



Digitalisation of Enforcement Proceedings

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ARTICLE

ABSTRACT

This article focuses on the compatibility of electronic enforcement proceedings and the right to a fair trial. Since Article 6 of the European Convention on Human Rights is applicable to enforcement proceedings, enforcement proceedings must be effective and satisfy the requirement of fair trial. Electronic enforcement proceedings need to find a fair balance between accelerated enforcement and protection of human rights. Thus, the authors analyse what procedural guarantees of fair trial are applicable in electronic enforcement proceedings and how they are compatible with the protection of human rights. In order to answer these questions, the authors first analyse what procedural guarantees of fair trial are applicable in electronic enforcement proceedings and what is the application, *ratione personae*, of Article 6 of the ECHR in such proceedings. Second, the authors focus on some specific issues of electronic enforcement proceedings: electronic issuance and submission of enforceable documents and electronic auctions. The analysis encompasses the relevant case law of the European Court of Human Rights, and the regulation of enforcement proceedings and case law of various states. Third, the authors discuss the problems of liability for violations of the right to fair electronic enforcement proceedings.

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1. INTRODUCTION

The use of electronic communication tools in litigation is well recognized.¹ However, though the problems of effectiveness of enforcement proceedings have attracted scholars' attention,² analysis of the use of electronic communication tools in enforcement proceedings is still scarce. Also, there is a lack of international standards and requirements related to the protection of human rights (such as the right to fair enforcement, right to property and right to private life) in electronic enforcement proceedings. For instance, the Guidelines on Electronic Evidence in Civil and Administrative Procedure prepared by the Council of Europe³ (the CoE) deliberately excluded enforcement proceedings from its application due to the specific nature of such proceedings.

The need for and promotion of digitalization of enforcement proceedings is recognized in the Good Practice Guide on Enforcement of Judicial Decisions⁴ which emphasizes that dematerialization of enforcement procedures helps to save time in the implementation of certain protective or enforcement measures and increases the potential number of purchasers at public auctions. However, it is unclear how electronic enforcement proceedings are compatible with the right to a fair trial deriving from Article 6 of the European Convention on Human Rights (the ECHR). The use of electronic enforcement proceedings is relevant not only for national proceedings, but also in cross-border enforcement of civil judgment and other enforceable documents.

This article focuses on the compatibility of electronic enforcement proceedings with the requirements for fair enforcement proceedings deriving from Article 6 of the ECHR and analyses certain aspects of electronic enforcement proceedings, namely: what elements of the right to a fair trial are applicable in such cases; the *ratione personae* application of Article 6 of the ECHR in electronic enforcement proceedings; and what are the specific features of these rights in certain aspects of electronic enforcement proceedings. In addition, the authors analyse the problems of the liability of a Member State of the ECHR for unfair electronic enforcement proceedings. The national laws of Estonia, Germany, Latvia, Lithuania and Poland are assessed since, in these countries, certain aspects of enforcement proceedings are digitalized, for instance, submission of enforcement titles to the bailiff (the enforcement agent) by electronic means, organization of electronic auctions in which debtors' assets are sold. Such comparative analysis is important to reveal the problems of digitalization of enforcement proceedings and analyse how different states deal with the challenges related to ensurance of the procedural guarantees under Article 6 of the ECHR in these proceedings.

2. APPLICATION OF ARTICLE 6 OF THE ECHR IN ELECTRONIC ENFORCEMENT PROCEEDINGS

Analysis of fair electronic enforcement proceedings (efficiency, equality of arms and other principles) begins with the question of the application of Article 6 of the ECHR in such proceedings. In 2010 the CoE published Opinion No13 (2010) on the role of judges in the enforcement of judicial decisions, in which it noted that enforcement should be understood as putting into effect judicial decisions and also other judicial or non-judicial enforceable titles. The effective enforcement of a binding judicial decision is a fundamental element of the rule of law. Independence and the right to a fair trial is in vain if the decision is not enforced. The enforcement procedure must be implemented in compliance with fundamental rights and freedoms.⁵

¹ 'The Guidelines on Electronic Evidence in Civil and Administrative Procedure' adopted by the Committee of Ministers on 30 January 2019, CM(2018)169—add1final; M Świerczyński and R Jokubauskas, 'Impact of the Council of Europe Guidelines on Electronic Evidence in Civil and Administrative Law' 2020 9(1) *Global Journal of Comparative Law* 1–16; M Świerczyński and R Jokubauskas, 'Is revision of the Council of Europe guidelines on electronic evidence already needed?' 2020 16(1) *Utrecht Law Review* 13–20; M Świerczyński and R Jokubauskas, 'Electronic Evidence in Intellectual Property Disputes under the Council of Europe's Guidelines' 2020 14(2) *Masaryk University Journal of Law and Technology* 303–320; Council of Europe, 'Online dispute resolution mechanisms in civil and administrative court proceedings 2021' adopted by the Committee of Ministers on 16 June 2021 CM(2021)36add4-final.

