

# Legal challenges of private professions in Odesa region

Odesa Regional Justice Reform Council

November 2020



THIS PROJECT IS FUNDED BY  
THE EUROPEAN UNION



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This publication was produced with the financial support of the European Union. Its contents are the sole responsibility of Odesa Regional Justice Reform Council and do not necessarily reflect the views of the European Union.

In autumn 2018, EU Project "Pravo-Justice" started active work in the regions in the framework of supporting the implementation of reforms in justice sector in regions. In particular, in October 2018, **Odesa Regional Justice Reform Council** was established in Odesa to implement bottom-up reform by bringing across region-specific challenges and their solutions to the central level and organizing a better exchange of information on sector reforms from the centre to the regions and at the interregional level. The task of the Council is to identify problematic issues that arise in the process of judicial reform and to prepare generalized proposals for their solution. The functioning of the Regional Council should become a solid basis for establishing a permanent professional dialogue between the regions and the centre. Today, Regional Justice Reform Councils operate in six regions of Ukraine.

## 1. Application of the Bankruptcy Code of Ukraine.

**Challenge:** payment for bankruptcy trustee's services is still relevant with the entry into force of the Bankruptcy Code of Ukraine. The bankruptcy trustee receives core and additional monetary remuneration. The right to claim the core monetary remuneration arises for bankruptcy trustee on the last day of each calendar month of the discharge of his duties. If the procedure continues after the funds of the applicant are exhausted, the core remuneration of the bankruptcy trustee is paid: 1) from funds received by the debtor - a legal entity as a result of economic activity, 2) or funds received from the sale of the debtor's property. Creditors may set up a fund to advance monetary remuneration and reimburse the costs of the bankruptcy trustee.

*What can be done if the debtor does not have such funds and creditors are reluctant to set up a fund to advance monetary remuneration and costs reimbursement for bankruptcy trustee? Who must pay monthly monetary remuneration and reimbursement of expenses for bankruptcy trustee?*

Analysis of case law on sources of monetary remuneration and reimbursement of expenses of bankruptcy trustee shows differing legal positions. In some cases, courts refused to collect from the creditors the amount of accrued but not paid monetary remuneration and the amount of expenses to be reimbursed in view of the provisions of Article 115 of the Bankruptcy Law. Also, most court decisions upheld by the court of cassation express a legal position aimed at protecting the legal right of the bankruptcy trustee to receive monetary remuneration and reimbursement of expenses even if the bankrupt does not have property.

The situation is taking an interesting turn: on the one hand, courts protect the legal right of the bankruptcy trustee to receive remuneration, and on the other hand, the funds for remuneration of the bankruptcy trustee are taken from persons who are not legally responsible for such remuneration and did not violate the bankruptcy trustee's right to receive remuneration.

**Solution option:** The problem can be solved by amending the Bankruptcy Code of Ukraine. At the same time, the legislator must protect not only the legal rights of the bankruptcy trustee, but also take care to protect creditor's rights and interests in bankruptcy proceedings. For example, the rules under which lawyers provide free legal aid to persons who are unable to receive such aid on a paid basis. In these cases, the state undertakes to pay for legal services. Similar rules would be appropriate for remuneration of bankruptcy trustees if there are no sources of remuneration provided for in Article 30 of the Code. It is the state that must undertake monetary obligations to bankruptcy trustees because according to Article 3, Part 2 of the Constitution of Ukraine, the state is responsible before persons for its activities and asserting and enforcing human rights is the main duty of the state.

**Challenge:** One of the novelties of the Bankruptcy Code of Ukraine is legal norm set forth in Article 28, Part 4 of this Code which concerns the possibility of terminating bankruptcy trustee's powers from office without grounds.

