured debts;
- (6) post-insolvency interest on debts;
- (7) deferred debts;
- (8) the balance (if any), to be returned to the contributories.^{*24}

Professor Fletcher explains that 'the definition of the "prescribed part" is based on a hypothetical construct, which involves the computation of the amount of the company's property (termed "the company's net property") which would, but for the provisions of [the Insolvency Act 1986's Section] 176A^{*25} itself, be available for satisfaction of the claims of holders of debentures secured by, or holders of, any floating charge created by the company'.^{*26}

Professor Fletcher continues: 'First, where the company's net property does not exceed £ 10 000 in value, the prescribed part consists of 50 per cent of that property. Secondly, where the company's net property exceeds £ 10 000 in value the prescribed part consists of the sum of two elements: 50 per cent of the first £ 10 000 in value, and 20 per cent of that part of the company's net property which exceeds £ 10 000 in value. However, an absolute maximum of £ 600 000 is imposed on the total value of the prescribed part to be made available for the satisfaction of unsecured creditors in any given case.'^{*27}

Professor Fletcher has found that 'the purpose of this regulation is to adjust the distribution of corporate assets on insolvency, so that a portion of the assets comprised in any floating charge granted by the company is made available to the satisfaction of the unsecured creditors'.^{*28}

In the author's opinion, it is clear that these amendments made to the English Insolvency Act are composed on the basis of methods quite similar to those outlined by the Cork Committee. The system of limiting the priority of the floating charge in the insolvency proceedings worked out by the Cork Committee and the system used in the Insolvency Act of England in force today are both based on rather excellent ideas, except that these systems are too complicated to implement.

For instance, Finnish law too appears to be affected by the ideas of the Cork Committee report, because the floating charge is not fully preferred in Finnish insolvency proceedings. However, the way that Finnish law regulates the priority of the floating charge in insolvency proceedings is much simpler. According to Article 5 of the legal act addressing priority claims^{*29}, the claims of holders of a floating charge are secured only in the amount of 50% of the value of the encumbered assets.

5. The system of limitation of the priority of the floating charge

The author agrees with the Cork Committee to the extent that allocation of a certain amount from the funds originally meant to be distributed to the floating-charge holder, on behalf of the unsecured creditors, will relieve injustice and motivate unsecured creditors to take part of the insolvency proceedings. However, the author is of the opinion that the 10% fund proposed by the Cork Committee is too complicated in implementation. That said, the methods proposed in the report are necessary for composition of a fair system for determining the amount to be distributed to the unsecured creditors on behalf of the floating-charge holder.

Considering the discussion above, the author supports creation of a system for distributing a fair amount of money to the unsecured creditors on behalf of the floating-charge holder's fund. Although the

²⁴ I.F. Fletcher. *The Law of Insolvency*. London: Sweet & Maxwell 2009, p. 773.

²⁵ Insolvency Act 1986. Available at <http://www.legislation.gov.uk/ukpga/1986/45/contents> (most recently accessed on 21.3.2015).

²⁶ I.F. Fletcher (see Note 24), p. 787.

²⁷ *Ibid.*, p. 788.

²⁸ *Ibid.*, p. 787.

²⁹ Laki velkojien maksunsaantijärjestyksestä (Act on the Ranking of Claims). Available at <http://www.finlex.fi/fi/laki/ajantasa/1992/19921578> (most recently accessed on 21.3.2015) (in Finnish).

floating-charge holder is a secured creditor, this intervention in the rights of the floating-charge holder is justified – if its extent remains minimal – because of the principle that security interests and other real rights created prior to the insolvency proceedings are unaffected by the winding up. Therefore, the system for distributing a fair amount of money to the unsecured creditors on behalf of the floating-charge holder's fund should be as simple as possible and limit the rights of the floating-charge holder only to the minimal limit necessary on the one hand, and to relieve injustice and encourage the unsecured creditors to participate in the insolvency proceedings on the other hand.

In consideration of the above, the author proposes the following solution. The claims secured by the floating charge would be preferred to a certain extent only, and in the remaining part such claims should participate in the distribution to the unsecured creditors in accordance with the *pari passu* principle. This solution guarantees that in a certain amount the floating-charge holder will be preferred and in the remaining amount the claim that was secured by the floating charge shall not go unsatisfied but participate in the distribution of the remaining funds on equal ground with the unsecured creditors, according to the *pari passu* principle. This system enables regulation of the extent of the priority accorded the floating-charge holder by percentage and secures a particular fund for the unsecured creditors. In any case, if there are funds to be distributed, the floating-charge holder will receive more than unsecured creditors and unsecured creditors will not remain fully unsatisfied. The determination of the exact percentage indicating the extent to which the floating-charge holder should be preferred is up to every jurisdiction. The author would recommend limiting the priority of the claim secured by the floating charge to 50%.

For example, if the claims secured by the floating charge were to be preferred in the extent of 50%, the situation would be as follows. Let us take a case wherein the assets of the insolvent debtor have been sold for EUR 1,000,000, the amount of the claims secured by the floating charge is EUR 1,000,000, and the claims of the regular creditors amount to EUR 300,000. Current Estonian law provides for the satisfaction of the claim of the floating-charge holder in its entirety and the regular creditors have nothing to receive.

In contrast, under the system the author proposes, the claims secured by the floating charge are preferred in the amount of EUR 500,000, or 50%. Next, the remaining EUR 500,000 is to be shared *pari passu* among the regular creditors and the floating-charge holder to the extent that his claim remained unsatisfied. In consequence, the second-rank claim of the floating-charge holder is satisfied in the amount of EUR 312,500 (that is, 62.5% of EUR 500,000) and the so-called regular creditors receive EUR 187,500, which is 37.5% of EUR 500,000. In summary, the floating-charge holder receives EUR 500,000 plus EUR 312,500, which totals 81.25% of the claims. The regular creditors' claims are satisfied in the amount of EUR 187,500, or 62.5% of their face value. Such an outcome is much more acceptable to the regular creditors and, at the same time, does not decrease the floating-charge holder's dividend significantly.

Proceeding from the foregoing, the author maintains that the claims secured by the floating charge should be preferred to a certain extent only. In the remaining part, such claims should participate in the distribution to the unsecured creditors in line with the *pari passu* principle. Taking into consideration the Finnish law, the author finds that it is reasonable to prefer the floating charge only in the amount of 50% of the outcome. In the remaining part, such claims must be treated with unsecured claims in accordance with the *pari passu* principle.

6. Conclusions

The author has reasoned in this article that secured creditors should have priority in insolvency proceedings. If the security were to be void in the event of insolvency, the risk of unsuccessful investments in the case of insolvency becomes higher for the creditor. The greater risk of losing the invested amounts leads to higher interest rates and a reduction in loans. Accordingly, creditors will invest more funds if their loans are secured in case of the insolvency of the debtor than if their loans are not secured in case of the debtor's insolvency. Securing the claim induces creditors to invest more funds, which encourages the credit system. The credit system is important for the development of the market economy. Thus, the protection of securities in the insolvency proceedings develops the economy, which is the reason for which the security-associated claims shall be preferred in insolvency proceedings.

The floating charge is a security and, accordingly, shall be preferred in insolvency proceedings. Still, the floating charge differs from other securities – because of its object. If a loan is secured by a pledge, the

lender and the borrower know that, whatever happens, the object of the loan shall secure the loan. This means that if the borrower does not pay, the object of the pledge shall be sold and the outcome shall cover the loan. In regular cases, the creditor and the debtor know exactly what object is pledged. Only in the case of the floating charge shall the object of the pledge become known after crystallisation. This means that the object of the floating charge is not certain; as the name indicates, the object is floating. Generally, the object of the floating charge includes all of the movable property that is not secured by other pledges, with some exceptions (money, stocks, etc.). In the case of the floating charge having full priority in insolvency proceedings, the outcome of the process of selling the property of the insolvent debtor shall be distributed only to the floating-charge holder whilst the claims of the unsecured creditors remain unsatisfied. A situation wherein the claims of the unsecured creditors go unsatisfied distinctly decreases the interests of the unsecured creditors in participating in the insolvency proceedings and inflicts inequality. Full priority of the floating charge in the insolvency proceedings so as to leave the unsecured creditors without dividends is strictly against the principle of collective proceedings and the principle of the equal treatment of creditors in the course of insolvency proceedings.

Whereas the nature of the floating charge differs from that of other securities, special regulation of the floating charge is necessary for insolvency proceedings. In order to relieve injustice and motivate the unsecured creditors to take part in the insolvency proceedings, one should limit the full priority of the floating charge in the insolvency proceedings such that a certain amount from the funds generated via the sale of the property secured by the floating charge shall be distributed to the unsecured creditors.

The author suggests a system wherein the floating charge would be preferred to a certain extent only and in the remaining part such claims should participate in the distribution to the unsecured creditors in accordance with the *pari passu* principle.

The exact percentage is a matter for further discussion. The author considers it reasonable that 50% of the amount of the claim secured by the floating charge be regarded as a secured claim. The remaining amount can participate in distribution of dividends equally with the unsecured creditors' claims in line with the *pari passu* principle.

This system does not infringe the rights of the floating-charge holder significantly, yet it relieves injustice and increases the degree of participation of unsecured creditors in insolvency proceedings.



Kersti Kerstna-Vaks

Mag. iur.

Judge Tartu Circuit Court

Available Options for Funding the Insolvency Proceedings of Corporate Debtors

1. Introduction

As a general rule, insolvency proceedings^{*1} are funded from the insolvent debtor's assets. Yet there are many cases in which those assets are insufficient to cover even the cost of the proceedings. Different jurisdictions apply different principles when deciding whether the courts should declare bankrupt an insolvent debtor who has no assets and when allocating the burden of funding such proceedings.

In order for insolvency proceedings to be conducted efficiently, there must be legal clarity as to their funding at least as to the following issues: 1) May the court require the person who filed for bankruptcy to pay a deposit to the court to cover potential costs incurred in the course of the proceedings? 2) What are the requirements for funding after the declaration of bankruptcy? 3) Would it be possible to finance the work of the trustee in bankruptcy from public funds? Clarity on these issues lays the foundations for efficient and purposeful conduct of the proceedings. In the UK, the courts have found that neglecting to provide funding for insolvency proceedings is likely to further increase the number of directors who breach their obligations and to give such directors an incentive to clean out the debtor's assets.^{*2} The existence of public interest in scrutinising the actions of insolvent companies whose assets are insufficient to cover the cost of the proceedings has been stressed also in UNCITRAL recommendations.^{*3} For this reason, the author will focus in this article specifically on issues connected to funding the insolvency proceedings of corporate debtors.

Where the insolvent corporate entity has no assets, Estonian bankruptcy law allows the courts to terminate the bankruptcy proceedings on account of abatement. Abatement terminations have been severely criticised, yet no provision has so far been made to allow public funds to be used to pay the costs associated with the proceedings, and the creditors rarely exhibit anything beyond a feeble interest in providing supplementary financing. The same conclusion was reached in the pilot study of the efficiency of bankruptcy

¹ The author employs the terms 'bankruptcy' and 'bankruptcy proceedings' in the meaning that they have in the Estonian Pankrotiseadus (Bankruptcy Act), publication reference in RT I 2003, 17, 95; publication reference of the last amendments 9.5.2014, 14. For the purposes of said act, the term denotes proceedings with a view to liquidation of the debtor, unless the creditors decide to reorganise the debtor's business. The terms 'insolvency' and 'insolvency proceedings' are used where the reference is broader or concerns specific jurisdictions that employ the terms.

² *Eastglen Ltd v. Grafton*, 1996 2BCLC 279 at pp. 292–293, referred to in A. Keay, P. Walton. *Insolvency Law: Corporate and Personal*. Pearson-Longman 2003, p. 383.

³ UNCITRAL Legislative Guide on Insolvency Law 2005, p. 62. Accessible at the URL http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (most recently accessed on 24.2.2015).

proceedings that was commissioned by the Estonian Government Office in 2013⁴, which also produced policy recommendations dealing with the funding of corporate bankruptcy proceedings.

The aim of this article is to analyse the options available for financing the insolvency proceedings of corporate debtors and to assess their impact on the funding of the costs of the proceedings and the efficiency of proceedings. An opportunity to combine different funding arrangements makes it possible to take into consideration different aims of insolvency proceedings and the debtor's obligation to file a bankruptcy petition before it is too late. In consideration of the length limitation that the article must respect, the author has excluded from analysis the specific issues related to the costs arising in connection with the actions filed by the bankruptcy trustee.

2. The options for funding insolvency proceedings

The funding of bankruptcy proceedings means making available the funds required for paying the costs of the proceedings, including the fee of the interim trustee and of the trustee in bankruptcy, along with the reimbursement of the necessary expenses incurred by them in connection with the performance of their duties (see §150 (1) of the Bankruptcy Act, hereinafter 'BA'). In a more general sense, the consolidated obligations (set forth in §148 of the BA) arising in the course of the proceedings can also be regarded as falling in the category of costs, because they have been incurred after the declaration of bankruptcy and have priority over the claims of bankruptcy creditors.

Under §150 (2) of the BA, the proceedings that follow the declaration of bankruptcy are to be funded out of the debtor's estate. This represents the regular funding arrangement. Other, extraordinary arrangements, extending beyond this, must be found when the estate is insufficient to cover the cost of the proceedings. Said extraordinary arrangements are primarily deposits by creditors, assistance from public funds, or post-commencement financing, all of these aimed at financing the trustee's activities in creating new assets and/or expanding the debtor's estate. Also, public funding may be granted for ascertaining the reasons for the bankruptcy or to protect other public interests. It is the author's view that the courts must, when declaring a bankruptcy, know where the money to fund the ensuing proceedings is to come from.

In Estonia, the rules that govern extraordinary funding arrangements make a distinction between creditor- and debtor-petitioned bankruptcies. If the petition is brought by a creditor, the court has the power to order the creditor to pay a deposit to cover the cost of the proceedings when it has reason to believe the debtor's estate inadequate for the task (see §11 of the BA). Under §30 of the BA, creditors are entitled but not obliged to pay the deposit required for avoiding the termination of proceedings on account of abatement. Failure by the creditors to pay the deposit releases the court from the obligation to declare the bankruptcy, and proceedings then are terminated on account of abatement (under §§ 29 (1) and 29 (2) of the BA). If the court, however, declares the bankruptcy and the trustee has consented to be appointed, the court is no longer responsible for the absence of assets to cover the cost of the proceedings, and the trustee must perform his duties until the proceedings are closed, whether he is paid or not.⁵

The trustee is authorised, subject to approval by the creditors' committee, to borrow funds in order to conduct the proceedings (§125 (4), BA). Public funds are available only to pay the fee and expenses of the interim trustee, provided that the corporate debtor itself filed for bankruptcy and its assets are not sufficient to cover the cost of the proceedings (§23 (4), BA). A creditor who has brought a bankruptcy petition must bear the costs of the proceedings if the court refuses to declare the bankruptcy (§150 (3), BA).

The following sections look at the various funding options in more detail.

⁴ Maksejõuetuse menetlemise tõhususe uuring 2013 (A study of the effectiveness of insolvency proceedings), commissioned by the Estonian Government Office, carried out by AS PricewaterhouseCoopers Advisors (in Estonian). Available at http://valitsus.ee/UserFiles/valitsus/et/riigikantselei/strateegia/politika-analuusid-ja-uuringud/tarkade-otsuste-fondi-uuringute-kokkuvõtte/Maksej%C3%B5uetuse_menetlemise_t%C3%B5hususe_uuring.pdf (most recently accessed on 10.5.2013). The data used in the study include approximately 3,500 cases in Estonia from the period 2004–2012.

⁵ For instance, in the Netherlands, the courts give no regard to the presence or value of assets that are part of the debtor's estate when declaring the bankruptcy. Under certain circumstances, the insolvency representative will be entitled to apply for public assistance to pay his preliminary fee. See H. Vallender (ed.). *The Role of the Judge in Nomination, Supervision and Removal of the Insolvency Representative*. Nottingham; Paris: INSOL Europe 2014, p. 103.

3. Payment of the costs from the debtor's estate

In Estonia, members of corporate management boards have a statutory duty to file for bankruptcy without delay when the corporate body has become permanently insolvent.^{*6} The timely filing duty is intended, amongst other things, to provide for the presence of resources for the financing of bankruptcy proceedings, including the payment of their costs. In practice, however, this mechanism does not function as intended.

According to the study commissioned by the Estonian Government Office, during their last year of operation, 50% of the corporate bodies whom the courts found to be permanently insolvent held assets worth less than 1,000 euros. In 2004–2012, 58% of corporate bankruptcy proceedings were terminated on account of abatement without a declaration of bankruptcy.^{*7} Thus, in these cases, there were no assets from which to cover the cost of the proceedings, nor was there any interest on the part of the creditors in financing them. It should be taken into account that, even where it is possible to expand the bankruptcy estate (by recovering or reclaiming property), this presumes expenditure for the drawing up of actions and the payment of court fees and security deposits. Where the debtor's assets prove insufficient to cover the cost of bankruptcy proceedings, it is possible to close the case on grounds of abatement also after the declaration of bankruptcy (§158 (1), BA), and the trustee is required to notify the court of such situations without delay.

The debtor's assets may prove insufficient to cover the cost of the proceedings also in cases wherein they have been encumbered with a security interest. Only a portion of the proceeds from the sale of the property subject to the security interest may be used to pay the expenses incurred by the trustee. Under §153 (2) of the BA, secured creditors may only be required to contribute toward the cost of the proceedings 15% (excluding VAT) of the proceeds from the sale of the property in which they hold the security interest.^{*8} The limitation has been enacted for the protection of the interests of security holders in order to guarantee the satisfaction of the lion's share of the secured creditor's claim also in bankruptcy proceedings. Yet such a limitation may pose problems with respect to covering the actual and necessary costs of bankruptcy proceedings, including payment of the trustee's fee. This conflict has resulted in a number of legal disputes between bankruptcy trustees and secured creditors. The trustees have argued that the relevant provisions may not be interpreted so as to result in a situation in which the trustee has performed his duties in the bankruptcy proceedings yet cannot even be paid the statutory minimum fee because of the restriction laid down in the BA's §153 (2).^{*9}

The Supreme Court has on numerous occasions scrutinised the extent of the duty of secured creditors to contribute to financing the proceedings and has found that the ceiling provided in §153 (2) of the BA must be regarded as an absolute value that applies to all types of payment mentioned in §146 (1), including the trustee's fee.^{*10} Should the trustee succeed in selling secured property for a sum that exceeds the relevant creditors' secured claims, those claims would be satisfied in full and the creditors would not have to pay any costs at all. In such a case, the difference between the proceeds from the sale and the payment made to the secured creditors may be used to make the payments listed in §146 (1) of the BA.^{*11} This means that in Estonia secured creditors' rights have priority over payment of the cost of the proceedings. The author finds nevertheless that, where the secured creditor agrees, the trustee is allowed to use a greater proportion than 15% of the proceeds for payments under §146 (1) of the BA.

It is important to note that this is liable to place control over the conduct and fulfilment of the aims of the proceedings in the hands of the dominant secured creditor. In consequence, the interests of creditors who do not hold privileged claims may be affected, as may ascertainment of the reasons for the debtor's

⁶ This obligation arises from sections 36 and 44 of the General Part of the Civil Code Act, as well as from the specific rules (§§ 306 (1) and 180(5¹) of the Commercial Code).

⁷ See Note 4 for the reference. The high number of abatement terminations suggests the absence of a bankruptcy culture. See A. Jäger, *Pankrotikultuuri parandamisele peaksid tõuke andma ettevõtjad* (Improvement of the Bankruptcy Culture Should Be Led by Entrepreneurs) (in Estonian). Available at <http://blog.krediidiinfo.ee/2013/03/pankrotikultuuri-parandamisele-peaksid-touke-andma-ettevotjad/> (most recently accessed on 10.5.2013).

⁸ This limitation applies as of 1 January 2004. Before that, there were no restrictions as to the sums from the proceeds of the sale of secured properties that the trustee was allowed to spend on covering the expenses or consolidated obligations, provided that the court approved the payments. See also CCSCd 3-2-1-92-10.

⁹ CCSCd 3-2-1-167-11.

¹⁰ CCSCd 3-2-1-44-05; 3-2-1-126-06; 3-2-1-167-11.

¹¹ CCSCd 3-2-1-167-1.

insolvency (one of the aims of the proceedings) and the independence of the trustee.^{*12} Insolvency proceedings are proceedings of a collective nature and are therefore intended to fulfil several aims. Their main aim, as scholars universally agree, lies in providing the best possible satisfaction of the creditors' claims (§2 BA). Satisfying only the claim of the privileged creditor does not actually attain the main aim of the proceedings, especially in a situation wherein satisfaction of the claims held by the rest of the creditors would be subject to the existence of assets to cover the cost of the proceedings. The relevant statutory rules indicate that the Estonian legislature intended to protect the rights of privileged creditors, hoping that 15% of the proceeds from the sale of secured property is sufficient to cover the cost of the proceedings also in cases in which the debtor holds no other assets.^{*13}

Hence, even where the debtor is not assetless, its assets, if subject to security interests, may not be enough to pay all costs that are required to complete the proceedings in the case. The author finds that policymakers ought to consider differentiating the proportion of the proceeds from the sale of secured property that may be used to cover the cost of the proceedings and vesting the courts with the authority to determine the specific proportion. Such a solution would correspond better to the collective nature of insolvency proceedings. The expenses related to preserving and realising a property subject to security interests should be borne exclusively from the proceeds of sale of that property.

There are no other statutory restrictions on the cost of the proceedings in Estonian bankruptcy law (except for the trustee's fee).

In conclusion, it should be pointed out that when making expenditures from the debtor's estate, trustees should always be mindful of the fact that they operate in the aftermath of business failure and that any expenses incurred must be strictly necessary for the fulfilment of the aims of the proceedings. Already at the start of the case, the trustee should be able to estimate the extent of required expenditure and provide the court with the corresponding information in his report on the debtor's estate (§132 BA). Where most of the estate is subject to security interests, the trustee may expect only the statutory minimum funding to be available to pay the costs – unless he obtains the consent of secured creditors to contribute a larger proportion of the sum to which they are legally entitled.

4. Funding of the proceedings via contributions from the creditors

The prevailing opinion in Estonia is that in cases wherein the assets of a corporate debtor's estate are insufficient, the insolvency proceedings of the debtor must be paid for by the parties presumed to benefit from them: the creditors. This view has received considerable indirect support in the case law of the Supreme Court pertaining to trustees' applications for exemption from the payment of court fees.^{*14}

Already the creditor's right to bring a bankruptcy petition against the debtor is subject to the duty to guarantee the presence of funds to cover the expenses of the interim trustee where this appears necessary (§11, BA). In the case law on the subject, disputes have arisen as to the amounts that the courts have set as the deposit. The setting of the amount is fully within the discretionary power of the court, and the resulting orders may be set aside by the higher courts only where the lower court has clearly overstepped the bounds of its discretion.^{*15}

Requiring the creditor who brings a bankruptcy petition against its debtor to make a security deposit is a practice that is known also in other jurisdictions. In Poland, the courts are authorised to require the petitioning creditor to make a deposit payment in order to ascertain whether or not there are valid reasons for declaring the bankruptcy. When a declaration of bankruptcy has been entered, the overseeing judge

¹² R. Goode. *Principles of Corporate Insolvency Law*, 4th edition. Sweet and Maxwell, 2011, p. 79.

¹³ See also J. Westbrook. *The control of wealth in bankruptcy*, 82 Texas L. Rev 795 (2004). The article analyses the interplay of secured creditor rights and bankruptcy proceedings and stresses the importance of centralised control over the bankruptcy estate in the course of the proceedings.

¹⁴ The Supreme Court has stated in several decisions (on cases 3-2-1-19-12, 3-2-1-13-09, and 3-2-1-18-08) that there is a presumption under which a party who holds a financial interest can bear the costs of the proceedings required to enforce it. In the case of actions brought by the trustee in bankruptcy, the parties who hold the corresponding financial interest will be the creditors.

¹⁵ CCSCd 3-2-1-171-12; 3-2-1-13-13.

will decide whether to require the creditor that holds the largest claim (the claim must exceed 30% of the total sum of all claims against the estate) to provide a deposit or to convene a general meeting of the creditors to settle the matter of costs. Should the creditors fail to pay the cost of the proceedings, the case will be closed.^{*16} In the Czech Republic, the courts may require the party who files the bankruptcy petition (i.e., also the debtor) to make a deposit of up to 2,000 euros toward the costs.^{*17} In Germany, creditors are entitled to make deposits to guarantee the conduct of the proceedings.^{*18} Prior to declaring the bankruptcy, the court must make sure that there are sufficient funds to cover the cost of the proceedings, for bankruptcy proceedings are opened in the interests of the creditors and not of the public.^{*19} If the funds are insufficient to cover the costs, the case will be closed (§207 of the Insolvenzordnung, or InsO). The provision reflects the decision of the German legislature to terminate proceedings that are unable to raise the funds to cover their costs, let alone satisfy the creditors' claims.^{*20}

The author holds the view that the requirement that a creditor pay a deposit to cover the cost of the proceedings must not amount to an unreasonable limitation of the creditor's right to file a bankruptcy petition against the debtor and that the creditor should be entitled to request assistance from public funds in line with standard procedure for such assistance. The case law on the subject reflects the view that the expenses incurred by the interim trustee must be considered on the same footing as those of expert witnesses and, accordingly, represent a cost of the proceedings toward which a natural-person creditor is entitled to request public assistance.^{*21} The deposit required for the bankruptcy to be declared does not, as a rule, have to be sufficient to cover all possible expenses of the trustee. It is for oversight by the court and by the creditors to ensure that the amount of the deposit is commensurate to the needs of the case and that the trustee uses the money prudently.

V. Finch has expressed the view that the creditors' potential inclination to finance insolvency proceedings is frustrated by their length and by fear that the trustee may not use the money collected from the creditors in their best interests. Moreover, it is not possible to offer those creditors who choose to finance the proceedings a larger proportion of the proceeds than those creditors are entitled to under the *pari passu* principle.^{*22}

Currently, the only guarantee for the creditors who finance the proceedings is that the sums they pay as a deposit will also be classified as a cost of the proceedings and consequently are to be repaid with priority over disbursements to ordinary creditors (§150 (6), BA). The author finds that in, order to increase the creditors' interest in financing insolvency proceedings, Estonian legislators should consider granting additional rights to the financing creditors with respect to the distribution of the debtor's estate. For instance, the claims held by ordinary creditors who agree to finance the proceedings might be recognised to a certain extent as privileged claims. This derogation from the principle of equal treatment of the creditors would be justified by the consideration that in the absence of funds to cover the cost of the proceedings, the case would abate and the creditors would not receive any satisfaction at all.

5. Post-commencement financing

Post-commencement financing may be provided, amongst others, by an ordinary creditor who already holds claims against the debtor and who is interested in committing additional funds to the case in order to secure the existing claim and to earn interest at a higher rate. Under UNCITRAL recommendations, post-commencement financing should be regarded as part of the cost of the proceedings. The resulting claim would not have priority over secured claims yet would come before claims of unsecured creditors or receive priority in situations wherein public claims would otherwise have priority. There are jurisdictions where

¹⁶ D. Faber *et al.* (eds). *Commencement of Insolvency Proceedings*. Oxford University Press, 2012, pp. 493–494.

¹⁷ *Ibid.*, p. 255.

¹⁸ *Ibid.*, pp. 329–330.

¹⁹ E. Braun (ed.). *Commentary on the German Insolvency Code*. Düsseldorf, Germany: IDW-Verlag GmbH 2006, p. 111.

²⁰ H. Vallender (ed.). *The Remuneration of the Insolvency Representative in Europe*. Nottingham; Paris: INSOL Europe, 2012, p. 42.

²¹ Tartu Court of Appeal, order in civil case 2-13-3634.

²² V. Finch. *Corporate Insolvency Law: Perspectives and Principles*. Cambridge University Press, 2002, p. 386 DOI: <http://dx.doi.org/10.1017/CBO9781139164283>.

post-commencement financing is treated as having ‘super-priority’; i.e., the post-commencement creditor is prioritised over other persons to whom the debtor owes consolidated obligations. The author considers such treatment well founded because it appears the most suitable as a guarantee for the claims held by post-commencement creditors.

Post-commencement borrowing requires the corresponding decisions by the trustee and the creditors participating in the proceedings, along with their general preparedness to underwrite new risk with a view to improving the outcome of the proceedings. Under the UNCITRAL recommendations, jurisdictions should establish rules to govern the conditions of post-commencement financing and provide protection to post-commencement creditors, as well as to the parties whose interests may be jeopardised by the provisions for such funding.^{*23}

An important question arises in connection with the allocation of authority to decide on post-commencement borrowing. The need for supplementary financing may necessitate speedy decisions, which suggests that the number of approvals required should be reduced to a minimum. Although involving the courts tends to result in more transparency and provide additional security to the creditor, it will still often be the trustee who holds the information requisite for evaluating the need for borrowing. If the law grants priority for post-commencement creditors over ordinary creditors, court authorisation for the borrowing will not be necessary. Under UNCITRAL recommendations, authorisation by the court should be required when the priority of post-commencement financing or the guarantees connected to it affect the interests of secured creditors. Post-commencement borrowing should be subject to the principle that the economic value of secured creditors’ claims must be guaranteed also when the decision to borrow is made.^{*24}

In the US, the provision of post-commencement financing to insolvent companies has turned into an industry in its own right. Such financing represents high-risk loans provided at high interest rates. The loans must be authorised by the court. Post-commencement creditors are granted priority over all other creditors except secured creditors. Where the debtor possesses yet unencumbered assets, the court may authorise the granting of a security interest to the post-commencement creditor.^{*25} In the Netherlands, post-commencement creditors are not granted priority over secured creditors, and the trustee does not require court authorisation to effect the borrowing.^{*26} In Australia, the trustee is not required to obtain the approval of the court or the creditors for his decision to borrow. Post-commencement borrowing is regarded as a transaction executed by the trustee and, as such, commands priority of repayment over the claims of ordinary creditors.^{*27}

In Estonia, trustees rarely resort to borrowing to finance the proceedings. Borrowing would presume the approval of the creditors’ committee – which is perfectly understandable, given that it is the creditors (through the creditors’ committee) who exercise oversight of the expediency of the trustee’s actions. In this connection, the Supreme Court has ruled that a loan agreement entered into by the trustee is not rendered null and void by mere absence of the approval of the creditors’ committee. Where the funds borrowed are used in a manner that is incompatible with the purpose of the proceedings, the trustee will be liable for repayment of the loan.^{*28}

In this author’s view, the rights of post-commencement creditors are well protected under Estonian bankruptcy law, because post-commencement borrowing is regarded as a transaction of the trustee and qualified as a consolidated obligation, which means that it holds priority of repayment over debts to ordinary creditors (§146 (1) 3), BA). There is no requirement to obtain the court’s authorisation for the borrowing, because it does not affect the rights of secured creditors and because in Estonia the courts are charged only with overseeing the lawfulness of the proceedings.