² C H van Rhee and A Uzelac, *Enforcement and Enforceability* (Intersentia 2010); J von Hein and T Kruger, *Informed Choices in Cross-Border Enforcement* (Intersentia 2021).

³ Guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings adopted by the Committee of Ministers on 30 January 2019, at the 1335th meeting of the Ministers' Deputies, CM(2018)169—add1final.

⁴ The Good Practice Guide on Enforcement of Judicial Decisions adopted by the European Commission for the Efficiency Of Justice (2015) CEPEJ(2015)10.

⁵ Council of Europe Opinion no13 (2010), paras 6–8.

The ECHR does not indicate that the right to a fair trial applies to litigation in court only, and not to enforcement proceedings as well. However, in the landmark case *Hornsby v Greece*, the European Court of Human Rights (the ECtHR) found that execution of a judgment given by any court must be regarded as an integral part of the ‘trial’ for the purposes of Article 6.⁶ Consequently, the standards of the right to a fair trial established in Article 6 of the ECHR must be applicable in enforcement proceedings, meaning that enforcement must ensure the real protection of human rights. Also, the court found that the right asserted does not actually become effective until enforcement.⁷ The right to a fair trial would be illusory if a domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.⁸ Therefore, effective implementation of judicial decisions is an indispensable part of the right to a fair trial.

The rationale that enforcement proceedings are an integral part of litigation in court (a trial) has also been affirmed by later case law of the ECtHR⁹ and by the CoE. For instance, in 2003 the CoE adopted the Recommendation in which it stated that the enforcement of a court judgment is an integral part of the fundamental human right to a fair trial within a reasonable time, in accordance with Article 6 of the ECHR.¹⁰

Nevertheless, the legal debate on the application of Article 6 of the ECHR to enforcement proceedings in general is far from over. The first question which arises is to what extent the guarantees of the right to a fair trial are applicable to enforcement proceedings. What procedural guarantees (elements) of the right to a fair trial established in Article 6 of the ECHR and the case law of the ECtHR could be applicable in enforcement proceedings? Who will guarantee these procedural guarantees when the actual enforcement is carried out by a bailiff (private or public)? These questions will be addressed in detail in this article.

The application of the right to a fair trial in enforcement proceedings may provide some guidance as to how electronic enforcement proceedings can be compatible with Article 6 of the ECHR. The ECHR underlines the importance of administering justice without delays which might jeopardise its effectiveness and credibility.¹¹ Undoubtedly a certain time limit for enforcement proceedings depends on each case. Nevertheless, reasonable delays in enforcement proceedings may happen which can be justified in particular circumstances, but they must not be such as to impair the essence of the right protected under Article 6 of the ECHR.¹²

To ensure effective legal remedies and execution of enforcement titles, enforcement proceedings must be prompt. The first procedural guarantee of the reasonable length of enforcement proceedings might be achieved when electronic communication tools between the court and the bailiff can be used. For instance, the application to issue an enforceable document and submission of this document to the bailiff. Also, a crucial part of this guarantee might be the realization of a debtor’s assets by electronic auction which primarily does not require the participants in the auction to come to a certain place and ensures the widest possible spread of the organization of the auction to the public. Thus, access to a bailiff by electronic means and electronic auction may be regarded as the ‘extension’ of the right to access to court in enforcement proceedings, meaning that the persons in enforcement proceedings have a better chance to participate in enforcement proceedings by electronic means. Nevertheless, the organization of an electronic auction, though accepted in some Member States of the ECHR, may breach the equality of arms principle which in essence means that both parties must have a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage vis-à-vis the other party.¹³ In addition, the regulation and

6 *Hornsby v Greece* App no 18357/91 (ECtHR, 19 March 1997), para 40.

7 *Cocchiarella v Italy* App no 64886/0 (ECtHR, 29 March 2006), para 88.

8 *Hornsby v. Greece* (n 6), para 40.

9 *Metaxas v Greece* App no 8415/02 (ECtHR, 27 May 2004), para 25.

10 Council of Europe Recommendation Rec (2003) 17 of the Committee of Ministers to Member States on Enforcement.

11 *Katte Klitsche De La Grange v Italy* App no 12539/86 (ECtHR, 27 October 1994), para 61.

