# The Austrian Enforcement Administrator

Martin TRENKER*

## 1. Introduction

The concept of an administrator operating in enforcement proceedings – hereinafter referred to as: the *enforcement administrator* – is a very recent development in Austrian law. It was introduced as part of a comprehensive reform of Enforcement Law in 2020 ("Gesamtreform des Exekutionsrechts 2020"),[1] which in general brought significant changes to the Enforcement Code ("Exekutionsordnung", hereinafter simply: EO).[2] The implementation of the enforcement administrator,[3] however, can be named as one of the most notable innovations. With a high degree of autonomy, the enforcement administrator is tasked with carrying out enforcement measures relating to movable property. His responsibilities include identifying the obligor's relevant assets, seizing and realising those assets, and ultimately distributing the proceeds.

The primary objective of this reform is to enhance the effectiveness and efficiency of the proceedings in order to enforce monetary claims against movable assets. By streamlining the process, enforcing creditors are expected to achieve improved realisation outcomes with reduced procedural effort.[4] In order to better understand how these objectives are to be met, it is essential to first examine the scope of the enforcement administrator. For this purpose, some additional context is necessary.

## 2. Scope of application of the enforcement administrator

### *2.1. Limitation to monetary enforcement against movable assets*

At the outset, it is important to clarify that the enforcement administrator's role is confined exclusively to the enforcement of monetary claims.[5] Even within this context, his

---

* This is the English manuscript of Prof. Dr. Martin Trenker, Faculty of Law, University of Innsbruck, delivered at Ritsumeikan University on November 9, 2024.

1) See BGBl (Federal Law Gazette: "Bundesgesetzblatt") I 2021/86.

2) RGBl (Imperial Law Gazette: "Reichsgesetzblatt") 1896/79.

3) §§ 79 et seqq EO.

4) See ErlRV 770 BlgNR 25. GP (explanatory remarks on the government bill, no 770 of the National Assembly's Supplements, 25th legislation period) page 1 et seq, 10; see as well *Mohr*, "Das erweiterte Exekutionspaket", in ÖJZ ("Österreichische Jurist:innenzeitung") 2021, page 1013.

5) §§ 88-345 EO.

responsibilities are restricted to the enforcement of claims against movable assets, whereas he is not involved in the enforcement of claims against immovable property.[6] For the latter, a separate role – a receiver ("Zwangsverwalter") – may be appointed,[7] which bears similarities to the system under Articles 93 et seqq of Japan's *Minji-shikkoo-hoo*. However, the receiver is entirely distinct from the enforcement administrator discussed here.

Thus, the enforcement administrator's scope of application is limited to the execution of monetary claims against movable assets. Austrian law, like Japanese law, categorises enforcement against movable property into several distinct types. However, in Austria, the term "enforcement against movable property" includes all types of enforcement proceedings involving assets which cannot be qualified as immovable property. Specifically, three categories can be distinguished:

1) Enforcement against movable objects ("Fahrnisexekution").[8] This corresponds to Articles 122 et seqq Minji-shikkoo-hoo, the *doosaan-shikkoo*.
2) Enforcement against monetary claims ("Forderungsexekution").[9] This complies with *saiken-shikoo* according to Articles 143 et seqq *Minji-shikkoo-hoo*, albeit with some differences.[10]
3) Enforcement against property rights ("Vermögensrechteexekution").[11] This serves as a catch-all category for assets not covered by the other two types.[12] Apparently, the comparable concept in Japanese law is the *sono-ta-no-zaisanken shikoo* pursuant to Articles 167 et seqq *Minji-shikkoo-hoo*.

In principle, an enforcement administrator can be appointed for all three types of enforcement. However, not every authorisation to enforce against movable assets permits the appointment of an enforcement administrator. Indeed, the concrete scope of application of the enforcement administrator is even narrower. The following explanations will illustrate this point.

