GAP ANALYSIS Of Enforcement Legislation

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2017 EXECUTIVE SUMMARY

Since 2014 Ukraine marked considerable progress in reforming its Judgement Enforcement System. Major tangible results include, inter alia: introduction of performance based incentives at the State Enforcement Service, some 100 Private Enforcement Officers (PEOs) operational to date who report first cases successfully completed. PEOs Professional Association was just recently established and is ready to grow as vibrant self-governing institution. Register of Debtors is available online and every citizen or business can search in it to find if his counterpart is already a debtor in a pending enforcement case. Ukraine set a simple and transparent enforcement fees schedule that would facilitate transparency and accountability of costs of enforcement for the benefit of all parties.

Ukraine is on the eve of a new stage of judgement enforcement reform implementation: statutory and institutional frameworks are all set and now that complex should be turned live and functional. Laws and implementing regulations are adopted, MOJ and PEOs Association are ready to act as managers of the reformed system, PEOs and SEOs are getting used to their new professional endeavors, legal and business communities but also general public are aware of the reform and looking forward to getting all benefits it can offer to them.

Despite that, experts are evidencing kind of **reform hesitation** with reform implementing body (MOJ), PEOs but also with legal and business communities. It seems that on all sides there is no certitude, no firm conviction if the reform is going into the right direction and if the reform mechanisms put in place will contribute to its success. Indicators for such hesitation are numerous:

1) Very low number of licensed and acting PEOs: more than 600 candidates passed their initial training but only few of them inscribed for entry examination, not more than 50% of those who inscribed showed up at the examination, only some 50% of those who passed the examination inscribed in the register of PEOs and started operation. The current design and implementation of PEOs admission process is moving the reform out of the route mapped by the legislator. PEOs admission process limits dramatically the number of new PEOs to enter the market which on its turn refrains competition, facilitates market's closure for future prospective newcomers and creates stimulus for establishment of abusive and monopolistic practices in harm of all end-users.

2) Policy makers explore judgement enforcement reform experience of Croatia and Georgia: both countries are good examples for failure of PEOs introduction. In Croatia it was introduced on paper but never came up into reality and the law was dismissed within its *vacacio legis* period. Georgia invested a lot of efforts and money in improving its state enforcement service while in the same time was putting numerous constraints to the development of the new profession of PEOs. All this resulted in current situation where PEOs lost their competitive advantage vis-à-vis their colleagues at the state service and thus couldn't prove their ability to perform

3) Transfer of pending enforcement cases at State Enforcement Service to PEOs is not functioning despite the clear provisions of the law in that respect. State Enforcement Service explains its refusal to transfer pending cases to PEOs upon creditors' application with lack of sub-normative rules laying down the exact procedure for such transfer

4) MOJ, being the only reform implementing body so far, transfers great portion of State Enforcement Service inefficiency to the new profession of PEOs by simply copying existing rules, policies and work protocols in place at the State Enforcement Service and pasting them mechanically to the professional activity of PEOs. Examples are numerous, e.g.: rules for record

keeping and archiving, Automated System of Enforcement Proceedings (ASEP) which hardly can serve PEOs workflow, rules on MOJ inspections, rules on money transactions processing and documenting, etc. Experts would recommend other way around for regulating enforcement activity in the reformed system: setting up brand new rules for PEOs professional activity and only then tailoring that rules to the particularities of the State Enforcement Service being a state agency

5) In the same time, the vast majority of newly licensed PEOs show no interest in strategic planning and going beyond their daily preoccupations. PEOs took day-per-day approach for addressing systematic, regulatory and communicational impediments they are facing. Further, they show no commitment to their role in building the reformed enforcement system in partnership with MOJ and other stakeholders: they do not show interest in forming policies and turning them into reality

6) Banks and other institutional creditors stand aside and still hesitate to assign their bulk cases to PEOs despite they are unhappy with the State Enforcement Service. Some bargaining strategies might be in place (banks trying to discard application of the 2% advancing of enforcement costs) but also some ambiguity in good prospects of the new profession might be in stake.

For sure reasons for such hesitation are complex and may vary from simple reform fatigue, passing by some caution in taking political responsibility for vast-spread irreversible reform that will touch very broad sample of Ukraine's population and ending up with presence of some shady interests that need time and favorable environment to set their infiltration vessels into the circulatory system of the new PEOs profession.

With present report, experts insist on the following immediate, mid-term and long-term actions to be taken by all stakeholders in Ukraine.

Urgent, immediate actions:

- Measures geared at improving PEOs admission process: eliminating hesitation of candidate PEOs to show on exam and start their office once licensed; e.g. diversification of initial training providers, continuous improvement of question bank's quality and external auditing of automated testing software, online broadcasting of Qualification Commission and oral examination sessions, expiration period for exam results, etc.

- Streamline of pending cases transfer from State Enforcement Service to PEOs

- Full authority for Assistant PEOs

- Emancipate PEOs operational rules from those existing in State Enforcement Service and avoid transposition of inefficient workflows and practices from State Enforcement Service to PEOs

- Performance based Management and Budgeting at State Enforcement Service

- Switch from delegates to direct voting system in PEOs Association as temporary and provisional rule until the number of PEOs reaches at least 500.

- Fix PEOs insurance rules: mandatory minimum and timeline for its determination, risks covered, etc.