12 *Užkurėlienė and others v Lithuania* App no 62988/00 (ECtHR, 7 April 2005), para 31.

13 *Regner v the Czech Republic* App no 35289/11 (ECtHR, 19 September 2017), para 146.

organization of public auctions must not only aim to serve the interests of the debtor, but also those of the creditor and possible buyers who may suffer financial loss if the public auction is not organized properly.

Another critical aspect of the application of Article 6 of the ECHR in enforcement proceedings concerns its application *ratione personae* (the parties and interested persons in the case). However, the application *ratione personae* of Article 6 of the ECHR in enforcement proceedings raises difficulties. Since, pursuant to *Hornsby v Greece*, enforcement of the judgment is regarded as a continuation of the litigation in the court, the litigants also enjoy the guarantees of Article 6 in enforcement proceedings. However, enforcement proceedings are complex and involve various stakeholders, for instance, the buyers of a debtor's assets amongst others. Thus, it is important to analyse whether other persons (not parties to the case) enjoy the procedural guarantees of Article 6 of the ECHR in enforcement proceedings.

In general, the parties (the creditor and the debtor) have the primary interest in effective enforcement proceedings. Thus, the parties to the enforcement proceedings always enjoy the procedural guarantees under Article 6 of the ECHR and can demand that the person responsible for the enforcement of an enforceable document comply with these guarantees. However, this rationale should not mean that other persons are excluded from the *ratio personae* application of Article 6 of the ECHR in enforcement proceedings. These persons may also claim violation of fair electronic enforcement proceedings, but only in cases where a dispute arises. For instance, if the asset of the debtor belongs to several persons and the asset is seized and is to be sold in enforcement proceedings, in such a case these persons have recourse to the court and dispute enforcement actions (selling of the property), and they also enjoy the procedural guarantees under Article 6 of the ECHR related to the selling of the assets at the electronic auction.

Often debtors are not willing to participate in enforcement proceedings, or cooperate with the bailiff. The lack of debtors' cooperation means that the bailiff has to employ coercive measures such as searching and seizing debtors' assets (in the case of enforcement of pecuniary enforcement titles) and others. It increases costs of enforcement proceedings and delays enforcement of the enforcement title. Thus, even in those enforcement proceedings when coercive measures are employed, the debtor should also participate actively (for instance, provide information about the assets, answer requests by the bailiff) rather than hiding from the creditor and concealing property. The European Commission for the Efficiency of Justice stated that, as far as it is possible and without slowing down enforcement procedures, states should encourage debtors to take part in enforcement procedures concerning them. The principle of equality of parties is applicable in enforcement proceedings as well.¹⁴ As in litigation, in enforcement proceedings each party must be afforded a reasonable opportunity to present his or her case (positive element). A party cannot be placed at a substantial disadvantage vis-à-vis the other party (negative element).

In conclusion, the basic elements of the right to a fair trial, such as the requirement of a trial of a reasonable length, and the equality of parties, are applicable in enforcement proceedings. However, not every person in the enforcement proceedings enjoys this right. Application *ratione personae* of Article 6 of the ECHR encompasses primarily the parties to the enforcement proceedings; other persons may only enjoy this right and claim the violation of it online when a dispute arises regarding the lawfulness of enforcement proceedings. These conclusions are relevant for the further analysis of the peculiarities of electronic enforcement proceedings and how these proceedings are to be compatible with Article 6 of the ECHR. The further analysis reveals how the right to fair enforcement proceedings is applicable in certain procedural aspects of electronic enforcement proceedings.

3. ELECTRONIC ISSUANCE AND SUBMISSION OF ENFORCEABLE DOCUMENTS

The basis of enforcement proceedings is an enforceable document (an enforcement title). The notion and requirements for enforcement titles vary greatly between the Member States of the ECHR. In general, it should be regarded as the document which establishes how court

¹⁴ M Žemkauskas, M Kirkutis, V Višinskis, 'Bendrujų civilinio proceso principų taikymas civiliniame procese' (2020) 27(2) *Jurisprudence* 525.

decisions (or another legal act) are to be enforced. An enforcement title may be defined as a judicial act (or a non-judicial act) establishing a party's right to receive payment of a debt, on the basis of which national legislation allows the use of enforcement measures.¹⁵ Without an enforceable document, enforcement proceedings are null.¹⁶ Also, all the actions of a bailiff must be compatible with an enforceable document.