### *2.2. Reform of enforcement law: The expansion of "General Enforcement"*

Austrian enforcement law has traditionally been characterised by the interplay of two key principles: The principle of party disposition ("Dispositionsgrundsatz") and the principle

6) See also *Auer* in *Garber/Simotta*, "Kommentar zur Exekutionsordnung" (2023) § 81 point 4.
7) §§ 97 et seqq EO.
8) §§ 249-288 EO.
9) §§ 289-325 EO.
10) The main difference – though not further relevant in the following – is that under Austrian law only claims for monetary payments fall into this category, whereas claims for the surrender of movable objects do not.
11) §§ 326-345 EO.
12) *Mohr/Reichel* in *Mohr/Eriksson/Pesendorfer/Reichel*, "Gesamtreform des Exekutionsrechts – GREx" (2021) point 402; *Neumayr/Sommer* in *Garber/Simotta*, "EO" § 327 point 2; *Neumayr/Nunner-Krautgasser*, „Exekutionsrecht"[5] (2024) page 292.

of speciality ("Spezialitätsgrundsatz"). According to the principle of speciality, enforcement measures must not be directed at all of the debtor's assets but rather at specifically identified assets. Furthermore, the principle of party disposition implies that the enforcing creditor must in general specify the assets to be seized in the application for enforcement.

An exception to this rule has always applied to enforcement against tangible movable objects. Thus, in this case, it has already been possible to obtain a more general or even "blanket" authorisation to enforce, allowing to cover all tangible movable objects in the obligor's custody. Ultimately, the bailiff ("Gerichtsvollzieher") is thus responsible for determining which tangible objects shall be seized and realised. My understanding is that this approach closely resembles the process in Japan, where the *doosan-shikkoo* is carried out by the *shikkookan*. However, the Austrian enforcement administrator should not be confused with the *shikkookan*.

The introduction of the enforcement administrator in Austria became necessary because the comprehensive reform of enforcement law addressed above extended the possibility of general or blanket authorisations to enforce to all types of movable assets. Thus, according to § 54 (2) no 3 EO, creditors can now apply for a general authorisation to enforce, covering all of the debtor's monetary claims or all of his other property rights.[13] Creditors may even apply for enforcement to be authorised against all movable assets, including tangible movable objects, monetary claims and (other) property rights.[14] This new approach, referred to in Austrian law as an *extended enforcement package* ("erweitertes Exekutionspaket"),[15] represents a form of "general enforcement" against movable assets.

## 3. The administrator as an essential instrument of "general enforcement"

The introduction of these options to obtain a blanket enforcement authorisation has, to some extent, marked a systemic shift in Austrian enforcement law towards the principle of – partial – "general enforcement". The rationale behind this shift is quickly explained: Under the system of special execution, enforcing creditors frequently face fundamental obstacles because they often lack sufficient knowledge about the debtor's assets. Even when creditors subsequently identify specific assets, according to the former legal position they were required to file a new application. With the newly introduced possibility of general or blanket authorisation to enforce, this process has been streamlined: Once the enforcement is

13) § 289 (1) EO, § 327 (1) EO; see as well *Mohr/Eriksson* in *Mohr et al*, "GREx" point 295 et seqq, 417 et seqq.

14) *Mohr/Michlitis* in *Mohr et al*, "GREx" point 72 et seqq; *Mohr* in ÖJZ 2021, page 1013; *Garber/Otti* in *Garber/Simotta*, "EO" § 20 point 1.