Satisfaction of creditors' claims in a bankruptcy case is the main task for every bankruptcy trustee, especially at the stage of liquidation proceedings. If there is a misunderstanding between the liquidator and the creditors' committee, the trustee does not trust creditors' committee anymore or the committee is dissatisfied with his activities and the bankruptcy trustee in such a situation does not consider it necessary to terminate his powers on his own, then in order to avoid long-windedness because of consideration of complaints by the committee of creditors (individual creditors) on the actions of the bankruptcy trustee, the legislator gave the creditors' committee the right to apply to court to terminate the bankruptcy trustee's powers regardless whether there are grounds for such termination in the manner set forth in Article 28 Part 4 of the Bankruptcy Code of Ukraine.

Currently, this rule has caused a heated debate both among the participants in bankruptcy proceedings (on the one hand, they are creditors, on the other hand - bankruptcy trustees) and among judges who specialize in insolvency proceedings.

The problem is that those applying this rule in bankruptcy proceedings interpret it differently.

Creditors represented by the creditors' committee are increasingly appealing to commercial court to terminate the powers of bankruptcy trustees' powers in a particular case with reference to Article 28 Part 4 of the Code and propose another candidate for the position of a bankruptcy trustee, with the creditors' committee indicating no grounds for removal of the bankruptcy trustee. Bankruptcy trustees consider such petitions by creditors' committee illegal as removal from office without any grounds grossly violates their constitutional rights to work and remuneration and also interferes with their independence.

Case law regarding application of Article 28, Part 4 of the Bankruptcy Code of Ukraine is ambiguous, the appointment and removal of bankruptcy trustees are considered only by courts of first and appellate instances as the Code does not provide for cassation appeals against decisions on these issues.

The latest conclusions of the appellate commercial courts are quite differing, the case law of applying Article 28, Part 4 of the Civil Procedure Code is formed in each region separately.

There are two legal positions of commercial courts of appeal on this issue which differ significantly, as some courts in fact protect creditors' interests, and others - that of bankruptcy trustees.

**Solution option:** Art. 9, Part 3 of the Bankruptcy Code of Ukraine does not provide for the possibility of cassation appeal in cases where bankruptcy trustees' powers as a liquidator, are terminated and therefore the most effective way to solve this challenge is to discuss it with judges of all instances using the framework of the Association of Commercial Judges with a view to forming uniform case law.

## 2. Enforcement challenges

**Challenge:** in enforcing court judgements and decisions of other bodies, enforcement officers must first recover the debtors' money, that is why such money is blocked. Consequently, funds that are the debtor's salary, pension, or other social benefits are sometimes blocked.

Also, the process of blocking debtors' money in execution of enforcement documents is long, orders for blocking are sent on paper to more than 80 banks, which leads to significant expenditures and long processing of correspondence. Funds write-off also takes place via enforcement officers sending relevant documents in paper format to banks.

**Solution option:** introduction of automated arrest and write-off of debtors' funds which will reduce expenditures in the process of enforcing decisions, speed up enforcement and improve its quality. It is also necessary to take into account social nature of the debtors' funds and, accordingly, to prevent blocking such funds or to introduce a minimum amount of funds that will remain in the debtor's accounts.

**Challenge:** private enforcement officers have the right to enforce a limited category of enforcement documents, unlike state enforcement officers. This leads to the fact that collectors are deprived of the opportunity to choose the contractor to whom they would like to apply when submitting documents for enforcement. This in turn leads to the fact that the enforcement reform is not fully implemented and the percentage of actually enforced decisions remains extremely low.

**Solution option:** to equalize the powers of private and public enforcement officers (according to the principle of private and state enforcement officers working) so that there is a competitive environment and the claimant is free to choose who he would like to apply to and who will better enforce court judgment.

**Challenge:** assistants of private enforcement officers do not have sufficient powers to carry out all the instructions of the private enforcement officers and do not have the opportunity to fully work in ASEP system in connection because the enforcement officer is physically limited in his ability to accept enforcement documents and to process them efficiently.

**Solution option:** to broaden the powers of assistants of private enforcement officers so that they can carry out the instructions of private enforcement officers and act on their behalf (such as work in ASEP system, perform certain enforcement actions: to do property listing, to check property status, etc.). This will help private enforcement officers to accept more enforcement officers documents and better process them.