- Reconsider the majority of procedural terms set in the law: most of these might be needed for State Enforcement Service but are excessive for PEOs; such terms might be established for State Enforcement Service only on sub-legislative level
- Improved regulation of no-assets case termination and its legal consequences
- Improved and clear rules on competing/joined creditors enforcement
- Establishment of a Civil Society Organizations Watchdog Board to ensure ongoing monitoring and accountability mechanism in the enforcement system. The CSO Board should serve as platform for both supportive and opposing opinions in the society to be heard and addressed adequately by the two policy bodies in enforcement system: the MOJ and the Association. The Board would be also aimed at balancing the policy making in the system by serving as a third centre of authority besides MOJ and the Association.
- Intensive, targeted and proactive Public Awareness and Education on Enforcement Reform

Mid-term actions:

- Establish equal authority for PEOs and SEOs
- Establish professional and effective, transparent and accountable oversight on PEOs activity
- Build the PEOs Associationas organization which is clearly positioned (Mission and Vision), Participative and Inclusive, Transparent and Accountable
- Build ASEP as prompt case management and performance monitoring system
- Streamline bank accounts garnishment process to allow for electronic/automated exchange
- Streamline enforcement linked court procedures: Provisionary measures, Payment Order and Review on complaints in enforcement

Long-term actions:

- Improve Transparency of Assets in Ukraine through: unique identification of all citizens in Ukraine, interconnection/consolidation of entities, addresses and property registers
- Decrease Compliance costs in enforcement activity
- Abolishment of existing discriminatory regimes disrupting exercise of property rights in Ukraine

2019 EXECUTIVE SUMMARY

In 2017 first private enforcement officers (PEOs) started operating. To date some **200 PEOs** (and about 300 assistant staff) are operational, having enforced almost **3 times more** judgments per case closed, to compare with the State Enforcement Service (SES), whose number of officers represents some 4,500 persons.

The **enforcement reform** is so far a moderate success. It brings **significant outcomes** to the society in the form of money collected and legitimate creditors paid, much **faster** and **earlier** than the equivalent results appearing in other areas of the justice sector reform. At the same time it suffers from certain **design and implementation flaws**.

This report is **not exhaustive**. It outlines the most pertaining, in experts' opinion, issues that need addressing and suggests solutions extracted from the best European comparative practice and experience.

The identified **Gaps** and recommended **Priority Actions** to be taken by respective Ukrainian stakeholders can be summarized as follows:

1. The lack of effective enforcement against **State bodies/agencies** was evidenced in the reports of the Business Ombudsman Council and in the ECHR judgments in *Burmich v. Ukraine*, etc.

   Recommendation:

   Re-enforce the compliance of **State bodies** to **non-monetary** court decisions by allowing PEOs to act against State and by providing for viable (financial) incentives for the heads of the agency-debtors to comply with such court decisions. For **monetary claims**, the State should provide to the judgement-creditor a fair compensation of the delayed payment by reference to a statutory determined default interest to be applicable to all default judgement-debtors, state or private.

2. Enforcement moratoriums (and other restraints on enforcement) disadvantage the creditors of the **state-owned companies**. There are no equal and non-discriminatory conditions of enforcement for all economic players in Ukraine. 'Protecting' the business continuity of the state-owned companies in such a way is even more obscure as it does not contribute to the economic sustainability of 'immune' enterprises but in contrary – it worsens their economic and financial standings and decreases prospects for healthy restructuring or improved corporate governance.

   Recommendation:

   Lift the **moratorium** established by the Law No 2864-3 of 2001 to create and to allow for a full-body enforcement (foreclosure on all sizable assets and not on bank accounts only) to be carried out against state-owned enterprises.

   Allow **PEOs to enforce** court decisions against state-owned companies.

   Increase the **time-span** (e.g. from 6 to 18 months) for enforcement to be carried out by an EO before transferring the case for payment to the Treasury.

Provide for a fair compensation of the delayed payment to the judgement-creditor by reference to a statutory determined default interest, applicable to all default judgement-debtors, state and private.

3. At the end of 2019 the **number of PEOs** is **well below** the inception policy target of **800** by the end of 2018. Prospective lawyers in Ukraine have not so far recognized the PEOs profession as an opportunity for independent (free of administrative interference), competitive (low cost-benefit ratio) and meaningful (high professional and personal standing) career path. The system has not yet proven zero tolerance to misconduct of PEOs by implementing effective and transparent oversight and unbiased and accountable scrutiny mechanisms.

   Recommendation:

   Personal composition of the PEOs profession is of instrumental importance. No admission process can ensure the quality of people. It can only be achieved naturally: by creating an environment for exercise of the profession that would attract quality candidates while at the same time being immune and hostile to all 'bad apples' in the profession. Further **liberalization of the PEOs activity** (as described further in this report) is the key to the sustainable quality change of the enforcement system in Ukraine.

4. Although the PEOs proved to be a viable alternative to the MoJ-run enforcement service and are called liberal professionals, in fact, they are still under the heavy wardship (піклування) of the MoJ.

   Recommendation:

   Emancipate the PEOs from the executive in order to bring their full potential to the benefit of the citizens and businesses in Ukraine. The MoJ should discontinue overregulation and micromanagement of the PEOs activity while at the same time should re-enforce the tools for effective, transparent and accountable oversight and scrutiny of the PEOs.

   Prevent **conflict of interest in the MOJ** exercising a dual role of a regulator/controlling body and competitor of PEOs, with a particular emphasis on **shared regulatory competences** between the MoJ and the Association of Private Enforcement Officers (APEO) and transfer of the **disciplining authority** from the MoJ to the APEO.

   The **MoJ regulatory authority** vis-à-vis the activity of the PEOs should be clearly defined in the law by an exhaustive list of sub-normative acts (implementing regulations) to be adopted by the MoJ. Most of these regulations should be adopted by the MoJ **in consultation/concordance** with the self-governance body of the PEOs, the APEO.

   Back up **compliance** in enforcement system by implementing effective and transparent **oversight** and unbiased and accountable **scrutiny** mechanisms. Review the MOJ regulations on the **inspections of PEOs offices**, including the composition of inspections, the scope and extent of the inspection control, the eventual scoring and sanctions for PEOs.

5. Programming the PEOs in Ukraine back in 2016 was extremely diffident and too far prudent as at that point it was unclear how PEOs would behave and how the society would react. Now, after 2 years of PEOs operations, we can evidence that neither of risks that were

evoked in 2016 have occurred. PEOs are working in line with the law. There is **no more good reason to keep all the limitations** that were put back in 2016 as safeguards for PEOs' failure. If continue to exist, such limitations would become without any legitimate justification and thus disproportionate and discriminatory.

Recommendation:

Level the **mandates of PEOs and SEOs.** Allow PEOs to enforce judgments against State bodies and agencies, and to act in collection of administrative fines and other public or private state claims, etc.