15) § 20 EO.

authorised, it undefinedly covers all of the obligor's movable assets.[16)]

However, this system naturally requires the identification of specific assets at some stage of the enforcement process to allow targeted measures. This is precisely where the enforcement administrator plays a crucial role. The appointment of an enforcement administrator is therefore mandatory whenever "general enforcement" is authorised. In particular, there are three different scenarios in which the appointment of an enforcement administrator is required:

1) When the enforcing creditor applies for the extended execution package. This means – as already mentioned – he applies for execution against all movable assets.[17)]
2) When the enforcing creditor applies for execution covering all monetary claims.[18)]
3) When the enforcing creditor applies for execution covering all property rights.[19)]

However, this system of "general enforcement" is not mandatory. Creditors retain the option of pursuing specific execution, provided that they identify particular assets and thereby forgo the appointment of an enforcement administrator.[20)] Conversely, if a creditor applies for the authorisation to enforce without specifying individual assets, the appointment of an enforcement administrator becomes compulsory.[21)] In certain cases involving the enforcement of property rights, however, the appointment of an enforcement administrator is required even if the creditor prefers otherwise.[22)] For example, according to § 330 (4) EO, company shares held by the debtor can only be realised by the enforcement administrator.[23)] Occasionally, this requirement may conflict with the creditor's interests, given that the appointment of an enforcement administrator incurs costs, which the creditor has to advance (for more details, see below, point 5).

---

16) See the explanatory remarks on the government bill: ErlRV 770 BlgNR 25. GP page 2; see also *Mokrejs-Weinhappel* in *Garber/Simotta*, "EO" § 54 point 6.

17) § 20 EO.

18) § 54 (2) no 3, last clause EO; § 289 (2) EO.

19) § 54 (2) no 3, last clause EO; § 330 EO.

20) § 289 (2) no 1-3 EO; § 330 (1) EO.

21) § 289 (1) EO; § 327 (1) EO.

22) The legislator had originally intended to reserve the enforcement of property rights exclusively to an enforcement administrator (see the original ministerial proposal 77/ME XXVII. GP page 33, referring to § 331 [1], clause 2) but – apparently based on the *author's* proposal in the review process (*Trenker,* 15/SN-77/ME XXVII. GP page 24 et seq) – later transitioned to an *"opt-out system"*: Pursuant to § 330 (1) EO, the appointment of the administrator may be waived upon request by the enforcing creditor if specific assets are identified in the application. However, in such cases, there remains a risk of termination of the enforcement proceedings pursuant to § 330 (2) EO for reasons that, in my opinion, do not seem appropriate. Both the mandatory appointment of an administrator in cases under § 330 (4) EO and the rule of precedence under § 330 (2) EO should be abolished.

23) *Mohr/Reichel* in *Mohr et al*, "GREx" point 438; *Frauenberger* in *Deixler-Hübner*, "Kommentar zur EO" (36th delivery, 2022) § 330 point 15.

## 4. Duties of the enforcement administrator

### *4.1. "Mini insolvency administrator"*

In order to better understand the role of the enforcement administrator, it is helpful to compare his function to that of an insolvency administrator. Unlike insolvency administrators, however, enforcement administrators are restricted in both their duties and powers: They are not granted authority over all of the debtor's assets but are limited to *movable* assets (or even specific categories thereof). As a result, the enforcement administrator could be referred to as a "mini insolvency administrator".[24] In fact, many of the legal provisions governing enforcement administrators have been modelled on those applicable to insolvency administrators under the Insolvency Code ("Insolvenzordnung").[25]

### *4.2. Identification of assets*

As noted earlier, the enforcement administrator is typically appointed when no specific assets have been identified in the enforcement application. Accordingly, his first and arguably most critical task is to identify the obligor's valuable assets and determine which of these should be subjected to enforcement.[26] Practitioners consider this identification of assets by the execution administrator to be one of the greatest advantages of the new system.

The most significant tool in order to determine the debtor's assets available to the enforcement administrator is the list of assets ("Vermögensverzeichnis"):[27] The debtor is required to complete a form detailing all assets in his possession.[28] Submitting false information on this list is a criminal offense under § 292a of the Criminal Code ("Strafgesetzbuch"), punishable by imprisonment of up to six months. Notably, even in cases without an appointed enforcement administrator, debtors are still required to provide a list of assets (arguably similar to the *zaisan kaiji tetsuzuki* under Articles 196 et seqq of the *Minji-shikkoo-hoo*).[29] This means that creditors can obtain information for further

---

24) *Trenker,* "(Andere) Vermögensrechte nach dem Ministerialentwurf zur Gesamtreform des Exekutionsrechts", in ecolex ("Zeitschrift für Wirtschaftsrecht") 2021, page 317.