Although the UNCITRAL recommendations include the provision of a security interest to post-commencement creditors, this appears problematic in the Estonian setting in that debtors’ estates rarely include assets that have not been pledged ‘to the hilt’. The only unburdened assets of the estate are likely to be those that the trustee succeeds in recovering. The question then would be whether or not to allow recovered assets

²³ UNCITRAL (see Note 3), pp. 113–119.

²⁴ *Ibid.*, pp. 113–119.

²⁵ D. Faber *et al.* (see Note 16), pp. 765–766.

²⁶ *Ibid.*, pp. 441–442.

²⁷ *Ibid.*, p. 14.

²⁸ CCSCd 3-2-1-5-01.

to be encumbered with security interests.^{*29} The author represents those holding the view that this should be allowed because there appears to be no valid reason for providing an exception to the regime of security interests on the grounds that a property entered the debtor's estate in a specific manner.

All in all, it appears that trustees should consider borrowing primarily in cases wherein the creditors decide to reorganise the debtor's business. In such cases, the trustee can include the need for post-commencement borrowing in the reorganisation plan. The Supreme Court has ruled that borrowing may be necessary for the administration of the debtor's estate (an economic activity) just as much as for the inventorying and sale of the assets in order to achieve satisfaction of the claims of the creditors – the aim of the proceedings – as provided for by law.^{*30} The risk of default is reduced via the competence of the trustee and by oversight on the part of the court and the creditors. It would also be possible to create a security interest in respect of the post-commencement borrowing.

6. Public assistance for paying the cost of the proceedings

Views on the need for public assistance in funding of insolvency proceedings vary widely from one jurisdiction to the next. The dominant view in the UK is that no insolvency case should be left unscrutinised for lack of the requisite funds. The insolvency practitioners will accept a case if they are certain that their expenses will be covered from the debtor's estate; in other cases, the courts will appoint an official receiver.^{*31} Unlike under the regimes of other jurisdictions, official receivers in the UK are held to exercise public authority.^{*32} In Germany, on the other hand, the courts will not declare a debtor bankrupt unless there are funds to cover the cost of proceedings (§26 (1) InsO). There are no public funds available for corporate insolvency proceedings, save for the fees of the experts required to ascertain whether the debtor's assets are sufficient to cover the costs.^{*33} According to the information presented in *Commencement of Insolvency Proceedings (2012)*, also among the countries that provide no public assistance to fund insolvency proceedings are Poland, Spain, China, Belgium, and Brazil.^{*34}

In addition to distributing the insolvent debtor's assets among its creditors, in contemporary society the bankruptcy trustee fulfils a number of other public tasks (preserving jobs and protecting the environment, fighting against tax fraud and other crime, etc.), which might lead various legislatures to consider paying (some of) the trustee's expenses. In the Netherlands, the national tax office compensates the trustee for expenses that are directly related to establishing the commission of bankruptcy fraud. There is also a fund administrated by the Ministry of Justice that provides guarantees to the trustees with respect to the obligations they may incur by virtue of the actions they initiate before the courts, including payment of the costs of the adverse party in cases in which judgement is delivered against the trustee. Trustees may only apply to the guarantee fund if the debtor has no assets. There is currently discussion as to whether public funding should be made available also to cover the expenses of the investigation that the trustee might undertake to examine possible insolvency fraud.^{*35} In Sweden too, the government will (with certain exceptions) provide public funding for proceedings in cases in which the debtor's assets are insufficient.^{*36} In the Czech Republic, the tasks of the trustee may be performed by an official receiver.^{*37} The Australian government has created the Assetless Administration Fund to finance proceedings in respect of insolvent debtors with no assets.^{*38}

²⁹ UNCITRAL (see Note 3), pp. 113–119.

³⁰ CCSCd 3-2-1-5-01.

³¹ R. Goode (see Note 12), pp. 152, 160.

³² Jan C. van Apeldoorn, *Human Rights in Insolvency Proceedings*. Kluwer 2012, p. 472.

³³ D. Faber *et al.* (see Note 16), p. 324.

³⁴ *Ibid.*, pp. 54, 92, 173, 493–494, 633–634.

³⁵ *Ibid.*, pp. 441–442.

³⁶ *Ibid.*, p. 675.

³⁷ *Ibid.*, p. 255.

³⁸ *Ibid.*, p. 14.

In Estonia, the need to provide public funding for insolvency proceedings in certain cases has been grasped only in the last decade. The possibility of financing the work of the interim trustee in assetless insolvencies by up to 397 euros per case from public funds allows the trustee to ascertain, amongst other things, whether the assets are sufficient for bankruptcy proceedings to be conducted. There is no official receivership in Estonian bankruptcy law.

The author supports the appointment of an official receiver as an alternative to the abatement of proceedings in insolvency cases in which the debtor lacks the assets to pay the costs and that the creditors are not interested in financing yet in which there are grounds to believe that the insolvency was caused by acts of a criminal nature or grave errors in management. The exemplar in this respect is Finland, which has made provision for the bankruptcy ombudsman to order special scrutiny funded by public monies to ascertain the facts of the case in assetless insolvencies. Where this is requested by the ombudsman, the court may declare the assetless debtor bankrupt and nominate an official receiver, who is then appointed by the ombudsman. The official receiver has the same duties as the bankruptcy trustee and must possess the same qualifications (as a rule, the trustee appointed in the case stays on as the official receiver).^{*39}

The primary purpose of insolvency proceedings is to provide the best possible satisfaction of the creditors' claims. Hence, in jurisdictions wherein the proceedings are focused exclusively on the interests of the creditors, policymakers have not deemed it necessary to allocate public money to pay for their costs. The author finds that in jurisdictions that link insolvency proceedings to a broader range of aims (including ascertaining the causes of the insolvency) and that recognise those aims as having a public interest component, public funding for conducting the proceedings should be available to a greater extent than the minimum costs of the interim trustee. Otherwise, achievement of the aims of the proceedings would be jeopardised. The provision of public funding (including appointment of an official receiver) would make it possible for the trustee to expand the asset pool of the debtor's estate for all creditors and include in that pool claims against the individuals who are responsible for the insolvency and/or who unduly delayed the filing of the bankruptcy petition. The decision to authorise public funding should be taken on the merits of each case and be based on the importance of the public interest at stake. The need to combine different sources of funding in such cases is also stressed in the UNCITRAL recommendations.^{*40}

7. Payment of the cost of proceedings by the corporate debtor's directors

P. Manavald has expressed the view that in a situation wherein the predominant form of insolvency proceedings is liquidation proceedings, the debtor has no incentive to request the opening of proceedings at an early stage, because it cannot participate in the resulting redistribution of resources.^{*41} For this reason, bankruptcy filings by debtors tend to be late.

It has also been suggested in Estonia that in the cases of debtors whose assets are insufficient to cover the costs of the proceedings, those costs should be borne by the individual who delayed the filing of the petition. The Supreme Court has stated that under Section 146 (1) 2) of the Code of Civil Procedure a director may be ordered to pay the expenses of the interim trustee under the head of costs if that director has agreed to pay those costs in a declaration made or agreement submitted to the court.^{*42} In practice, individuals related to the debtor often concede being late in filing for bankruptcy and agree to pay the costs of the interim trustee but refuse to finance the proceedings that follow the declaration of bankruptcy, hoping for their abatement.

³⁹ The 2015 INSOL Comprehensive Directory of Restructuring, Insolvency and Bankruptcy Professionals throughout the World. GTI Media 2015, p. 43; The Office of Bankruptcy Ombudsman. The responsibilities, the object of supervision and the field of action. Available at <http://www.konkurssiasiamies.fi/en/index/responsibilities.html> (most recently accessed on 24.2.2015).

⁴⁰ UNCITRAL (see Note 3), p. 67.

⁴¹ P. Manavald. *Maksejõuetusõigusliku regulatsiooni valikuvõimaluste majanduslik põhjendamine* (Economic Effectiveness of the Regulatory Options for Insolvency Rules), PhD thesis for the University of Tartu Faculty of Law. University of Tartu Press 2009, pp. 153, 158 (in Estonian).

⁴² CCSCd 3-2-1-112-08.

A creditor who has paid the deposit set by the court in the case of an assetless corporate debtor is entitled to claim the sum deposited from the individual who, in breach of the relevant duty, failed to file for bankruptcy in a timely manner (§30 (3), BA). The same rule is applied in German bankruptcy law (§26 (3) ,InsO), which additionally allows ordering the individuals who breached the duty to file for bankruptcy to make advance payments toward the cost of the proceedings (§26 (4), InsO).

The author does not believe that the financing of insolvency proceedings could be improved and the number of abatement terminations reduced by the passing of rules that make conducting the proceedings contingent on the payment of the costs by individuals connected to the debtor. Were (even if only in certain situations) such a financing arrangement to be imposed on directors, it could even entail additional delays in complying with the duty to file for bankruptcy. On the other hand, the court should have the power to order an individual who fails to file for bankruptcy in a timely manner to pay the sums deposited by a creditors or contributed from public funds in the ensuing proceedings.

8. Conclusions

As a rule, corporate insolvency proceedings are financed from the debtor's estate. If the debtor has no assets at the time it is declared bankrupt, the court should determine the sources from which the proceedings are to be funded or terminate them on account of abatement.

The author takes the view that, in resorting to extraordinary arrangements for financing the proceedings, the interests to be protected by the proceedings must be observed. The primary purpose of insolvency proceedings is providing the best possible satisfaction of the creditors' claims, this being the reason it is possible to allow the proceedings to be financed by the parties that stand to benefit from them – i.e., the creditors. The rights of creditors who finance the proceedings and those of post-commencement creditors must be protected by law.

With respect to financing of the proceedings, problems arise in cases wherein most of the assets of the estate are encumbered by security interests: the rights of the holders of such interests may readily clash with the rights of other creditors. It is important to avoid situations in which actual control over the conduct of insolvency proceedings shifts from the trustee to the security interest holder. The author's recommendation to Estonian policymakers in this regard would be to abolish the fixed proportion of the proceeds from sale of secured property that limits the extent to which those proceeds may be used to cover the cost of the proceedings and to vest the authority to determine the proportion in the court dealing with the case.

Since the aims of insolvency proceedings are connected to a variety of interests, including public ones, it should be possible to avoid abatement terminations in assetless-debtor cases by recourse to the scheme for assistance with court costs or by appointing an official receiver. It will more often than not be impossible to ensure that insolvency proceedings are at the same time efficiently supervised by the court, paid for by the creditors, and in service of the public interest.

Although it is necessary to have rules regulating the duties of the individuals responsible for the timely filing of corporate bankruptcy petitions in payment of the costs of the corresponding insolvency proceedings, this cannot resolve all of the problems encountered in the financing of such proceedings. Should the individual whom the court has ordered to make certain payments within a certain time (prior to the declaration of bankruptcy) fail to comply with the order, the funds for those proceedings will still be missing. However, such a regime would be consonant with the duty of the directors to submit the bankruptcy petition in good time.



Kaido Künnapas

Doctoral student
University of Tartu

The Concept of Preventive Actions Securing the Enforcement of Tax Liability to be Determined in the Future:

Prosperity under the Principle of Prevention in Tax Law

1. Introduction

Public law has taken a direction toward prevention of threat instead of fighting the consequences of it. The importance of the principle of prevention is recognised and accepted in many branches of public law, such as environmental law^{*1} and law-enforcement law^{*2}, reflecting the general tendencies in this regulative area.

The same has emerged in material and procedural tax law with regard to prevention of tax evasion.^{*3} One form of such measures is used for accelerated assessment and enforcement of tax liability that is going to be determined in the future. Namely, when taxpayers face tax assessment procedure, possible tax liability may drive them to hide their assets or, at least, to become apathetic toward the well-being of their business. This can be a consequence of *mala fide* or *bona fide* acts, just as it can be of wilful or negligent acts. No matter the intentions, compulsory execution of tax liability may, in consequence, become considerably more difficult or even impossible. For prevention of such situations with negative value output, the right to secure or enforce payment of potential tax liability before doing so may be possible under customary procedure may be granted

¹ N. de Sadeleer. *Environmental Principles: From Political Slogans to Legal Rules*. Oxford University Press 2002, p. 68 DOI: <http://dx.doi.org/10.1093/acprof:oso/9780199254743.001.0001>. In discussion of the principle of prevention, it becomes necessary to distinguish between the principle of prevention and the principle of precaution. The principle of prevention deals with threats known in consequence of scientific evidence, while the principle of precaution has to do with hypothetical risks. See also E. Rehinder. *The Precautionary Principle in an Environmental Perspective*. *Miljorettens grundsporgsmål* 1994, p. 92, referred to in H. Veinla. *Ettevaatusprintsip keskkonnaõiguses* (The Principle of Precaution in Environmental Law). Tartu Ülikooli kirjastus 2004, p. 25 (in Estonian). This article discusses measures used for implementing the principle of prevention.

² M. Laaring. *Estonian Law-enforcement Law as Danger-prevention Law*. – *Juridica International* 20 (2013), p. 197.

³ In the EU, the main focus is on prevention of tax evasion through material tax law and cross-border co-operation. For further information, see the Communication from the Commission to the European Parliament and the Council concerning an Action Plan to strengthen the fight against tax fraud and tax evasion. COM(2012)722 final. Available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_fraud_evasion/com_2012_722_en.pdf (most recently accessed on 27.2.2015).

to the revenue authority. It may even be granted before the tax liability has been identified and evidence been collected.

By its nature, this is a preventive method used in a situation of uncertainty. This preventive accelerated-assessment measure, in combination with elements of enforcement of tax liability and the state's privileged position in cases of insolvency, is known in many countries, including Estonia, the United States, Australia, Canada, the Netherlands, Ireland, Japan, Singapore, Sweden, and the United Kingdom.^{*4} As there is no uniform term for such sets of measures^{*5}, the author refers to them as preventive enforcement actions (or PEAs).

PEA measures have a direct negative effect on the taxpayer's right to ownership of property and may affect other fundamental rights and freedoms too. The ultimate effect on the taxpayer may be disastrous, rendering him impecunious and often permanently ruining his business.^{*6} Well-defined legal norms are a 'must' if the principle of rule of law is to be honoured and the required taxpayer-protection standards applicable in most jurisdictions.^{*7} It is evident that application of such preventive measures require a high degree of justification and due process guarantees, to minimise their negative effect on taxpayers and third persons.

The author aims to discuss the topic not only from an Estonian perspective. There is no significant body of international regulations covering such measures. Article 1 of the First Protocol of the European Convention on Human Rights ('the Convention') provides a few minimum standards that the measures applied for securing payment of taxes must meet (**the minimum standards**)^{*8}. But the design of these measures is to a great extent open to the discretion of the jurisdictions (which should aim for **the best standards**).

The author discusses the best standards for PEA measures and does not concentrate on the minimum standards. It is the author's contention that ambiguous regulations open PEAs to maladministration and enable restriction of the taxpayer's procedural and fundamental rights under questionable standards. The author undertakes to find answer to the following question: on which criteria should a PEA measure be based if its compatibility with the above-mentioned principles is to be ensured and it is to reflect the balance of interests? Within this discussion, the author concentrates on two main issues: whether and in what extent the assumed tax liability should be identified and under which criteria to identify threat of possible future insolvency.

The method used is twofold. Firstly, this analysis is based mainly on comparison of the regulations set forth in §136¹ of the Estonian Taxation Act (TA) with the summary-assessment institution presented in the Internal Revenue Code (IRC) applicable in the USA.^{*9} Secondly, as some issues are related inevitably to minimum standards as well, certain aspects pointed out by the European Court of Human Rights (ECHR) are discussed. Since the author discusses possible design of PEA methods within the EU (the jurisdiction of the Convention), the IRC serves purely as material for comparison.

⁴ OECD. Working Smarter in Tax Debt Management. OECD Publishing 2014, pp. 95–96. Available at <http://www.oecd.org/ctp/administration/working-smarter-in-tax-debt-management-9789264223257-en.htm> (most recently accessed on 27.2.2015).

⁵ Section 136¹ (1) of the Estonian Taxation Act (maksukorralduse seadus). – RT I 2002, 26, 150; 23.12.2014, 15 (in Estonian; English text of Estonian legal acts is available via <https://www.riigiteataja.ee/en/>) refers to it as 'performance of acts ensuring enforcement before imposition of financial claim or obligation'. Sections 6861 and 6851 of the United States Internal Revenue Code (Pub. L. 113-296, available at <http://www.irs.gov/Tax-Professionals/Tax-Code,-Regulations-and-Official-Guidance> (27.2.2015)) refer to it as 'jeopardy assessment' or 'termination assessment' or the two together as 'summary assessment'. However, Article 16 of Council Directive (EU) 2010/24 of 16.3.2010 concerning mutual assistance for recovery of tax claims relating to taxes, duties and other measures (OJ L 84, 31.3.2010, pp. 1–12, with EU legal texts available via <http://eur-lex.europa.eu/>) refers to 'precautionary measures', designed to embrace a wider spectrum of measures.

⁶ J.E. Gleason Jr, D.K. Poole. IRS summary assessment powers: Abuse and control. – *Brigham Young University Law Review* 1976/1, p. 237.

⁷ Communication from the Commission to the European Parliament and the Council from 19.3.2014 concerning a new EU framework to strengthen the rule of law. COM(2014)158 final/2, pp. 2–4.

⁸ The European Convention on Human Rights (Rome, 4.11.1950) and the First Protocol to the European Convention on Human Rights (Paris, 20.3.1952). Available at <https://www.riigiteataja.ee/akt/78154> (most recently accessed on 10.3.2015). The convention and its first protocol have been in force in Estonia since 1996.

⁹ The statutory progenitor of all jeopardy provisions is the Revenue Act of 1924, for within a few years a clamour arose for tighter control of the commissioner's powers of jeopardy assessment, as the problems and abuses related to expensive administrative discretion under the provision became apparent. See M.M. Armen. Assessing Internal Revenue Service jeopardy procedures: Recent legislative and judicial reforms. – *Cleveland State Law Review* 26 (1997), p. 419. The US model provides excellent examples of specific termination assessment measures with a long history. Since analysis of the general structure shows that the US version can be used for comparison, the author has chosen the summary assessment procedures applied in the United States for this purpose.

2. The position of PEA methods in administrative law

First of all, in the design of legal instruments, it is important to situate the relevant mechanism within the legal system and legal theory if one is to understand the principles and tendencies applicable to such regulations, in order to design an instrument that actually fits the system.

According to Kaspar Lind's approach in his doctoral thesis on value added tax (VAT) fraud, the shortcomings of the current tax system^{*10} can be divided into three classes. The first set of shortcomings has to do with the nature of the current tax system, in connection with which one can discuss whether it is possible to change something in the tax system (that is, substantive law) itself. The second category involves the consequences – i.e., how it is possible to identify tax fraud and have a systematic overview. The third group of shortcomings is related to bringing action against tax fraudsters under criminal law, in relation to which the discussion explores how to recover tax debts.^{*11}

The PEA approach is applicable to tax liability arising from all kinds of taxes; the ideology behind us is not based on the nature of the current material tax system. The PEA-based methods do not help to prevent tax fraud; PEA may be a reaction to the tax fraud discovered, if any. Therefore, it is not a measure operating to address the second group of shortcomings. Instead, PEA methods can be linked to the third group: PEAs are used for preventing insolvency, which could hinder recovery of tax debt. They are aimed at combating inability to pay tax debts. Under §136¹ (1) of the TA, application of PEA requires the possibility of the compulsory execution of advance tax claims becoming considerably more difficult or impossible on account of the activities of the taxable person. The purpose of it is to prevent loss of tax revenue that may result from insolvency of the taxpayer acting *mala fide* or at least in a manner threatening the enforcement of tax claims. In Estonia, it is therefore directed against taxpayers' active engagement aimed at causing inability to pay tax debts. Estonian regulation describes the essence of this measure.

Secondly, the PEA method as a tool in administrative law can be classed as part of the system of administrative coercive measures. Justice of the Supreme Court of Estonia Mr Indrek Koolmeister once stated the following:

Administrative coercive measures can be divided into two categories – administrative preventive measures and administrative sanctions. The main goal of the administrative preventive measures is prevention of offence as much as prevention of the consequences of the offence. In application of the preventive measures, it must be taken into account that 'the required precondition for it is appearance of the characteristics of the (administrative) offence in the actions of the person'. 'Application of the preventive measure is legitimate only if the characteristics of the offence emerge in the acts of a person and such offence is an administrative offence under the law.'^{*12}

PEA's function is to prevent taxpayers' acts from having negative consequences for fulfilment of tax liability. It is not clear whether not fulfilling obligations arising from public law such as tax liability can be understood as 'offence' in the meaning of the above and PEA measures belong to this system. It may be so, but not always. Both the fundamental problems of PEA and the functional criteria are, however, extremely similar to the ones met by danger-aversion law providing criteria for application of administrative preventive measures. Averting a danger is related to supporting, directing, forward-looking, and preventive state activity.^{*13} The scope of both the legislative and the executive power's activities depends on the probability of danger, the nature of the protected and threatened good, and the fundamental rights at stake.^{*14} Standard

¹⁰ Kaspar Lind used this approach to analyse shortcomings in the VAT system. The author finds it to be equally applicable to tax systems in general.

¹¹ K. Lind. Käibemaksupettused ja nende tõkestamine (VAT Fraud and Its Prevention). – Tartu Ülikooli Kirjastus 2012, pp. 12–13 (in Estonian).

¹² K. Merusk, I. Koolmeister. Haldusõigus (Administrative law). Õigusteabe AS Juura 1995, pp. 165–171. Referred to in M. Ernits. Preventiivhaldus kui tulevikumudel (Preventive administration as a model for the future). – *Riigikogu Toimetised* 17 (2008) (in Estonian). Available at <http://www.riigikogu.ee/rito/index.php?id=12530&op=archive2> (most recently accessed on 20.2.2015).

¹³ J. Jäätma. The constitutional requirements for averting of a danger: The principles of a state based on democracy, and the rule of law v. averting of a danger. – *Juridica International* 19 (2012), p. 137.

¹⁴ P.M. Huber. Risk decisions in German constitutional and administrative law. – G.R. Woodman, D. Klippel (eds). *Risk and the Law*. Routledge-Cavendish 2008, p. 29 DOI: <http://dx.doi.org/10.4324/9780203891292>. Referred to in J. Jäätma (*ibid.*), p. 137.

measures create a legal base upon which one may restrict fundamental rights and freedoms, but they are more precisely specified than are terms of a general clause.^{*15}

PEA measures can be considered to be standard measures providing a tailored definition of danger and grounds for preventing it. The author finds that, in a similarity to danger-averting law, it is extremely difficult to estimate what the level of certainty of the risk becoming actualised should be and how the administrative body and the court should estimate the occurrence of characteristics of an offence in the actions of the relevant person. This is a question of the standard of proof, which is by all means one of the most central and problematic questions in tax disputes in practice.^{*16} General standards applicable in preventive administrative law are not helpful and do not provide much assistance. However, some concepts from the theory of administrative coercive measures can be considered here. The requirement of having a factual basis of evidence of the existence of threat (of inability to pay taxes) could be such a principle, discussed in Estonian legal theory of law-enforcement law already in 1935.^{*17} It is clear that the principle *audiatur et altera pars*^{*18}, standing for *due-process guarantees*, may be severely restricted since it may jeopardise the functioning of the measure.

3. The general structure of PEA methods

3.1. The Estonian model directed toward seizure of assets

Under Estonian law, PEA measures are regulated under the TA as ‘performance of acts ensuring enforcement before imposition of financial claim or obligation’. Under §136¹ (1) of the TA, if, upon verification of the correctness of payment of taxes, a ‘justified doubt’ arises that after imposition of a financial claim or obligation the compulsory execution thereof may become considerably more difficult or impossible on account of the activities of the taxable person, the measure may be considered.

Estonia has adopted an *ex ante ex parte* probable-cause-type model. Namely, when PEA comes to be desired, the head of the regional structural unit of the Tax and Customs Board may submit an application to an administrative court to be granted permission for the performance of the PEA. The application includes the following information: the reasons for which the compulsory execution of tax obligation may become considerably more difficult, the estimated value of the financial obligation, which kind of guarantee can be used for replacing the one set by tax authorities, concrete collateral, and reasoning as to why the chosen collateral is the best (TA, §136¹ (2)).

With the purpose of pointing out special preconditions that must be presented to the court in any application for seizure of assets, the Estonian Supreme Court issued a binding ruling in case 3-3-1-15-12. According to the facts of the case, Estonia’s tax authority (Maksu- ja Tolliamet) filed an application with the court applying for permission to set a judicial mortgage on the real estate belonging to O.K. The owner, O.K., was a member of the management board of a company that had tax debts, and it was not possible to enforce this liability, because of lack of assets. The tax authorities found that the evidence collected to that point might justify issuing a liability decision to O.K. personally also. The authority relied on the TA’s §136¹ and claimed for PEA measures. The Supreme Court presented a list of conditions that must be met for PEA to be applicable, in paragraph 50 of this ruling, thus:

- (i) tax-audit procedure has been initiated by tax authorities;
- (ii) it is probable that an additional tax obligation is going to be imposed as a result of such procedure;
- (iii) the tax authorities have a justified suspicion that the compulsory enforcement procedure may become considerably more difficult or impossible in consequence of the taxpayer’s activities;
- (iv) the tax liability period has not expired.^{*19}

¹⁵ J. Jäätma (see Note 14), p. 141.

¹⁶ M. Kähri. Tõendamiskoormus maksumenetluses (The burden of proof in tax proceedings). – *Juridica* 1 (2004), p. 53 (in Estonian).

¹⁷ M. Ernits. Preventiivhaldus kui tulevikumudel (Preventive administration as a model for the future). – *Riigikogu Toimetised* 2008 (17) (in Estonian).

¹⁸ In English, ‘let the other side be heard as well’.

¹⁹ GASCr 3-3-1-15-12, 27.11.2012 (in Estonian). In this article, the author has not addressed the specific conditions related to personal liability of the member of the management board discussed in this court ruling.

Proportionality of restriction of fundamental rights (especially the right to ownership) is justified by the taxpayer's due-process rights, as the court's consent is a prerequisite for application of PEA measures. It is important to point out that the measure itself does not have an effect on the assessment of tax liability at all. The normal assessment process continues after this procedure. Since PEA measures do not accelerate the assessment procedure as such, no additional procedural guarantees are provided to taxpayers with regard to tax audit. The measure becomes applicable only after the end of the tax period, as otherwise it would not be possible to estimate whether taxes were paid correctly or not.

3.2. The US model employed for accelerated-assessment procedure

In the US, accelerated-assessment models have been used instead. Under normal Internal Revenue Service (IRS) assessment and collection procedures, a taxpayer has ample notice that the tax commissioner proposes to assess additional taxes and collect these from him. In fact, after informally notifying the taxpayer that more tax is owed, the IRS will usually attempt to negotiate a settlement with the taxpayer.^{*20} Under special circumstances, however, the IRS is empowered to bypass these normal procedures for notice and a prepayment hearing, moving immediately to an assessment, a demand for payment, and collection by seizure of the taxpayer's assets (summary procedures). These summary procedures are of two fundamental types: jeopardy assessments (IRC, Section 6861) and termination assessments (IRC, Section 6851).^{*21} Jeopardy assessments and termination assessments both are performed in situations wherein, prior to the assessment of a deficiency at some level, it is determined that collection of the amount lacking would be endangered if standard assessment procedures were followed.

Section 6861 of the IRC defines jeopardy assessment:

If the Secretary believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213 (a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary for the payment thereof [...]

The seizure of assets follows immediately. In some cases, the entire process can take less than two hours.^{*22} The statutory notice of deficiency, or 90-day letter, which ordinarily precedes and forestalls assessment and collection, is still required in the jeopardy assessment context but need only be sent within 60 days **after** the jeopardy assessment has been made.^{*23} The property may be sold after the statutory notice of deficiency has been issued and the taxpayer's 90-day period for filing a petition with the United States Tax Court has expired.^{*24}

Section 6851 of the IRC's definition of termination assessment states the following:

If the Secretary finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act (including in the case of a corporation distributing all or a part of its assets in liquidation or otherwise) tending to prejudice or to render wholly or partially ineffectual proceedings to collect the income tax for the current or the immediately preceding taxable year unless such proceeding be brought without delay, the Secretary shall immediately make a determination of tax for the current taxable year or for the preceding taxable year, or both, as the case may be, and notwithstanding any other provision of law, such tax shall become immediately due and payable.[...]^{*25}

²⁰ J.E. Gleason Jr, D.K. Poole (see Note 7), p. 237.

²¹ *Ibid.*, p. 235.

²² *Ibid.*, p. 237, Note 21.

²³ *Ibid.*, p. 237.

²⁴ *Ibid.*, p. 238.

²⁵ When it comes to the assessment procedure, it follows from the same section that such determination and assessment is to be supplied to the taxpayer, together with a demand for immediate payment of the accordant tax.

Termination assessment, on the other hand, is carried out for the tax year that has not yet ended and for which the due date of returns has not passed.^{*26} Because either the taxpayer or the IRS can reopen the question of liability at any time until the end of the year, any mid-year 'deficiency' is, in effect, meaningless.^{*27} The final tax liability cannot be determined until the end of the taxpayer's taxable year. Consequently, there is no obligation to provide the taxpayer with a statutory notice of deficiency within 60 days after the jeopardy assessment has been made. This regulation is aimed not at determining tax liability in unclear cases but at determining it in an accelerated way, triggered by *mala fide* acts of the taxpayer.

Although the measures applied in Estonia and the US are similar in their **rationale**, the US regulation provides more effective powers to tax authorities, by enabling PEA actions before the end of the taxable period. This is, however, an extremely invasive method, for it is not even clear how the taxpayer may pay taxes at the end of the year. Under Estonian law, such measures are rather uncommon and classified as involving recommendations or notices. The jeopardy assessment procedure, on the other hand, provides an attractive example for Estonia and for PEA measures' design in general. Having a restricted, 90-day period for statutory notice of deficiency during the jeopardy assessment protects taxpayers from unpredictably long assessment procedures. In Estonia, the tax assessment procedure follows its usual course, without acceleration.^{*28} In the author's opinion, such difference is derived from the fact that the US model places the assessment procedure at the centre of the PEA process while the Estonian model is directed at seizure of assets *per se*, providing a privileged situation for the state in situations of insolvency.