Give the **Assistant PEOs** full authority under the supervision and upon liability of the PEO, to allow outsourcing mundane functions by a PEO and enabling creation of proper business practice.

Open the **access to the PEOs profession** by removing any **Administrative Barriers** to candidates and full automation of the **Admission Exam**. Carry out external independent **audit of tasting software** administrated by HAIC.

Discontinue **overregulation of PEOs activity** by removing **unnecessary formalism and bureaucracy** in PEOs daily operations, including unnecessary procedural terms/deadlines, burdensome documenting and reporting requirements, unnecessary requirements as to the records and case keeping and PEOs' offices' set up, etc.

Liberalize **ITC service provisioning to PEOs** by allowing use by the PEOs of **alternative electronic systems** (other than the **АСВП** and **СЕТАМ).**

6. The **overzealous** oversight by the PEOs **Disciplinary** Commission at the MoJ evidences another block of problems. Five out of seven DC's decisions that were appealed were discarded by the court. The low quality (professional standing) of disciplinary decisions evidenced lack of professionalism and/or bias of the DC members and bad management on the MoJ part. Disciplinary decisions are currently enforceable before being subject to review by a court with full jurisdiction which is direct infringement of the fair trial acquis of the ECHR.

   Recommendation:

   Transfer the **DC's administration** from the MoJ to the APEO to achieve better personal composition (attract and retain high quality members of the DC), management, and accountability of the DC.

   Regulate the **disciplinary process** in more details to put additional procedural safeguards for a fair trial.

   Ensure that a disciplinary decision would be **enforceable** only after review by a court with full jurisdiction as defined in the ECHR's fair trial acquis.

7. The **self-governance** of PEOs remains **weak**. The Association of Private Enforcement Officers (**APEO**) was programed by the legislator as **'no authority organization'**. All regulations governing PEOs operations are adopted unilaterally by the MoJ without any prior-to-adoption consultations with the APEO. The PEOs discipline is rendered by an external body (the MoJ) that additionally weakens the PEOs' self-governance. The APEO is

progressing slowly in developing its institutional capacities, project management and strategic planning abilities, efficient internal and external communication. The heavy organizational structure and lack of direct voting at the general assembly are to the detriment of the APEO's faster organizational development.

Recommendation:

Charge the APEO with **regulatory, disciplining and vocational training** authority to catalyse its institutional development and help it to grow as a real self-governance organization.

Make the formation of APEO's **Regional Councils** optional (currently mandatory) and **voting** at the APEO's general assembly direct (currently by delegates).

Provide continued support to APEO's **institutional building**

APEO, together with MOJ and other stakeholders, should elaborate and implement a structured, consistent and effective **public awareness campaign** to educate citizens and businesses on their rights and obligations, and **the role and responsibilities of PEOs**.

8. **Statistics** on performance of the enforcement system are hardly accessible. Currently the only possible source of such data is the АСВП which is administrated by the state-enterprise HAIC. No performance reports being ever published. No transparent reporting tools in place. No accountability for data misuse or misinterpretation.

   Recommendation:

   HAIC should develop a flexible **Reports Generation Tool** to be available for use by key stakeholders in enforcement system, e.g. MoJ, APEO, High Judicial Council. The tool will generate customizable reports from the АСВП's database that can be further utilized by authorized stakeholders.

   Transfer basic performance data on enforcement to the **Open Data Cloud** of the Ukrainian Government for further free usage.

9. The **courts' interventions** in enforcement still impede/slow it down rather than facilitate it. **Suspension of enforcement** is abusively used by the debtors who simply want to delay repayment.

   Recommendation:

   Limit the court's interventions in enforcement to disputes only: if no party disputes, no need for the court to intervene. Discontinue court's administration of the enforcement process: the court should be involved in controversial/adversary proceedings only.

   Mandate for a **bond guarantee** (in cash, bank guarantee or mortgage) to be provided before the court by the party requesting suspension of enforcement.

10. SMEs and entrepreneurs have awkward **access to enforcement and PEOs**, in particular. Small value claims (or claims with uncertain prospects for success) are rarely accepted for enforcement by PEOs as their only remuneration is in direct proportion to the amount effectively collected. Payment order procedure, although existing, is not functioning due to its limited application scope and flaws in the service of process.

Recommendation:

Improve the **access of SMEs and Entrepreneurs to enforcement** by creating financial incentives for PEOs to engage in **Small Monetary Value Claims.**

Make the **Payment Order** procedure functional by removing obscure limitations in its application scope and by streamlining the **Service of Process** in civil and commercial court proceedings.

11. There is no fair **compensation of delayed payment** of non-contractual claims or of contractual ones where the contract was terminated upon filing the court suit. Lack of statutory determined Default Interest rate creates wrong incentives to enforcement debtors who prefer to prolong enforcement rather than repay their debts in due time.

    Recommendation:

    Establish in the Civil Code the institute of the Default Interest as alternative to contractual interest (проценти) for fair compensation of all delayed payments which are not covered by a contractually agreed compensation.

12. The **bank account garnishment process** in Ukraine is lengthy, multi-staged and hardly traceable for compliance. Paper-based process-flow, multiple communication lines on each and every garnishment and lack of traceable and reliable record of that communication decrease dramatically the efficiency of that enforcement tool. Automation of the **money write-off** is hardly achievable in a system with extensive number of exemptions and limitations as to the seizable money that could be eventually written-off from debtor's bank account. The variety of exceptions decreases compliance and increases risks of abuses by all participants in the process – debtors, creditors, EOs and banks.

    Recommendation:

    Digitalize the bank accounts garnishment process-flow.

    Pave the way to the full automation of bank accounts garnishment process by establishing **one simple rule on seizable amounts** (amounts that could be written-off) on debtor's bank accounts that can be easily formalized. Avoid any exception or exclusion from such general rule.

13. **Judgement debtors' assets are not transparent** to their creditors. The communication with property/entities registers is slow, fragmented and costly. The registers as a rule are hardly searchable and contain incomplete or outdated information. Same data exists in various databases, run by different administrators for achieving different goals

    Recommendation:

    Continue the wider efforts to **ensure transparency of assets** by implementing viable tools for unique (digital) **identification and registration of individuals** in Ukraine, consolidation and/or interconnection of **land and property registers** etc.