25) *Konecny*, "Verwalter in Exekutionssachen und Insolvenz des Verpflichteten", in ÖJZ 2024, page 598; *Mohr* in ÖJZ 2021, page 1013 (1014 et seq); *Konecny*, „Die Gesamtreform des Exekutionsrechts im Hinblick auf Insolvenzrecht und Kreditschutz", in ZIK ("Zeitschrift für Insolvenz und Kreditschutz") 2021, page 134 (137); *Weidinger*, "Zur Unabhängigkeit des Verwalters in Exekutionssachen im nachfolgenden Insolvenzverfahren", in ZIK 2022, page 22.

26) Therefore, the provision of § 27 (3) EO must be observed, see *Deixler-Hübner* in *Deixler-Hübner,* "EO" § 27 point 1a.

27) § 47 et seqq EO.

28) This applies at least to the extended enforcement package, § 20 (1) EO. See *Schneider,* "Der Verwalter im Exekutionsverfahren - Vermögensermittlung, Pfändung, Ruhen", in ZIK 2022, page 18 (19).

29) For more details, see *Mokrejs-Weinhappel* in *Garber/Simotta*, "EO" § 47 point 1 et seqq; *Deixler-*

proceedings even without an administrator.

Nevertheless, the proceedings under an enforcement administrator do have significant advantages: First, creditors may only request a list of assets after an unsuccessful enforcement attempt, whereas enforcement administrators may initiate this process immediately.[30] Second, unlike enforcing creditors, according to § 81 (2) EO enforcement administrators may enter the debtor's properties, business premises and residence to conduct enquiries as well as inspect the debtor's books and records and require him, his employees or his authorised representatives to provide all necessary information.[31] These powers equip the enforcement administrator with effective tools for uncovering the obligor's assets.

Furthermore, from a practical point of view, it is worth noting that enforcement administrators are typically individuals with extensive experience in asset determination.[32] In practice, lawyers who also serve as insolvency administrators are most often appointed as enforcement administrators. This expertise provides further advantages: These professionals can leverage their authority as lawyers and their legal and commercial expertise as insolvency administrators to effectively compel debtors to disclose their assets. Reports from practitioners confirm that enforcement administrators consistently achieve higher success rates in asset identification than bailiffs and creditors who are trying to enforce "on their own".

### *4.3. Promotion of consensual solutions*

Besides, according to the reports from practitioners mentioned above, liable parties are more often willing to voluntarily repay their debt when confronted by the enforcement administrator. The obligor's willingness to pay can also be encouraged by the fact that the enforcement administrator is authorised to conclude agreements to pay back in instalments with the obligor according to § 81 (4) EO, whereas this is beyond the bailiff's powers.

Practicing enforcement administrators have also indicated that they often succeed in mediating a type of settlement between the enforcing creditor and the debtor. A typical settlement involves the enforcing creditor waiving part of the debt owed in exchange for immediate payment, which is often not made by the obligor but by a third party, such as the obligor's relatives.[33] The mediation of such settlements is not an explicitly prescribed

---

*Hübner* in *Deixler-Hübner*, "EO" § 47 point 1 et seqq.

30) § 20 (3) EO; *Mohr/Michlits* in *Mohr et al*, "GREx" point 60; *Mohr* in ÖJZ 2021, page 1013 (1016); *Schneider* in ZIK 2022, page 18 (19).

31) § 81 (2) EO.

32) See also the requirements of § 80 (1) EO.

33) Such amicable solutions are arguably often facilitated by the potential threat arising from the possible determination of manifest illiquidity according to § 49a EO since, typically, neither the obligor nor the enforcing creditor are interested in the related "restriction" (see *Deixler-Hübner* in *Deixler-Hübner*, "EO" § 49a point 1 et seqq with further references) or in the frequently ensuing insolvency proceedings (risk of avoidance!).

responsibility of the enforcement administrator under the law. However, in my opinion, such amicable solutions are a very welcome side effect of the new legislation.