4. Whether and how existence of tax liability should be assessed

4.1. Relevance of the tax liability

The author finds that the main trigger for PEA should be the understanding that there may be tax liability. There is no justification for PEA without tax liability. There is no relevance to tax assessment procedure when a person is becoming insolvent or acting *mala fide* but there is no obligations arising from tax law. Insolvency is regulated by other legal means, which neither are within the scope of tax assessment procedure nor fall under the regulatory purview of tax law and, moreover, are covered by the **rationale** of PEA measures. The PEAs enter in when there is a certain level of doubt, concern that some taxes may be unpaid. The question arises of what the legal standard of proof related to emergence of tax liability should be: what should be the threshold for PEA measures?

4.2. The Estonian approach: No clear standard

Under the TA, it is not mandatory to show evidence of the existence of a tax claim upon application for PEA. Only the information on the estimated value of tax liability must be provided to the court. It is, of course, understandable for the tax authority not to be able to estimate the value of the claim unless it has some kind of information available on the tax liability. The law does not, however, state that the court should take into account the basis for tax liability when deciding on the applicability of PEA or that it should be presented to the court.

The relevance of tax liability within the PEA procedure was discussed by the Tallinn Circuit Court in its 12.1.2015 decision on case 3-14-52363. According to this, issuing consent under the TA's §136¹ (1) does not require a certain belief that tax liability will be determined or tax evasion emerge. The court must verify whether tax liability may be 'possible and probable'.^{*29} However, as can be seen from the reasoning

²⁶ *Walker v. U.S.*, 650 F. Supp. 877, 87-1 U. S. Tax Cases (CCH) P 9237, 59 A.F.T.R.2d 87-651 (E.D. Tenn. 1987). Available via <http://international.westlaw.com/> (most recently accessed on 25.2.2015).

²⁷ E. Gleason Jr, D.K. Poole (see Note 7), p. 239.

²⁸ Indeed, in some rulings, the Estonian courts have set certain time limits after which the PEA measure becomes ineffective. This impels tax authorities to carry out assessment procedures in a short span of time and collect significant amounts of evidence before turning to the court to obtain permission for seizure. It is, however, a matter of the court's discretion to decide whether to apply such a time limit or not. The law does not require it.

²⁹ See Note 19, paragraph 50.b.

presented later in the same ruling, the court actually assessed whether determination of the amount of tax would be 'clearly impossible or not'.^{*30} This can be seen in many other cases as well.^{*31} The Estonian Supreme Court, on the other hand, has indicated, in court case 3-3-1-15-12, that the court must assess whether it is 'probable' that additional tax obligation is going to be imposed as a result of such investigation.^{*32} It is evident that the standard of proof for tax liability varies, and it is not clear what standard is necessary for applying PEA. Regrettably, the law provides no clear instructions.

What is more, the application submitted to the court need not include much evidence: the application must be substantiated under the Code of Administrative Court Procedure (CACP)'s §63.^{*33} Under the relevant clause, substantiation means explaining a factual assertion to the court such that the court finds that assertion credible; there is no requirement for evidence to be presented. The standard of reliability required of the reasoning behind said assertion is therefore low.

The legislator has tried to minimise the vagueness of tax liability by imposing a procedural requirement. Namely, according to TA §136¹, the formal procedure of a tax audit must be started by tax authorities before it is possible to apply PEA. However, according to the Estonian Administrative Procedure Act (APA)'s §35 (1) 3) the administrative procedure starts automatically with the first acts employed for review of the taxpayer's activities.^{*34} This standard is apparently a formal one, related as it is to the mere fact of whether the tax authority has performed the first procedural act or not.

The Supreme Court has tried to limit the broadness of this procedural criterion. In case 3-3-1-7-13, it was argued that the procedure must have taken place in the extent necessary to create doubt with respect to the compulsory execution of expected tax being hindered.^{*35} In many cases, however, such doubt has been created easily by means of the taxpayer's public company records and the available data on assets, with the addition of perfunctory reference to the taxpayer's bad-faith actions supported by the same, unproved doubts about existing tax liability. Firstly, this criterion is clearly related to inability to enforce tax liability and not to emergence of tax liability. Secondly, the criteria and this limitation are rather formal, providing no material criteria for the description of such doubt. It is up to the tax authority to demonstrate such doubt. In real terms, this clarification provides little help for the taxpayer against maladministration and no solid grounds from which the judge can estimate whether there may be a tax liability or not.

4.3. The US approach: Factual basis

Sections 6851 and 6861 of the IRC provide rather clear regulation regarding the existence of tax liability. Under these sections, the tax authority must assess the tax liability; only after that may the jeopardy assessment be carried out. The law does not allow PEA actions in the case of no assessment having been made. It can be done more rapidly, however. The US Internal Revenue Service has stated, in its Revenue Manual (2014), that the assessed amount must be supported; i.e., there must be a reasonable, factual basis for determining that the taxpayer has received income.^{*36} Uncertainty covers the question of whether the collection procedure can be threatened by certain factors and whether there is reasonable doubt in that respect.

It is crucial to note that after the assessment of tax is performed for jeopardy or termination assessment, the actual notice of deficiency must be provided by the tax authority within 60 days of the start of application of jeopardy assessment measures. This prevents the tax authorities from undertaking jeopardy assessment without any real and factual basis, as the notice of deficiency must be delivered within this strict time limit. In Estonia, on the other hand, the usual assessment procedure can continue; the requirement is that it reach its conclusion within reasonable time, which could easily be two to three years.^{*37}

³⁰ *Ibid.*

³¹ See also Tallinn Circuit Court ruling 3-13-70224, of 24.3.2014, paragraph 10; Tallinn Circuit Court ruling 3-14-50489, of 1.7.2014, paragraph 13. Available via <https://www.riigiteataja.ee/> (in Estonian).

³² See Note 19.

³³ According to the Tallinn Circuit Court ruling 3-14-52363, of 12.1.2015, paragraph 6 (in Estonian).

³⁴ Haldusmenetluse seadus (Administrative Procedure Act). – RT I 2001, 58, 354; 23.02.2011, 3 (in Estonian).

³⁵ ALCSCr 3-3-1-7-13, of 14.5.2013, paragraph 12.

³⁶ R.A. Steco. IRS Internal Revenue Manual, 23.10.2014, version 5.17, Section 5.17.15.2.2.2. Available at http://www.irs.gov/irm/part5/irm_05-017-015.html (most recently accessed on 20.2.2015).

³⁷ The Civil Law Chamber of the Supreme Court has referred to four criteria that must be considered in decisions upon reasonable time of procedure: '1) complexity of the case; 2) activities of the applicant; 3) activities of relevant public institutions

4.4. Minimum standards from the Convention: What to aim for

When analysing the design of measures used for securing the payment of taxes for jurisdictions within Europe, one finds that the absolute minimum standards based on protection of human rights are stated in the Convention.^{*38} The Convention indeed has significant relevance for tax matters. Professor Philip Baker writes: ‘Some would say that taxation and human rights is an oxymoron. [...] I personally do not believe that taxation and human rights are in any way irreconcilable or conflicting; I think human rights are a fundamental aspect of taxation. Human rights limit what governments can do to their citizens – to people affected by their decisions [...] provid[ing] limits to what governments can do to taxpayers.’^{*39} The right to peaceful enjoyment of possessions and the right to ownership, regulated in Article 1 of the First Protocol (the Protocol) to the Convention, are the central rules with a bearing on PEA.^{*40}

One type of interference with the substance of property regulated under Article 1 of the Protocol is interference justified by the need to secure payment of taxes.^{*41} Article 1 (2) states that the right to ownership shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary for controlling the use of property in accordance with the general interest or for securing the payment of taxes or other contributions or penalties. The author emphasises that the meaning of the condition ‘in any way’ has been significantly narrowed by the practice of the ECHR, which stated that this justification for interfering with the right to ownership is not absolute and that it can be applied only if certain general principles are followed.^{*42}

The test accepted by the ECHR involves three main criteria to be analysed: the principle of legality, principle of legitimate aim, and principle of fair balance (proportionality).^{*43} The author does not analyse the first and the second thoroughly, since these are not at issue except in cases of serious infringement.^{*44} What the legislator should, however, keep in mind is that the application of such preventive measures must be sufficiently foreseeable and precise.^{*45} Norms regulating application of PEA should, therefore, be designed to be as precise as possible, with foreseeable applicability. When it comes to not requiring a certain evidentiary basis for the tax liability for seizing property under PEAs, the applicability of the PEA norm

(state); 4) what is at stake for the applicant.’ CLSCd 3-1-1-43-10, of 18.6.2010, paragraph 30. The same criteria are applicable when one is assessing the duration of tax assessment procedures.

³⁸ In addition to the Convention, protection of human rights in the EU is regulated by the EU Charter of Fundamental Rights as well. In the present article, the author does not discuss the relevance and applicability of the charter. The charter applies inasmuch as the legal issues are related to EU law (see Article 51). The terms set forth in the Convention shall be applied through Article 53 of the charter. Therefore, the Convention has fundamental importance with respect to the issues discussed in this article and can be seen as a higher-level legal act than the charter. Accordingly, the author examines only the Convention here.

³⁹ M.A. Grau Ruiz. Decisions of the ECHR affecting domestic laws. – *Lex ET Scientia International Journal – Juridical Series* 2011/1 (XVIII), p. 9. As for the general situation, apparently trivial issues of tax procedures reach the European Court of Human Rights.

⁴⁰ This article applies *expressis verbis* both to legal-person and to natural-person taxpayers. M.K. Addo. Human rights standards and the responsibility of transnational corporations. – *Kluwer Law International* 1999, p. 187. See also W.H.A.M. van den Muijsenbergh, S. Rezaï. Corporations and the European Convention on Human Rights. Presentation at the University of the Pacific, McGeorge School of Law Symposium on the Global Impact and Implementation of Human Rights Norms, Sacramento, California, 2011. Available at http://www.mcgeorge.edu/Documents/Conferences/GlobeJune2012_Corporationsandthe.pdf (most recently accessed on 28.2.2015).

⁴¹ L. Sermet. The European Convention on Human Rights and Property Rights. *Human Rights Files*, No. 11, revised. Council of Europe Publishing 1998, p. 8.

⁴² ECHR judgement of 21.2.1986 in *James and Others v. United Kingdom*, Series A, No. 98, paragraphs 29–30 and 37; ECHR judgement of 23.9.1994 in *Sporrong and Lönnroth v. Sweden*, Series A, No. 52, paragraph 24; ECHR judgement of 9.12.1994 in *The Holy Monasteries v. Greece*, Series A, No. 301-A, paragraph 31; ECHR judgement of 20.9.2011 in *OAo Neftyanaya Kompaniya Yukos v. Russia*, application no. 14902/04, paragraph 554. The ECHR judgements are available via <http://hudoc.echr.coe.int/> (most recently accessed on 20.3.2015).

⁴³ L. Sermet (see Note 42), p. 32.

⁴⁴ In legal literature and court practice, it has been acknowledged that applicants encounter difficulties when relying on claims of breach of the two principles, due to the state’s high level of discretion in these matters. Please see the *OAo Neftyanaya Kompaniya Yukos v. Russia* decision (see Note 43), paragraph 598; C. Sheldon. Article 1 of Protocol 1 of the European Convention on Human Rights: Taxation, p. 7, paragraph 23. Available in <http://www.11kbw.com/uploads/> (most recently accessed on 8.4.2015).

⁴⁵ ECHR judgement of 22.9.1994 in *Hentrich v. France*, Series A, No. 296-A, paragraph 42; ECHR judgement of 8.7.1986 in *Lithgow and Others v. the United Kingdom*, Series A, No. 110, paragraph 42.

disposition becomes highly unpredictable. Consequently, this solution is not favoured by the ECHR and should be avoided at least within ECHR jurisdiction.

When considering the principle of fair balance, the ECHR has instructed that public interests and infringement of the taxpayer's property rights must be balanced. One of the fundamental cases connected with tax matters is *Gasus v. Netherlands* (1995)⁴⁶. The ECHR stated that, while the legislator must have ample discretion to adopt the fiscal legislation required to secure payment of taxes (para. 60)⁴⁷, the resulting legislation must strike a 'fair balance' between means and ends (para. 62) and impose no special and exorbitant burdens on owners of property rights (para. 67).⁴⁸ There must, therefore, be a reasonable relationship of proportionality between the means employed and the aim pursued (para. 62).

The principle of proportionality is subject to a wide margin of evaluation by national courts, and this is recognised by the ECHR⁴⁹, which mostly examines whether the national court has considered all relevant aspects of the test. With the test as applied by the Estonian Supreme Court, to meet the proportionality requirement, the measures must be necessary as applied.⁵⁰ A measure is deemed to be necessary if no other measure has a less interfering effect while still being capable of achieving the intended goal (in this case, preventing loss of tax revenue).⁵¹ The author finds that PEA can reach its goals both when it is materially not related to the status of tax assessment procedure (as in Estonian law) and when it is designed as accelerated assessment procedure or the procedure is given clear limits after application of a PEA measure (as under the US model). But when it comes to assessing the measure's burden on the taxpayer, the latter way shows much less negative effect on the taxpayer, encouraging a short assessment period and foreseeability of the measure's effects on the taxpayer's proprietorship.

Such procedural considerations in the fair-balance test were discussed by the ECHR in the *Riener v. Bulgaria* case (2006), in which the Court considered the issue of violation of Article 2 of the Fourth Protocol to the Convention, regulating freedom of movement. The Court concluded that the authorities had failed to give due consideration to the principle of proportionality in their decisions and that the travel ban imposed on the applicant had been an automatic measure of indefinite duration.⁵² Although considered under a different article of the Convention, the indefinite length of application of preventive measures can lead to a non-proportional result of the method used for securing payment of taxes.

The author argues that material guarantees should be preferred to due-process guarantees, where appropriate and possible to apply. Material guarantees are easier to enforce, as these are set by law (whether via material or procedural regulations), while exercising due-process rights requires initiating or at least participating in a court procedure, which can be onerous for the taxpayers. Material guarantees provide a higher level of protection also. Setting a specific time limit for tax assessment procedure taking place after application of PEA measures supports conducting assessment procedures in reasonable time, given the possible serious negative effect on the taxpayer's fundamental right to ownership (whether in the form of deprivation of property or interference with the peaceful enjoyment of property). Other material factors, such as taxpayer intentions or standards of proof related to the existence of tax liability, should be regulated by law too in the maximum extent, with a minimal role left for due-process guarantees, with an ancillary function.

⁴⁶ ECHR judgement of 23.2.1995 in *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, Series A, No. 306-B, paragraph 59. The facts of the case were the following. Applicant company Gasus had sold a concrete-mixer to Atlas, subject to retention of title until the full price had been paid. Possession of the machine was given to Atlas, but its ownership remained with Gasus. The tax authorities in the Netherlands seized the machine and subsequently sold it on account of Atlas's tax liability.

⁴⁷ Per the *paritas creditorum* principle, the Court pointed out that when passing such laws the legislature must be allowed a wide margin of appreciation, especially with regard to the question of whether – and, if so, to what extent – the tax authorities should be put in a better position to enforce tax debts than ordinary creditors are in to enforce commercial debts. The Court showed respect toward the legislature's assessment of such matters except where it is devoid of reasonable foundation (para. 60). A negative effect in relation to the *paritas creditorum* principle has *per se* relatively little importance in this connection.

⁴⁸ See also: L. Sermet (see Note 42), p. 36.

⁴⁹ ECHR judgement of 23.10.1997 in *National & Provincial Building Society and Others v. United Kingdom*, Reports 1997-VII, paragraph 80.

⁵⁰ Judgement of the Estonian Supreme Court Constitutional Review Chamber of 17.7.2009, No. 3-4-1-6-09, paragraph 21; judgement of the Estonian Supreme Court Constitutional Review Chamber of 15.12.2009, No. 3-4-1-25-09, paragraph 24.

⁵¹ *Ibid.*

⁵² Taxation and the European Convention on Human Rights. Fact Sheet – Taxation. European Court of Human Rights Press Unit, May 2013, pp. 6-7. Available at http://www.echr.coe.int/Documents/FS_Taxation_ENG.pdf (most recently accessed on 3.5.2015).

4.5. Some suggestions related to tax liability in the PEA model

In analysis of Estonian PEA regulations as discussed above, it emerges that the standard for application is overwhelmingly low, per existence of tax liability, and can lead to tax assessment procedure taking place over an indefinite period of time. The author finds that it is not appropriate to create the criteria for assessing the legality of an administrative act in the manner employed by Estonian courts, let alone apply it in an inconsistent way. Criteria should be set by law in this connection, to ensure adherence to the rule-of-law principle and provide a just and legal basis for limiting the right to ownership as required by the Convention on the minimum-standard basis. Applying PEAs should require a factual grounding for the tax liability, as existence of such liability provides overall meaning for this procedure.

The author finds the accelerated-assessment procedures applied in the US to provide better balanced and more proportional regulation than does the one used in Estonia. Accelerated assessment with certain time limits meets the minimum standards set by the ECHR and provides more balance among the various interests. The risk of conflict with the requirement of foreseeable application of the measure is lower, as is that of non-proportionate nature. This would motivate tax authorities to apply PEA measures only to those cases in which they have certain knowledge about possible tax liability. It would lift the heavy burden of reasoning from the court and place it with the tax authorities instead. With accelerated-assessment procedure applied, there must be certain knowledge of the existence of liability, supported by certain evidence. The author suggests including the requirement of presenting evidence of existence of a tax claim in the PEA norm's disposition for the purposes indicated above.

5. The taxpayer's contribution to negative prospects of expected enforcement procedure – are *mala fide* activities a prerequisite?

Threat of insolvency can be a natural outcome of unsuccessful business, or it may be encouraged by the taxpayer's activities (or, in the case of legal-person taxpayers, those of its representatives). Such activities may be *mala fide* or *bona fide*. In the design of PEA measures, the legislator must determine whether the purpose of these is protection against insolvency *per se* or, instead, it should provide protection against activities of the taxpayer, whether acting in *bona fide* (lack of knowledge in this field of business) or in *mala fide* (as with intentional insolvency). The first scenario may place tax authorities in an advantageous position in possible-bankruptcy procedure in jurisdictions where creditors with surety will receive the payments in the first round.

Section 136¹ (1) of the Estonian TA refers to compulsory execution becoming considerably more difficult or impossible in consequence of the activities of the taxable person. The law relies on the principle of active participation of the taxpayer regardless of intentions. Estonia's Supreme Court has confirmed this approach in its case 3-3-1-15-12.^{*53} The actual court practice, however, relies also on criteria that are not related to the taxpayer's active contribution to possible insolvency, such as amount of share capital or lack of assets. In some cases, acting in *mala fide* has been emphasised also.^{*54}

In the IRC, the system is two-pronged; how it plays out depends on which of the two measures is used. While jeopardy assessment does not require active engagement of the taxpayer, the more invasive alternative – termination assessment – requires certain actions taken by the taxpayer to become applicable. A fine examples of the latter is fleeing the country and distributing all or some of one's assets.

US court practice diverges somewhat from the wording of the law, providing a wider range of criteria under which the inability to pay tax may become evident. In the IRS's Internal Revenue Manual, it is stated that the court, for instance, may consider whether the taxpayer is involved in illegal activity.^{*55} The court also may consider whether the taxpayer possesses, or deals in, large amounts of cash; whether prior tax

⁵³ See Note 19, paragraph 50 (in Estonian).

⁵⁴ Tallinn Circuit Court ruling 3-14-50822, of 6.11.2014, paragraph 8 (in Estonian).

⁵⁵ *Mueller v. CIR* (S.D. Fla. 1995); *Harvey v. United States* (S.D. Fla. 1990); *Young v. United States* (S.D. Fla. 1997). All referred to in R.A. Steco (see Note 37).

returns report little or no income despite the taxpayer's possession of a large amount of cash; whether there is a lack of assets from among which potential tax liability can be collected; and whether the taxpayer has used multiple addresses, rendering it hard to find the taxpayer.^{*56} Evidence of pending bankruptcy does not on its own establish insolvency.^{*57}

The author first concludes that the written law and court practice are not identical, both in the US and in Estonia. As the legal criteria require certain 'acts' to be undertaken by the taxpayer, the conclusion of possible jeopardy may be justified also by means of other criteria, which do not consist of 'acts' of the taxpayer. In the IRC and US court practice, however, criteria not falling within the category 'acts' cannot be used as the only justification for jeopardy, though they may be supporting considerations. The author finds this a reasonable approach, one that could be followed in Estonia and in other jurisdictions as well. The PEA method should not be an additional measure, placing the tax authorities in a better position in bankruptcy proceedings and deviating from the *paritas creditorum* principle; it should be aimed at protection against *mala fide* taxpayers. If it is designed to be part of the body of insolvency regulations, its suitability in connection with the existing insolvency law system should, however, be analysed.^{*58}

6. Conclusions

Prerequisites for applying PEA measures vary with the jurisdiction and are generally open to misuse. On account of several minimum requirements rooted in the Convention and also constitutional principles, the criteria and due-process guarantees for identifying (possible) tax liability and (possible) future problems with enforcement of such liability ought to be stricter than foreseen in Estonian legislation. Although the Estonian model provides due-process guarantees with its *ex ante ex parte* probable-cause-type model, the US model used for comparison has some clear advantages in certain respects. The US model meets the minimum standards set by the Convention to a greater extent and, accordingly, can be used as a comparative example for PEA measures' design.

Firstly, the author suggests that accelerated-assessment procedures should be used instead of mere seizure of assets. This would provide the taxpayer with more guarantees against excessively long and invasive assessment procedures and motivate tax authorities to apply PEAs only for those procedures in which they have some certain level of knowledge of possible tax liability. Secondly, a reasonable and factual basis for the conclusion that there is tax liability and is a threat of incapability of enforcing that liability should be demonstrated to the court upon application for PEA measures by tax authorities. Thirdly, a clear standard for assessing the existence of tax liability should be put forth. *Bona fide* actions, as well as 'non-acts' of the taxpayer, should be excluded for reason of being covered by other legal tools (such as bankruptcy procedure).

⁵⁶ *Maqluta v. United States* (S.D. Fla. 1996); *Mesher v. United States* (D. Or. 1990). Referred to in R.A. Steco (see Note 37).

⁵⁷ Refer to R.A. Steco (see Note 37).

⁵⁸ This was discussed by the ECHR in the case *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands* (see Note 47), paragraph 65.



Mari Kelve-Liivsoo
Bachelor's student
University of Tartu



Artur Knjazev
Master's student
University of Tartu



Tea Kookmaa
Master's student
University of Tartu

Legal Remedies Available to Competitors of Recipients of Unlawful State Aid under Estonian Law

1. Introduction

This article addresses the issue of breaching the standstill obligation under Article 108 (3) of the Treaty on the Functioning of the European Union (hereinafter 'TFEU')¹ and the legal remedies possible under Estonian legislation that are available to persons whose rights have been infringed by way of unlawful state aid. The paper focuses mainly on the competitors of the recipient of unlawful state aid.

State aid and its potential recovery is highly topical in Estonia. In April 2014, the European Commission decided to initiate formal investigative procedure in the case of Estonian Air.² The company had benefited from several public interventions over the space of 10 years while only a single capital injection is allowed as restructuring aid.³ Another example is the Estonian Electricity Market Act, which allows support for producers of energy from renewable sources.⁴ This state aid scheme was approved by the European Commission but actually launched before the approval.⁵

Pursuant to Article 107 (1) of the TFEU, aid granted by a Member State to undertakings and fulfilling the criteria listed in that article⁶ (i.e., state aid) is generally not permissible. State aid may be given or altered only upon prior approval of the European Commission (also 'the Commission').⁷ The Member State concerned shall not put its planned measures into effect until the Commission has reached a final decision on the compatibility of these measures with the internal market. This is referred to as the standstill obligation.⁸ Said obligation is breached where the Member State fails to notify the Commission of state aid or does notify the Commission but fails to wait for a positive decision. The standstill obligation is intended to guarantee that state aid does not take effect before the Commission has had a reasonable period within

¹ Treaty on the Functioning of the European Union. – OJ C 326, 26.10.2012.

² European Commission SA.36868. Publication in OJ on 9.5.2014. JOCE C/141/2014.

³ *Ibid.*, para. 80.

⁴ Estonian Electricity Market Act ('EMA' in later notes), §59.

⁵ European Commission. State Aid SA.36023 (2014/NN) – Estonia, Section 4 ('Conclusion') and para. 55.

⁶ State aid is aid that 1) is granted by a Member State 2) through state resources, 3) confers an advantage on the recipient, 4) is selective in nature, 5) distorts competition, and 6) has potential to affect cross-border trade.

⁷ Article 108 (3) of the TFEU.

⁸ *Ibid.*

which to check the compatibility of a state aid measure or scheme with the single market and, should it deem this necessary, to initiate the procedure foreseen in Article 108 (2) of the TFEU.^{*9} It must be stated, however, that two types of aid are exempted from the notification obligation: aid falling under the *de minimis* regulation^{*10} and under the General Block Exemption Regulation^{*11}. These two types of aid are not addressed in the present article.

The beneficiary of unlawful aid gains a competitive advantage that distorts competition in the common market. Even if the Commission later finds the aid compatible with the common market, such distortion is deemed to have been present until the time of the decision by the Commission, which is the only permissible legal basis for disbursing the aid. If this were not the case, Article 108 (3) of the TFEU would not have the impact for which it has been designed.^{*12}

The Commission, when notified of a state aid measure or scheme, takes one of the decisions outlined in the respective procedural regulation.^{*13} It can record that it has found no state aid^{*14}, that the aid is compatible with the internal market^{*15}, or that there are doubts as to whether the aid is compatible^{*16}. In the last of these cases, the Commission will launch a formal investigative procedure, inviting the Member State to submit comments within a month^{*17} and issuing a final decision within 18 months^{*18}.

A negative decision by the Commission^{*19} carries severe consequences: the Commission can rule recovery in order, with illegality interest due from the date on which the aid was granted.^{*20} Even if the Commission takes a positive decision, the latter does not remedy the breach of the standstill obligation.^{*21}

Article 108 (3) of the TFEU has a direct effect and gives rise to rights of individuals^{*22}, such as the competitors of the beneficiary. These are the individuals most adversely affected by the aid measures, because the aid increases the competitiveness of the recipient to the detriment of its competitors. However, there are other possible categories of individuals whose rights are negatively affected by the breach of the standstill obligation, such as taxpayers if the latter pay taxes under an unlawful state aid scheme.^{*23}

The European Court of Justice (or 'ECJ') has clarified that national courts are obliged to safeguard the rights of individuals until the final decision of the Commission is issued.^{*24} This includes obligation to ensure that the aid does not remain at the free disposal of the recipient during the standstill period.^{*25} The national law must therefore provide effective legal remedies for the affected individuals to exercise their rights.^{*26} The article first analyses legal remedies proposed by the ECJ. It then examines Estonian law in terms of availability of these remedies.

⁹ Case C-368/04, *Transalpine Ölleitung in Österreich GmbH and Others v. Finanzlandesdirektion für Tirol and Others* ('*Transalpine*' in later notes) (2006), ECR I-09957, para. 26.

¹⁰ Commission Regulation (EU) No. 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (24.12.2013). OJ L 352/1.

¹¹ Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (26.6.2014). OJ L 187/1.

¹² Case C-199/06, *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE)* ('*CELF*' in later notes) (2008), ECR I-00469, para. 40.

¹³ Council Regulation (EC) No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (27.3.1999). OJ L 083, P. 0001–0009.

¹⁴ *Ibid.*, Article 4 (2).

¹⁵ *Ibid.*, Article 4 (3): '[...] the decision not to raise objections [...]'].

¹⁶ *Ibid.*, Article 4 (4): 'The decision to initiate the formal investigation procedure [...]'].

¹⁷ *Ibid.*

¹⁸ *Ibid.*, Article 7 (6).

¹⁹ *Ibid.*, Article 7 (5): '[...] aid is not compatible with the internal market [...]'].

²⁰ Case C-70/72, *Commission of the European Communities v. Federal Republic of Germany* (1973), ECR 813, para. 13.

²¹ *CELF* (see Note 12), para. 40.

²² Case 120/73, *Gebrüder Lorenz GmbH v. Federal Republic of Germany and Land Rheinland-Pfalz* (1973), ECR 1471, para. 8; Case C-284/12, *Deutsche Lufthansa AG v. Flughafen Frankfurt-Hahn GmbH* ('*Lufthansa*' in later notes) (2013), ECLI:EU:C:2013:755, para. 29.

²³ Case C-174/02, *Streekgewest Westelijk Noord-Brabant v. Staatssecretaris van Financiën* ('*Streekgewest*' in later notes) (2005), ECLI:EU:C:2005:10, para. 21.

²⁴ *Lufthansa* (see Note 22), para. 31; Case C-1/09, *CELF and Ministre de la Culture et de la Communication* (2010), ECR I-2099, para. 30.

²⁵ *Lufthansa* (see Note 22), para. 31; Case C-1/09, *CELF and Ministre de la Culture et de la Communication* (*ibid.*).

²⁶ *Transalpine* (see Note 9), para. 45.

2. Legal remedies derived from the case law of the ECJ

2.1. General considerations

All undertakings operating in the single market have a right to operate under conditions that are not distorted by unlawful state aid. It must be recalled that EU law recognises the liability only of the aid grantor, not the recipient.^{*27} State liability was confirmed, *inter alia*, in the *Traghetti* case.^{*28}

According to the case law of the ECJ, protection of the rights derived from Article 108 (3) of the TFEU is a task of the national courts.^{*29} The national courts' competence and duty is based on that obligation, which has been specified over the decades through ECJ case law.

Claims that are based on violation of Article 108 (3) of the TFEU must be processed in accordance with the relevant national law. In that regard, the ECJ held in the *Transalpine* case that, since there is no Community legislation on the subject, each Member State must, under its own legal system, designate the courts having jurisdiction and determine the detailed procedural rules governing actions in law intended to safeguard the rights derived for individuals from Community law.^{*30} In doing so, Member States need to respect the principle of equivalence, guaranteeing that those rules are not less favourable than those governing rights originating in domestic law.^{*31} They must also comply with the principle of effectiveness – i.e., not render the exercise of rights conferred by the Community legal order impossible or excessively difficult in practice.^{*32}

The case law of the ECJ indicates that national courts' main obligation when facing an unlawful state aid measure is to eliminate the distortion of competition that was caused by the violation of the standstill obligation.^{*33} In other words, national courts must restore the competitive situation that existed prior to the infringement.^{*34}

2.2. Recovery of unlawful aid

The ECJ has consistently held that national courts must, in principle, order the recovery of unlawful aid pursuant to their national law.^{*35} In cases wherein the Commission has initiated a formal procedure in accordance with the TFEU's Article 108 (2), a national court is competent to order the recovery of the unlawful aid measure and also to order provisional measures so as to safeguard the interests of the parties concerned.^{*36} A possible and effective provisional measure would be to suspend the implementation of the measure in question or deposit the unlawful sums.^{*37}

Another development in the ECJ case law shows that unlawful aid must be recovered along with the illegality interest in respect of the time of unlawfulness. Even in cases of a positive decision, the aid given prior to the decision remains unlawful and the obligation to pay the illegality interest still holds.^{*38} The national court may ask the Commission for assistance in calculating the amount.^{*39}

^{*27} Case C-39/94, *Syndicat Français de l'Express International (SFEI) and Others v. La Poste and Others* ('SFEI' in later notes) (1996), ECR I-03547, para. 74.