I. ENFORCEMENT REFORM ENABLING BUSINESSES AND ECONOMIC GROWTH

I-1. Equal Business Opportunities for all economic players in Ukraine

Different treatment of enforcement debtors that translates directly to different treatment of their creditors is discriminatory to the extent it is not proportional to the legitimate goal. Experts believe that the existing Enforcement Moratorium favoring state-owned enterprises and incompletion of debtors' list in the Register of Debtors manifest such disproportionality and thus should be discontinued.

I-1A. Enforcement Moratoriums

Identified Gaps

Currently, there is a dozen of 'enforcement moratoriums' that exempt certain debtors and render impossible enforcement of a final court decision. As a rule, enforcement moratoriums were statutorily established in favor of the state-owned enterprises.

Enforcement moratoriums drain 'protected' companies' liquidity off as well as render their products and services uncompetitive. Moratoriums contribute to the creation of unhealthy and non-competitive suppliers' clusters around such companies. Those suppliers' circles naturally disrupt the competition in the supply chain which results in higher purchase prices for lower quality of products and services furnished. In the end, exemption from enforcement does not contribute to the economic survival of 'immune' enterprises but in contrary – it worsens their economic and financial standings and decreases prospects for healthy restructuring or improved corporate governance.

Enforcement moratoriums ruin the rule of law and the perception of general fairness in Ukraine. They 'justify' none-compliance with the court decisions by all other economic players.

Recommendation

Remove the enforcement moratorium established by the *Law No. 2864-3 of 2001,* exempting state-owned companies' assets from enforcement. Increase the time-span, established by the *Law No. 4901-6 of 2012 on State guarantees for enforcement of court decisions*, for enforcement against state-owned companies that can be carried out by EOs. Currently it is 6 months but should be extended at least to 18 months to allow for viable enforcement against such companies to be carried out by an EO. Back up *business continuity* of all companies-judgement debtors (state- or privately owned) by introducing a clear rule on *proportionality of enforcement*. All enforcement actions that constitute a disproportionate infringement of judgement debtor's business continuity should be *subject to judicial review* and repealed by the court.

Expected Outcome

State-owned enterprises would be able to diversify their suppliers' portfolios which will result in cost savings and better quality of purchased products and services. Legitimate pressure from judgement creditors will catalyze business restructuring, improve corporate governance and make state-owned companies accountable. The rule of law will be restored in the field of the state's business operations. Proportionality of enforcement scrutinized by courts will safeguard the business continuity of all enterprises and those who are provisioning services and products resorting to public order.

I-1B. Register of Debtors

Identified Gaps

According to the legislation, there is a Unified Register of Debtors (RoD) in Ukraine which is a systematic database of debtors. It is maintained for purposes of real-time disclosure of information about debtors' pending liabilities and prevention of the alienation of property by the debtors. Stakeholders report delays in removing of a debtor from the RoD even after payment in full mainly due to technical and bureaucratic reasons.

PEOs enter information about debtors to the Register at the same time as they sign a resolution on opening of an enforcement proceeding. At the same time, statutory requirements to the maintenance of this Register envisage that information about debtors in the enforcement proceedings of non-monetary claims is not entered. The same goes for debtors in the enforcement proceedings which are state bodies or local self-governance authorities or debtors, in whose respect enforcement proceedings had been opened before the introduction of the Register.

Recommendation

Change statutory rules on the Register maintenance. Envisage inclusion of information about debtors, which are state bodies, local self-governance authorities, and debtors in non-monetary claims, as well as about debtors in whose respect enforcement proceedings had been opened before the introduction of the Register.

Allow for notary transactions if the debtor presents a certificate issued by a notary that the full amount of the claim, appearing in the RoD, was deposited on the notary's fiduciary bank account.

Expected Outcome

Changing statutory rules on the Register maintenance will allow harmonization and systematization of up-to-date information about all debtors in enforcement proceedings. It will also facilitate the application of coercive measures as provided by law.

I-2. Access to Judgement Enforcement

Access to Judgement Enforcement is an immanent part of the access to justice. Experts believe that currently the exercise of that right is impeded by: (1) unsatisfactory territorial coverage of the PEOs' service, (2) lack of financial incentive for PEOs to engage in enforcement of small monetary value claims and (3) non-functioning Payment Order procedure.

I-2A. State Enforcement Service

To date all international assistance provided to MOJ is targeted to the creation of the new profession of PEOs and thus SES somehow left aside from reform focus. At the same time, under the current legal framework all important (large monetary value[1]) and all socially sensitive

[1] On December 21, 2016 the Verkhovna Rada of Ukraine adopted the Law "On the High Council of Justice (Pravosuddia)". The said Law also introduced amendments to the legislation on enforcement proceedings, in particular in terms of regulating the professional activity of private enforcement officers. Thus, Chapter XIII "Final and Transitional Provisions" of the Law of Ukraine "On Enforcement Proceedings" was supplemented with paragraph 11: Before January 1, 2018, a private enforcement officer cannot exercise the enforcement of decisions in case if the recovery amount is equal or exceeds six million UAH or its equivalent in foreign currency".
Besides, part 2 of Article 5 of the Law was supplemented with new paragraphs going as follows: "During the first year of practicing as private enforcement officer, a PEO cannot exercise the enforcement of decisions for which recovery amount is equal or exceeds twenty million UAH or its equivalent in foreign currency. The term / period of practicing as

enforcement cases (evictions, child custody, administrative, restitution to work, etc.) would be handled by SEOs only. In that situation MOJ SES should consolidate resources to improve (i) its performance-based-management protocols and tools and (ii) professional qualification of SEOs.

a. Performance Management of SES

Establishing Performance Management protocols and tools within SES became a must in particular after introduction of the possibility for additional financial stimulus for SEOs based on their performance[2]. For the SES it's a relatively new concept and thus heads of units would need (i) clear **rules and procedures** for managing that incentives scheme in a transparent and accountable manner and (ii) **training** to acquire specific managerial skills that are required.