### *4.4. Seizure of assets*

Once the enforcement administrator has decided which assets to seize, he must carry out the seizure himself. The administrator can seize movable objects, monetary claims as well as all other property rights.[34] When seizing movable objects, the enforcement administrator must act in the same way as a bailiff. The law does not specify whether the administrator can delegate the seizure of movable objects to a bailiff from the outset.[35] However, in practice, this reportedly happens in some cases. For the seizure of monetary claims, the court still issues the prohibition of payment to the third-party debtor and the prohibition of disposal to the obligor. The enforcement administrator, however, must specify the claim and independently deliver these prohibitions after determining the specific monetary claim against the third-party debtor.[36] The attachment of other property rights functions in a similar way. For instance, when seizing a company share, the enforcement administrator must serve the company with a prohibition on performance and the obligor with a prohibition on disposal (§ 328 [1] EO).[37]

Since, according to the prevailing opinion, the seizure also has a public-law effect, namely the so-called *entanglement* ("Verstrickung"),[38] it is debatable whether the enforcement administrator acts as a holder of state sovereign authority. However, legislative materials indicate that the legislator did not intend to grant the enforcement administrator sovereign powers.[39] Accordingly, the enforcement administrator is only personally liable with his private assets if he unlawfully and culpably causes damage to any person involved.[40] Conversely, there is no official liability of the Republic of Austria as it is established by the Official Liability Act ("Amsthaftungsgesetz") for sovereign enforcement.[41]

---

34) § 81 (1) EO; *Mohr/Michlitis* in *Mohr et al,* "GREx" point 102; *Auer* in *Garber/Simotta*, "EO" § 81 point 4.

35) § 81 (1), last clause EO; see as well *Auer* in *Garber/Simotta*, "EO" § 81 point 7; *Frauenberger-Pfeiler/Schwab* in *Deixler-Hübner*, "EO" § 81 point 2.

36) § 294 (2) EO. See also *Marokowetz* in *Deixler-Hübner,* "EO" § 294 point 49 et seqq.

37) For example, see *Mohr/Reichel* in *Mohr et al*, "GREx" point 424; *Neumayr/Sommer* in *Garber/Simotta*, "EO" § 328 point 1.

38) Instructively, see *Neumayr/Nunner-Krautgasser,* "Exekutionsrecht"[5] page 268.

39) Explanatory remarks on the government bill: ErlRV 770 BlgNR 27. GP page 21; clearly in this sense, see *Frauenberger-Pfeiler/Schwab* in *Deixler-Hübner,* "EO" § 81a point 25; see as well *Auer* in *Garber/Simotta*, "EO" § 81 point 4.

40) § 81a (2) EO; *Frauenberger-Pfeiler/Schwab* in *Deixler-Hübner,* "EO" § 81a point 26 et seqq.

41) Explanatory remarks on the government bill: ErlRV 770 BlgNR 27. GP page 21; *Mohr/Michlits* in *Mohr et al*, "GREx" point 91; *Frauenberger-Pfeiler/Schwab* in *Deixler-Hübner,* "EO" § 81a point 25.

### *4.5. Realisation and distribution*

After the seizure, the enforcement administrator must realise the seized assets. The realisation of movable objects is very flexible. The enforcement administrator can sell the objects on the open market in any way he considers appropriate. He is only required to publicly announce the sale fourteen days in advance, and even that is only required if it is not impractical or inexpedient in the specific case.[42] The administrator may also apply for a public auction if he believes it to be more promising.[43] Online auctions through platforms such as eBay are also an option.