^{*28} Case C-173/03, *Traghetti del Mediterraneo SpA v. Repubblica italiana* ('Traghetti' in later notes) (2006), ECLI:EU:C:2006:391, paragraphs 41 and 50.

^{*29} *Lufthansa* (see Note 22), para. 29; *SFEI* (see Note 20), para. 40; *CELF* (see Note 12), paragraphs 12 and 14.

^{*30} *Transalpine* (see Note 9), para. 45.

^{*31} *Ibid.*

^{*32} *Ibid.*

^{*33} Case C-275/10, *Residex Capital IV CV v. Gemeente Rotterdam* (2011), 2011 I-13043, para. 34 ('*Residex Capital*' in later notes) and the case law cited therein.

^{*34} *Ibid.*, para. 46.

^{*35} *CELF* (see Note 12), para. 39; *Residex Capital* (see Note 33), para. 29.

^{*36} *Lufthansa* (see Note 22), para. 43.

^{*37} *Ibid.*

^{*38} *CELF* (see Note 12), paras 52 and 55.

^{*39} Commission notice on the enforcement of State aid law by national courts (2009/C 85/01), para. 36. See also Commission Regulation (EC) 794/2004 on this subject.

Recovery of aid must be effective and immediate.^{*40} However, there may be a few exceptional cases in which the unlawful aid cannot be recovered. Firstly, the recipient of unlawful aid may rely on the principle of legitimate expectations in cases wherein a Community authority has caused the recipient to entertain those expectations.^{*41} This would be the case, for example, where the Commission has previously adopted a decision declaring that there is no state aid or that the aid is compatible with the single market. Secondly, the recipient of unlawful aid may rely on the principle of legal certainty if the Commission does not act within 10 years from the time when it learnt of the existence of the aid incompatible with the common market.^{*42} Thirdly, the Member State may plead that it is absolutely impossible to recover the aid.^{*43}

2.3. Preventing payment of unlawful aid

If the unlawful aid has not yet been given, the individual suffering on account of the violation of Article 108 (3) TFEU must have an effective remedy to prevent the rendering of the unlawful aid. This kind of remedy is derived from the general principle that national courts must safeguard individual rights conferred by Article 108 (3) of the TFEU and take all appropriate measures related to the validity of measures giving effect to the aid, recovery of the latter, and possible interim measures.^{*44}

2.4. Damage claims

In addition to the recovery obligation arising from the breach of the standstill obligation, the above-mentioned provision may give rise to damage claims. If competitors to the aid beneficiary sustain damages and there is a direct causal link between the breach of Article 108 (3) TFEU and the damage, the injured party has a right to claim damages.^{*45} The conditions for damage claims are derived from the case law – specifically, the *Francovich*^{*46} and *Brasserie du Pêcheur*^{*47} cases.

3. Legal remedies in Estonian administrative law

3.1. General considerations

According to Estonian law, unlawful aid must be recovered along with the illegality interest on the basis of the Commission's or ECJ's decision.^{*48} The national law does not contain specific legal remedies for dealing with issues of unlawful state aid in circumstances wherein the standstill obligation is breached. However, in public law, the relevant claims can be derived from the State Liability Act^{*49} (or 'SLA'). A person may also rely on directly applicable provisions of EU law such as those of Article 108 (3) TFEU and the relevant interpretations of the ECJ.

⁴⁰ Case C-415/03, *Commission of the European Communities v. Hellenic Republic* (also known as 'Olympic Airways') (2005), 2005 I-03875, para. 6; Case C-232/05, *Commission of the European Communities v. French Republic* (also known as 'Scott') (2006), I-10071, para. 2.

⁴¹ Joined Cases C-182/03 and C-217/03, *Kingdom of Belgium* (C-182/03) and *Forum 187 ASBL* (C-217/03) v. *Commission of the European Communities* (2006), 2006 I-05479, para. 147.

⁴² Case C-372/97, *Italian Republic v. Commission of the European Communities* (2004), 2004 I-03679, paragraphs 116–118; Council Regulation (EC) 659/1999, Article 15.

⁴³ Case C-177/06, *Commission of the European Communities v. Kingdom of Spain* (2007), 2007 I-07689, para. 46 and the case law cited therein.

⁴⁴ *Lufthansa* (see Note 22), para. 30. Case C-354/90, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France* ('FNCE' in later notes) (1991), ECLI:EU:C:1991:440, para. 12. Please see also the document 'Commission notice on the enforcement of State aid law by national courts' (see Note 39), paragraphs 28–29.

⁴⁵ *Traghetti* (see Note 28), para. 45.

⁴⁶ Joined Cases C-6/90 and C-9/90, *Francovich and Others* (1991), 1991 I-05357.

⁴⁷ Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur* (1996), 1996 I-01029.

⁴⁸ Konkurentsiseadus (CA' in later notes). – RT I 2001, 56, 332 (in Estonian), §42 (3). English text available at <https://www.riigiteataja.ee/en/eli/519012015013/consolide/> (most recently accessed on 1.6.2015).

⁴⁹ Riigivastutuse seadus. – RT I 2001, 47, 260 (in Estonian). English text available at <https://www.riigiteataja.ee/en/eli/515112013007/consolide/> (most recently accessed on 1.6.2015).

The applicant may seek one of the following actions with the Estonian administrative courts:^{*50} 1) the full or partial annulment of the administrative act (annulment action)^{*51}; 2) the issuing of an administrative act or the taking of an administrative measure (mandatory action); 3) a prohibition to issue an administrative act or take a certain administrative measure (prohibition action); 4) compensation for harm caused in a public-law relationship (compensation action); 5) elimination of unlawful consequences of an administrative act or measure (reparation action); and 6) declaration of nullity of an administrative act, declaration of unlawfulness of an administrative act or measure, or declaration of ascertaining other facts of material importance in a public-law relationship (declaratory action). This article focuses on those actions that can be used to achieve the following: 1) recovery of unlawful aid along with illegality interest (annulment and reparation action); 2) interim measures, which can be submitted alongside other actions;^{*52} and 3) compensatory damages – compensation action.

The action is filed against the granting authority. According to Estonian law, the granting authority is the state, local-government, or other body (including a foundation, not-for-profit association, legal person in public law, or public undertaking) that directly or indirectly uses resources of the state or a local government for granting state aid.^{*53} A public undertaking is an undertaking over which the state or a local government exercises a dominant influence either directly or indirectly by virtue of right of ownership or financial participation, on the basis of the legislation applicable to the person or in any other manner.^{*54}

State aid may be granted in any of a variety of ways: issuing regulations^{*55} or legislative acts of general application (e.g., the Estonian Electricity Market Act), entering into a contract under public law^{*56}, and issuing administrative acts^{*57}.

3.2. Recovery of aid in Estonian administrative law

3.2.1. Aid granted on the basis of an administrative act

If unlawful aid has been granted on the basis of an administrative act, the remedy for recovery of the unlawful aid would be to repeal the act.^{*58} The consequence of repeal of an administrative act is that the unlawful aid is returned or, alternatively, compensated for in a manner pursuant to the relevant provisions of Estonian civil law.^{*59} The beneficiary would have to return the aid after the court's decision. Where this is impossible, the granting authority will have an unjust-enrichment claim against the beneficiary, which only the granting authority may submit.^{*60} In that case, the person may seek a reparation action to ensure the elimination of the unlawful consequences via ordering of the granting authority to reclaim the unlawful aid amounts.^{*61} The court may, when a reparation action is filed for, order the granting authority to take all legitimate measures, including submitting claims to third parties.^{*62}

⁵⁰ Halduskohtumenetluse seadustik (Estonian Code of Administrative Code Procedure) ('CACP' in later notes). – RT I, 23.03.2011, 3 (in Estonian), §37 (2) 5). English text available at <https://www.riigiteataja.ee/en/eli/509022015001/consolide/> (most recently accessed on 1.6.2015).

⁵¹ The CACP (§37 (2) 1)) and SLA (§3) use different terms for the same concept, for which reason 'annulment action' and 'action for repeal' are used synonymously in this article.

⁵² CACP, §249 (2).

⁵³ CA, §30¹ (1).

⁵⁴ CA, §31 (3¹).

⁵⁵ Haldusmenetluse seadus (Estonian Administrative Procedure Act) ['APA' in later notes]. – RT I, 2001, 58, 354 (in Estonian), §88. English text available at <https://www.riigiteataja.ee/en/eli/509022015001/consolide/> (most recently accessed on 1.6.2015).

⁵⁶ APA, §95.

⁵⁷ APA, §51.

⁵⁸ SLA, §3 (1).

⁵⁹ APA, §69 (1).

⁶⁰ APA, §69 (1) and võlaõigusseadus (Estonian Law of Obligations Act). – RT I, 11.04.2014, 13 (in Estonian), §1028 (1). English text available at <https://www.riigiteataja.ee/en/eli/516092014001/consolide/> (most recently accessed on 1.6.2015).

⁶¹ CACP, §37 (2) (5). Similarly, CCSCd 3-2-1-100-08, para. 27.

⁶² SLA, §11 (2).

A person may generally claim for the repeal of an administrative act with an Estonian administrative court within 30 days after being notified of the act.^{*63} If not receiving proper notification, the person may submit the claim within a reasonable period after obtaining information from an alternative channel about the administrative act granting the unlawful aid.^{*64}

Pursuant to Estonian law, the court may refuse the claim for repeal if it is filed significantly later than the notification sent to the addressee about the administrative act and repeal may violate the legitimate expectation of a third person.^{*65} European Union state-aid law and the relevant case law of the ECJ do not recognise the possibility of refraining from recovering the aid in order to protect legitimate expectations of a third person. If that were the case in national proceedings, the court would have to ask for a preliminary ruling from the ECJ in order to interpret Article 108 (3) of the TFEU and ultimately determine the relevant provision's conformity with EU law.

Under Estonian law, the unlawfulness of an administrative act does not affect its validity.^{*66} In cases of state aid, this provision could be problematic, since according to EU law, unlawful aid may not remain at the free disposal of the beneficiary.^{*67} It follows that declaration of unlawfulness of the relevant administrative act is not a route that can yield results. The person instead has to claim for the repeal of the administrative act.

3.2.2. Aid granted on the basis of a legislative act

There are no special remedies in Estonian law that allow recovery of unlawful aid when the aid is granted on the basis of a legislative act. The SLA's §14 (1) allows the injured party to claim damages in this case. However, if the aid is disbursed through administrative acts that are based on that legislative act, recovery would be possible in accordance with the procedure described above. The current situation in Estonian law should be reviewed since Member States are obliged to implement procedural regulations effective for ensuring effective protection of individual rights conferred by Article 108 (3) of the TFEU^{*68} and no clear remedies are available under the current provisions.

3.2.3. Illegality interest

A successful recovery claim results in the unlawful aid being recovered along with the illegality interest.^{*69} If the Commission issued a positive decision but the aid measure was implemented before that decision, the unlawful aid does not have to be recovered unless national law allows this, but the obligation to pay the illegality interest remains.^{*70} The illegality interest may be equated to the market interest accrued over the period of unlawfulness.^{*71}

3.3. Damage claims

3.3.1. EU law background applicable in Estonia

Damage claims submitted on the basis of EU law must meet the following criteria:^{*72} 1) the infringed provision confers rights on individuals, 2) the breach of the provision is sufficiently serious, 3) individuals have suffered damage, and 4) there is a direct causal link between the breach of the state's obligation and the damage suffered by the injured parties.

⁶³ CACP, §46 (1).

⁶⁴ CACP, §46 (7).

⁶⁵ SLA, §3 (3) (2).

⁶⁶ APA, §61.

⁶⁷ Lufthansa (see Note 22), para. 31 and the case law cited therein.

⁶⁸ *Transalpine* (see Note 9), para. 45.

⁶⁹ *CELF* (see Note 12), paras 52 and 55.

⁷⁰ *Ibid.*, para. 55.

⁷¹ *Ibid.*, para. 51.

⁷² *Traghetti* (see Note 28), para. 45.

Breach of the standstill obligation is always considered to be a sufficiently serious violation because a Member State has no discretion in the matter and may not decide to implement state aid without first notifying the Commission or waiting for its decision.^{*73} Where the state has no discretion, violation of the EU law provision may automatically establish sufficiently serious breach.^{*74}

It is up to the national court to establish a direct causal link between the breach of the state's obligations and the damages suffered by the injured parties.^{*75} According to Estonian law^{*76}, such a link is established if the injured party is able to demonstrate that it would have avoided the damage had the state not failed in its obligations under Article 108 (3) TFEU.

A damage claim may still be an option where the Commission has declared state aid compatible with the internal market. One example involves the above-mentioned Estonian aid scheme subsidising renewable-energy producers.^{*77} However, certain provisions of national law may restrict the possibility of claiming for damages, such as a time limit for bringing an action.^{*78}

3.3.2. Estonian law

While it is up to the Member State to decide on the procedure of submitting damage claims, the national law must still be consistent with the relevant provisions of EU law and the case law of the ECJ. The latter has been confirmed by the Supreme Court of Estonia, which has also ruled that a national law provision colliding with EU law must not be applied.^{*79} This principle, implying the supremacy of EU law, has been affirmed by the ECJ ever since the *Simmenthal* case.^{*80}

Persons whose rights are violated by the unlawful activities of a public authority in a public-law relationship in Estonia may claim damages under the Estonian State Liability Act. Where unlawful state aid is granted via an administrative act, the injured parties may rely on §7 (1) of the SLA. Compensation for direct patrimonial damage and loss of income^{*81} may be claimed if 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 the SLA. It is most likely that persons harmed by unlawful state aid will claim for compensation for loss of income because the unlawful state aid would have improved the market position of the aid beneficiary to the detriment of the competitors.

If unlawful state aid has been granted on the basis of a legislative act, the injured parties must make their claims on the basis of the SLA's §14 (1). This provision states that a person may claim compensation for damage caused by legislation of general application or by failure to issue such legislation only if the damage was caused by a significant violation of the obligations of a public authority, the legal provision forming the basis for the violated obligation is directly applicable, and the person belongs to a group of persons who have been specially injured through the legislation of general application or failure to issue such legislation. The last condition significantly restricts the number of persons able to claim compensation on the basis of the SLA's §14 (1). As the condition runs counter to the relevant ECJ case law^{*82}, it is not applied in cases wherein the standstill obligation is infringed.

Damage claims may be, in principle, satisfied if all the conditions set forth in §14 (1) and §7 (1) of the SLA are met. The injured persons may claim direct patrimonial damages suffered as a result of a legislative act. This could also be the case with the unlawful aid scheme in Estonia that subsidised renewable-energy producers^{*83}, as end consumers were obliged to pay sums that the energy company had no right to invoice for before a positive decision of the Commission.

⁷³ Commission notice 2009/C 85/01 (see Note 29), para. 47.

⁷⁴ Case C-278/05, *Robins and Others* (2007), ECLI:EU:C:2007:56, para. 71.

⁷⁵ See ALCSCr 3-3-1-37-12, para. 21.

⁷⁶ SLA, §7 (4); LOA, §127 (4).

⁷⁷ Commission: State Aid SA.36023 (2014/NN) – Estonia (see Note 7), §4, para. 28.

⁷⁸ CACP, §46 (4).

⁷⁹ ALCSCd 3-3-1-84-12, para 20.

⁸⁰ Case C-106/77, *Simmenthal II* (1978), ECR 629.

⁸¹ SLA, § 7 (3).

⁸² ALCSCd 3-3-1-84-12, para. 21.

⁸³ EMA, Sections 59–59"; see also Commission: State Aid SA.36023 (2014/NN) – Estonia (see Note 7).

When processing claims submitted on the basis of the SLA's §14 (1), the national court may reduce state liability pursuant to §13 of the SLA. This provision is applicable also in cases wherein EU law has been violated^{*84}. Estonian courts may limit the amount of compensation, taking into account the following: the extent to which the damage was unforeseeable; objective obstacles to preventing damage; the gravity of the violation of rights; limitations provided for in private law, regarding the part the injured party had in causing the damage; and other circumstances that would render compensation in full for the damage unfair.^{*85} The national provision also sets out the following criteria to specify when the national court is allowed to limit the amount of compensation:

- Loss of income is not compensated for if the person obliged to compensate for the damage proves that he is not at fault in causing the damage.^{*86} This provision is in conflict with EU law, as the latter does not require the state's fault as a prerequisite for claiming damages that include loss of income.^{*87} Therefore, this provision of Estonian law must be set aside.
- 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 with full observance of the diligence necessary for the performance of public duties^{*88}. This provision would not be applied in state-aid cases, because there is no public duty to subsidise undertakings in breach of Article 107 (1) of the TFEU without informing the Commission in line with Article 108 (3) of the TFEU.
- An injured party who requests the elimination of consequences is required to incur the costs of elimination of consequences to the extent corresponding to the part the injured party had in causing the consequences. If, because the injured party cannot incur the costs corresponding to the part said party had in causing the damage, the consequences are not eliminated, then the injured party may request financial compensation corresponding to the share of liability of the public authority^{*89}. Such a situation might arise where the competitor was aware of the unlawful state aid but did not inform the authorities and incurred losses as a result of ongoing aid.

In addition, the state may, regardless of the request of the injured party, eliminate consequences connected to the matter by taking all lawful measures, including the issuing of administrative acts, taking of measures, and filing of claims in private law against third persons, if financial compensation would substantially exceed the costs of elimination of consequences and if the person does not have a good reason for claiming financial compensation.^{*90} For example, the damage claims of the above-mentioned clients of Eesti Energia could be set off against their invoices.

3.4. Interim measures

There is no Estonian case law addressing interim measures used in situations involving state aid. However, the general principles underlying the application of interim measures could also be used in cases of state aid.

In the case law, it has been emphasised that the aim with interim measures is to prevent the situation of the claimant from worsening and to guarantee the execution of a court decision.^{*91}

The Code of Administrative Court Procedure states that when ruling on interim measures the court must consider public interests and the rights of the persons affected, alongside the prospects that the action entails, as well as the foreseeable consequences of the ruling for interim measures.^{*92}

From examination of the relevant case law it becomes evident that the courts apply interim measures when the following criteria are fulfilled:

⁸⁴ ALCS Cd 3-3-1-37-12, para. 28.

⁸⁵ SLA, §13 (1).

⁸⁶ SLA, §13 (2).

⁸⁷ *Brasserie du Pêcheur* (see Note 47), para. 51.

⁸⁸ SLA, §13 (3).

⁸⁹ SLA, §13 (4).

⁹⁰ SLA, §11 (2)–(3).

⁹¹ ALCS Cr 3-3-1-67-01, of 21.12.2001, *Tõnu Kõrda*. – RT III 2002, 4, 37 (in Estonian), para. 3.

⁹² Code of Administrative Court Procedure, §249 (3).

- it is not highly unlikely that the claim will succeed^{*93};
- there is a risk of irreversible consequences^{*94};
- there is no significant public or third-party interest in non-application of the interim measure^{*95};
- and
- the interim measure is proportional^{*96}.

The likelihood of the claim's success is a general prerequisite. The courts have explained that the application of an interim measure is, in essence, an advance assessment of whether the claim is founded or not.^{*97} Since the decision on an interim measure must be taken as soon as possible, the court cannot conduct an extensive analysis of the likelihood of the claim being ultimately successful. The court makes an assessment of the prospects for the claim under limited conditions.^{*98} Therefore, in a state-aid case, the competitor would have to substantiate with a degree of certainty that his right to fair competition has been infringed.

The risk of irreversible consequences is assessed in each individual case. Interim measures are applied where the applicant's rights would not be sufficiently protected even in the event of a favourable court decision.^{*99} Alternatively, there is a need to apply an interim measure if the refusal to apply it would bring about burdensome consequences for the applicant and the elimination of these would be unreasonable^{*100}. In a state-aid case, the competitor would be able to rely on the risk of an irreversible consequence because the courts have regarded hampering the activity of a business as an irreversible consequence.^{*101} In cases involving state aid, the competitor could argue that the unlawful aid gives the beneficiary a more competitive position in the market and this consequence cannot be subsequently reversed.

There must not exist any significant public or third-party interest against the application of the interim measure. Significant public interest is present, for example, when it is necessary to carry out a public procurement in order to build a schoolhouse.^{*102} State aid may be given, *inter alia*, to projects of significant public interest. It is then the task of the courts to decide whether such interest outweighs the interests of the competitors of the beneficiary.

On the basis of the case law, it can be concluded that a competitor can successfully apply for interim measures in a state-aid case when the criteria described above are fulfilled.

3.5. Preventing the payment of unlawful aid

The above-mentioned argumentation could be effectively used to prohibit the issuing of an administrative act. A prohibition action is well founded if the rights of a person are at risk of being negatively affected.^{*103} One can file for a prohibition action only if infringement of the competitor's rights has not yet taken place.

⁹³ ALCSCr 3-3-1-76-04, of 22.11.2004, *OÜ Kirderand*. – RT III 2004, 34, 352 (in Estonian), para. 6; ALCSCr 3-3-1-85-04, of 14.12.2004, *Toomas Raisi*. – RT III 2005, 1, 1 (in Estonian), para. 16; Tartu Circuit Court ruling 3-15-27, of 29.1.2015 (in Estonian), para. 11; Tartu Circuit Court ruling 3-14-50421, of 13.5.2014 (in Estonian), para. 13; Tallinn Circuit Court ruling 3-14-50319, of 17.4.2014 (in Estonian), para. 19.

⁹⁴ See, among materials from other authorities, Tallinn Administrative Court ruling 3-13-1665/4, of 6.8.2013 (in Estonian), para. 6.1; Tartu Circuit Court ruling 3-12-1936, of 31.10.2012 (in Estonian), para. 9; Tallinn Administrative Court ruling 3-14-50091, of 28.1.2014 (in Estonian), para. 3.1.

⁹⁵ ALCSCr 3-3-1-67-01, of 21.12.2001, *Tõnu Kõrda*. – RT III 2002, 4, 37 (in Estonian), para. 1; ALCSCr 3-3-1-13-04 [of 8.4.2004]. – RT III 2004, 11, 130 (in Estonian), para. 19.

⁹⁶ Tallinn Circuit Court ruling 3-14-50411, of 30.4.2014 (in Estonian), para. 12; Tallinn Circuit Court ruling 3-14-50319, of 17.4.2014 (in Estonian), para. 19; Tallinn Circuit Court ruling 3-13-768, of 1.7.2013 (in Estonian), para. 14; Tallinn Administrative Court ruling 3-13-1665/4, of 6.8.2013 (in Estonian), para. 11; Tallinn Administrative Court ruling 3-13-1265, of 12.6.2013 (in Estonian), para. 9.

⁹⁷ ALCSCr 3-3-1-17-04, of 17.6.2004, *Eesti Haigekassa*. – RT III 2004, 18, 213 (in Estonian), para. 30.

⁹⁸ ALCSCr 3-3-1-76-04, of 22.11.2004, *OÜ Kirderand*. – RT III 2004, 34, 352 (in Estonian), para. 9; Tallinn Administrative Court ruling 3-13-1273, of 14.6.2013 (in Estonian); Tallinn Administrative Court ruling 3-13-1265, of 12.6.2013 (in Estonian), para. 12.

⁹⁹ Tallinn Administrative Court ruling 3-14-50411/15, of 7.4.2014 (in Estonian), para. 8; Tallinn Circuit Court ruling 3-14-50411, of 30.4.2014 (in Estonian), para. 12; Tartu Circuit Court ruling 3-13-1960, of 7.11.2013 (in Estonian), para. 6.

¹⁰⁰ *Ibid.*

¹⁰¹ Tartu Administrative Court ruling 3-12-1917, of 13.9.2012 (in Estonian), para. 7.

¹⁰² Tallinn Circuit Court ruling 3-14-51996, of 12.9.2014 (in Estonian), para. 12.

¹⁰³ ALCSCr 3-3-1-84-11, of 19.6.2012, *Aleksandr Šapovalov* (in Estonian), para. 22; Tallinn Administrative Court ruling 3-13-198, of 5.2.2013 (in Estonian), para. 3.2; Tallinn Administrative Court ruling 3-14-51640, of 11.11.2014 (in Estonian), para. 16.

Therefore, in a state-aid case a prohibition action could be used only before an administrative act is issued. After the issuing of an administrative act on the basis of which the beneficiary receives aid, a prohibition action loses its intended effect, since competition is distorted and therefore infringement of the competitor's right to fair competition has already taken place.

4. Legal remedies in Estonian civil law

State aid could also be granted through a civil transaction, such as a capital injection. In these situations, various civil-law remedies can be used by the competitors to the unlawful-aid beneficiary.

4.1. Suspension of the implementation of the measure

In a situation wherein there is potential of state aid being implemented, it is necessary to suspend implementation until the final decision of the Commission. Section 1055 (1) of the Estonian Law of Obligations Act (or 'LOA') provides a legal basis for said remedy. This provision forms part of tort law and allows the plaintiff to demand cessation of the action that is causing unlawful damage.

To demand the cessation of the action that is causing unlawful damage, the plaintiff must prove the following:

- 1) that the plaintiff has suffered damage due to the defendant's actions;
- 2) that the causing of damage is unlawful; and
- 3) that the causing of damage is ongoing.

The damage could be, for instance, loss of profit, which is named as a type of damage subject to compensation.^{*104} As such, the loss need not entail harm to the person or property; it could be deemed a 'pure economic loss'. Under Estonian law, the tortfeasor is generally not liable for causing 'pure economic loss'.^{*105} However, liability arises from the breach of a provision that is aimed at protecting the victim from such loss.^{*106} The Supreme Court has affirmed the liability arising from the breach of provisions of the Competition Act that are intended to protect fair competition. Considering that provisions prohibiting the granting of state aid have been designed in pursuit of the same goal, one can assume that they serve as a basis for liability for causing 'pure economic loss' to the competitors of the recipient of state aid. Therefore, declaring a competitor's loss of profit a 'pure economic loss' should not be an obstacle to the use of legal remedies under civil law.

The instances wherein the causing of damage is unlawful are enumerated in §1045 (1) of the LOA. The only reason for unlawfulness is stated in point 7 of this section. According to the relevant provision, the causing of damage is unlawful if the cause constitutes a 'behaviour which violates a duty arising from law'. In the cases of state aid, the legal duty stems from Article 108 (3) of the TFEU.

Although a transaction can be finalised in a brief span of time, doing so does not put an end to the breach of the standstill obligation. As the ECJ found in the *FNCE* case, wherein unlawful aid was granted by a transaction, the validity of this transaction is affected^{*107}. A basis for declaring a transaction void is provided in §87 of the General Part of the Civil Code Act. The provision stipulates that a transaction is void if it is contrary to a prohibition arising from law and the purpose of that prohibition is to render the transaction void upon violation of the prohibition. Proceeding from the *FNCE* case, one could argue that Article 108 (3) of the TFEU does have such a purpose. The aid that has been received on the basis of a void transaction shall be returned pursuant to the provisions pertaining to unjust enrichment unless otherwise provided by law.^{*108} Given that the Competition Act does not specify the procedure applicable in cases wherein there has been no Commission decision on the recovery, the provisions dealing with unjust enrichment are to be

¹⁰⁴ LOA, §128 (4).

¹⁰⁵ CCSCd 3-2-1-19-11, of 20.4.2011, para. 17.

¹⁰⁶ *Ibid.*

¹⁰⁷ *FNCE* (see Note 44), paras 12 and 18; Case C-390/98, *Bank* (2001), ECR I-6117, para. 73.

¹⁰⁸ Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act). – RT I 2002, 35, 216 (in Estonian). English text available at <https://www.riigiteataja.ee/en/eli/528032014002/consolide/> (most recently accessed on 24.3.2015). Section 87.

applied. If aid is not recovered, the grantor's inactivity would continually cause damage to the competitors. Therefore, the competitor to the aid beneficiary could demand that the grantor recover the aid as means of suspending the damage-causing actions.

4.2. Recovery of aid

An obligation to recover unlawful aid is set forth in §42 (3) of the Competition Act. Upon a decision of the European Commission or the ECJ ordering recovery, the grantor of the state aid must recover unlawful aid with the illegality interest. In contrast, the case law of the ECJ requires national courts to order aid recovery already when the Commission has initiated a formal investigation procedure and an action has been filed demanding recovery.^{*109} Therefore, the national courts must not wait until the Commission issues its decision; they need to act upon the claim of the plaintiff. Any other interpretation of Article 108 (3) of the TFEU would make the aid available for use and endanger the functioning of the common market. Consequently, if Estonian courts were to rely only on the existing provisions of the Competition Act and not recover aid when the standstill obligation is breached, they would disregard the objective of the standstill obligation.

The necessary claim could be based on §1055 (1) of the LOA. The Supreme Court of Estonia has ruled that this provision allows the plaintiff to demand termination of the negative consequences of the damaging acts.^{*110} If the granting of the aid is to be regarded as the damaging act, the competitor could suffer negative consequences in the form of lost profit, which would be ongoing as long as the aid remains available to the beneficiary. The competitor may therefore demand the grantor of state aid to order recovery. As examined above, acts, including civil transactions, that entail the implementation of aid measures in breach of the standstill obligation are void^{*111} under Estonian law. This leads to the application of the provisions on unjust enrichment under Estonian law. If the grantor decides not to apply these provisions, the plaintiff can initiate an enforcement procedure to ensure that the unlawful aid is recovered from the recipient. In accordance with the case law of the ECJ, aid recovery must be ordered with the corresponding illegality interest.^{*112}

4.3. Damage claims

Competitors of the aid beneficiary may incur losses because unlawful state aid renders the beneficiary more competitive. Whilst being a 'pure economic loss', such damage should be subject to compensation under Estonian law (see Subsection 4.1). The competitors would thus have a basis for a damage claim with the ECJ. Since Article 108 (3) of the TFEU is directly applicable, competitors may also claim damages on the basis of the case law of *Francovich*^{*113} and *Brasserie du Pêcheur*^{*114}. The preconditions for damage claims have been analysed above.