Enforcement proceedings are commenced when the creditor submits an enforcement title to the bailiff who accepts this document (unless there are grounds for non-acceptance of the enforcement title established in the national law) and starts an enforcement action. One of the ways to accelerate enforcement proceedings is to organize the procedure of issuance and submission of an enforceable document in electronic form. However, in such a case it is important to guarantee that only the person who has the right to obtain an enforceable document can apply for it. Below, we will discuss a few examples of the international standards for effective enforcement proceedings and the rules of the national law of the Member States of the ECHR which regulate submission of enforcement titles to the bailiff. The authors chose to analyse the law of those Member States of the ECHR which have established certain rules as to how enforcement titles can be submitted to the bailiff in electronic form (online) without bringing the enforcement title to the office of the bailiff.

The Guidelines for a Better Implementation of the Existing Council of Europe's Recommendation on Enforcement establish that, at the stage of the enforcement of decisions, swift communication (such as e-mail) between the court, the bailiff and the parties should be possible.¹⁷ Thus, the use of electronic communication tools in enforcement proceedings is acceptable and encouraged.

According to Article 23(6) of the Code of Enforcement Procedure of the Republic of Estonia,¹⁸ an application for enforcement and an enforcement instrument may be submitted by electronic means. The application must bear the digital signature of the sender. Thus, the application for issuance of an enforceable document can be submitted in electronic form when the identity of the applicant can be established. Also, pursuant to Article 33(6) of the Code of Enforcement Procedure, a bailiff must register and record enforcement instruments and enforcement actions electronically pursuant to the procedure established by a regulation of the Minister responsible for these matters. The electronic form of an enforceable document is also established in Article 783(3¹) of the Code of Civil Procedure of Poland.¹⁹

A simplified electronic procedure of enforcement in the case of writs of execution is also found in German law. It seems that use of electronic communication systems by creditors, however, is applicable only in a limited number of enforcement cases. Pursuant to Article 892a(1) of the Code of Civil Procedure of Germany,²⁰ in cases in which an electronic petition is filed for compulsory enforcement under a writ of execution which does not require a court certificate of enforceability, forwarding the executed copy of the writ of execution may be dispensed with in the case of a monetary claim being attached and transferred, provided that the monetary claim due, that is set out in the writ of execution, does not amount to more than 5,000 EUR.

In Lithuania persons have a right to submit an enforceable document and other procedural documents to the bailiff in electronic form via the Electronic Enforcement File Portal. According to Article 43¹(2) of the Law on Bailiffs of the Republic of Lithuania,²¹ the parties to the enforcement proceedings and the interested persons have the right to submit all documents and information related to the enforcement proceedings to the bailiff in electronic form, using electronic means of communication. The Electronic Enforcement File Portal²² is governed by

¹⁵ The Good Practice Guide on Enforcement of Judicial Decisions adopted by the European Commission for the Efficiency Of Justice (2015) CEPEJ(2015)10.

¹⁶ Article 586 of the Code of Civil Procedure of the Republic of Lithuania; Article 549(1) of the Code of Civil Procedure of the Republic of Latvia.

¹⁷ Guidelines for a Better Implementation of the Existing Council of Europe's Recommendation on Enforcement adopted by the European Commission for the Efficiency Of Justice (2009) CEPEJ(2009)11REV2.

¹⁸ Code of Enforcement Procedure of the Republic of Estonia (2014), RT I 2005, 27, 198.

¹⁹ Polish Code of Civil Procedure of 17 November 1964, Polish Journal of Laws of 1964, No 43.

²⁰ Code of Civil Procedure, Bundesgesetzblatt BGBl., Federal Law Gazette.

²¹ Law on Bailiffs of the Republic of Lithuania, Žin., 2002, Nr. 53-2042.

²² See <https://www.antstoliai.lt/vbp/public>.

the State Enterprise Centre of Registers. By using this portal, a person can check if there is any enforcement process with reference to him/her, submit documents to the bailiff for accepting the electronic enforcement document for enforcement, submit a free-form document to the judicial officer and look through the information in the enforcement file, and view actions performed by the judicial officer in the enforcement process and the documents in the file in real time.

One of the main practical issues of submission of an enforceable document in electronic form is how to ensure the identity of the person who submits the application and accordingly how to log in to the electronic enforcement system. In Lithuania a person can log in to the Electronic Enforcement File Portal with a certificate; an identity card; mobile electronic signature; and via an electronic banking account. It means that the Electronic Enforcement File Portal in Lithuania is connected with the data of commercial banks and mobile service providers. Thus, there are a number of ways and technological solutions concerning how persons can submit enforceable documents online.