Experts would recommend developing tailored **Performance Management Program** for SES with two main components: (i) rules and procedures and (ii) training for practical implementation/application of those protocols. The Program to be **piloted into SES Central Department** which is the unit responsible for handling all major enforcement cases all over Ukraine[3]. Once proven to work properly in the Central Department in Kiev, the Program could be roll-out through all regional SES departments.

b. *Professional training for SEOs*

Professional acquaintance and skills of SEOs necessitate particular attention. There is unanimous consensus that the level of professionalism among SEOs is at critical low levels that jeopardize play of fundamental civil rights in Ukraine. Training modules on domains where SEOs would have exclusive jurisdiction (e.g. evictions, child custody, restitution to work, administrative cases, etc.) should be developed and trainings delivered in Kiev and in major regions.

PEO shall be calculated from the date of entry of information about a PEO in the Unified Register of Private Enforcement Officers of Ukraine".

[2] Thus, according to the Decree of the Cabinet of Ministers of Ukraine of September 8, 2016, No. 643 "On Approval of the Procedure of Payment of Remuneration to SEOs and its Amount, and the Amount of the Enforcement Fee of PEOs" in the event of actual execution (full or partial) of the writ of execution related to property, as defined in part one of Article 7 of the Law of Ukraine "On the Authorities and Individuals Exercising the Enforcement of Court Decisions and Decisions of Other Authorities", the following enforcement fee shall be paid:
2 percent, which should not exceed 200 minimum wages, of the recovered amount or of the cost of the debtor's property transferred to the claimant under the writ of execution to the state enforcement officer, who executed (is executing) the writ of enforcement of which was (is) the executive document;
0.5 percent, which should not exceed 200 minimum wages, of the recovered amount or of the cost of the debtor's property transferred to the claimant under the writ of execution to the head of SES unit and deputies thereof to whom the SEO is subordinated to the State Executive.

[3] The Decree of the Ministry of Justice of Ukraine of 29.09.2016 No. 2835 / 5 envisages the new draft of the Guidelines on Organization of Enforcement of Decisions. Paragraph 4 of the Guidelines reads as follows:
2he jurisdiction of the Enforcement Division of the MOJ Department of State Enforcement Service shall apply to the decisions where:
- the debtors are the Administration of the Verkhovna Rada of Ukraine, the Presidential Administration of Ukraine, the Cabinet of Ministers of Ukraine, central executive authorities, the Constitutional Court of Ukraine, the Supreme Court of Ukraine, ..., other public authorities and their officials;
- the amount of the obligation is equal or ecxeeds twenty million UAH or its equivalent in foreign currency.
Such assignment of jurisdiction on certain categories of decisions to enforcement divisions established under a bylaw is contrary to the legislation hierarchy, and has a direct impact on the legitimate rights of the parties of enforcement proceedings set up under the Law of Ukraine "On Enforcement Proceedings". In particular, there is a clear contradiction to Article 24 of the Law, since the provisions of this Article do not provide any other jurisdiction so far as presenting the writ of enforcement to a particular SES authority except for the one provided in this article – "depending on the debtor's place of residence, stay, or work, or the place where his/her property is located."

The parallel functioning of SES and PEOs should stay as a transitional solution only, as it was programmed back in 2015/2016. How long such transition will last is the next question. The SES should persist until the point when the number and territorial coverage of the PEOs ensure sufficient level of competition among them throughout the entire territory of Ukraine. The policy benchmark for PEOs number set back at the inception of the reform was 800. Two years after that, Ukraine is far from reaching that target.

Historically, all the attempts for reforming the SES were unsuccessful. It's hard to believe that the current government will succeed in turning the SES into the flagman of the so needed administrative reform in Ukraine by bring it to the level of a modern, customer-oriented, efficient and accountable administration.

The above said doesn't mean that the government should not put further efforts in improving operations of the SES. Nonetheless, the government should stay on the clear policy choice that was made back in 2015/2016 for gradual transition to entirely private enforcement system in Ukraine.

Further liberalization of the PEOs profession and activity is the way Ukraine should continue on.

I-2B. Small Monetary Value Claims

II.1. Basic remuneration (success fee) of PEOs

Remuneration of a PEO serves actually two aims: financing of PEO's activity and stimulating a debtor to execute voluntarily the decision.

The Regulation of the Cabinet of Ministers of Ukraine of 8 September 2016 No. 643 "On Approval of the Remunerations of Enforcement Officers and Amount Thereof, and the Amount of the Basic Remuneration of PEOs" stipulates the following remuneration for PEOs:

The PEO, who ensured full or partial execution of a pecuniary writ of execution, shall receive basic remuneration of 10 percent of the recovered amount, or the value of the assets, to be transferred by under the writ of execution.

The PEO, who ensured the actual full execution of a non-pecuniary writ of execution, where the debtor is a physical person, shall receive the basic remuneration of two minimum wages, if the debtor is a legal entity - of four minimum wages.

Ten percent remuneration calculated on the basis of the amount recovered, will enable the establishment and development of the new profession, and eventually, after the lifting of the moratorium on the collection of large amounts by PEOs[4], may be revised to provide for a decreasing scale where basic remuneration stake would decrease while the amount of the claim for collection increases. As higher the amount of the claim is as lower the percentage of the Basic Remuneration should be. This will incentivize PEOs to maintain their portfolios balanced and diversified which on its side will contribute to their independence and impartiality. Decreasing scale, along with automation of work processes, will make more profitable for a PEO to take and work on 1,000 new cases of 100 EUR each instead of taking one only case of 100,000 EUR. As a matter of example such decreasing scale might look like that:

Amount of the Claim (UAH)	**Basic Remuneration (UAH)**
Up to 10,000	1,000
From 10,000 to 50,000	1,000 + 8% on the excess above 10,000

[4] See Footnote 1 on page 3 of this report

From 50,000 to 500,000	4,200 + 6% on the excess above 50,000
From 500,000 to 5,000,000	31,200 + 4% on the excess above 500,000
From 5,000,000	211,200 + 2% on the excess above 5,000,000

Exemption of certain categories of debtors from paying the enforcement fee and basic remuneration of the PEO.