Only actual and certain financial damage is subject to compensation.^{*115} However, the European Commission has interpreted this notion quite broadly, including 'pure economic loss' among the damage subject to compensation. The claims of the competitor may encompass loss of the possibility of improving its asset position, loss of market share, or compensation for being forced out of business in consequence of unlawful state aid.^{*116}

The plaintiff must also ascertain the extent of the damage. This could prove problematic if the undertaking has suffered damages as a result of the breach of Article 108 (3) of the TFEU while also experiencing

¹⁰⁹ *Ibid.*, paras 69–70.

¹¹⁰ CCSCd 3-2-1-127-10, of 9.12.2010, *Rein Kallaste v. Eesti Päevalehe AS*, para. 11.

¹¹¹ *FNCE* (see Note 44), paras 12 and 17; Case C-390/98, *Bank* (see Note 107), para. 73.

¹¹² *CELF* (see Note 12), para. 54.

¹¹³ *Francovich* (see Note 46).

¹¹⁴ *Brasserie du Pêcheur* (see Note 47).

¹¹⁵ Enforcement of EU State aid law by national courts: The Enforcement Notice and other relevant materials. Brussels: European Commission 2010, para. 48. Text available at http://ec.europa.eu/competition/publications/state_aid/national_courts_booklet_en.pdf (most recently accessed on 20.05.2015).

¹¹⁶ *Ibid.*, para. 21.

financial difficulties caused by other factors. In situations of this nature, professional appraisal might be necessary. Where the damage is established but the exact extent of the damage cannot be established, the amount of compensation shall be determined by the court.^{*117}

4.4. Interim measures

Probably the least clearly defined legal remedies that have been mentioned by the ECJ are the ‘interim measures’. Irrespective of the nature of these measures, it follows from the case law of the Court that they must be effective enough to safeguard the interests of the individuals faced with violation of the standstill obligation. This objective could be achieved via various measures for securing an action, listed non-exhaustively in §378 of the Estonian Code of Civil Procedure. Section 377 of the code allows the court to secure an action if there is reason to believe that failure to secure it may render enforcement of a court judgement difficult or impossible. Clearly, the aim behind these measures is to simplify the enforcement of the court decision.^{*118}

Whether the court actually employs any of the measures to secure an action depends largely on the claim. For instance, the court could prohibit the potential grantor from carrying out transactions related to the unlawful aid measure if the action to suspend the aid measure would not prevent disbursement of the aid in due time.^{*119} On the other hand, the court may refuse to secure the action where it finds that the plaintiff would not have difficulties in receiving the damages.

5. Conclusions

According to the case law of the ECJ, it is up to the national courts to protect the rights of those individuals faced with breach of their rights derived from Article 108 (3) of the TFEU. The individuals most likely to be affected by violation of the standstill obligation are the competitors of the aid recipient. In order to guarantee the effectiveness of the standstill obligation and protect the rights of affected individuals, national law must prescribe legal measures that could remedy the violation of the standstill obligation. Remedies include suspension of the payment of unlawful aid, recovery thereof and interest thereon, awarding of damages, and interim measures. In Estonian law, possible measures are rooted in the State Liability Act and the Code of Administrative Court Procedure, under which potential aid is granted through an administrative act or measure, and the Law of Obligations Act, whereby aid measures are implemented through civil transactions. The most problematic aspect of the Estonian law affecting this matter is the absence of a sufficiently clear legal basis for ordering aid recovery prior to the Commission’s decision. Recovery of aid could prove especially difficult in cases wherein aid has been granted on the basis of a legislative act. In consideration of the ECJ having indicated that Member States must provide such legal remedies, it is advisable that the Estonian legislator establish a clear provision for aid recovery prior to the Commission decision, preferably in the Competition Act, which contains provisions on state aid. The legislator could also review the State Liability Act, since this act establishes legal remedies to protect individuals against the state.

¹¹⁷ LOA, §127 (6).

¹¹⁸ CCSCd 3-2-1-30-11, of 11.5.2011, *Aktsiaselts FRELOK v. OÜ SGA Production*, para. 10.

¹¹⁹ Code of Civil Procedure, §378 (1) 3).



Margot Olesk

Doctoral student
University of Tartu

Protection of the Right to Life in Prison

1. Introduction

*'Show me your prisons and
I shall say in which society you live'*
W. Churchill^{*1}

Death – for centuries considered an independent punishment or inevitable consequence to the deplorable conditions of imprisonment. Nevertheless, as a consequence to the hegemony of humanitarianism and ideological turnarounds in the latter half of the 20th century, the death penalty has been abolished in Europe for three decades (in Estonia, for a little over half that time). Similarly, in the last 20 years, material conditions of prisons have been under scrutiny by international organisations, such that civil rights, among which we find the right to life and human dignity, would find vigorous protection.

Indisputably, the currently dynamic European human-rights protection mechanism – born as an epilogue to the Second World War – provides more solid protection to prisoners than any other regional or international mechanism. European prison law with its crown jewels, the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR)^{*2} and the European Court of Human Rights (hereinafter 'ECtHR'), provides a positive example globally. For example, Professor Jonathan S. Simon, with the University of California at Berkeley, has noted that European prison law is for America still a utopian model.^{*3}

It is clear that European prison law was not born overnight. French philosopher Michel Foucault has described how in the 19th century the spectacle of physical punishment by torture was replaced by a system of punishment wherein the body of an individual was placed in a complex 'system of constraints and privations, obligations and prohibitions'.^{*4} Hence, the body ceased to be the central axis of the punishment. The first apogee arrived near the beginning of the 21st century, with a change of paradigm in European prison law – in talking about prisons, it is not the limitations of rights that are at the forefront of the discussion but, rather, the protection of rights, and not only civil rights such as human dignity but others as well: second- and third-generation human rights, such as a right to offspring, right to vote, or right to use the Internet.

¹ W. Elkin. *The English Penal System*. Penguin 1957, p. 277.

² The Convention for the Protection of Human Rights and Fundamental Freedoms, 4.11.1950, in force from 3.9.1953, CETS 005. In Estonia, from 13.3.1996. – RT II 1996, 11/12, 34; RT I 2005, 39, 308.

³ J.S. Simon. *Punishment, Culture and Society* (University of California at Berkeley, 26.4.2012). Available at <https://itunes.apple.com/us/itunes-u/legal-studies-160-001-spring/id496139226> (most recently accessed on 2.1.2014).

⁴ M. Foucault. *Surveiller et punir. Naissance de la prison* (Discipline and Punish: The Birth of the Prison). Gallimard 1975, pp. 17–18.

Consequently, prison as a harsh and severe institution, which used to isolate people and cram them in together, was changing (and it is still): it cannot be defined exclusively as the institution limiting freedom(s) and rights so much as one that is also a guarantor of these. Notwithstanding the above-mentioned, errors occur, which can be illustrated with reference to statistics. For example, in Estonian prisons, within the last 10 years there have been 1.7 suicides per year.^{*5} Although the number may seem trifling, it is excessive, because it is the human life that is at stake. This proves the concreteness of the topic.

The research problem addressed in the present article is how to clarify and systematise the obligations of states under European prison law. Clarification is deemed necessary because the case law of the ECtHR is vast, the principles are scattered across a myriad of cases, and the wording of the ECHR is laconic. Accordingly, the aim of this paper is to compass the negative and positive obligations of states, with their extent and limits.^{*6} The protection of the right to life *per se* has not received as much attention in analysis of prisoners' rights in a modern prison; nevertheless, it is one of the two foundations – together with the right to human dignity – of all human rights. The article is aimed at defining the theoretical foundations stemming from the jurisprudence of the ECtHR, whilst possible practical questions from Estonian prisons are left aside because they would merit independent research.

The question is relevant to various actors – it is evidently essential to the addressee (the prisoner victim or, in the case of his death, the relatives), to the practitioner (prison staff and others who make relevant decisions on a day-to-day basis), to those applying human rights in legal pursuits (judges), and to persons in charge of modifications and developments in the criminal policies (legislator).

The research method is qualitative and the discussion inductive; i.e., it takes the jurisprudence of the ECtHR as the starting point and constitutes an attempt to find correlations from which to draw general principles. Therefore, the focal element lies in the synthesis of the jurisprudence of the ECtHR. The article has two main sections. In the first of them, the author approaches the protection of life through the prism of negative obligations, in the second, through the positive obligations of states.

2. The right to life – the state's negative obligation to refrain

2.1. The right to life as a fundamental human right reflecting democratic values

The right to life ranks as one of the highest social values without which all other rights, freedoms, and liberties lose their significance. It is the prerequisite for exercising other rights and freedoms.^{*7} As such, the right to life finds protection in the 1950 ECHR and in the 1992 Constitution of the Republic of Estonia (hereinafter 'the Constitution').

2.1.1. Supranational principles of protection

Article 2 of the ECHR, in combination with Article 3, protects the two most fundamental human rights – the rights to human life and dignity. Article 2 admits no derogations and thus is absolute, 'enshrin[ing] one of the basic values of the democratic societies'^{*8}, and it is the first substantive article in the ECHR. Article 2 (1) lays down the general principle that 'everyone's right to life shall be protected by law'.^{*9} The right to life

⁵ Request for information made electronically with the Ministry of Justice. The response, from 4.4.2013, covers suicides and violent deaths in prison from 2006 to 2013. Data for 2014 are available at <http://www.vangla.ee/57860> (most recently accessed on 25.2.2015). From 2005 to 2014, there have been 17 suicides.

⁶ Taking into consideration the restrictions necessary for the article, here I do not cover the cases wherein the prisoner takes the life of a third party while on prison leave.

⁷ R. Maruste. *Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse* (Constitutionalism and the Protection of the Fundamental Rights and Freedoms). Juura 2004, p. 321 (in Estonian).

⁸ *McCann and Others v. United Kingdom*, ECtHR decision of 27.9.1995, Section 147.

⁹ The wording of Article 2 may be misleading, but the death penalty was abolished with Protocol 6 (specifically on the abolition of the death penalty), on 28.4.1983, and with Protocol 13 (on the abolition of the death penalty in all circumstances), on 3.5.2002. Therefore, the question of the death penalty is not dealt with further.

finds its protection through laws enacted in democratic states that protect human life and establish sanctions against those who violate this right.^{*10} However, the state's obligations, particularly the positive ones, are not so clear; hence, further analysis is indispensable, this being the subject matter of Section 2 of this article.

Article 2 (2) lists the circumstances under which deprivation of life is not regarded as being in violation of the ECHR. These circumstances are described with reference to certain conditions. Firstly, non-contravention of Article 2 in the deprivation of life can be established only when the 'use of force [...] is no more than absolutely necessary'. This sets the qualitative condition. Secondly, the circumstances themselves are set forth in an exhaustive list, covering three situations: defence, prevention of escape, and quelling a riot or insurrection: 'in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection'. This sets the quantitative condition. In a prison context, all three elements of it are relevant.

2.1.2. National principles of protection

In parallel, the right to life is protected in the Estonian Constitution. The wording of Article 16 is even more abstract than that of the ECHR's Article 2, stating as it does that '[e]veryone has the right to life. This right shall be protected by the law. No one shall be arbitrarily deprived of his or her life'.^{*11} Another difference is that, while in the ECHR the right to life is the first right to be enumerated, in the Constitution it is only the ninth, after rights such as those to citizenship, to equality, to the protection of the state and law, and to recourse to the courts. The structure of the presentation of the rights in the Constitution gives no guidance as to the importance of the right protected. And like in the ECHR right to life is not an absolute right, but in the national law the hint for derogation is even more vague referring to 'arbitrariness'. The Constitution establishes the subjective right to life, which corresponds to the obligation not to take someone's life. In the scholarly commentaries, it is stated that this right does not include merely actions that are directed at taking someone's life, that it covers as well actions that might have as their secondary effect the loss of life. Herein is rooted the theory addressing the positive obligations.^{*12}

The judicial interpretation is structuralist: in order for us to define the positive obligations under the Constitution, the interpretations given by the ECtHR to Article 2 must be taken into account.^{*13} This is part of the systematic interpretation doctrine that has such an important place in Estonian legislation^{*14}. The Estonian Supreme Court has said that the case law of the ECtHR is inherent to the legal order in Estonia^{*15} and that some cases need to take direct guidance from the ECHR and from the jurisprudence of the ECtHR.^{*16}

In Estonian legal theory, negative and positive rights have synonyms – the first being the rights to the duty of the state (in Estonian, 'soorituspõhiõigus') and the latter the right to the withdrawal of the state (referred to as *vabadus- ehk tõrjepõhiõigus*). According to one of the leading scholars of Constitutional law in Estonia, Mr Madis Ernits, rights in the latter category protect the inviolability of the private sphere.^{*17} This means that the state shall not use force in a manner that would simply endanger a prisoner's life; the right to the state duty gives the person a right to positive actions on the part of the state. In this case, the state is given a wide margin of appreciation with respect to the goals.^{*18}

Provisions that would name the circumstances admitting the use of force are not stated in the Constitution, unlike what is found *expressis verbis* in the ECHR. This said, Article 16 is by some legal scholars considered as a Constitutional norm with no reservations (the Estonian concept is *seadusereservatsioonita*

^{*10} A. Taavi. Riigiõigus (State Law). Juura 2006, p. 259 (in Estonian).

^{*11} Constitution of the Republic of Estonia, of 28.6.1992, in force from 3.7.1992 – RT 1992, 26, 349...RT I 2007, 33, 210.

^{*12} E.-J. Truuväli *et al.* Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition). Juura 2008, Section 16, pp. 181–182 (in Estonian).

^{*13} *Ibid.*, Chapter II.

^{*14} R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental rights in the Constitution of the Republic of Estonia). – *Juridica eriväljaanne* 2001, pp. 5–96 (in Estonian).

^{*15} SCd *en banc* 3-3-1-13-03, of 6.1.2004, p. 31.

^{*16} CRCSC 3-4-1-12-08, of 30.12.2008, p. 22.

^{*17} E.-J. Truuväli *et al.* (*supra nota* 13), pp. 82–83.

^{*18} *Ibid.*, pp. 82–83.

pōhiōigus). However, it has been said that a silent reservation is embodied in the third sentence, which uses the term ‘arbitrarily deprived’^{*19}, language that could serve as the basis of justification for situations wherein force is used. Whether this silent reservation would be sufficient in light of the requirements of the ECHR is another question that is not considered in this article.

2.2. The right to life as a negative obligation to abstain from use of force

The negative obligation laid out in Article 2 (2) set the limits to usage of force, with the central notion being ‘absolute necessity’, which means that any use of force, including firearms, must be absolutely necessary and strictly proportional to the aims to be achieved and the circumstances of the situation.^{*20}

2.2.1. The obligation to use strictly proportional force in cases of absolute necessity

Absolute necessity, in the context of lethal force used by state agents in order to prevent crime, was analysed in a fundamental case, *McCann v. The United Kingdom* (1995). In this case, the Court emphasised that Article 2 does not list the situations wherein intentional killing is allowable and that, instead, it ‘describes the situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life’. Furthermore, the Court referred to the criterion of absolute necessity for the achievement of one of the purposes set out in Article 2 (2)’s items a–c: defending a person, arresting or preventing an escape, or actions for quelling a riot or insurrection. The Court underscored that absolute necessity is a stricter and more compelling test of necessity than is the criterion ‘necessary in a democratic society’, used in articles 8–11 of the ECHR. In other words, the force must be strictly proportional to the aims to be achieved. Strict proportionality is a rigorous requirement, and the most careful scrutiny needs to be employed to ensure that the actions of the state agent as well as surrounding circumstances such as the planning and control of the actions are subjected to examination. In the *McCann* case, the ECHR concluded that the state should have taken other measures than use of lethal force by opening fire on suspects, because the state did not take into consideration that the assessments of the intelligence gained might have been erroneous; hence, the automatic recourse to lethal force was deemed contrary to Article 2.^{*21}

On the other hand, use of force when it is absolutely necessary is not contrary to the convention even when the subject might be in a wheelchair or someone needing a walking frame. Here it must be noted that non-proportional use is a direct violation of Article 3 even if the life of the person has not been put in danger. For example, in the case *Mathew v. The Netherlands* (2005), the use of fetters was justified by the obstreperous and violent behaviour of the prisoner, who refused to obey the orders of officials. In order to prevent and terminate violent episodes, the state engaged in use of force but did not go beyond what was a strict necessity.

Evidently, any usage of physical force that ‘has not been made strictly necessary by [the person’s] own conduct [and] diminishes human dignity’ is a violation of Article 3^{*22} and Article 2. The Court has underscored that even though there might be undeniable difficulties that are innate to the fight against crime, these cannot justify placing limits on the protection of the fundamental human rights.^{*23}

2.2.2. The obligation to use firearms strictly proportionally, in cases of absolute necessity

Article 2 does not give general permission to use lethal force for the prevention of crime; rather, this is granted only when there is real and imminent threat to someone, as pointed out by former Estonian judge with the ECtHR Mr Rait Maruste.^{*24} Similarly, the ECtHR has emphasised that Article 2 does not ‘grant *carte blanche*’ to the usage of lethal force; in other words, it should never be unregulated or

¹⁹ *Ibid.*, p. 254.

²⁰ R. Maruste (*supra* nota 8), p. 324.

²¹ *McCann and Others v. United Kingdom*, ECtHR judgement of 27.9.1995, paras 146–150 and 213.

²² *Ribitsch v. Austria*, ECtHR judgement of 4.12.1995, para. 38.

²³ *Tomasi v. France*, ECtHR judgement of 27.8.1992, para. 115.

²⁴ R. Maruste (*supra* nota 7), pp. 235.

arbitrary.^{*25} Since firearms are not carried within the prisons, usage of lethal force occurs in limited situations, such as actions to keep prisoners from escaping (in the arrest context) or cases of riots or hostage-taking.

Lawful arrest and prevention of escape are cases found in standard police work. The Grand Chamber of the ECtHR demonstrated its extremely restrictive approach toward firearms in the case *Nachova and Others v. Bulgaria* (2005). According to the circumstances as presented, the authorities killed two persons of Roma origin (one sentenced for theft to a term of nine and the other of five months) who had fled – more specifically, not returned from working outside – prison. These persons were not armed but had previous convictions for theft. They did not seem to pose any direct danger to the health of third persons. However, the state agents were instructed to use any means to arrest them. During their arrest, the fugitives tried to escape, and the state agents started shooting, eventually killing both of them. The ECtHR explained the criterion of a legitimate aim, according to which lawful arrest can justify putting human life at risk only in circumstances of absolute necessity. Absolute necessity does not exist when the person does not pose a threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost. In the eyes of the ECtHR, the approach of the Bulgarian officers demonstrated ‘deplorable disregard for the pre-eminence of the right to life’; accordingly, a violation of Article 2 was found, because the use of firearms in these circumstances was ‘grossly excessive’.^{*26}

Similar was the conclusion in *Leonidis v. Greece* (2009), wherein the Court emphasised the duty of appropriate care to ensure that any risk to life is kept to a minimum. In this case, the police wanted to monitor the identity of young adults on the streets as a matter of preventive measures, because several burglaries had been reported in the relevant area. The person started to run away, but the police officer was finally able to approach him and came to the conclusion that, since the young adult had just put his hand inside his jacket, he would take out a weapon. Accordingly, an officer pulled out his revolver, which had no safety catch and was loaded. Holding the revolver in his right hand, with his finger on the trigger, he ordered the person to stop. In the ensuing scrum, when the police officer tried to handcuff the person, said officer received a right elbow to the side, which caused the officer pain. The police officer then bent forward and when drawing himself back up, fired a single shot at the person, instantly killing him. The difference in this case is that the use of force was spontaneous, and the important element is that the person was neither committing any offence or demonstrably violent or aggressive. Simply running away, in the Court’s view, did not prove that he had committed an illegal act. The ECtHR concluded that, after the person had been immobilised, there was no need to keep holding the weapon, especially with finger on trigger – the person was not in any way threatening the police officer’s life or limb. For the Court, the situation resulted from a lack of clear rules and lack of proper training that resulted in this misuse of force. In fact, as was seen in this case, simply subjective doubts with respect to dangerousness cannot be interpreted in a person’s disfavour.^{*27}

However, on the other side, the ECtHR has found no violation in an unintended killing of a person during a siege after he had been firing at police officers. In the case *Huohvanainen v. Finland* (2007), the Court concluded that the use of force was no more than absolutely necessary in defence of the lives of the personnel outside the armoured vehicles. The police officers involved had honestly believed that it was necessary to open fire to protect their colleagues who were without protection outside the armoured vehicle.^{*28}

In addition, hostage situations could lead to the necessity of use of lethal force. For example, in the case *Andronicou and Constantinou v. Cyprus* (1997), the authorities tried to resolve a hostage situation through persuasion and dialogue right up to the last possible moment; however, the threatening tone and the hostage’s shouts for help persuaded the state agents that the person intended to kill the hostage and then commit suicide, so they had to use firearms. Regrettably, the operation resulted in the death of both people, but since the lethal force was absolutely necessary in this situation to defend from unlawful violence, there was no violation found.^{*29}

^{*25} *Makaratzis v. Greece*, ECtHR judgement of 29.12.2004, para. 57.

^{*26} *Nachova and Others v. Bulgaria*, ECtHR judgement of 6.7.2005, para. 95 and paras 105–109.

^{*27} *Leonidis v. Greece*, ECtHR judgement of 8.1.2009, para. 58–66.

^{*28} *Huohvanainen v. Finland*, ECtHR judgement of 13.3.2007, para. 109.

^{*29} *Andronicou and Constantinou v. Cyprus*, ECtHR judgement of 9.10.1997, paras 181–186 and 191–193.

2.3. Interrelation of negative and positive obligations and example borderline cases

The spectrum of cases falling under Article 2 is broadening to include cases wherein it is not always easy to draw the line between negative and positive obligations. Therefore, at this point, it merits analysing the question surrounding the right to decide over one's life or death in prison and the extent of the responsibility in prison conditions in cases of HIV infection.

2.3.1. The right to life in prison – a right to suicide in prison?

When the negative and positive obligations set forth in Article 2 guarantee the right to life, does this mean that in prison inmates are under an obligation to live? In other words, does the right to life mean that the prisoner has a right to die, either by suicide (via hanging or medications) or by indirect suicide (hunger strike)? The matter of suicide is analysed in Subsection 3.2.2, so at this juncture what must be asked is whether a prisoner has a right to self-determination to such an extent that the prison must let him harm himself in the event of a potentially fatal hunger strike. Addressing the first important aspect of the case, the ECtHR has stated the general principle that Article 2 cannot be interpreted as guaranteeing the right to die, stating that 'the right to die is not the antithesis of the right'.³⁰ The second important element nevertheless is that force-feeding prisoners when there are no medical grounds for doing so has been found on several occasions to be contrary to Article 3.³¹ Consequently, a paradox in a sense might arise: on one hand, the person has no right to die, but, on the other hand, the state has no right to interfere.

This was the main issue in the case *Horož v. Turkey* (2009), dealing with circumstances in which prisoners organised a hunger strike against a move from dorm-type prison to cell-type prisons, accepting only water with sugar and vitamins. In consequence of the strike, an inmate fell into a coma and died. Although the prisoner's health was deteriorating because of the hunger strike, the authorities refused to release him. For the ECtHR, the authorities had amply satisfied their obligation to protect the subject's physical integrity, specifically through the administration of appropriate medical treatment. The prisoner had noted that he did not wish to have any food or medical interference. The state accepted that clear refusal. However, several times when he needed hospitalisation, he was hospitalised, though the prisoner refused any assistance. Eventually, the prisoner entered the coma and died. The Court accepted the free will of the prisoner to refuse any treatment, so the authorities could not be criticised for not respecting the wish of a person.³²

This case does not indicate that the state must stay passive (negative obligation), but it does show that the state must be able to prove the steps that it has taken to protect the life (positive obligation) without interfering with personal liberties. In other words, the authorities have a duty of care similar to the ones in suicide-prevention cases³³. In this case, the duty of care was fulfilled: the prison doctor reviewed the prisoner's condition 11 times and gave him vitamins, and he was transferred to hospital and emergency units. But another question arises: what if the prison had force-fed the prisoner? The ECtHR has made it clear that force-feeding when not medically required is a violation of Article 3. So at some point force-feeding might have been a medical decision. In such situations, it would still be recommended for states to engage in force-feeding when the life of the person is in imminent danger. It is evidently more difficult for the ECtHR to find that a state is at fault when that state wants to save a life than find a fault of the state because the state refrained from any sort of interference.

³⁰ *Pretty v. United Kingdom*, ECtHR judgement of 29.4.2002.

³¹ M. Olesk. Inim- ja põhiõigused vanglas. Euroopa vangistusõiguse põhimõtted (Human and Fundamental Rights in Prison. The principles of the European Prison Law). Tallinna Raamatutrükikoda 2010, p. 119 (in Estonian).

³² *Horož v. Turkey*, ECtHR judgement of 31.3.2009, paras 22–31.

³³ *Keenan v. United Kingdom*, ECtHR judgement of 3.4.2001, para. 90.

2.3.2. The right to life in prison – the state's responsibility in cases of HIV infection

The second group of cases is related to contamination with HIV in prison. This is not purely a hypothetical question, for 13–15% of the inmates in Estonian prisons are HIV positive.^{*34} Since HIV has no cure, it is justified to ask whether the state could be held responsible when a prisoner gets infected while in prison. From the jurisprudence of the ECtHR it can be derived that the answer is affirmative.

For example, in the case *Shchebetov v. Russia* (2012), a prisoner claimed that the prison doctor, while under the influence of alcohol, reused a syringe that had previously been used to draw blood from an HIV positive inmate. The Government indicated that the transmission of HIV might have been due to the applicant's relations with an HIV positive inmate and his sharing of contaminated syringes to inject drugs. Although, the ECHR identified some shortcomings in the Government's investigation into the prisoner's complaints, it did not conclude that the doctor would have been at fault 'beyond reasonable doubt'.^{*35} *A contrario*, the case illustrates that the state can be held liable if a prisoner gets infected with HIV through the fault of the prison. Even more recently, in the case *Gorelov v. Russia* (2013), the state was found guilty of violating a prisoner's right to life, from the procedural element of Article 2, when the latter became infected with HIV in prison but the prison failed to carry out 'prompt, expeditious and thorough' investigation of the matter.^{*36}

This issue gives rise to additional questions about the limits of such responsibility. Evidently, states cannot be held liable for HIV infection that has occurred through intimate (voluntary) relationships or syringe exchange to inject drugs. However, a state could be held liable if it knew or should have known that one of the HIV-infected inmates is at high risk of using physical or sexual violence against a co-inmate. States cannot isolate and stigmatise HIV positive inmates but do have to take into account the possible risks. In any case, the state is under an obligation of investigation, which is analysed in detail in Subsection 3.3.

3. The right to life – the state's positive obligation to act

In comparison to negative obligations, it is significantly more complex to define positive obligations, because they cannot be derived from the wording of Article 2 and must be deduced from that, in consideration of the jurisprudence of the ECtHR. Besides procedural obligations – such as establishing legal regulations, organising training, investigating deaths, and making reparations for damages – there are material obligations such as providing medical assistance and preventing both deaths by violence and suicides in prison.^{*37}

3.1. The state's material obligation to provide medical assistance

The state's obligation to provide medical help is related to making available general medical services in prison and providing medical assistance after use of force.

3.1.1. The state's obligation of medical assistance in cases of health problems

Failing to provide required medical treatment violates the right to life. In the case *Gagiu v. Romania* (2009), the prisoner's medical file mentioned chronic hepatitis but he did not receive proper treatment; instead, he had been treated in the main for the bronchopneumonia from which he also suffered. In consequence, his chronic disease was aggravated. He was not admitted to the prison hospital but placed in an ordinary cell

³⁴ K. Rüütel, A. Trummal, HIV-epideemia Eestis: strateegilise info analüüs (The Epidemic of HIV in Estonia: Analysis of Strategic Info). Uuring (Tervise Arengu Instituut: 2011). http://www.sm.ee/fileadmin/meedia/Dokumendid/Tervisevaldkond/Tervisepoliitika/HIV_AIDS/Kasulikud_lingid/HIV_epideemia_Eestis_2012.pdf (in Estonian) (most recently accessed on 5.4.2013).

³⁵ *Shchebetov v. Russia*, ECtHR judgement of 10.4.2012, para. 40 ff.

³⁶ *Gorelov v. Russia*, ECtHR judgement of 9.1.2014, paras 44–56.

³⁷ M. Olesk (*supra* nota 32), p. 57 ff.

until the day before he died. The ECtHR concluded that the prison authorities had failed to show ‘due diligence’ of providing the applicant with the requisite medical care.^{*38}

Often, the practical difficulty has to do with the quality of medical services in prison. The ECtHR has stated in the case *Shelley v. United Kingdom* (2008) that matters of health-care policy, particularly with regard to general preventive measures, were, in principle, within the margin of appreciation of the domestic authorities.^{*39} Here, the state has a twofold obligation, to protect life, by providing appropriate health care and prevention of diseases. In this concrete case, the decision of the authorities not to implement a needle-exchange programme for drug users in prisons was not found in violation of the convention. For the Court, ‘prisoners can claim to be on the same footing as the community as regards the provision of health care’, and the difference in treatment falls within the margin of appreciation of states. However, it must be proportionate and supported by objective and reasonable justification.^{*40}

3.1.2. The state’s obligation of medical assistance after use of force

After recourse to force, medical examinations are primordial, because the burden of proof lies with the authorities and the state is obliged to protect life. This is illustrated by the case *Saoud v. France* (2007), wherein the death of a young inmate occurred by gradual asphyxia. The person had been handcuffed and held face-down on the ground by police officers for over 30 minutes. The usage of force was considered initially justified, but experts found that the cause of death was the position. The ECtHR emphasised that the authorities had an obligation to protect the health of persons who are in detention or police custody, or of someone who has just been arrested, that ‘entailed providing prompt medical care where the person’s state of health so required’. The Court found a violation of the positive obligation to protect the life of the arrested person. The Court noted that people who are arrested find themselves under ‘direct dependence of the state authorities’ and, hence, must be protected by means of medical assistance in order to avoid fatal consequences. However, the Court added that this does not lay an unreasonable or excessive burden on the authorities, because the point of view of a reasonable person is taken into account – it must be asked whether aid would have eliminated real and imminent risk of loss of life. In the case at issue, the police were aware of the health issues but took no steps accordingly; instead, the person was held in a highly dangerous position.^{*41}

The medical aid has to be appropriate and timely. An example is found in the case *Anguelova v. Bulgaria* (2002), which was brought to the ECtHR by a parent whose son died after having spent several hours in police custody after his arrest for attempted theft. When seeing the condition of the person deteriorating, police, instead of summoning an ambulance, contacted their colleagues who had arrested the boy. Those officers took him to the hospital instead of calling for an ambulance. This case illustrates that not providing timely medical assistance can lead to a violation of Article 2. The Court underscored that persons in custody are in a ‘vulnerable position’ and the authorities are under an obligation to account for their treatment. Consequently, where an individual is taken into police custody in good health but later dies, it is incumbent on the state to provide a ‘plausible explanation’.^{*42}

Another case *Mojsiejew v. Poland* (2009) concerned a death in the custody (in sobering-up center), where a person without pre-existing injuries or obvious illnesses had been tied up to bed with four belts as a result of threats and verbal aggressiveness. A bit less than two hours later the person had died of asphyxiation. The time between the last two inspections was an hour. In this case the Polish Government failed to provide a convincing explanation as to whether sufficient periodic medical checks had been carried out and whether the restraint bed was at all correctly used by the state officials.^{*43}

The ECtHR has taken a broad approach to protection under Article 2 – the right to make a complaint under that article does not mean that there has to be a loss of life. This was illustrated in the case *Duzova v. Turkey* (2012), wherein law-enforcement forces intervened at a prison in order to end a strike and regain control over the prison, when they injured the applicant with bullets. He did not die, but the shots did

³⁸ *Gagiu v. Romania*, ECtHR judgement of 24.2.2009, paras 55–64.