Furthermore, a particularly important recent amendment of Article 650(3) of the Code of Civil Procedure of the Republic of Lithuania (CCP Lithuania) was made regarding the submission of an application to commence pecuniary enforcement proceedings and communication between bailiffs and persons participating in enforcement proceedings. According to the amendment, the use of electronic communication means in enforcement proceedings has become a priority. Thus, in enforcement proceedings concerning the recovery of sums of less than 1,000 EUR, procedural documents must be sent to participants in enforcement proceedings by electronic means, except for those cases where the procedural document is sent by registered mail. In enforcement proceedings concerning the recovery of sums of more than 1,000 EUR, procedural documents are sent to participants in enforcement proceedings by registered mail; however, upon written request of the participant in the proceedings, procedural documents may be sent by electronic means alone. Thus, these recent amendments suggest that communication between the bailiff and participants in enforcement proceedings should be electronic. The reasons for this amendment are acceleration of enforcement proceedings and saving of costs.

In addition the new order of distribution of enforcement documents among the bailiffs has been introduced. Formerly, the creditor had the right to choose the bailiff to enforce an enforceable document. However, according to the amendment to Article 650(3) of the CCP Lithuania, enforcement documents for the recovery of sums of money are distributed to bailiffs by the Bailiffs' Information System. According to this system, enforceable documents are distributed in proportion to all bailiffs operating in that area of activity, taking into account the categories of enforcement documents and the amount to be recovered. Therefore, a creditor no longer has the right to choose a bailiff to enforce the enforcement document since it will be automatically distributed to any available bailiff. However, this regulation applies only for enforcement documents for the recovery of sums of money (pecuniary enforcement proceedings).

A right to submit enforcement titles to the bailiffs in electronic form has already been recognized in various Member States of the ECHR, at least in Estonia, Germany, Lithuania and Poland. The authors believe that the use of electronic communication systems in enforcement proceedings significantly contributes to the effectiveness of enforcement proceedings and allows the participants in these proceedings to access the bailiff more smoothly and effectively. Prompt initiation of enforcement proceedings is important to accelerate enforcement proceedings, and reduce costs of enforcement proceedings. Thus, submission of enforcement titles to the bailiff by electronic means should be encouraged and it contributes to effectiveness of fair enforcement proceedings.

4. PUBLIC ELECTRONIC AUCTIONS

One of the major problems of effectiveness of enforcement proceedings is realization of a debtor's assets and satisfaction of a creditor's claim. In enforcement proceedings a debtor's assets should be sold at the market value. The requirement of fair and effective enforcement proceedings requires that the debtor's assets must be sold promptly and for the highest possible market price. The problem arises when a debtor's assets are sold below the market value, meaning that less money remains for the satisfaction of costs and enforcement proceedings and the creditor's claim. Such a situation also raises concerns about the restriction of the right to property of a debtor.

One of the general methods of selling a debtor's property is a public auction in which all interested persons can participate and make bids. The significance of this method is that all interested persons must have easy access to the auction and be able to participate in the bidding procedure. However, standard public auction procedures involve a number of logistical and financial issues since all interested parties have to gather at a certain place, assess the asset, and submit bids, and the bailiff has to maintain order and organize all the procedures. So, electronic auctions can tackle the problems of standard public auctions and significantly increase the effectiveness of enforcement proceedings.

The possibility of allowing everyone to make bids in an electronic auction is required in order to reach the main goal of this procedure, which is to sell the debtor's property at a price which is, at least, not lower than the market price. Thus, this would logically mean that the more people who know about the auction, the more chances there are that the selling of the debtor's property will be efficiently carried out. The aim of a public auction is also related to the requirement for the public hearing of a case in the court which is a fundamental aspect of the right to a fair trial.²³ However, in enforcement proceedings the publicity of the auction not only ensures lawfulness of proceedings, but also significantly contributes to the aim to sell the debtor's assets for the highest possible market price. It should be noted that the organization of public auctions is also coupled with the protection of a debtor's property which is protected by Article 1 of Protocol 1 of the ECHR. The ECtHR has ruled that, in enforcement proceedings, the debtor should have an opportunity to have their property sold at a price corresponding to its market value.²⁴ In addition, the selling of the debtor's property in the auction must correspond to the value of enforcement. For instance, if the recovery sum is comparatively low, the selling of the debtor's assets which have a much higher value may contravene Article 1 of Protocol 1 of the ECHR.²⁵

The procedure of electronic public auction is recognized in various Member States of the ECHR. According to Article 78(1) of the Code of Enforcement Procedure of the Republic of Estonia, a bailiff must sell seized movables at a public electronic auction, unless otherwise provided in this code. Article 88¹ (2) of this code establishes that an electronic auction must be open for at least five working days. Thus, the law establishes a strict and rather short period for the auction process. Article 91(2) establishes that, at an electronic auction, the bid with the highest price submitted in the auction environment by the end of the auction is declared to be the winner. Also, the law ensures the lawfulness of electronic auction by establishing the right to appeal the auction process to the court. Pursuant to Article 92¹ of this code, participants in an electronic auction may submit objections concerning the conduct of the auction within the working day following the date of termination of the auction.