For seized monetary claims, the administrator can act against the third-party debtor.[44] He can also file a lawsuit against the third-party debtor "on behalf of the obligor."[45] Thus, there is no need to transfer the claim separately for collection. Interestingly, the enforcement administrator is also authorised to settle with the third-party debtor regarding the seized claim.[46] Consequently, he can even waive parts of the claim at the expense of the obligor. Although such settlements only become effective with court approval,[47] this authority is quite controversial because the effect can, in some cases, amount to expropriation of the obligor.

The realisation of other property rights must follow the appropriate form. § 331 (1) EO stipulates that realisation may occur in particular through sale, auction, forced administration, leasing, or letting. For example, the forced administration of a company share can be authorised, which raises interesting questions. For instance, it is unclear who is authorised to exercise shareholder rights during forced administration. Consequently, it is uncertain whether the obligor or the enforcement administrator is permitted to vote at shareholders' meetings. At least in most cases, it is likely that the enforcement administrator will carry out this task,[48] which may not sit well with the obligor's co-shareholders.

Finally, the enforcement administrator must distribute the realised proceeds. In order to do so, he has to submit a draft distribution plan, which the court must approve during a distribution hearing.[49]

---

42) § 268 (2) EO. In detail, see *Schneider,* "Der Verwalter im Exekutionsverfahren - Verwertung und Verteilung", in ZIK 2022, page 58 (59).

43) *Schneider* in ZIK 2022, page 58 (59). See as well § 270 (3) EO, according to which he can assign a bailiff with conducting a public auction.

44) § 303 (1) EO.

45) § 303 (1) EO; § 308 (1) EO. *Schneider* in ZIK 2022, page 58 (60); *Höllwerth* in *Deixler-Hübner,* "EO" § 308 point 21.

46) § 308 (1) EO.

47) *Schneider* in ZIK 2022, page 58 (60); *Höllwerth* in *Deixler-Hübner,* "EO" § 308 point 11a.

48) § 329 (3) EO; to the possible backgrounds of these provisions, see *Trenker,* 15/SN-77/ME XXVII. GP page 27 et seqq.

49) §§ 87, 87a EO. For more details, see *Schneider* in ZIK 2022, page 58 (61 et seq).

## 5. Costs of the enforcement administrator

As previously mentioned, of course enforcement administrators do not work for free. Rather, they receive a minimum remuneration of € 500 plus 20% VAT, as well as reimbursement of their cash expenses. The enforcing creditor must pay an advance on these costs to the court. In practice, courts demand an advance of € 700-1.000.[50] The court may only appoint the enforcement administrator once the enforcing creditor has paid this advance.[51] This increases the risk for enforcing creditors that the enforcement remains unsuccessful: In this case, creditors will not only fail to enforce their claim but also carry the costs of the enforcement administrator for themselves.

If the enforcement administrator succeeds in enforcing the claim, he will receive a percentage of the amount collected as remuneration.[52] The system is degressive, which means that the percentage decreases as the amount collected increases. Approximately, the remuneration amounts from 10 to 15 % of the claim. For example: For a claim amounting € 10.000,-, the enforcement administrator receives € 1.500,-; for a claim amounting € 100.000,-, the administrator receives € 11.100,-. The court determines the remuneration, and the enforcement administrator must provide a detailed account of his activities beforehand.[53]

## 6. Conclusion

In my opinion, the conclusion on the institution of the enforcement administrator is positive: The procedurally simpler, more flexible, and typically more effective determination and realisation of assets by a professional is a gratifying option for enforcing creditors. Whether this benefit outweighs the costs of the administrator depends on the individual case. Anyway, in general the enforcing creditor has the option to decide for or against the involvement of an enforcement administrator. As an additional enforcement option, indefinite execution by an administrator can therefore be recommended to foreign legislators.

---

50) *Schneider* in ZIK 2022, page 18.

51) § 79 (1) EO.

52) § 82 EO.

53) For more details, see *Schneider,* "Der Verwalter im Exekutionsverfahren - Berichtspflichten, Rechnungslegung, Entlohnung", in ZIK 2022, page 143 (144 et seqq).