Under paragraph 5 of Article 27 of the Law of Ukraine "On Enforcement Proceedings", the enforcement fee shall not be collected, in particular, under the writ of execution on *recovery of regular payments, seizure of assets with purposes of security for a claim, and under the writ of execution to be executed immediately*;

According to paragraph 3 of Article 45 of the Law of Ukraine "On Enforcement Proceedings", the basic remuneration of the PEO shall be collected in the manner provided for collection of the enforcement fee.

The abovementioned regulation brings us to the conclusion that, if in a particular case, the Law does not stipulate collection of the enforcement fee, collection of basic remuneration, in case of successful execution by the PEO, is neither envisaged.

Debtors can also be users of such a "privilege":

- under the notary's executory inscription on agrarian receipts (according to paragraph two of Article 3 of the Law of Ukraine "On Agrarian Receipts", in case if the debtor fails to comply with their commitments within the term indicated in the agrarian receipt, the creditor under the agrarian receipt may has a right to address to a notary for the notary's *executory inscription to be executed immediately*),

- if it comes to alimony payments,

- under the order on security for a claim and provisional measures,

- if it comes to reinstatement in job.

However, this "privilege" is not in favor of the creditor, as collection of both enforcement fee and basic remuneration of the PEO are a kind of sanction imposed on the debtor for failure to comply with the judgement voluntarily.

In this case, on the contrary, the debtor is not interested in voluntary execution because he/she does not incur any losses or expenses, other than the costs of enforcement proceedings.

However, if the creditor addresses to a PEO, it will come to the payment of additional remuneration, which, if we may remind about it, cannot be recovered from the debtor.

It should also be noted that this "privilege" is not fair toward other debtors.

Given the above, the law "On Enforcement Proceedings" should be amended so that the words "*on recovery of regular payments, seizure of assets with purposes of security for a claim, and under the writ of execution to be executed immediately"* be deleted in paragraph 5 of Article 27.

The law should provide instead that the enforcement fee of 10% shall be collected from regular payments on installments, and that, under the writ of enforcement on seizure of assets with purposes of security for a claim, the enforcement fee shall be collected in the manner envisaged for the enforcement of non-monetary judgements.

Identified Gaps

Currently, most of the PEOs hesitate to engage in enforcement of claims of low monetary value or such with low prospects of success. Mainly because PEOs' only remuneration is determined as a success fee (10%) of the amount effectively collected. No money collected, no fee; small claim collected, small fee.

On the other hand, PEOs are provisioning more efficient and customer-oriented service than the SES. Small claims creditors should not be deprived of accessing PEOs' better quality service. Indeed, non-professional creditors need even more enhanced service of the PEOs than the institutional creditors or those with significant amount in stake who engage a lawyer.

Recommendation

Performance (success) Fee, partially advanced by the creditor upon inception of the enforcement case

Experts would recommend for provisioning for an *advance payment* of some portion of the Performance Fee, determined as a lump sum of no dependence of the value of the claim to be enforced (e.g. half of the minimum monthly salary). Such advance will be paid by the creditor upon inception of the enforcement case and will cover basic actions of the EO, e.g.: summoning the debtor, search of assets, levying arrests. The enforcement will continue only if the debtor is solvent, i.e. has tangible assets to be monetarized. If the debtor has no assets in course of a certain period of time (e.g. 2 years), the enforcement case should be terminated and a bankruptcy procedure should be launched.

Vulnerable categories of creditors should be exempted from such advance payment. In these cases the Treasury will make such advance payment upon PEO's formal request. The advance paid by the Treasury will be reverted back to the Treasury by the PEO upon successful collection from the debtor.

Further, the Performance Fee can be determined on a descending scale as a percentage of the amount effectively collected with a median value of the currently provisioned 10%.

Other Direct Costs for third-party services provided within enforcement

Direct costs (for third-party service providers, e.g. expert evaluator, key-locksmith, transportation and storage of seized assets, bank transactions fees, etc.) in enforcement should be advanced by the creditor as they occur. The creditors would be ready to advance only those costs that are necessary and reasonable which will naturally contribute to the proportionality of enforcement. Direct costs, to be recovered from the debtor, should be statutory established, e.g. by a regulation of MoJ/CoM.

Expected Outcome

Claims of small monetary value will become interesting for PEOs from an economical point of view. Creditors will pay a fair advance for the initial set of services provided by the enforcement officers: summoning the debtor, search and seizure of assets. Direct costs in enforcement will be advanced if and when they occur. Enforcement will be dealing with solvent debtors only; for all insolvent ones, the bankruptcy procedure will be launched. Descending scale for the Basic Fee will make more profitable for a PEO collecting 100 cases x 1,000 EUR/each rather than succeeding in one case of 100,000 EUR.

I-2C. Payment Order and Service of Process

The Payment Order (PO) is a uniform and harmonized instrument in the EU that facilitates tremendously creditors' access to enforcement. By default, it's a cheap and fast way for obtaining an enforceable title and start enforcement. On the other hand this fast-track procedure should pay attention to defendants' right to get his/her case heard by a court if the obligation under the PO is disputable. This right could be only safeguarded if there are enough procedural and organizational guarantees for effective service of the PO to the defendant. The deadline for filing an objection against the PO should start counting after the service to the defendant. Such service could happen either on the court stage, i.e. before enforcement, or on the enforcement phase, i.e. after opening of an enforcement case. In the latter scenario, the objection might suspend enforcement ex lege, or enforcement might continue unless suspended by the court under the general or particular rule. The cornerstone of the PO instrument is its service to the defendant; without functioning and effective service of process, PO procedure could not bring its real value to the parties.

Identified Gaps

As of now, the main **service of process** channel used by the courts and EOs is the post. More than 70% of the mail sent to individuals (natural persons) by post is being returned as 'not delivered'. Despite that fact, the courts and EOs continue to insist on the legal fiction and consider these documents as being effectively served to their addressees. This puts in jeopardy the stability of the court decisions rendered in absentia (including the POs) and of the final foreclosure acts in enforcement (the acts of alienating debtor's property).