The selling of a debtor's property in electronic auctions is also established in Latvian law. According to Article 587(1) of the Code of Civil Procedure of the Republic of Latvia, a participant in an auction may electronically make bids from the time when he or she is authorized to participate in the auction. Article 587(7) establishes that, after the end of the auction, notification must be sent to the highest bidder, electronically via the user account of the site of electronic auctions registered in the Register of Participants of Auctions, that they have made a higher bid than anyone else and the obligation to pay the whole amount due arises then. Pursuant to Article 605¹ (1) of this code, a site of electronic auctions is a module of the Register of Enforcement Cases which ensures: posting of notices regarding auctions; registration of participants in the auction; accumulation of information regarding registered participants in the auction; authorization of the registered participants in the auction to participate in the announced auction; and also a set of technological tools for making and registering bids. The procedures for an Auction of Immovable Property are regulated in detail in Article 608 of the code.

In Lithuania auctions in enforcement proceedings are only electronic. Persons can participate in the auction, make bids and buy property without any physical meetings (e-auction system). This is important for increasing the publicity of auctions and public interest. All public auctions

²³ *De Tommaso v Italy* App no 43395/09 (ECtHR, 23 February 2017), para 163.

²⁴ *Kanala v Slovakia* App no 57239/00 (ECtHR, 7 October 2007), para 61.

²⁵ *Vrzić v Croatia* App no 43777/13 (ECtHR, 12 July 2016).

in Lithuania are found on one web page. Various types of property can be sold at public auction (dwellings, buildings, vehicles and other types of property). All types of property can be easily found in the portal. Each object is thoroughly described and photographs and other additional information (location, distinctive features) of the object are provided. The basic rule of the public electronic auction is that the person (bidder) who submits the highest bid is regarded as the winner of the auction.

The sale of property in electronic auctions ensures transparency and publicity of the auction, a larger number of participants in the auction, and more active competition for the property being sold.²⁶ Effective and efficient auctions, in which assets are sold at the highest possible price, are not only an important precondition for ensuring the enforcement of a judgment, but also a means of balancing the legitimate interests of the participants in the enforcement process (debtor and collector) and other interested parties.

The procedure of electronic auctions is strictly regulated. For instance, the rules of organization and participation in electronic auctions in civil proceedings are regulated by the Code of Civil Procedure of the Republic of Lithuania which establishes when the auction is to be announced and ended. The auction is announced on weekdays from 09:00 to 14:00. The start of the auction is the moment of its publication on the special website.²⁷ The auction ends after thirty days when selling real estate and other property registered in accordance with the procedure established by law, as well as other movable property, when the unit value of such property exceeds 30,000 EUR, or after twenty days when selling all other assets.²⁸ It should be noted that a person who wants to participate in the auction has to meet certain requirements. One of the main requirements is that such a person must pay an auction participant's fee, which is 10 per cent of the initial price of the property for sale.²⁹

Nevertheless, the organization of electronic auctions presents challenges due to its electronic form. Since an electronic auction is organized online, it means that it is open to the general public and everyone can participate in the auction, make bids and buy assets. One of the aspects of fair auction process is that it is deemed that only persons who are really willing to acquire an asset should make bids. If the winner of a public auction fails to buy an asset and pay the price, a new auction must be organized and consequently the enforcement proceedings and procedural expenses will increase. Thus, the regulation of enforcement proceedings must establish a mechanism to avoid frivolous bids and encourage a participant to pay the price for the assets if the participant is a winner. In Lithuania and Latvia this problem is addressed by establishing a requirement to pay a certain amount as security in order to participate in the electronic auction. According to Article 607(1) of the Code of Civil Procedure of the Republic of Latvia, a person who wishes to participate in an auction of immovable property must pay a security, amounting to 10 per cent of the assessment of the value of the immovable property, into the deposit account of the bailiff indicated in the notice of the auction, within 20 days from the initial date of the auction indicated in that notice, and must send a request to the bailiff to authorize him or her to participate in the auction. A similar rule is established in Article 710(1)(4) of the Code of Civil Procedure of the Republic of Lithuania. Consequently, if the participant who is the winner of the electronic auction fails to pay the price, this security will be used by the bailiff in enforcement proceedings for satisfaction of creditor's claim.