³⁹ *Shelley v. United Kingdom*, ECtHR judgement of 4.1.2008.

⁴⁰ *Ibid.*

⁴¹ *Saoud v. France*, ECtHR judgement of 9.10.2007, paras 88–104.

⁴² *Anguelova v. Bulgaria*, ECtHR judgement of 13.6.2002, paras 109 and 123–135.

⁴³ *Mojsiejew v. Poland*, ECtHR decision of 24.3.2009.

result in a handicap. The Court acknowledged the justification for the invention but found that the use of lethal force was not strictly necessary. It awarded EUR 72,000 in material damages for the handicap and EUR 18,000 for moral damages.^{*44}

3.2. The state's material obligations to prevent deaths

Since neither human health nor behaviour is ever predictable, the obligation to prevent deaths in prison is not absolute either. Just as doctors cannot give prognoses of total certainty in relation to physical health, suicide and violent behaviour are not always foreseeable. Here the question arises of how to distinguish these types of situations from others.

3.2.1. The state's obligation to prevent deaths by violence

In the case of a murder in prison, the state can be held responsible under certain circumstances. This was the conclusion in the case *Paul and Audrey Edwards v. UK* (2002), which pertained to the killing of an inmate (Edwards) at the age of 30, a man diagnosed as schizophrenic. He had been arrested and taken to a police station, where he was placed in a cell with another inmate (Linfort), who had a history of violence and assault (including assault of a cellmate in prison) and had been admitted to a mental hospital six years before and subsequently been diagnosed as schizophrenic. Some time later, Edwards was found to have been stamped and kicked to death.

In this case, the Court noted that it bears in mind the difficulties in policing modern societies, the 'unpredictability of human conduct' and the operational choices that must be made in terms of priorities and resources, stating that the scope of the positive obligation must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities. Therefore, for a positive obligation to arise, it must be established that the authorities 'knew or ought to have known' at the time of the existence of a 'real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'. Therefore, the state not only has to refrain from taking someone's life but must also take action to identify risks to this person.

In this case, the Court examined, firstly, whether the authorities knew or ought to have known of the existence of a real and immediate risk to the life, and the response was affirmative, because inmate Linfort was making continual reference to being possessed by evil spirits and devils. Secondly, the Court addressed whether the state had failed to take measures within the scope of its powers that, judged reasonably, might have been expected to eliminate that risk. The Court found that the possible risks from inmate Linfort had been identified (via records of violence and his bizarre and violent behaviour upon and following arrest) and noted that the medical information ought to have been brought to the attention of the prison authorities. However, in this case there was a series of shortcomings in the transmission of information to the prison admissions staff, and the screening examination on arrival was brief and cursory. The Court concluded that the failure of the agencies involved in this case (members of the medical profession, police, the prosecution, and the court system) to pass on information about inmate Linfort to the prison authorities and the inadequate nature of the screening process represented a breach of the state's obligation to protect the life of another inmate.^{*45}

Another case, *Makbule Akbaba v. Turkey* (2012), related to the state's obligation to prevent deaths in any situation, involved special operations undertaken by force units in a prison against a hunger strike that was aimed at stopping the authorities making prison cells smaller. The operation lasted four days. More than a thousand officials were implicated, one officer and seven prisoners died, and several persons were injured. Numerous weapons, including pistols, were found in the prison. One of the prisoners died because of a fire. Since the state could not prove otherwise, the Court concluded that, because the person was under the responsibility of the state, even in the case of a riot in prison the state could be held liable. For the Court, the loss of control over the prison was a result of lack of organisation and the absence of normal functioning of public service and, hence, only a state could be held liable.^{*46}

⁴⁴ *Duzova v. Turkey*, ECtHR judgement of 5.6.2012, paras 81–93.

⁴⁵ *Paul and Audrey Edwards v. United Kingdom*, ECtHR judgement of 14.3.2002, paras 54–64.

⁴⁶ *Makbule Akbaba v. Turkey*, ECtHR judgement of 10.7.2012, paras 36–37 and 42–43.

3.2.2. The state's obligation to prevent suicide

In modern democracies, suicide attempts cannot be punishable,^{*47} but the prison nevertheless has the obligation to protect a person against suicide. Since human behaviour can be unpredictable, how then can one determine the range of cases in which the state is liable for not having fulfilled its positive obligation to protect an inmate's life?

In the case *Renolde v. France* (2008), the ECtHR found a violation of Article 2, because the state had not taken the necessary measures to protect the prisoner's life, and Article 3, because the prisoner had been placed in a disciplinary cell for 45 days without regard for his mental health and where he eventually hanged himself. The important detail of this case was that in the same month he had already made an attempt to commit suicide and that he had had issues with his mental health (retardation and deficits in the cognitive sphere, a neurotic structure, paranoid traits, an incapability of mentalising that resulted in all his violence being expressed on a physical level, having used psychiatric medicines, and having been in a psychiatric hospital).

For the Court, the state was obviously dealing with a prisoner known to be suffering from serious mental disturbance and posing a risk of suicide and, hence, someone who would have needed special attention (preferably admission to a psychiatric institution or at least medical treatment commensurate with his condition), not the placement in a disciplinary cell. In addition, the Court noted that mentally ill persons are considered vulnerable and call for special protection. The actions of the state proved to be the contrary, because he was placed in a punishment cell for a prolonged period, which affected his mental state. Another problem pointed out was the handing out of medication without any checking of whether the person is actually taking it. In this case, the person had not taken his neuroleptic or his anxiolytic medication for several days before death. The Court acknowledges that personal autonomy is of value but says also that there are general measures and precautions that can diminish the opportunities for self-harm, and that in certain cases even more stringent measures might be necessary. As in the cases addressed earlier in the paper, here the ECtHR applied the same 'knew or ought to have known' test and concluded that the risk was real and immediate and that the agents of the state did not do everything that reasonably would have been expected from them; instead, they made the situation even worse by placing the person in a disciplinary cell.^{*48}

Unlike in the above-mentioned case, in the earlier case *Keenan v. UK* (2001) the state was not found to be responsible for the suicide of an inmate, because the authorities, in the Court's view, could not have known the risk. However, it is important to note here that the state was found guilty of violation of Article 3, because a person with mental issues had been placed in isolation. That case came considerably earlier than *Renolde*, and we can see that the approach of the Court toward the actions of the state has grown stricter. In the earlier case, the prisoner had received anti-psychotic medication from the age of 21 and his medical history included symptoms of paranoia, aggression, and violence and deliberate self-harm. After assaulting two prison officials, he was placed in a segregation unit and his overall prison sentence thereby increased by 28 days. However, two prison officers discovered him hanged in a cell by bed sheets. The question was whether this suicide was the responsibility of the state. The Court noted that schizophrenics' risk of suicide is well known and high but that there had been no formal diagnosis of schizophrenia, so he was not considered a high-suicide-risk prisoner, and his behaviour had shown some periods of apparent normality. In addition, he had been taken to a health-care centre for observation and prescription of medications and was assessed twice a day. Accordingly, the state was deemed not responsible for the life of the prisoner. However, the problem that occurred with respect to Article 3 remained, in the fact that he was found fit to be placed for several days in the segregation unit only nine days before his expected date of release.^{*49}

Nevertheless, states do not carry an unreasonable burden, as illustrated in *Younger v. UK* (2003), wherein the son of the applicant hanged himself with his shoelaces while in custody. The applicant claimed that the state had failed to take adequate measures to safeguard his life, but the Court accepted that the person had been under adequate supervision, stating that to regard all prisoners as representing a high suicide risk would not only impose a 'disproportionate burden upon the authorities' in the unusual situation of being under a positive obligation to prevent an individual from taking his own life but also be a 'potentially

⁴⁷ R. Maruste (*supra* nota 7), p. 323.

⁴⁸ *Renolde v. France*, ECtHR judgement of 10.10.2008, para. 66.

⁴⁹ *Keenan v. United Kingdom*, ECtHR judgement of 3.4.2001, paras 83–116.

unnecessary and inappropriate restriction on the liberty of the individual'. Hence, when there has been no identified risk of suicide, the state cannot be held liable.^{*50}

In the case *Mitic v. Serbia* (2013), the Court emphasised again that authorities are responsible only if they knew or ought to have known about the real and immediate risk of suicide and, if so, did all that could reasonably have been expected of them to prevent that risk. In this case, the prisoner acted in a normal fashion, showing no particular signs of physical or mental distress while placed in solitary confinement after an attempt at escape. The suicide was not found to be the responsibility of the state.^{*51} In the case *Çoşelav v. Turkey* (2012), the ECtHR reached the opposite conclusion, because the person had already made two suicide attempts, the person had repeatedly made requests for help, and there were incidents of self-harm. Therefore, for the Court, the authorities had been given 'ample indication' that the person was at risk of suicide. For the Court, it was required not only to keep constant watch on the prisoner but as well to provide adequate medical help for his psychological problems. The Court was struck by the fact that after the person had harmed himself by hitting his head against the walls, he was still left alone in his cell with no supervision. Hence, the state was found to be responsible for the exacerbation of his problems and for the manifest failure to provide any medical or other specialist care.^{*52}

Constant watch and supervision might mean searches that are more in-depth and that occur more often than normally, to find items that could be used for suicide. For example, in the case *Ketreb v. France* (2012), the state ought to have predicted the possibility of the suicide, because the person had alerted the authorities beforehand about his suicidal thoughts. In addition, his previous episodes of self-mutilation should have shown the need for assistance. Since the authorities failed to supervise him, they did not find the belt that the prisoner later used to hang himself. Surveillance and searches are two non-medical measures to prevent suicides. With regard to medical services, the authorities are obliged to propose measures such as medical and psychiatric services for prisoners.^{*53}

3.3. The state's procedural obligations

The procedural obligations can be divided into two categories – preventive obligations and restitutive obligations. The first are to prevent situations wherein an inmate would lose his life; in other words, the state has to put into force regulations and organise training. The second is an obligation subsequent to events of death and is aimed at investigation, punishment of liable persons, and in some cases covering the material and non-material damages.

3.3.1. The state's obligations of prevention: Regulating and organising training

The primary procedural obligation consists of taking appropriate steps within the internal legal order to safeguard the lives of those within state jurisdiction. This means that policing operations must be authorised under national law and involve regulation sufficient for protecting adequately and effectively against the arbitrariness and abuse of force, and even against avoidable accident.^{*54} Article 2 incorporates a primary duty of states to create an appropriate legal and administrative framework within which to specify the limited circumstances in which potentially deadly force and firearms may be used.^{*55} Appropriate training, instructions, and briefing are primordial; in the absence of these and in cases of lethal events, the state can be found guilty of violation of Article 2. For the Court, reflex actions might lack the degree of caution in the use of firearms to be expected from law-enforcement personnel in a democratic society. This caution is necessary even in dealing with dangerous individuals.^{*56} Firearms must be handled with care, because even if the death might be unintended, the state may be liable.^{*57} The state has the positive obligation to prepare

⁵⁰ *Younger v. United Kingdom*, ECtHR judgement of 7.1.2003.

⁵¹ *Mitic v. Serbia*, ECtHR judgement of 22.1.2013, para. 48 ff.

⁵² *Çoşelav v. Turkey*, ECtHR judgement of 9.10.2012, paras 52–70.

⁵³ *Ketreb v. France*, ECtHR judgement of 19.7.2012.

⁵⁴ *Makaratzis v. Greece*, ECtHR judgement of 20.12.2004, paras 56–57.

⁵⁵ D. van Zyl Smit, S. Snacken. *Principles of European Prison Law and Policy: Penology and Human Rights*. Oxford University Press 2009, p. 294.

⁵⁶ *McCann v. United Kingdom*, ECtHR judgement of 27.9.1995, para. 151 and para. 212.

⁵⁷ *Kelly and Others v. United Kingdom*, ECtHR judgement of 4.5.2001, para. 93.

and plan operations in advance, which means that possible risks must be evaluated and all necessary measures taken. When there has been no unexpected development, the criteria for the operations are stricter.^{*58}

3.3.2. The state's obligations of restitution: Investigating and compensating for damages

The primary restitutive obligation is to call for adequate, effective, and official investigations into the matter that would establish the relevant facts, identify the persons liable, and punish them. The obligation of investigation is especially important because there have been cases wherein an apparent suicide in prison was actually a homicide, with prison officials directly and indirectly involved.^{*59} As mentioned before, the burden of proof is reversed in human-rights cases^{*60} – it rests with the authorities to provide a satisfactory and convincing explanation. The Court has stated that where the events lie within the exclusive knowledge of the authorities, as in prisons, strong presumptions of fact will arise in respect of injuries and deaths that do occur.^{*61}

The obligation of effective and official investigation has been analysed in the case *Slimani v. France* (2004), with the Court concluding that the state must 'investigate of their own motion' and as soon as the case comes to their attention enable the cause(s) of death to be established and anyone responsible for the death to be identified and punished. It cannot be left to the initiative of representatives of the deceased to lodge a formal complaint.^{*62} The reversed burden of proof has been explained further in the case *Salman v. Turkey* (2000), wherein the Court stressed that where the 'events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities', as in the case of persons within state control in custody, 'strong presumptions of fact will arise' in respect of injuries and death occurring during such detention. In the *Salman* case, the person was taken into custody in apparently good health and without any pre-existing injuries or active illness but then died of cardiac arrest. No plausible explanation was provided, yet it might have been that the person had been tortured to death, because bruises and swelling were found on the body. Nevertheless, the government did not provide explanations for the marks and injuries found on the body. Hence, there was failure to carry out an effective investigation, which rendered the recourse to civil remedies equally ineffective.^{*63} It is evident that investigations must be independent and effective. For an investigation to be effective, the persons responsible for the investigation and carrying it out must be independent and impartial, in law and in practice. This means not only a lack of hierarchical or institutional connection with those implicated in the events but also practical independence.^{*64} Therefore, it remains highly questionable whether the criterion is fulfilled when the same institution conducts the investigations as is implicated.

As can be seen from the foregoing discussion, a violation of Article 2 can be substantive and/or procedural.^{*65} A procedural violation can even stand alone, as in the case *Trubnikov v. Russia* (2005), wherein the authorities were not found guilty of a substantive violation for failure to prevent a real and immediate risk of suicide 21 days before release but the authorities were found guilty of not conducting an effective investigation into the death. Two investigations had been conducted in this case. The first one displayed a major issue with effectiveness, in that the investigating body was the prison governor, who represents the authority involved. The Court noted that the positive obligation to set up an 'effective judicial system' does not necessarily require criminal proceedings to be brought in every case if civil, administrative, or disciplinary remedies would be available for the victims. The second key issue was that the investigation by the authorities was not prompt, exemplary, or diligent and fell short of public scrutiny. In addition, the family of the victim were entirely excluded from the proceedings; they did not receive any information about the progress of the investigation and were notified only five months later about the results.^{*66}

The second positive obligation under Article 2 is the suppression and punishment of breaches – in other words, putting in place an appropriate legal and administrative framework to deter commission of offences

⁵⁸ *Rehbock v. Slovenia*, ECtHR judgement of 28.11.2000, para. 72.

⁵⁹ *Tsintsabadze v. Georgia*, ECtHR judgement of 15.2.2011, paras 74 and 75.

⁶⁰ M. Olesk (*supra* nota 31), p. 64.

⁶¹ *Kelly and Others v. United Kingdom*, ECtHR judgement of 4.5.2001, para. 92.

⁶² *Slimani v. France*, ECtHR judgement of 27.7.2004, paras 47–50.

⁶³ *Salman v. Turkey*, ECtHR judgement of 27.6.2000, paras 100–113.

⁶⁴ *Tsintsabadze v. Georgia*, ECtHR judgement of 15.2.2011, para. 76.

⁶⁵ *Ghimip and Others v. Moldova*, ECtHR judgement of 30.10.2012, para. 55.

⁶⁶ *Trubnikov v. Russia*, ECtHR judgement of 5.7.2005, para. 79 and paras 85–95.

against the person, backed up by law-enforcement machinery for the prevention, suppression, and punishment of breaches. This means that the capacity to enforce criminal law against those who have unlawfully taken the life of another is required. While there is no absolute obligation for all prosecutions to result in a conviction or in a particular sentence, the national courts should under no circumstances be prepared to allow life-endangering offences to go unpunished.^{*67}

The third positive obligation consists of providing just satisfaction in consideration of pain and suffering caused by the courts.

With regard to non-pecuniary damages, jurisprudence has been along the following lines. For example, in respect of the death of an applicant's son due to lack of medical assistance under conditions of custody, an applicant was awarded 19,000 euros in non-pecuniary damages.^{*68} For anguish and stress suffered by the parents of a person who was killed in prison, the Court awarded 20,000 pounds sterling (approx. 24,000 euros)^{*69}. Also, 8,000 euros was awarded for the grief and distress suffered by the father of a person who had committed suicide in prison (but in this case there was no violation of the positive obligation to protect life, just violation in the failure to provide effective investigation).^{*70} Furthermore, in another prison suicide case, the family was awarded 45,000 euros in non-pecuniary damages for the substantive and procedural violation (through failure to carry out an effective investigation) of Article 2.^{*71}

In addition to non-pecuniary damages, the Court might, in exceptional circumstances, award pecuniary damages. The Court admitted in the case *Ghimp and Others v. Moldova* (2012) that any calculation of future income is prone to some degree of speculation since it is subject to 'unpredictable circumstances and [...] it is virtually impossible to predict with precision the amount of lost income'. However, when the method is not excessively speculative or unreasonable, the Court might award the costs of, for instance, raising two children on one's own. The Court indeed awarded 50,000 euros for that purpose to the widow in a case in which a person lost his life in prison. In addition, the state had to pay 60,000 euros in non-pecuniary damages.^{*72} As can be seen, the amounts that the Court orders the state to pay are constantly increasing. Nevertheless, if the parties do not submit a claim for just satisfaction, the Court might not call for an award of pecuniary or non-pecuniary damages.^{*73}

4. Conclusions

We can be characterised by how we treat other humans. In other words, the way human life finds protection in prisons reflects our values. Throughout history, the protection of life has gone through a metamorphosis – from taking life as part of vendetta, through killing of people as a form of punishment, to death as an auxiliary result of punishment involving appalling prison conditions. With the aftermath of the Second World War, we arrived at the genesis of the present-day humanitarian doctrines, which state that human life is a value in itself and that states not only have to refrain from taking the life of their citizens but also have to be active in protecting them.

The right to life is fundamentally linked with the darkest – and perhaps most disturbing – sides of prison: usage of force, violent death or suicide, and immediate medical aid in cases of injuries after violence or maladies in prison. Here the obligor, the person bearing the legal obligations, is the state and the obligee, the person entitled to fulfilment of obligations, the prisoner. The state has two categories of obligations – negative obligations (obligations to refrain) and positive obligations (obligations to interfere). Negative obligations can be drawn from the wording of Article 2; the obligations will be fulfilled if the state refrains from the use of non-proportional force. However, the question surrounding positive obligations is more complicated – firstly, they are not derived from the direct wording of Article 2, and, secondly, it is not enough for the state to be passive, and the state has to take action (for example, setting up suicide-prevention mechanisms). In addition, positive obligations exist in various subcategories, such as material and procedural obligations.

⁶⁷ *Ghimp and Others v. Moldova*, ECtHR judgement of 30.10.2012, paras 42–45.

⁶⁸ *Anguelova v. Bulgaria*, ECtHR judgement of 13.6.2002.

⁶⁹ *Paul and Audrey Edwards v. United Kingdom*, ECtHR judgement of 14.3.2002.

⁷⁰ *Trubnikov. v. Russia*, ECtHR judgement of 5.7.2005.

⁷¹ *Çoşelav v. Turkey*, ECtHR judgement of 9.10.2012.

⁷² *Ghimp and Others v. Moldova*, ECtHR judgement of 30.10.2012.

⁷³ *Renolde v. France*, ECtHR judgement of 10.10.2008.

At this point in the analysis, a question arises: what do these positive and negative obligations actually mean? Negative obligations encompass the following elements. First and foremost is the principle that a state shall not use the death penalty as punishment. Secondly, a state shall not use physical force or fire-arms unless doing so is absolutely necessary. Absolute necessity means real and imminent danger in three circumstances: in defence of any person from unlawful violence (e.g., protecting prison officials from an attack by prisoners), in order to effect a lawful arrest or to prevent the escape of a person lawfully detained (applicable in the case of an escape from prison but only when the person poses a real threat), and in action lawfully taken for the purpose of quelling a riot or insurrection. The extent and limits of negative obligation are defined by criteria summing to absolute necessity. Non-proportional usage of force is a violation of Article 3 of the ECHR and, hence, considered inhuman, degrading, or torture.

Positive obligations, on the other hand, include not only material but also procedural obligations. Firstly, positive obligations are related to procedural obligations of different nature. This means primarily that the state must establish a sufficient legislative basis addressing use of force (clear guidelines and criteria, foundations, conditions, and reporting and complaint mechanisms). States are obliged to create an appropriate legal and administrative framework that would define the limited circumstances wherein the state could use force. In Estonia, this is done mainly in the Imprisonment Act; however, the conformity to the requirements of the ECHR would need to be subject to further research. Furthermore, states are obliged to organise training and provide proper instructions for officials who have the right to use force. The aim is to prevent the misuse and abuse of force. In addition, the state has the obligation to have put in place law-enforcement machinery to investigate each and every death in prison actively – and not only the deaths that are result of use of force, but also cases that might involve negligence from the prison – with a firm requirement being that the investigation must be adequate, immediate, effective, and neutral. The burden of proof, on account of the closed nature of a prison, lies within the authorities.

Secondly, positive obligations cover a wide spectrum. With regard to material obligations, the prison has to offer medical services of satisfactory quality, and the physical and mental health of a prisoner have to be monitored for ascertaining whether he would pose a danger to himself or to third persons. Here, the test used is whether the authorities knew or should have known about the existence of the imminent threat to life. If the state knew or should have known yet did not take any steps accordingly, then a violation of Article 2 has occurred. However, the ECtHR does not impose impossible burdens on states; this is due to the unpredictability of human nature. For illustration, to consider all prisoners high-suicide-risk persons and therefore limit their rights to move about and communicate in prison would be a violation of their other personal rights, such as those under Article 8, which enshrines the right to a private life, or even Article 3, which protects one's dignity. However, when there is a risk, the state has to protect the individual from himself, because prison is not an accurate reflection of society – free will there can be distorted by an extremely stressful environment. The above-mentioned test can be applied to cases wherein prisoners get infected with HIV – if it is only the voluntary act of a prisoner (needle-sharing for illegal drug use or voluntary sexual contact) and not an omission by the state (failing to supervise prisoners and prevent rape or violent outbursts) at issue, then the state cannot be held liable.

Another important point to note is that if a state agent has resorted to use of force – in consideration of the negative obligation of absolute necessity – then *a posteriori* and immediately after the nature of his duties changes, the state agent who a few moments ago has acted against the life of a person has to act now so as to preserve it by providing immediate medical aid. In other words, the state has to put in place appropriate legal and administrative frameworks to deter the commission of offences against persons, backed up by law-enforcement machinery for the prevention, suppression, and punishment of breaches of such provisions. The obligation of investigation must not be trivialised either, because, on account of the closed nature of prisons, there have been cases wherein behind a case of ostensible suicide and an investigation conducted by the prison authorities that confirmed the cause of death as suicide there was actually a murder that involved not only prisoners but corrupt state agents.

The aim of this article has been to define the various negative and positive obligations of states surrounding the right to life while one is in prison. The value of protection of life cannot be overestimated, because each and every life is value in itself and without the right to life, the other rights, freedoms, and benefits would lose their meaning. Reportedly, the prisons of the 21st century have gone through a major transformation and must be defined not as a limiter of rights but as a guarantor of them.



Anneli Soo

PhD, Lecturer of Criminal Law
University of Tartu

The Right to Choose Counsel in the Pre-trial Stage of Criminal Proceedings and Consequences of its Violation,

by Example of Estonian Supreme Court Decision 3-1-2-2-14

1. Introduction

According to Article 6 (3) c of the European Convention on Human Rights (ECHR),¹ everyone charged with a criminal offence has the right to choose to defend himself in person; to do so through legal assistance of his own choosing; or, if he has insufficient means to pay for legal assistance, to be given it free of charge when the interest of justice so requires. One does not have to possess a legal education to name the reasons for which accused persons should have counsel by their side in criminal proceedings (including pre-trial proceedings). First, counsel has knowledge of law and experience in court practice, along with skill in both informing the accused about his rights and exercising these rights accordingly (the technical aspect). Secondly, counsel, unlike the accused, is (or at least is supposed to be) objective (the psychological aspect). Thirdly, counsel provides not only technical but emotional support for the accused (the humanitarian aspect). Finally, although the principle *in dubio pro reo* applies in criminal proceedings, which means that the accused does not have to prove himself to be not guilty, participation of counsel guarantees that the accused is able to pursue an active role in the proceedings whenever necessary (the structural aspect).² Or, as the European Court of Human Rights (ECtHR) has put it in brief, the accused's lawyer serves as 'the watchdog of procedural regularity'.³

S. Trechsel has written that a defence conducted with the assistance of chosen counsel is certainly the best of the three alternatives offered by Article 6 (3) c.⁴ He does not explain what he means by the concept

¹ Convention for the Protection of Human Rights and Fundamental Freedoms. Available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (most recently accessed on 20.2.2015).

² S. Trechsel. *Human Rights in Criminal Proceedings*. Oxford: Oxford University Press 2005, pp. 244–247 DOI: <http://dx.doi.org/10.1093/acprof:oso/9780199271207.001.0001>; E. Cape et al. *Effective Criminal Defence in Europe*. Antwerp: Intersentia 2010, p. 38.

³ *Ensslin, Baader and Raspe v. Germany*, applications 7572/76, 7586/76, and 7587/76, of 8.7.1978, paragraph 114.

⁴ S. Trechsel (see Note 2), p. 266.

'best'. Since the aim with Article 6 (3) c of the ECHR is the possibility of presenting an effective defence^{*5} and a person in a situation wherein he is opposed by a professional lawyer can defend himself effectively with the assistance of professional counsel chosen as he best sees fit, it is clear that the best option among the rights set out in Article 6 (3) c of the ECHR is a person's right to defence with the assistance of counsel of his choice.^{*6}

The right to choose counsel is by its nature almost absolute: only the number of individuals representing the accused could be limited; not every person is eligible to act as counsel according to the relevant state's law, and the state is allowed to impose rules to limit the accused's choice of lawyer to members of a specialist bar in higher court instances.^{*7} In addition, a lawyer may be excluded for failure to comply with professional ethics and on account of conflict of interests.^{*8} In any other case, the ECtHR holds a right to intervene if the state has used its power to regulate participation of counsel in proceedings improperly.^{*9} In addition to restrictions imposed by the state, the right to choose counsel may be limited via waiver by the accused. The waiver must be voluntary, knowing, and intelligent.^{*10} In Estonian pre-trial criminal proceedings, the consequences of such waiver are the following. If participation of counsel is not mandatory and the suspect does not ask for other counsel, he will defend himself in person up to the point at which participation of counsel becomes mandatory.^{*11} If the suspect waives the right to choose counsel and participation of counsel is mandatory, the authorities shall appoint counsel for him. In the appointment of state legal-aid counsel, usually the suspect cannot choose the person who will act as his counsel.

Martin v. Estonia is an example of the last situation mentioned. In this case, Keijo Martin, who was suspected of committing murder when he was a minor, waived his counsel Paul Järve's services during pre-trial proceedings. As, according to the Estonian Code of Criminal Procedure (CCP)^{*12}, §45 (2) 1), participation of counsel was mandatory throughout the proceedings on account of the fact that Martin was a minor at the time the murder was committed, the authorities appointed counsel for him as legal aid. What makes the case interesting and constitutes the reason it came before the ECtHR some years later was the fact that, after waiver of retained counsel, Martin confessed his guilt during the next interrogation in which the state legal counsel participated. He had not done so during previous interrogations, at which Järve was present. The question as to whether his waiver had been voluntary, knowing, and intelligent was on the table for the ECtHR next to the question for both the ECtHR and the Supreme Court of Estonia (SCE) of how the ECtHR finding that it had not been would affect the result of the proceedings (Martin had been convicted of murder by the Estonian courts).

This article focuses on the second question, both providing the reader with an overview of how the ECtHR and the SCE resolved the question and proposing alternative solutions if needed. To this end, the author will firstly provide the reader with the facts of the case and the courts' findings, after which an analysis based on the case law of the ECtHR and the SCE, and on theoretical literature, shall be presented.

⁵ R.C.A. White, C. Ovey. Jacobs, White & Ovey: The European Convention on Human Rights, 5th edition. Oxford: Oxford University Press 2010, p. 291 DOI: <http://dx.doi.org/10.1093/he/9780199543380.001.0001>, referring to *Goddi v. Italy*, application No. 8966/80, 9.4.1984.

⁶ A. Soo. An individual's right to the effective assistance of counsel versus the independence of counsel: What can the Estonian courts do in case of ineffective assistance of counsel in criminal proceedings? – *Juridica International* 2010, p. 254, Note 13.

⁷ S. Trechsel (see Note 2), pp. 266–268.

⁸ C. Buckley *et al.* Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights, 3rd edition. Oxford: Oxford University Press 2014, p. 477 DOI: <http://dx.doi.org/10.1093/he/9780199606399.001.0001>.

⁹ *Ibid.*, p. 478.

¹⁰ *Pishchalnikov v. Russia*, application no. 7025/04, of 24.9.2009, paragraph 77.