Recommendation

Absent debtor situations could be better addressed by assigning a **legal representative**, an attorney of the absent debtor by the EO (or by the court) at creditor's expense to be further reimbursable from the receipts of the enforcement case. Such remedy will be in line with the ECHR fair trial acquis and will prevent revocation of final legal acts issued by the court or the EO. The costs for the appointed legal representative will be balanced by the economic feasibility. The creditors would apply for legal representative appointment only in cases where there are assets to enforce against and thus there are good prospects for successful collection. In no-asset cases, creditors naturally won't opt for legal representative, aiming at keeping their costs as low as possible.

I-3. Individual Insolvency

Since quite a long time, Ukrainian Parliament has not considered the implementation of bankruptcy procedure for individuals, who are not entrepreneurs. For instance, one of such draft laws was registered in Parliament in July 2015, but by the present time, the issue has not been completely addressed.

Indebtedness of citizens is a fundamental constraint of country's economic growth. Keeping that indebtedness into some healthy margins is a multi-component task for every government. One of key components of that equation is of course forced execution of outstanding claims vis-à-vis an insolvent individual. Judgement enforcement (individual enforcement) is aimed at solvent debtors only: it has no proper tools to address insolvent ones. Thus, insolvent debtors (and in particular individuals) should be processed on another track – subsequent, in parallel or prior to judgement enforcement.

Individual insolvency is a very broad and complex issue that implies legal but also economic, social and even psychological, educational and cultural considerations that need to be taken into account. Continuation of contract enforcement reforms requires the greatest possible clarity about the government's intentions, and taking into account European experience in the area of individual insolvency.

Identified Gaps

The **new Bankruptcy Code** entered into force just recently is provisioning for insolvency of individuals for the first time in Ukraine. Challenges in the implementation of the new institute are numerous, starting with the limited scope of application of the law and ending up with lack of trained judges and bankruptcy trustees to apply the new procedure.

Currently a **PEO** is not allowed to act as **bankruptcy trustee** of a debtor who was a debtor in a previously pending enforcement case with the same PEO. The ban is established to avoid conflict of interests. Experts can't see any conflict of interest in such situation, but in contrary, believe that the efficiency gap in that ban is apparent. The EO who is well familiar with the property status and indebtedness of the debtor from the enforcement case would not be able to use that knowledge within the bankruptcy procedure launched. The bankruptcy trustee assigned by the court will need to go the same way, collect the same information, and establish the communication with the debtor from scratch. All this will result in higher cost for the debtor and his/her creditors.

Recommendation

Carry out extensive **awareness and educational campaign** for both the general public and the legal practitioners (bankruptcy judges and trustees, lawyers, EOs) on the new procedure of individual insolvency

Develop and implement **Monitoring & Evaluation Tool** for collecting performance data to allow fine-tuning of the system and further policy making.

Allow **the PEO** who acted in enforcement against the insolvent debtor to act as a **bankruptcy trustee** of the same debtor.

I-4. Compensation of Delayed Payment of judgement claims

Identified Gaps

Lack of Default Interest in Ukraine to incur on the judgement claim principal until payment in full violates judgement creditor's right of getting compensated for the delayed payment by the debtor. Debtors in Ukraine have no financial incentive for repaying their outstanding debts sooner than later.

Default Interest is a uniform European practice (ref. the EU Late Payment Directive) – its absence in Ukraine discourages European businesses from getting involved in commercial transactions or from investing in Ukraine.

Recommendation

Introduce a statutory determined Default Interest to incur on all judgment monetary claims until payment in full. The interest rate can be established as a fixed percentage (e.g. 20%) or a fixed

percentage (e.g. 10%) + variable (e.g. Central Bank discount rate облікова ставка , LIBOR, EURIBOR, etc.).

The Default Interest should be regarded as an alternative (and not replacement) to the contractual interest (проценти). If the claim does not derive from a contract or the contract does not provide for an interest, then the creditor, upon submission of his/her claim to the court, can request a compensation for delayed payment in the amount of the Default Interest.

Expected Outcome

Improved collection rates of monetary claims. Fair compensation of judgement creditors for delayed payment. Fair financial burden on debtors and better protection from abusive creditors' practices.

II. THE PEOs: INDEPENDENT AND PROFESSIONAL SERVICE PROVIDERS

II-1. Access to the PEO profession

MOJ: PEOs Admission Process

Reform legislative package (Law on Enforcement Officers and Law on Enforcement Procedure) was supported by wide coalition of political fractions in Parliament. Thus, we may say that main lines of the reform enjoyed a broad political consensus.

One of the key-stone elements of the new enforcement system designed by the legislator was namely the establishment of new competitive market where SEOs and PEOs will enforce judgements in parallel for the benefit of the creditors who can chose whom to assign their claims to for collection. The legislator allowed for a broad competition among PEOs themselves by leaving the market open to as many players as the market would need (opting out of quota limitation of PEOs number to distinguish from the predominant practice in Europe) and allowing nationwide PEOs jurisdiction to broaden and open the competition even further. The conclusion is that the will of the legislator was to create a new market driven by free and broad competition benefiting end-users of judgement enforcement service.

The current design and implementation of PEOs admission process is moving the reform out of the route mapped by the legislator. The admission process now in place limits dramatically the number of new PEOs who enter the market, which on its turn refrains competition and facilitates market's closure for future prospective newcomers which will create additional stimulus for establishment of abusive and monopolistic practices in harm of all end-users.

RECOMMENDATIONS:

The MOJ should stay within the route lined up by the legislator and should organize the PEOs admission process geared at **establishment of competitive market** with enough number of players to avoid monopolistic or cartel practices.

c. *Initial Training*

Although the inscription process for PEO-candidates initial training suffers some shortcomings, the MOJ Training Institute (TI) called Institute of Law and Continuous Training, is declining prompt effort for addressing these. Although the TI admits some risks are presented, it prefers to react on

their eventual occurrence rather than acting proactively, in advance, avoiding realization of those risks.

Some of **risks identified** by project experts might be summarized as follows: lack of evidence for date and sequence of applications submitted by candidates and lack of training attendance requirement along with inadequately long and expensive training delivered in Kiev only.