According to Lithuanian case law, the essential purpose of the bidder's fee is to ensure the seriousness of the bidder's intention to participate in the auction and to buy the assets sold from the auction, if the bidder is found to be successful.³⁰ Another aim of this sanction is to deter frivolous bids. In addition, the sanction is proportional, since the higher the price of the property sold, the higher the sanction applied for non-refund of the auction participant's fee to a particular participant for abuse, in the enforcement process.³¹

²⁶ Case No. e3K-3-202-1075/2020 (Supreme Court of Lithuania, 1 July 2020).

²⁷ Article 713(3) of the Code of Civil Procedure of the Republic of Lithuania.

²⁸ *ibid* Article 713(4).

²⁹ *ibid* Article 710(1)(4).

³⁰ Case No. e3K-3-202-1075/2020 (n 22).

³¹ *ibid*.

Another issue which is associated with an electronic auction is that the participants have to raise the price (bid) by using electronic communication devices. The problem is that a participant can simply make a *mistake* and consequently make a wrong bid. For instance, a participant can write in the box of the electronic auction platform an incorrect number, for instance, 100,000 instead of 10,000 EUR. Such a mistake may not be obvious at the moment when the bid is made, but it brings consequences later, if the person is the winner and fails to buy the asset (namely, a person loses the auction participant's fee, and a new auction must be organized).

This problem has also been addressed in recent Lithuanian case law. In one case the participant in enforcement proceedings argued that his wish to bid for the property being sold in an electronic auction was fundamentally flawed and requested the application of the rules governing the invalidity of transactions (contracts) to annul the bid. The applicant argued that in the auction he made a mistake by manually offering a price of 180,000 EUR for the property on sale, instead of 118,000 EUR which he intended to bid. The Supreme Court of Lithuania found that the applicant's error in submitting the bid was due to his gross negligence, as the applicant did not check, in sufficient time after the last bid, that the bid was correctly entered into and in accordance with the applicant's actual will, and the court stated that the method of selling the debtor's property by auction, as a special procedural form of realization of property, is regulated by the norms of public law. The court emphasized that in the electronic auction the participants must be extremely careful and attentive when making bids. Also, sufficient safeguards are in place to protect a diligent and attentive bidder so that, in the event of an error in entering a bid, that person has the opportunity to change the bid without incurring any financial loss.³²

Thus, the relevant case law suggests that a participant in public electronic auctions must be cautious and diligent. Although the system of electronic auctions must establish certain safeguards to avoid unwilling (unconscious) bids, the participant is responsible for knowing the procedure concerning the making of bids. To ensure fair electronic enforcement proceedings, the state must establish certain safeguards and protection of participants in electronic auctions when there is a possibility of making a mistake in certain decisions, such as bidding for a higher price. Such a mechanism should prevent participants from making unreasonable decisions and ensure that the proposed bid reflects their true intentions.

5. LIABILITY FOR VIOLATIONS OF THE RIGHT TO FAIR ELECTRONIC ENFORCEMENT PROCEEDINGS

If the guarantees of Article 6 of the ECHR are applicable, at least to some extent, in electronic enforcement proceedings, the question arises as to who is liable for the violation of this Article in such proceedings. In various states the court is only a passive supervisor of enforcement proceedings, meaning that courts do not supervise (control) enforcement actions, but only settle the disputes which arise during the enforcement stage. Thus, the question is, who is to ensure the right to fair enforcement proceedings? How do the specific features of electronic enforcement proceedings impact the liability for violation of Article 6 of the ECHR in such cases? Various models of bailiffs exist in national legislation. In some states a bailiff is a state agent, in others this is a private profession and a third mixed model (private and public) is possible.

The ECtHR has found that the right of access to a court cannot oblige a state to have every single civil judgment executed, no matter what the judgment or the circumstances.³³ Exceptions to liability of the state can be found when the judgment creditor fails to take certain actions.³⁴ Also, authorities are accorded some discretion where enforcement could disturb the public order or where rights of others are involved.³⁵ Some authors suggest that, pursuant to the case law of the ECtHR, the right to enforcement does not entail an absolute right to obtain what was

³² *ibid.*

³³ *García Mateos v Spain* App no 38285/09 (ECtHR, 19 February 2013), para 42.

³⁴ *Fuklev v Ukraine* App no 71186/01 (ECtHR, 7 June 2005).

³⁵ M Hazelhorst, *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial* (Springer 2017) 160.

awarded by the decision and in such disputes the ECtHR reviews whether the authorities acted adequately and sufficiently.³⁶

Therefore, it seems that the state is primarily responsible for effective electronic enforcement proceedings and this duty is carried out by the state irrespective of which enforcement system (private, public or mixed system) is established in the national law, unless exceptions under the case law of the ECtHR can be found. Consequently, a breach of this duty may lead to the responsibility of the Member States of the ECHR under Article 6 of the ECHR.