¹¹ In Estonia, participation of counsel in a pre-trial proceeding is mandatory from presentation of the criminal file for examination to counsel, which means that if a Prosecutor's Office declares a pre-trial proceeding completed, it gives a copy of the criminal file to the defence counsel, who introduces it to the suspect (CCP, §45 (3), §223 (3), and §224 – especially §224¹). The participation of counsel is mandatory throughout a criminal proceeding if the suspect was a minor at the time the crime was committed; if he is, for reason of mental or physical disability, unable to defend himself; if the defence is complicated for the same reason; if the person is suspected of a criminal offence for which life imprisonment may be imposed; if the interests of the person are in conflict with the interests of another person, who has counsel; if the person has been under arrest for at least six months; or if the proceedings are conducted for the criminal matter pursuant to expedited procedure (CCP, §45 (2)).

¹² *Kriminaalmenetluse seadustik*. – RT I 2003, 27, 166; RT I, 30.12.2014, 9 (in Estonian). English text available via <https://www.riigiteataja.ee/en/> (most recently accessed on 20.2.2015).

2. The judgement of the ECtHR in *Martin v. Estonia*

On 30th May 2013^{*13}, the ECtHR concluded in *Martin v. Estonia* that there had been violation of Article 6 (1) and Article 6 (3) c of the ECHR on the basis of the following facts of the case.^{*14}

On 21 May 2006, a sixteen-year-old victim was killed, with his body found by the Estonian authorities a few days later. On 19 July, Martin, a schoolmate of the victim, was arrested on suspicion of murder. Until the 25th of July, he was represented by legal counsel R., but on that date his parents hired counsel Järve to defend him. Between the 25th of July and 4th of August, Martin and Järve met occasionally. On Friday, the 4th of August, Martin expressed hope that Järve would visit him on the following Monday. But on Monday, 7th August, Järve was not allowed to meet him. Up to that point, Martin had denied the charges.

In two distinct hand-written requests, dated 7 August, Martin stated his wish to waive the services of Järve. On the same day, the authorities granted him legal aid and appointed R. again as his counsel. Later the same day, Martin was interrogated in his presence and pleaded guilty. He gave detailed statements about the offence. On the same day and the next, he was taken to the crime scene in order to carry out an on-site reconstruction of the events. The investigative activity was video-recorded, with R. present as counsel. The case file also contains copies of two hand-written 'sincere confessions' by Martin, dated 7 and 8 August. In the first, he denied the charges, whereas in the second he admitted to killing the victim. On 11th August, R. learned that a new client agreement for the defence of Martin had been signed, with lawyer G. Meanwhile, although Järve stated that the waiver of his services by Martin had not been voluntary, his complaint was dismissed by the authorities. Martin's following behaviour was contradictory: he confessed to the murder at some points (e.g., when sending a letter to his father) and denied it at others. In the court proceedings wherein Järve was his counsel again, he denied his guilt, but he was nevertheless finally convicted of murder and sentenced to 10 years of imprisonment.

After his conviction, Martin filed a complaint with the ECtHR on the grounds that his defence rights had been violated as his appointed lawyer had been denied access to him during the pre-trial proceedings, and that his conviction had been based on evidence obtained in those proceedings.

The ECtHR concluded that there had been a violation, presenting the following arguments. Firstly, the Court stressed that the circumstances in which Martin terminated Järve's services are not entirely clear. It is hard to explain why Martin terminated Järve's services on the 7th of August after having agreed to meet him on the 4th of August.^{*15} It is noteworthy that after the termination the authorities were in quite a hurry: they interrogated Martin on the same day, with the following crime-scene reconstruction lasting almost until midnight.^{*16} In addition, Järve was not informed of the termination of his services and was unable to ascertain whether it had been of the suspect's own volition.^{*17} Secondly, even if there was an allegeable conflict between Martin's interests and those of two other suspects Järve had been defending (these people were never convicted of murder), no official proceeding was used to replace him. Reliance on an informal practice gives rise to concern about the respect for the suspect's rights of defence and freedom from self-incrimination. In addition, the legal-aid counsel had been chosen by the police investigator.^{*18} Thirdly, as Martin was a minor when the crime was committed, he was in a vulnerable position due to his age.^{*19} And, finally, the charges against him were very serious.^{*20} On account of these arguments, the Court was not satisfied that Martin's wish to replace counsel of his own could be considered genuine.^{*21}

The ECtHR noted that the evidence gathered through breach of Martin's rights was used against him by the county court. The court of appeal, although excluding it from the body of evidence, considered there to be nothing to prevent the use of 'general knowledge' that Martin had confessed to the murder, as it observed that the confession of murder had to a large extent been the reason for which Martin had been sent to trial

¹³ Application No. 35985/09, of 30.5.2013.

¹⁴ Based on paragraphs 6–51 of the judgement.

¹⁵ According to paragraph 88 of the judgement.

¹⁶ *Ibid.*, paragraph 91.

¹⁷ *Ibid.*, paragraph 89.

¹⁸ *Ibid.*, paragraph 90.

¹⁹ *Ibid.*, paragraph 92.

²⁰ *Ibid.*, paragraph 93.

²¹ *Ibid.*

on a murder charge and the investigative measures had been carried out on the basis of that knowledge.^{*22} Therefore, 'the applicant's defence rights were irretrievably prejudiced owing to his inability to defend himself through legal assistance of his own choosing'.^{*23}

Therefore, the ECtHR had two reprimands for Estonia. The first of these is that the right to choose counsel was violated by the fact that the process of termination of Järve's services at least seemed as if it had not been carried out voluntarily by the suspect. Secondly, the evidence gathered as a result of this violation (mainly Martin's confession) was used for convicting Martin. The court of first instance used it explicitly; the court of second instance excluded it from the body of evidence but relied on it nevertheless. Not surprisingly, Martin's counsel filed a petition for review with the SCE, referring to the findings of the ECtHR.

3. The SCE's response to the petition for review in *Martin v. Estonia*

Section 366 (7) of the CCP provides that criminal proceedings may be reopened if the ECtHR has found a violation of the ECHR that may have affected the outcome of the criminal proceedings and if it cannot be resolved or if damage caused thereby cannot be compensated for in a manner other than reopening of the proceedings. Therefore, in order for the case to be reopened by the SCE, three conditions had to be met. Firstly, the ECtHR had to have established a violation of the ECHR. Second was that said violation **may have affected** the outcome of criminal proceedings. For this condition to be met, it should be determined that without violation the outcome of the proceedings would have been different – it would have resulted either in acquittal of the accused or in less severe consequences for the accused. In any other case, the damages awarded by the ECtHR are sufficient to remedy the violation.^{*24} The third condition is that the violation could not have been remedied in any other way than by reopening the case. If the accused would not have been convicted had the violation not occurred, the damages awarded by the ECtHR are not sufficient to cure the violation.^{*25} But even if conviction would not have occurred without the violation, reopening is still excluded as an option if that itself would not change the result of the case – e.g., if a person has been convicted for multiple crime episodes, only one of these episodes was affected by the violation, and the punishment imposed on this person in the outcome of reopening would remain the same.^{*26} In sum, for resolution of a petition for review, three questions have to be answered: was there a violation, might it have affected the outcome, and in what extent did it affect the outcome?

Section 366 (7) of the CCP was the provision that Martin's counsel Järve relied on in his petition for review to the SCE. He claimed that in the case that the evidence gathered through violation of Martin's rights is excluded from the body of evidence, what is left to the body of evidence afterward does not prove his guilt.^{*27} By its judgement 3-1-2-2-14, of 29th September 2014, the SCE dismissed the petition, with the reasoning described below.

The SCE agreed with the ECtHR that the initial stages of the proceedings did not at least seem to be fair.^{*28} Nevertheless, it noted that, though the ECtHR established the violation of defence rights, the violation itself occurred in the pre-trial stage of the proceedings and was not associated with the body of evidence as a whole.^{*29} Despite the fact that the Estonian Court of Appeal referred to Martin's pre-trial statements as general knowledge that he had confessed to the murder, the violation did not affect the result of the case in a 'decisive manner', as the rest of the evidence did not indicate that reopening the case could lead to acquittal.^{*30} In conclusion, although the ECtHR noted in paragraph 107 of its judgement that 'where an individual has been convicted by a court in proceedings that did not meet the Convention requirement of fairness, as

²² *Ibid.*, paragraphs 95–96.

²³ *Ibid.*, paragraph 97.

²⁴ CLCSCd 3-1-2-2-08, 26.1.2009, paragraphs 10 and 16 (in Estonian).

²⁵ CLCSCd 3-1-2-2-14, 29.9.2014, paragraph 9.2 (in Estonian).

²⁶ CLCSCd 3-1-2-5-09, 17.2.2010, paragraphs 9–9.3 (in Estonian).

²⁷ CLCSCd 3-1-2-2-14 (see Note 25), paragraph 6.

²⁸ *Ibid.*, paragraph 15.2.

²⁹ *Ibid.*, paragraphs 11–12.

³⁰ *Ibid.*, paragraph 13.

in the instant case, a retrial, a reopening, or a review of the case, if requested by the applicant, represents in principle an appropriate way of redressing the violation', the violation of the accused's defence rights is cured by the damages awarded by the ECtHR since, according to §366 (7) of the CCP, no grounds for review exist.^{*31}

The SCE contested the finding of the ECtHR that for the termination of Järve's services a more formal procedure would have been appropriate. It noted that, according to §55 (2) of the CCP, formal procedure for removal of specific counsel is foreseen only for those cases in which it becomes evident that said counsel has abused his status in the proceedings by communicating with the person being defended, after the person has been detained as a suspect or taken into custody, in a manner that may promote the commission of another criminal offence or violation of the internal rules of procedure of the custodial institution. The CCP does not provide specific procedure for cases in which the suspect wants to terminate his counsel's services, as doing so is an 'expression of his free will'. Lengthy and thorough procedure for removal of counsel in these cases would materially prejudice suspects' right to choose counsel.^{*32}

4. Remedies for violation of the right to choose counsel in pre-trial proceedings

4.1. Should Martin's case have been reopened?

In the author's opinion, there are considerable shortcomings in the argumentation of the SCE in Martin's case, which should be discussed here before the remedies for violation of the right to choose counsel in pre-trial proceedings can be proposed, as these shortcomings determine the scope of the proposed remedies.

The SCE has not applied sufficient reasoning in its finding that the violation of Martin's defence right did not affect the result of the case. Furthermore, in paragraph 13, the Court concludes that the violation did not affect the result of the case in a 'decisive manner', although this finding is not in accordance with the law in force. According to §366 (7) of the CCP, a case may be reopened if the violation may have affected the outcome of the proceedings. The law does not specify in which manner it may have occurred. Therefore, the court has to decide whether the violation may or may not have affected the outcome, and if it does find that it may have done so, the case should be reopened (in the event that the third condition discussed in Section 3 of this article is present also). The Court's wording 'decisive manner' indicates that the violation may have affected the outcome but not to an extent that gives grounds for reopening the case, which should be a matter of the third question, the question of whether the violation could be cured in any other way than by reopening the case. As this question focuses precisely on what would change in consequence of reopening of the case, it is proper to ask in what extent the violation did affect the outcome.

Even if one agrees that the extent to which the violation affected the outcome belongs under the second question, the Court has not justified its finding. It has noted that pieces of evidence existed that were not gathered through violation of Martin's defence rights, but it neither named nor analysed that evidence. On account of this shortcoming, it also has not verified whether collection of that evidence was, in fact, influenced by initial infringement of Martin's right or not. In paragraph 3.3 of the judgement, where the Court gives an overview of the appeals court's findings, it lists the evidence upon which it relied: experts' reports, witness testimony, reports on comparison of statements to circumstances, and Martin's letter to his father in which he confesses to the murder. Nevertheless, the SCE has not itself evaluated the legality of these items.

In its judgement the SCE notes that, although the ECtHR has referred to retrial, reopening, or review of the case as a feasible remedy for Martin's case, grounds for reopening the case do not exist according to §366 (7) of the CCP. In the author's opinion, it would have been possible to interpret §366 (7) of the CCP in a manner more coherent with the findings of the ECtHR. As it does not lay down a comprehensive set of rules for the admissibility of evidence, the ECtHR has left this matter to be regulated by national law.^{*33} Nevertheless, in cases wherein the ECtHR has decided to intervene in the state's competence as it did in

³¹ *Ibid.*, paragraph 14.

³² *Ibid.*, paragraph 15.1.

³³ B. Emmerson *et al.* Human Rights and Criminal Justice, 3rd edition. London: Sweet & Maxwell 2010, p. 599. See also *Schenk v. Switzerland*, application No. 10862/84, 12.7.1988, pp. 45–46; *Khan v. the United Kingdom*, application No. 35394/97, 12.5.2000, paragraph 34; *Jalloh v. Germany*, application No. 54810/00, 11.7.2006, paragraph 95.

Martin's case by declaring that evidence gathered by violation of Martin's rights should not have been used by Estonian courts, the state authorities should take the Court's findings very seriously. The ECtHR comes to this kind of decision only if it deems the violation to have rendered the proceedings as a whole unfair.^{*34} Therefore, by stating that some of the evidence was gathered by violation of the applicant's defence rights, the ECtHR has in principle affirmed that two of the three conditions for grounds for review provided for in §366 (7) of the CCP exist in Martin's case. Firstly, there was a violation, and, secondly, it affected the outcome of the case, as the body of evidence would have differed in the case of the corrupted pieces of evidence having been left out. By stating that reopening of the case would constitute appropriate remedy, the ECtHR has essentially also concluded that the damages awarded by it do not cure the violation. In the context of the CCP, this means giving a negative answer to the question of whether the violation could be cured in any other way than reopening, and therefore affirming the grounds for reopening. It is true that the ECtHR's recommendation of reopening a case is not binding, as the just satisfaction provided for in Article 41 of the ECHR covers three types of awards: costs and expenses, awards for pecuniary damage, and awards for non-pecuniary damage.^{*35} Nevertheless, the state courts should still consider the ECtHR's recommendations in order to promote fair-trial rights in their country.

It is important to note that the ECtHR's practice with respect to Article 6 (3) has not been coherent. Where the case falls within a specific guarantee of Article 6 (3), it may be considered by the ECtHR to be subject to that specific guarantee alone; in conjunction with Article 6 (1), and therefore with an additional 'fair trial dimension' as was found in Martin's case; or just under Article 6 (1).^{*36} It has been suggested that, in order to achieve consistency in its practice, the ECtHR should conduct an analysis of the violation of Article 6 (3) c in isolation from other violations referred to by the applicant. This means that the inquiry should be strictly limited to the question of whether the authorities provided the applicant with the opportunity to choose his counsel and whether they allowed the counsel to participate actively in the proceedings. Reference to the broad notion of 'fair trial' should be avoided when it comes to Article 6 (2) or Article 6 (3) rights. In any other case, the interpretation of Article 6 as a whole would collapse the 258 words into a simple two-word 'fair trial' guarantee.^{*37} In Martin's case, it seems that the ECtHR, though referring also to the Article (1) fair-trial right, has looked directly at the nature of the right to choose counsel. The Court found a serious breach and suggested reopening the case as a proper remedy, which indicates that the violation *per se* renders the judgement of the case void. In that case, the violation of the right to a fair trial is not analysed additionally, as violating the right to choose counsel is itself a violation of the right to a fair trial. For curing that violation, any other possibility but reopening the case does not exist.

As was noted in the introduction, the right to choose counsel can be waived. This may be done either expressly or tacitly, but it must be 'established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance'.^{*38} It 'must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right'.^{*39} The EU directive on the right of access to a lawyer^{*40} also provides that the right to counsel may be waived on the condition that the person is informed of the content of the right and the possible consequences of waiving it, and that the waiver is carried out voluntarily and unequivocally (Article 3 and Article 9 (1) a and b). In the case considered here, Martin waived the services of the counsel hired by his parents in favour of state legal-aid counsel who had defended him previously (the case file indicates that not only did he agree with the change of counsel but he also accepted the authorities' choice of counsel). Although the ECtHR's reproach to the Estonian authorities that the formal proceeding of removal was not used for termination of Järve's services is contradictory to the law in force, it is still worth discussing. The problem with non-formal waiver is that retrospectively it is difficult to determine whether it meets the conditions laid down by the ECtHR or not. Therefore, although even the directive on the right of

³⁴ *Ibid.*

³⁵ C. Buckley *et al.* (see Note 8), p. 157.

³⁶ *Ibid.*, p. 409.

³⁷ R. Goss. Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights. Oxford; Portland, Oregon: Hart 2014, p. 87 DOI – <http://dx.doi.org/10.5040/9781474201858>.

³⁸ *Pishchalnikov v. Russia* (see Note 10), paragraph 77; *Saman v. Turkey*, application no. 35292/05, 5.4.2011, paragraph 32.

³⁹ *Pishchalnikov v. Russia* (see Note 10), paragraph 77.

⁴⁰ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. OJ L 294/1.

access to a lawyer does not require formal procedure for waiver of counsel's services – according to Article 9 (2), it could be carried out in writing or orally – in more demanding situations (e.g., when the suspect in a minor), it would be wise to follow a formal procedure. Thereby, not only the rights of the suspect are respected, but also any possible future disputes, including claims before the ECtHR, could be avoided, since the authorities would have solid proof that the waiver was both voluntary and intelligent. The SCE could have discussed it in Martin's case instead of limiting its argumentation to the law in force.

4.2. How could the violation of Martin's rights have been cured?

Although the ECtHR is reluctant to determine evidentiary rules for the states, it has often discussed whether domestic courts should have left certain pieces of evidence outside the record or not. In *Gäfgen v. Germany*, wherein the Court concluded that there had been violation of Article 3, it noted that one of the factors that influences the fairness of the proceedings is whether the evidence gathered in violation of the accused's rights was or was not decisive for the outcome of the case.^{*41} However, the use of evidence obtained in breach of Article 3 always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction.^{*42} This means that the Court has set down specific rules for the use of evidence in cases involving Article 3 rights but not for cases dealing with Article 6 rights. In the *Gäfgen* case, the ECtHR also specified the circle of evidence that may not be used in the event of Article 3 being violated. It noted that domestic courts should never rely on evidence that is 'a direct result of ill-treatment in breach of Article 3',^{*43} and in paragraphs 171 and 173 it indicates that this circle encompasses both evidence gathered in the course of ill-treatment and evidence that is gathered on the basis of information received via ill-treatment. With *Shishkin v. Russia*,^{*44} the ECtHR concluded that there were violations of Article 6 (1) in a case wherein the applicant had been tortured and his access to counsel had been denied, although there was absence of a clear indication that domestic courts had used his statements for his conviction.

The exclusionary rule that can be derived from ECtHR case law is well known in the USA. It has two rationales. Firstly, there is a preventive aim, which means that if the officials know that in court proceedings the state cannot take advantage of their illegal actions, they refrain from violating constitutional rights. Secondly, it serves an aim of protecting judicial integrity.^{*45} However, critics have pointed out considerable costs of this doctrine. In the main, it frees guilty people – i.e., prevents the courts from seeking the truth^{*46} – which, in turn, promotes cynicism among members of the public and parties within the criminal justice system.^{*47} In addition, there are proper remedies for curing the violation, such as civil actions and criminal prosecution of officials who have violated the rights of the accused.^{*48} The exclusionary rule does not apply only to the direct products of governmental illegality; it also covers the secondary evidence that is 'fruit of the poisonous tree'.^{*49} From the *Gäfgen* case it can be concluded that the ECtHR has also relied on this doctrine, although not specifying its contents. For the sake of the search for the truth, the US Supreme Court has narrowed the exclusionary rule, including the 'fruit of the poisonous tree' principle, considerably. Firstly, there is an independent-source doctrine, which means that evidence that is not causally linked to illegal governmental activity (even in cases wherein police officers have illegally entered the suspect's home, found the evidence, asked for a warrant while simultaneously keeping the house under

⁴¹ Application No. 22978/05, 1.6.2010, paragraph 164.

⁴² See paragraph 165. However, it should be noted that the Court failed to apply this rule on the facts of *Gäfgen*'s case, as it still analysed whether the evidence that had been gathered in violation of the accused's Article 3 rights was decisive for his conviction or not. Since it concluded that it was not, it denied violation of Article 6. See also B. Emmerson *et al.* (see Note 33), p. 636.

⁴³ See paragraph 167.

⁴⁴ Application No. 18280/04, 7.7.2011.

⁴⁵ J. Dressler. *Understanding Criminal Procedure*, 3rd edition. New York; San Francisco: Matthew Bender 2002, p. 381. In *Gäfgen v. Germany* (see Note 41), paragraph 175, one finds: 'Indeed, there is also a vital public interest in preserving the integrity of the judicial process and thus the values of civilised societies founded upon the rule of law.'

⁴⁶ *Ibid.*, p. 393. Also in *Gäfgen v. Germany* (see Note 41), paragraph 175.

⁴⁷ *Ibid.*, p. 394.

⁴⁸ *Ibid.*, p. 395.

⁴⁹ *Ibid.*, p. 413.

surveillance, and then entered the house legally) is not deemed fruit of a poisonous tree.^{*50} Secondly, there is an inevitable-discovery rule, according to which the evidence does not fall under the exclusionary rule if the official instances would have found it in the course of their legal activities anyway.^{*51} Thirdly, the attenuated-connection principle is applied, under which the secondary evidence may be used if it is free of the original taint.^{*52} Finally, there is the good-faith exception, under which if the authorities rely upon a defective search warrant in good faith, the evidence acquired thereunder may still be used.^{*53} The ECtHR's case law is not that detailed yet, as can be seen from the *Gäfgen* case.

In Estonia, the violation of procedural rules during collection of evidence does not always result in application of the exclusionary rule. In rare cases, the law provides directly that such evidence shall not be used in criminal proceedings (e.g., according to §126¹ (4) of the CCP, information obtained through surveillance activities is evidence – i.e., it could be used in proceedings – if the application for and granting of authorisation for surveillance activities and the conduct of those surveillance activities are in compliance with the requirements of the law^{*54}). In cases wherein the law does not provide such guidelines, the court has to take into account on one side the materiality of the violation and from the other side the gravity of the offence and the public interest in conducting the proceedings. In addition, the aim of the provision that was breached and the issue of whether the evidence could have been collected without violation of that provision should be considered.^{*55} In any case, the SCE has not yet confirmed that violation of the accused's constitutional rights would automatically result in application of the exclusionary rule.^{*56} However, if one considers the seriousness of violation of the constitutional rights of the accused, it is difficult to argue that public interests (among them the need for punishment for serious crimes) outweigh the violation. To the contrary, the more serious the charges the accused faces, the more his rights should be respected^{*57}, as illegally obtained evidence increases the probability of conviction based on unreliable evidence.^{*58}

In Estonia, even when a higher court concludes that a lower court should have left the tainted piece of evidence out, the circumstances may not result in annulment of the lower court's decision. The latter depends on whether the piece of evidence was decisive.^{*59} For instance, in a recent case^{*60} the SCE concluded that the authorities violated the suspect's right to counsel during the pre-trial stage of proceedings in a situation in which the suspect faced lifetime imprisonment. The suspect had been questioned several times: first with his counsel present, then with him not being present, and then again with counsel present. Martin confessed his guilt during an interrogation in which his counsel was not present and continued to do so in subsequent interrogations. The SCE concluded that the courts should have excluded the statements received during these interrogations from the body of evidence.^{*61} Nevertheless, it confirmed the legality of the judgements of the lower courts, as these statements were not of a decisive nature (there were also witnesses' statements, documents, and other pieces of evidence named in the SCE's judgement).^{*62} However, although the SCE has practice with the exclusionary rule, even in the area of the right to counsel, as could be seen from this case, it has never dealt with 'fruit of the poisonous tree'.

In Martin's case, the fruit of that tree was something that the SCE should have considered. This principle should not be ignored by the members of the ECtHR, as the ECtHR itself applied it in *Gäfgen v. Germany*. It should be noted that, according to the court of appeal, Martin's confession of murder was to a large extent why Martin had been sent to trial on a murder charge, and the investigative measures had been carried out on the basis of that knowledge. As the confession itself was a result of violation of Martin's

⁵⁰ *Ibid.*, pp. 414–415.

⁵¹ *Ibid.*, p. 416.

⁵² *Ibid.*, p. 417.

⁵³ *United States v. Leon* (468 U.S. 897).

⁵⁴ CLCSCd 3-1-1-22-10, 26.5.2010, paragraph 14.3 (in Estonian).

⁵⁵ CLCSCd 3-1-1-31-11, 28.4.2011, paragraph 15 (in Estonian).

⁵⁶ U. Lõhmus. *Põhiõigused kriminaalmenetluses* (Constitutional Rights in Criminal Procedure), 2nd edition. Tallinn: Juura 2014, p. 84.

⁵⁷ *Gäfgen v. Germany* (see Note 41), paragraph. 175.

⁵⁸ U. Lõhmus (see Note 56), p. 85.

⁵⁹ CLCSCd 3-1-1-22-10 (see Note 54), paragraph 14.6.

⁶⁰ CLCSCd 3-1-1-1-15, 19.2.2015, paragraph 9 (in Estonian).

⁶¹ *Ibid.*, paragraph 9.

⁶² *Ibid.*, paragraph 10.

defence rights, the courts should have analysed which pieces of evidence were actually permissible for use in the proceedings against Martin in light of the ‘fruit of the poisonous tree’ principle. The duty of the state to impose effective remedies under national law in the event of a breach of the right to counsel comes directly from the EU directive on the right of access to a lawyer, Article 12 (1). In Martin’s case, the courts did not ensure such remedies, either in the course of criminal proceedings or in the review proceedings. It might be speculated that a stricter approach by the court of appeal and the SCE would have remedied the violation during the criminal proceedings and there would not have been a need for the ECtHR’s guidelines four years later, with the person imprisoned in the meantime.⁶³ At the same time, as can be seen from the analysis above, the SCE did not remedy the violation, even after the ECtHR’s decision.

What should the SCE have done in Martin’s case? Firstly, it should have reopened the case, as discussed in the previous paragraph. Secondly, it should have given clear guidelines for the county court on how to cure the violation. In light of the ‘fruit of the poisonous tree’ doctrine, it should be borne in mind that merely ordering the lower court to leave Martin’s statements out from the body of evidence may not be enough. The SCE should have also decided what to do with the evidence collected on the basis of information supplied by Martin. It was up to the SCE to decide whether exceptions to the rule apply, but it is clear that the stance of the ECtHR in *Gäfgen v. Germany* should have been considered. Only after reordering the body of evidence by taking into account the exclusionary rule and the ‘fruit of the poisonous tree’ doctrine should the Estonian courts have made a decision on Martin’s guilt.

5. Conclusions

The suspect’s decisions in pre-trial proceedings, including those on whether or not to give statements, may determine the fate of the case. Therefore, it is extremely important that he have counsel whose advice he can rely on. If the suspect’s right to make the choice of contractual counsel is violated, the defence actions and strategy up to the trial are jeopardised. Under these circumstances, the ECtHR has acknowledged the need for a proper remedy, including applicability of the exclusionary rule and the ‘fruit of the poisonous tree’ principle. In Estonia, the SCE has applied the first, but whether the latter also applies is a question that remains unanswered, since the SCE did not reopen Martin’s case, proceeding from an argument that no grounds for reopening existed. In Martin’s case, not only should the courts have not admitted Martin’s statements that were given during interrogations wherein his chosen counsel was not present, but they should also have decided what to do with the pieces of evidence gathered in consequence of the information received from Martin during these interrogations, in order to cure the violation of the suspect’s right to choose counsel entirely.

⁶³ A. Tinsley, Protecting criminal defence rights throughout EU law: Opportunities and challenges. – *New Journal of European Criminal Law* 2013/4, p. 474.



Kristjan Kask
PhD, Researcher
University of Tartu



Sandra Salumäe
Master's student
University of Tartu

The Analysis of Complex Forensic Psychiatry and Psychology Expert Assessments in Estonia

1. Introduction

Every year, several hundred forensic psychiatry and psychology expert assessments are conducted on persons on whom an examination ruling has been issued by the body conducting proceedings (or 'BCP').^{*1} However, it is not known how frequent the cases are wherein the assessment identifies the presence of a 'mental and behavioural disorder'. Therefore, complex forensic psychiatric- and psychological-examination-based assessments in the years 2011 and 2012 are examined.

The composition of expert assessments is regulated by the Forensic Examination Act (FEA).^{*2} Under the FEA's §4 (1), an expert is a person who uses non-legal special knowledge for conducting expert assessment in his or her field of expertise. An expert may also, under the FEA's §4 (2), be either a forensic expert (who works at the relevant state institute of expertise and whose main task is to conduct expert assessments by dint of the FEA's §4 or a state-acknowledged expert (i.e., someone recognised as an expert by the state).

1.1. Capability of guilt

A person is capable of guilt when he or she is mentally capable and at least 14 years old, according to §33 of the Penal Code (PC)^{*3}. If a person is mentally capable, then he or she has understanding of the lawfulness of the act committed and is capable also of acting accordingly. If this ability is absent or limited, the person is not mentally capable (PC, §34) or has diminished mental capacity (PC, §35). Accordingly, a person is deemed mentally incapable (under the PC's §34) when he or she is incapable of understanding the unlawfulness of the act or incapable of acting according to such an understanding for reason of mental illness, temporary severe mental disorder, mental disability, feeble-mindedness, or any other severe mental disorder. A person can be considered as of diminished mental capacity (PC, §35) if there are statuses present that are consistent with the PC's §34, subsections 1–5 but at the same time the intensity thereof does not exclude his or her ability to understand the unlawfulness of his or her act or to act in accordance with such

¹ Kuritegevus Eestis 2014 (Crime in Estonia 2014). Tallinn: Justiitsministeerium 2015.

² Forensic Examination Act (Kohtuekspertiisiseadus). – RT I, 16.4.2014, 6 (in Estonian).

³ Penal Code (Karistusseadustik). – RT I, 23.12.2014, 16 (in Estonian).

an understanding. Therefore, if there is a doubt on the part of the BCP with respect to the suspect or accused corresponding to one of the statuses specified in the PC's §34, subsections 1 to 5, then an examination ruling is prepared wherein the circumstances of the crime, the reason for obtaining the expert assessment, and the area for assessment are stated, along with the questions to which the BCP wishes to have an answer.

Thus, fulfilling both medical and judicial criteria is important in establishing the capability of guilt.^{*4} The judicial criteria for mental incapability are understanding of the unlawfulness of the act and the ability to act accordingly, whereas the medical criteria describe the pathological states of the organism that influence the person's understanding of the unlawfulness of the act or guide his or her action.^{*5} Judicial criteria are to be applied only on the basis of the medical criteria, whilst medical criteria should be evaluated in line with judicial features (the person should be able to understand the unlawfulness of his or her behaviour and have the ability to guide his or her acts).^{*6} The person is incapable of guilt if both criteria are fulfilled; if the medical criteria are present but the person can understand the unlawfulness of the act and also guide his or her acts accordingly, that person cannot be judged incapable of guilt (but diminished capability of guilt may be present).^{*7} Capability of guilt should be taken to refer to only the context of the precise act during commission of the crime.^{*8}

The medical features of mental incapability demonstrate the pathological phenomena in the organism that should be evaluated with respect to mental capacity during commission of the act.^{*9} J. Sootak and P. Pikamäe have described these conditions in greater depth. A 'mental illness' is characterised by skewed perception of reality, difficulties in adaptation to reality, and change in the structure of the personality. A 'temporary severe mental disorder' is a severe mental disorder that lasts hours to weeks and is often generated by external factors such as loss of consciousness due to brain trauma or delirium arising from intoxication. 'Mental disability' refers to mental retardation that is long-lasting in the course of the individual's life and characterised by lower levels of perception, speech, motor skills, and communication. 'Feeble-mindedness' is a state wherein there is dysfunction in memory and thinking abilities that interferes with the person's everyday life and functioning. Finally, the category 'any other severe mental disorder' involves disorders that can have an effect on the understanding of the act and capability to guide one's acts at a level such that the person is not capable of understanding.

Sootak has noted that if an examination ruling has been issued, one or more experts establish the presence of the symptoms of the mental disorder along with the clinical picture, diagnose the disorder (if present), and evaluate whether the medical condition corresponds to the criteria of the PC (in §34 (1)–(5)).^{*10} For example, the person may be diagnosed with an acute psychotic disorder (a disorder is a clinically recognisable constellation of symptoms or behaviour that is accompanied by distress and that interferes with the person's functioning^{*11}) present during commission of the act that corresponds to the judicial criteria for a mental illness as the person was not able to guide his or her acts and to understand the unlawfulness of his or her behaviour. In court, the judge subsumes this by using PC's §34 since the person did not possess understanding of the unlawfulness of his or her act and therefore is incapable of guilt.^{*12}

1.2. A highly provoked state

Another element prevalent in BCP examination rulings involves issues related to an act committed by someone in a highly provoked state, which may be a circumstance mitigating guilt (as in the case of provoked murder according to the PC's §115, with an example being murder carried out under the influence of a sudden-onset

⁴ J. Sootak, P. Pikamäe. *Karistusseadustiku kommenteeritud väljaanne 3. trükk* (Commentaries to the Penal Code, 3rd edition). Juura 2009, pp. 175–178 (in Estonian).

⁵ *Ibid.*, pp. 175–178.

⁶ *Ibid.*, pp. 175–178.

⁷ *Ibid.*, pp. 175–178.

⁸ A. Aadamsoo. *Süüdimatuse meditsiinilised tunnused* (Medical Features of Incapability of Guilt). – *Juridica* 2/2002, pp. 100–102 (in Estonian).

⁹ J. Sootak, P. Pikamäe (see Note 4), pp. 175–178.

¹⁰ J. Sootak. *Süüivõime karistusseadustikus* (Capability of Guilt in the Penal Code). – *Juridica* II/2002, pp. 85–86 (in Estonian).

¹¹ World Health Organization. *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical descriptions and diagnostic guidelines*, 1992. Available at <http://www.who.int/classifications/icd/en/bluebook.pdf> (most recently accessed on 15.3.2015), p. 11.

¹² J. Sootak (see Note 10), pp. 85–86.

highly provoked state).^{*13} It had already been declared in the Law of Punishment, in 1903, that murder and causing severe harm to the health can be committed under the effect of ‘great soul-based anxiety’. The basis for privilege here is not the type of intent but an emotional state wherein emotions interrupt the process of normal motivation.^{*14} Because many of the expert assessments are made in cases of crimes of first or second degree, evaluation of the presence of a highly provoked state is an important issue to address.

There has been discussion in the literature of differences in interpretation of the term ‘highly provoked state’ between lawyers and the experts.^{*15} Often, the BCP asks experts to identify a ‘highly provoked state’ or ‘affect’; however, these terms are not synonyms. The former is a juridical term, whereas the latter is based more on behavioural science. Bridging the gap, the wording ‘a physiological affect’ is used. Judicially certain conclusions can be made on the basis of this, but, since this state does not belong to any of the specified medical conditions, it is difficult for the experts to identify such a state: there is no disorder using the name ‘affect’ in the ICD-10.^{*16} The closest cluster to a condition of this nature is the neurotic disorders, in which all the features are present that are encompassed by physiological affect. In practice, the following procedure is applied. During the complex expert assessment, the state of the person’s health is given a diagnostic evaluation (for example, as a neurotic disorder) and also an evaluation addressing the expression of the state – i.e., whether the person is capable of understanding the circumstances and guiding his or her actions accordingly.^{*17} Then the evaluation is rendered in terms of physiological affect. Therefore, if the person’s capacity of understanding is diminished, then that person has been in a state characterised by the physiological affect and if not, there are no signs of the relevant physiological affect.^{*18}

However, in a highly provoked state, one may present very intense emotions that do not require an assumption of pathology. Accordingly, this condition is not diagnosable in terms of ICD-10 criteria and lies within the competence of forensic psychological but not psychiatric expert assessments. Therefore, the aim is not to establish the presence of a mental disorder but rather to identify a specific state. In sum, as the human mental state is often complicated and these conditions difficult to delimit, the most rational approach is to use complex expert assessment.^{*19}

1.3. The study

The aim with this paper is to analyse complex expert assessments in forensic psychiatry and psychology. Firstly, the prevalence of mental disorders in expert assessment acts is examined (i.e., how often there are cases that correspond to the statuses in the PC’s §34, subsections 1 to 5). Secondly, the wording of questions asked of the experts by the BCP in the examination rulings is analysed, with special attention directed to whether the questions posed can be legitimately answered by the experts or instead exceed their field of expertise. Access to the examination rulings and assessment reports was granted by the Estonian Forensic Science Institute, and permission to analyse sensitive personal information was obtained from the Estonian Data Protection Inspectorate.

2. Results

In total, access to 76 expert assessments from 2011 and 2012 was gained. Fifty-five expert assessments of suspects were included for the present analysis; the cases of minors under the age of 14 and of victims were excluded, as these did not focus on issues related to capability of guilt.

¹³ T. Kompus. Emotsionaalsete seisundite hindamine kohtupsühholoogilisel ekspertiisil (Evaluating Emotional Statuses in Forensic-psychology Expert Assessment).. – *Juridica* II/2002, pp. 96–99 (in Estonian).

¹⁴ J. Saar, P. Pikamäe. Hingelise erutuse seisund. Probleemidest Eesti karistusõiguses ja kohtupraktikas (Highly Provoked State: Problems in Estonian Penal Law and Practice). – *Juridica* IX/2006, pp. 591–600 (in Estonian), p. 592.

¹⁵ T. Kompus (see Note 13); J. Saar, P. Pikamäe (see Note 14); P. Randma. Afekt kui hingelise erutuse seisund ja ajutine raske psüühikahäire (Affect as Highly Provoked State and Temporary Severe Mental Disorder). – *Juridica* V/2005, pp. 321–331 (in Estonian).

¹⁶ World Health Organization (see Note 11).

¹⁷ P. Randma (see Note 15). p. 324.

¹⁸ T. Kompus (see Note 13), pp. 97–99.

¹⁹ J. Saar, P. Pikamäe (see Note 14), pp. 597–598.

The assessments were conducted by 18 experts; for one expert assessment act, the experts were not listed. As only complex assessments were analysed, usually the evaluations were conducted by a psychiatrist and a psychologist, but there were situations wherein the assessment was made by two psychiatrists (in cases of in-patient care). Of the 18 experts, three were state-acknowledged experts (two medical doctors in psychiatry and one clinical forensic psychologist), four experts were psychologists, and 11 were medical doctors in psychiatry. Three doctors conducted more than 10 assessments each (range: 10–14, accounting for 67.3% of the assessments in all), and eight doctors performed fewer than 10 (range: 1–6). The selection of psychologists was narrower; only four persons were used (one of them a state-acknowledged expert). One psychologist had performed 28 assessments (50.9%), another had completed 19 (34.5%), and the remaining two made one expert assessment each.

The mean age of the persons assessed was 33 years (with a range of 14 to 65 years), and they included 45 men and 10 women. By nationality, 20 persons were Estonians, 31 were Russians, and one was of another nationality; there were no data for two persons. The mean delay between commission and assessment was six months. There were situations wherein the assessment took place less than a month from the commission, while the longest delay was 52 months. Also registered was the cost of the experts' assessments^{*20}. The cost varied from 255 to 2,350 euros, with the mean cost being 912 euros. The average cost of those expert assessments that suggested the person to correspond to the criteria of PC §34's subsections 1 to 5 did not differ statistically significantly from that of the assessments in which the person were deemed not to correspond to the criteria.

2.1. Preliminary psychiatric history and previous expert assessments

As judged by recorded previous psychiatric history, 26 persons (47.3%) had no psychiatric history, while the others had visited specialists (psychiatrists, psychologists, or both) one to seven times, on average once or twice. Of those who were assigned for evaluation, four persons were suggested later to be mentally incapable. With respect to history of psychiatric treatment in hospital, similarly, for 26 persons (47.3%) there was no history present. Others had been in hospital once, on average, and one person (suggested as mentally incapable) had been hospitalised 19 times. Previous expert assessments had not been conducted for 42 persons (76.4%; seven of them suggested as mentally incapable), 11 individuals had been subject to expert assessments once (with two of them suggested to be mentally incapable), and two persons had been evaluated twice before. The qualifications for which expert assessments were sought most often by the BCP were manslaughter and threat (see Table 1). Most often, one qualification associated with penal power was involved (41 cases, 74.5%); in 13 cases there were two and in one case three qualifications present.

Table 1: Frequency of qualifications in line with which the suspects were accused

Qualification according to the Penal Code	Instances
§113, manslaughter	13
§114, murder	5
§118, causing serious harm to health	6
§120, threat	7
§121, physical abuse	12
§141, rape	2
§199, larceny	3
§200, robbery	2
§203, damage or destruction of a thing	1
§213, computer-related fraud	1
§214, extortion	1
§215, unauthorised use of a thing	1
§263, aggravated breach of public order	4

²⁰ Formulated in Forensic Examination Act §27⁵'s subsections 1 to 5.

§274, violence against a representative of state authority or another person protecting public order	4
§331 ² , violation of a restraining order	1
§422, violation of traffic requirements or vehicle operation rules by a driver	1
§424, driving a motor vehicle, off-road vehicle, or tram in a state of intoxication	1
§275, defamation or insulting of a representative of state authority or another person protecting public order	1
§303, violence against judges, lay judges, preliminary investigators, prosecutors, criminal defence counsel, representatives of victims, or persons close to them	1
§404, arson	1

2.2. The appearance of statuses provided for by PC' §34 (1)–(5)

In nine cases (16%), there were conditions suggesting a conclusion of mental incapability according to Penal Code §34's subsections 1 to 5 (16.4% of the cases, all of men)^{*21}; in the court hearing stage, this number increased to 10 (since one person was diagnosed with an acute schizophrenia-like psychotic disorder). As for qualifications, in three cases the suspect was accused in line with the PC's §120 (see Table 1); in one case, PC §118, §141, §199, or §422 was the relevant section; and in two cases the accusations were in accordance with two PC qualifications, either §120 and §121 or §121 and §263. It should be acknowledged that the presence of the statuses is judged from the conclusion of the expert assessment acts and not by the court verdicts. Next, the appearance of the statuses specified in the PC's §34 (1)–(5) is introduced, by disorder cluster. The general characteristics of these disorders are described in terms of ICD-10 diagnostic criteria firstly, after which their correspondence to PC §34 (1)–(5) is discussed.

2.2.1. Organic mental disorders

Organic mental disorders are characterised by a common demonstrable aetiology in cerebral disease, brain injury, or other insult leading to cerebral dysfunction.^{*22} The dysfunction may be primary, as in cases of diseases, injuries, and insults that affect the brain directly and selectively, or secondary, as in systemic diseases and disorders that attack the brain only as one of the multiple organs or systems of the body that are involved.^{*23} In our analysis, there were four persons (7.4%) diagnosed with disorders in this cluster (the diagnoses were organic personality disorder, organic hallucinosis, and post-traumatic brain damage syndrome); two of the four persons assessed were suggested to be mentally incapable as they corresponded to the characteristics outlined in the PC's §34 (1)–(5).

2.2.2. Mental and behavioural disorders due to use of psychoactive substances

The disorders due to use of psychoactive substances differ in severity and clinical form but are all attributable to the use of one or more of these substances, which may or may not have been medically prescribed.^{*24} For example, acute intoxication is a condition that follows the administration of a psychoactive substance and results in disturbances in level of consciousness, cognition, perception, affect or behaviour, or other psycho-physiological functions and responses.^{*25} The disturbances are directly related to the acute

^{*21} It has to be noted that the court verdicts in these cases are not known so these decisions are based solely on the expert-assessment acts.

^{*22} World Health Organization (see Note 11), p. 45.

^{*23} *Ibid.*, p. 45.

^{*24} *Ibid.*, p. 67.

^{*25} *Ibid.*, p. 67.

pharmacological effects of the substance and resolve with time, with complete recovery except where tissue damage or other complications are present.^{*26} A dependence syndrome is defined as behavioural, cognitive, and physiological phenomena that develop after repeated substance use and that typically include a strong desire to take the drug, difficulties in controlling its use, persistence in its use without regard for harmful consequences, a higher priority given to drug use than to other activities and obligations, increased tolerance, and sometimes a physical withdrawal state.^{*27} Firstly, the conditions related to alcohol were analysed, followed by the use of other substances. Nineteen persons were intoxicated by alcohol during commission of the act (34.5%), and none of them met the criteria in PC's §34 (1)–(5). Dependence on alcohol was established in 14 cases (25.5%), with three of the individuals suggested to be mentally incapable. In the use of other psychotropic substances, the use of tranquillisers, caffeine, and heroin was noted (which occurred also concomitantly with use of alcohol) to be prevalent for five persons (9%), who were all concluded to be mentally capable.

2.2.3. Schizophrenia and schizotypal and delusional disorders

The schizophrenic disorders are characterised by fundamental and characteristic distortions of thinking and perception, along with emotions that are inappropriate or blunted.^{*28} Clear consciousness and intellectual capacity are usually maintained, although certain cognitive deficits may evolve in the course of time.^{*29} The most important psychopathological phenomena include thought echo; thought insertion or withdrawal; thought broadcasting; delusional perception and delusions of control, influence, or passivity; hallucinated voices commenting or discussing the patient in the third person; thought disorders; and initial negative symptoms.^{*30} In our analysis, it was mostly a diagnosis of paranoid schizophrenia that was present; an acute schizophrenia-like psychotic disorder (with symptoms similar to those of schizophrenia but persisting less than one month) was noted too. Eight persons (14.5%) were diagnosed with these disorders, seven of whom corresponded to the criteria of PC' §34 (1)–(5) and were therefore suggested as being mentally incapable.

2.2.4. Personality disorders

The personality disorders cover a variety of conditions and behaviour patterns of clinical significance that tend to be persistent and appear to be the expression of the individual's characteristic lifestyle and mode of relating to himself or herself and others.^{*31} Some of these conditions and patterns of behaviour emerge early in the course of the individual's development, as a result of both constitutional factors and social experience, while others are acquired later in life.^{*32} They represent extreme or significant deviations from the way in which the average individual in a given culture perceives, thinks, feels, and (in particular) relates to others.^{*33} Such behaviour patterns tend to be stable and to encompass multiple domains of behaviour and psychological functioning.^{*34} They are frequently, but not always, associated with various degrees of subjective distress and problems of social performance.^{*35} These are severe disturbances in the personality and behavioural tendencies of the individual not directly resulting from disease, damage, or other insult to the brain or from another mental disorder. The disturbances usually involve several aspects of personality, nearly always are associated with considerable personal distress and social disruption, and generally have manifested themselves since childhood or adolescence before continuing throughout adulthood.^{*36} Personality disorders were diagnosed in 16 cases (29.1%). Most were of the antisocial and emotionally unstable

²⁶ *Ibid.*, p. 67.

²⁷ *Ibid.*, pp. 69–70.

²⁸ *Ibid.*, pp. 78–79.

²⁹ *Ibid.*, pp. 78–79.

³⁰ *Ibid.*, pp. 78–79.

³¹ *Ibid.*, pp. 156–158.

³² *Ibid.*, pp. 156–158.

³³ *Ibid.*, pp. 156–158.

³⁴ *Ibid.*, pp. 156–158.

³⁵ *Ibid.*, pp. 156–158.

³⁶ *Ibid.*, pp. 156–158.

personality disorder with explosive manifestations, but there were also mixed-type personality disorders. All persons diagnosed with personality disorders were concluded to be mentally capable.

2.2.5. Mental retardation

Mental retardation is a condition of arrested or incomplete development of the mind and is characterised especially by impairment of skills manifested during development, skills that contribute to one's overall level of intelligence – i.e., cognitive, language, motor, and social abilities.³⁷ Mental retardation can occur with or without any other mental or physical condition. Mental retardation was diagnosed in three cases (5.5%), and the persons in question were all suggested to be mentally capable. The relevant persons were diagnosed as having mild mental retardation (likely to result in some learning difficulties in school, while many adults with this diagnosis are able to work and maintain good social relationships and contribute to society) sometimes alongside behavioural disorders and, in one case, antisocial personality disorder.

2.3. Categories of questions asked for the expert assessments

In total, 62 questions, with varying wording, were asked of the experts in examination rulings by the BCP. The questions were grouped into small categories on the basis of the topic the BCP dealt with in the examination rulings; see Table 2. As the table shows, mostly the questions addressed the compatibility of the person's status with the PC's §34 (1)–(5); in a lesser extent, the BCP wished to clarify issues pertaining to the necessity of coercive treatment, ability to testify in court and serve the sentence, and the presence of mental disorders (with questions posed both in medical and in judicial terms). Seventy-six per cent ($n = 276$) of the questions were answered separately (i.e., one question and one answer), and 24% ($n = 85$) were answered together (one answer for at least two questions – i.e., the experts answered several questions, of similar content, together). Different phrasing of the questions was used with respect to issues of compatibility with PC §34 and the presence of a mental disorder in medical terms. Of the questions addressing the presence of mental disorders with a time dimension, 48% ($n = 43$) of the questions asked dealt with the present (i.e., the time of the trial in court), 48% ($n = 43$) addressed the past (i.e., the time of commission of the act), and 4% ($n = 4$) had to do with the dynamics of the condition between those two points. Next, the most common categories of questions asked of the experts are examined more closely.

Table 2: Percentages of questions asked of the experts by a body conducting proceedings in its examination rulings, by category

	Percentage	Number of questions using the term	Number of wordings of the questions
Suffering or having suffered a mental disorder (judicial term)	13	46	2
Highly provoked state	4	16	7
Necessity of a lawyer's presence	2	7	2
Necessity of coercive treatment	18	65	4
Compatibility with PC §34	28	100	17
Capacity to testify in court / serve the sentence	14	52	6
Presence of a mental disorder (medical term)	12	44	11
Presence of physiological affect	4	14	3
Veracity of the statements	2	6	4
The influence of medication on the person	0.5	2	2
Cognitive function disorders	1.5	5	5
Inclination toward criminal behaviour	0.5	2	2
Dynamics of mental health status	0.5	2	2

³⁷ *Ibid.*, pp. 176–177.

2.3.1. Suffering or having suffered a mental disorder (in judicial or medical terms)

Questions in the first category were asked both in medical terms (i.e., with regard to a mental disorder) and in judicial terms (with a literal translation to ‘malfunction of the action of the mind’) with reference to the statuses listed in PC §34 (1)–(5). The experts answered these questions mainly by indicating the diagnosis (or diagnoses) of the person and the effect of the indicated disorders on understanding of the lawfulness of the act or capability of acting in line with such an understanding. The questions were worded for investigation of both situations, present and past (where these two contexts refer to the act’s commission and the trial).

2.3.2. Highly provoked state and/or the presence of a physiological affect

The experts in their answers stated that the terms ‘highly provoked state’ and ‘physiological affect’ are not precise in content or do not correspond to the emotional statuses in current psychological literature and that, therefore, establishing these states in an expert opinion is not possible. In some wordings of the questions, the term ‘neurotic disorder’ was present; also, there were questions addressing whether the state (also worded as ‘traumatic experience’ or ‘special emotional state’) in question was present and how it affected understanding of the lawfulness of the act or influenced capability of acting accordingly, along with issues related to the duration of the highly provoked state. In some expert assessments, it was written that, although, because of incompatibility in terminology, it was not possible for the experts to identify the presence of a highly provoked state (e.g., this was not in their competence), no such behaviour occurred as the term entails. However, there were experts who answered the questions – i.e., who stated that there was no ‘physiological affect’ present. In sum, there is disagreement in the opinions of the experts themselves with respect to answering these questions, which indicates that this issue needs to be clarified, so as to prevent misunderstandings.

2.3.3. Necessity of coercive treatment and capacity to testify in court / serve the sentence

The necessity of coercive treatment is assessed largely via the criteria of the PC’s §86. The experts stated that their opinions were based on the severity of the medical condition(s) of the examinees, considering also the facts of whether the person was of danger to him- or herself or to others. The associated question was asked also for better understanding of whether the person has a mental disorder and how the disorder, if any, affects his or her ability to give testimony in court. For example, experts found that a neurotic disorder does not limit a person’s understanding of the surroundings or, in other cases, that the accused would need to be talked to in a simple manner but is able to be present in court. Issues related to serving the sentence were linked more to the issues of coercive treatment – the expert had to answer questions as to whether at present the person is capable of serving the sentence. There was a case wherein an acute psychotic disorder had been diagnosed in the accused by the trial date and the experts therefore answered that the accused was currently not able to understand the surroundings and, accordingly, not able to serve the sentence (although at the time of the act’s commission the accused was capable of understanding the surroundings).

2.3.4. Compatibility with PC §34

The BCP asked experts often about the presence of mental disorders that could prove that a person was not able to guide his or her acts or understand the unlawfulness thereof in line with the specifications in the above-mentioned subsections of the PC’s §34. However, someone may have a mental disorder that corresponds to the judicial criteria of statuses specified in the PC’s §34 while at the same time the expert may state that this did not affect the person’s understanding or act as the intensity of the condition was low. Therefore, answering this question solely from the correspondence to the judicial or medical criteria might not be correct. For example, five times the question was asked in such a manner that the expert was to present an answer as to guilt capacity (which Sootak³⁸ argues is the decision of the judge). In summary, there

³⁸ J. Sootak (see Note 10), p. 86.

were cases in which the question was answered by the experts but also cases wherein the experts stated that answering this question was not within their competency.

2.3.6. Veracity of the statements

The experts were asked to state a conclusion (working also from the history of the examinee) as to whether someone could have influenced the individual's testimony or whether that person's testimony is credible. In these cases, the experts answered that there were no mental disorders that affected the person's memories or abilities to present those memories both orally and in writing. However, it was stated also that the term 'credibility of the statements' does not lie within the competency of the experts and therefore the question posed in that connection cannot be answered.

3. Conclusions

This paper has analysed the prevalence of mental disorders in forensic psychiatry and psychology expert assessment acts of a complex nature and the questions the BCP has asked of the experts in the examination rulings in the years 2011 and 2012. The following conclusions are drawn on the basis of that analysis.

If the BCP has doubts about the suspect's or accused's capability of guilt, then an expert assessment is necessary, as the designated experts possess specific knowledge that can be used to verify whether the person is or was capable of understanding the situation and able to guide his or her actions both during the commission of the act and in court, which information helps the court to formulate a just decision. It needs to be debated whether the complex expert assessment as it stands is the best method for assessing the accused, but involving expert knowledge is clearly necessary.

Assessing mental disorders is difficult without special knowledge of this field. For example, being intoxicated by psychotropic substances can produce symptoms similar to those of a more serious mental disorder. The questions asked by the BCP about the past and the present have their place in clarifying the person's mental state – as it is dynamic rather than static, changes in state clearly can take place between commission and the trial in court. However, since this paper has examined decisions solely on the basis of expert assessments regarding capability of guilt, not from court verdicts, generalisation of these findings should be performed with care.

The BCP should be more precise in wording the questions in examination rulings, especially those addressing issues dealt with in the PC's §34 (1)–(5). In cases of doubt that may nonetheless remain, the question(s) should be formulated such that if the substance is not within the competence of the experts they are to say so. The data indicated that the experts can provide answers to most categories of questions employed. There tended to be some categories of questions – such as those about inclination to criminal behaviour or veracity of statements – that produced mostly responses that these issues lie outside the competency of the experts, whereas the questions as to the compatibility of the person's status with the PC's §34 (1)–(5) were answered (i.e., those with judicial terms translated into medical terms and vice versa). However, when the BCP formulated the question in such a manner that the experts had to provide a direct answer regarding whether the person was mentally capable, incapable, or of diminished capability (in line with the PC §34 or §35), discrepancies between the experts' responses emerged: in some cases, the experts formulated a categorical decision on that question (e.g., whether the individual was capable or incapable of guilt) whilst in other cases the experts noted that stating a conclusion on this would be beyond their expertise.

Thus, there is lack of a unified view in some domains in conducting of forensic psychiatry and psychology expert assessments. Direct guidelines would be needed on how the questions should be formulated in the examination rulings.



JUSTIITSMINISTEERIUM



Notarite Koda

20 YEARS OF COMMERCIAL CODE

Estonian and European Company Law Experiences and Perspectives

Venue: Dorpat Conference Centre

Thursday, 22 October

9.30 Doors open

Plenary Session

(Struve Hall, simultaneous interpretation, web streaming)

Moderator: Paul Varul, Head of Institute of Private Law, Professor of Civil Law, University of Tartu

10.00–10.20 Opening Addresses

Erik Puura, Vice-Rector for Development, University of Tartu

Urmas Reinsalu, Minister of Justice

Priit Pikamäe, Chief Justice of the Supreme Court of Estonia

10.20–10.50 Andres Vutt, Associate Professor of Commercial Law, University of Tartu

20 Years of Estonian Company Law: Review and Prospects

10.50–11.20 Mads Andenas, Professor, University of Oslo

General Trends in European Company Law

11.20–11.50 Coffee Break

11.50–12.20 Farkhad Karagussov, Professor, Caspian State University

Development of Company Law in Kazakhstan: Main Trends and Issues

12.20–12.50 Indrek Niklus, Director of Private Law Division, Ministry of Justice

To Change or Not to Change the Commercial Code, That Is the Question Discussion

13.00–13.45 Lunch (Dorpat Conference Centre)

13.45–14.00 Book Presentation: Kalev Saare, Urmas Volens, Andres Vutt, Margit Vutt
Company Law I: Limited Companies

The book will be presented in the Baer Hall

I Session Commercial Register

Moderator: Anne Saaber, Notary in Tallinn

- 14.00–14.20 PhD Viljar Peep, Director General of Estonian Data Protection Inspectorate
Establishment and Development to Date of the Commercial Register: A Critical Review
- 14.20–14.40 Margit Veskimäe, Director of Registers Division, Ministry of Justice
Commercial Register: Problems and Possible Developments
- 14.40–15.00 Urmas Volens, Associate Professor of Civil Procedural Law, University of Tartu
Specialist Counsel, Law Firm SORAINEN
Commercial Register in 2025 – For Whom and How?
- 15.00–15.20 Paavo Uibopuu, Notary in Tartu
Commercial Register and the Role of Notary
Discussion
- 15.30–16.00 Coffee Break

II Session Protection of the Minority Partner

Moderator: Peeter Jerofejev, Justice of the Civil Chamber, Supreme Court of Estonia

- 16.00–16.30 Hans de Wulf, Professor, Ghent University
Minority Shareholder Remedies in Belgium
- 16.30–16.50 Martin Käerdi, Associate Professor of Civil Law, University of Tartu
Counsel, Raidla Ellex Law Firm
The Need and Extent of Protecting Minority Rights in Dividend Disputes – Why Case Law Cannot Adopt the Role of Legislator
- 16.50–17.10 Tanel Kalaus, Partner and Attorney-at-Law, Jesse & Kalaus Attorneys
Practical Ways of Protecting Minority Partners. Is it Actually Possible to Exercise the Rights Granted by Law?
- 17.10–17.30 Discussion
- 19.30 Festive Evening
Science Centre AHHAA, Sadama 1
From 19.00 to 23.00
The evening commences with a Science Theatre show. The guests can also visit Planetarium shows, various workshops and embark on a musical visual journey *Rännak*.

Friday, 23 October**III Session Groups of Undertakings and Their Legal Issues**

Moderator: Andrus Lillo, Attorney-at-Law, Law Office Lillo & Lõhmus

- 9.15–9.45 Pierre-Henri Conac, Professor, University of Luxembourg
The Concept of Group Interest and the Possibility of Implementing Group Interest
- 9.45–10.05 PhD Margit Vutt, Adviser to the Civil Chamber, Supreme Court of Estonia
Is Group Liability Possible in Estonia?
- 10.05–10.25 Karl Kull, Doctoral Student, Faculty of Law, University of Tartu, Associate, Law Office COBALT
Group Financing and Financial Assistance
Discussion
- 10.45–11.15 Coffee Break

IV Session Governance Standards and Liability

Moderator: LLM Norman Aas, Secretary General of the Ministry of Justice

11.15–11.35 Kalev Saare, Associate Professor of Civil Law, University of Tartu, Senior Associate, Law Office COBALT
Obligation to Avoid the Conflict of Interests

11.35–11.55 PhD Marko Kairjak, Partner and Attorney-at-Law, Law Office VARUL
Levels of Accessoriness of Criminal Law Towards Civil Law – the Example of Director’s Criminal Liability

11.55–12.15 PhD Leonid Tolstov, Partner and Attorney-at-Law, Law Office VARUL
The Possibility of Tort Liability of Management Board Member in Cases of Disclosure of Untrue Statements

12.15–12.35 PhD Iko Nõmm, Judge of Tallinn Circuit Court
Director’s Liability through the Eyes of a Judge
Discussion

12.45–13.30 Lunch (Dorpat Conference Centre)

Panel Discussion – How Can the Law Help the Economy?

(Dorpat Conference Centre, Struve Hall, web streaming)

Moderator: Hardo Pajula, Economic Expert

13.30–15.00 Panelists: Mait Palts, Director General of the Estonian Chamber of Commerce and Industry,
Juhan Parts, Member of the Estonian Parliament (Riigikogu) and Erkki Raasuke,
Management Board Member of LHV Group

15.00 Closing of Conference