One of the cases when liability of the state in electronic enforcement proceedings may arise is organization of electronic auctions. Since the state has a duty to ensure effective enforcement proceedings, it must also ensure the standards of the right to a fair trial.

First of all, the state must ensure that the electronic auction platform is user friendly and supplies all necessary information regarding how an electronic auction is organized and its order of procedure. For instance, the Supreme Court of Lithuania found that the fact that there was no information on the website of an electronic auction regarding what Internet browsers should be used could be regarded as violation of the duty of care, but does not itself give rise to civil liability.³⁷ However, even though the state governs and regulates electronic enforcement tools, the courts do not accept the position that the state is automatically liable even when the state institutions have failed to implement certain aspects. According to the case law of the Supreme Court of Lithuania, the balance of public and private interests in enforcement proceedings must be ensured. The fact that the state institutions have not properly implemented the law cannot of itself be used against any of them, if there are no grounds to establish that the subjective rights of a person have been materially violated as a result of such inaction by the state.³⁸

Moreover, participants in enforcement proceedings should be diligent. In other words, if a person makes a mistake or incorrectly interprets the regulation of enforcement proceedings, it should not mean that the state is liable under the ECHR if the person suffers harm. Thus, the participants in electronic auctions should be diligent and careful. For instance, in one case the claimant argued that he had made a mistake (bidding an unreasonable price) since he clicked, on the web page of the electronic auction, the box “Propose” (*Siūlyti*) and consequently then on the box “Do you really propose?” (*Ar tikrai siūlote?*). The claimant argued that both boxes appeared on the screen one immediately after the other and on the same spot (one after the other), thus he did not have a chance to correct the mistake. Nevertheless, the court found that the claimant ought to have acted more diligently and carefully and the information provided in the guidebook on electronic auctions and the safeguards against bidding an unreasonable price were sufficient to ensure that the enforcement proceedings were fair.³⁹

Therefore, even though the state is theoretically liable for violation of Article 6 of the ECHR in enforcement proceedings, it is important to consider all relevant factual circumstances which might exempt a state from such liability. Also, participants in electronic enforcement proceedings should act diligently and carefully. The lack of diligence on the part of the participant in electronic enforcement proceedings should not give rise to the liability of the state when the organization and order of the proceedings is simple and all relevant information is provided.

6. CONCLUSIONS

1. Application of Article 6 of the ECHR in enforcement proceedings means that these proceedings must be effective and the procedural guarantees established under this Article should be ensured. However, due to the specific nature of enforcement proceedings, only part of the procedural guarantees of the right to fair trial are applicable to them (at the least, the requirement for a reasonable length of enforcement, and equality of parties). Also, not all persons in enforcement proceedings enjoy the protection

³⁶ *ibid* 161.

³⁷ Case No. e3K-3-171-969/2020 (Supreme Court of Lithuania, 27 May 2020).

³⁸ Case No. e3K-3-592-469/2015 (Supreme Court of Lithuania, 13 November 2015).

³⁹ Case No. e3K-3-171-969/2020 (n 34).

under Article 6 of the ECHR. Application *ratione personae* of Article 6 of the ECHR encompasses in essence the parties to the enforcement proceedings (the creditor and the debtor).

2. Electronic communication between participants in enforcement proceedings and the bailiff has had a significant impact on the effectiveness of enforcement proceedings. In various countries such as Estonia, Latvia and Lithuania, the electronic enforcement system has been established and it allows submission of enforceable documents and other procedural documents to the bailiff via the special Internet website. Such electronic communication increases access to enforcement proceedings and saves enforcement costs.
3. The electronic auction in enforcement proceedings contributes to the publicity of enforcement proceedings and allows the debtor's assets to be sold at the highest possible market price. However, in order to ensure effective enforcement proceedings, certain safeguards concerning electronic auctions must be established. A certain initial auction fee should be required in order for a person to participate in the auction as this discourages frivolous bids made without a serious intention to acquire the property. In addition, the electronic system of auction has to be user-friendly and not require specific technical and legal knowledge.
4. The state has the duty to ensure effective electronic enforcement proceedings and it is carried out by the state irrespective of which enforcement system is established in the national law. Violation of this duty may lead to the liability of the Member States of the ECHR under Article 6 of the ECHR. Nevertheless, the participants in electronic enforcement proceedings should also act diligently and, under certain circumstances, the liability of the state can be exempted.

COMPETING INTERESTS

The authors have no competing interests to declare.

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