No particular curriculum development methodology was employed by the TI for training materials development and training delivery, which reconfirms the overall impression that the training is organized pro-forma with no idea of delivering real value for the money paid by participants.

As result: MOJ TI is delivering initial training with poor quality, not addressing risks presented and handling training inscription process in a way which is not transparent and customer-oriented.

RECOMMENDATIONS

Initial training providers should be diversified while in the same time MOJ should establish clear and objective requirements and rules for training suppliers[5].

If the MOJ opts for keeping the monopoly of its Training Institute, then the MOJ and its Training Institute should:

Ensure **transparent, accountable and customer-oriented Initial Training inscription process** for all candidates. This might include online registration of applicants with inscription confirmation slip automatically generated by the inscription system, posted trainings schedule for at least 6 months ahead with possibility for applicants to choose training session to inscribe to.

Design and deliver high quality professional training that represents real value for trainees. Recommended course of action:

- Cutting number of days of training down from 23 to 10 working days: one week theoretical and one week practical training. For practicing lawyers (not scholars) two weeks intensive training would be more than enough. This will naturally increase attendance rate and may cut in half the course tuition fee to make it affordable to broader audience
- Training delivery in main regions and thus allowing for even broader outreach of the training campaign while cutting displacement costs (travel and accommodation) for candidates as well
- Acquisition and implementation of curriculum development methodology that will ensure high quality of training materials and delivery.

d. *Admission Exam*

Admission exam consists of three parts: (1) 100 Multiple-choice questions, (2) Situational exercise (with five MCQ) and (3) Practical exercise (essay). Part 1 (MCQ) scores for 50 points, i.e. 0,5 points for each question, Part 2 (Situational exercise) scores another 25 points, i.e. 5 points for each question, and Part 3 (Practical exercise) scores the last 25 points out of 100.

[5] On 27 November 2017, MOJ adopted the amendments to the Regulations on access to PEOs profession allowing educational establishments from all over Ukraine to deliver initial training to the candidates to profession. Regulations is also setting up the requirements to be respected by educational establishments (Decree of the Ministry of Justice N3793/5 from 27/11/2017)

Opening of each next part of the exam will require achieving 70% correct answers on the previous part. Example: a candidate will continue with Part (2) only if he/she achieved more than 35 points on Part 1, i.e. he/she answered to at least 70 MCQ correctly. He/she will continue to Part 3 only if he/she answered to at least 4 of 5 MCQ within the Part 2.

No taxonomy calculations on candidates' performance on Part 2 and 3 were made to date, as these were introduced by the MOJ beyond the recommendations provided by foreign and local experts, but we can hardly expect better results on these parts.

First part of the admission exam, Multiple-Choice Questions, was developed with solid expert support and on the basis of sophisticated test development methodology. In reverse, the other two sections of the admission exam, **Situational and Practical exercises**, were developed without whatsoever methodology behind, did not pass any approbation testing and thus one can argue they suffer bad quality. To date, keys to these exercises have not been developed at all (or are of really bad quality) which will make objectivized (automated) scoring impossible. This would be a direct breach of the law with all associated to that risks for compromising the exam.

Although the float-gate to the Admission Exam is considerably tight (only 25 candidates can pass the exam per day due to the limited examination stations/computers available) this proved to be enough to examine all interested candidates who passed the initial training over a month. While the first group of candidates is being examined, the second one is trained and so on. Such schedule would require at least two examination sessions per week. The **Qualification Committee** should be supported with sufficient resources for at least: processing and formal review of candidates' applications, initial and follow up communication with candidates, methodological, logistical and physical support during examination process, etc.

RECOMMENDATIONS:

MOJ has to ensure automated, objective and transparent PEO Admission Exam at least by allowing:

- **Automated/objective scoring** for Situational and Practical exercises

- **External observers to the Qualification Committee** set up by MOJ. The QC will need further assistance with administration, logistics and communication but also with situational/practical exercises keys application and scoring

- **Online Broadcasting** of Qualification Committee and oral examination sessions

- External independent **auditing of MCQ automated testing software**.

II.3. Requirements to PEOs office: avoid establishment of artificial barriers to entry into profession by establishment of inconsistent requirements to PEO's office

The Regulation "On Approval of the Requirements to the PEO's Office" was approved under the ministerial order of 15.11.2016.

The document raises concerns related as the MOJs establishes such requirements to the PEO's office that are complicated to comply with, or allow for misinterpretation.

Paragraph 3 of the Regulation reads as follows: "The windows of the premises where the office is located shall be protected with metal bars or security roll-ups despite the floor, where the premises are located (except for the cases where the office is located in the building whose construction

does not allow for such equipment). One of the ways to address unauthorized access is installing the alarm. In the case of signing a contract to secure the office where the PEO's workplace is located, such a contract shall be signed between a PEO and a relevant entity.

We consider the requirement to install the alarm or to sign an agreement with a security agency to be sufficient to protect the PEO's office from unauthorized access.

However, paragraph 4.3.2 of the draft regulation requires the door to be metal, or protected with roller-shutters.

If it comes to 20 to 30 store office building where a PEO rents premises, in our opinion, the owner would not spoil architectural look of such a building with bars or shutters.

Paragraph 8 of the Regulation states that the documents and archives of the PEO shall be stored in a metal cabinet (s) in the PEO's office or in a specially equipped room. It is forbidden to place cabinets for storage of documents or archives in the places that can be easily accessed by visitors.

Thus it does not come to the limitation of access to the documents, which would be logical, but to the limitation of access to the cabinets (!) , where the documents are stored. It is not clear how this should be achieved in the case of storing documents in cabinets in the PEO's office, where he receives visitors.

With this in mind, paragraph 3.of the Regulation should be removed, and subparagraph two of paragraph 8 of the Regulation should be read as follows, that the PEO shall secure the documents stored in their office from the visitors' access.

Identified Gaps

Currently in order to enter the profession potential candidates for a position of a PEO should pass cumbersome procedure that starts with the paid one-month initial training operated by nine admitted by the MOJ universities. Then follows one-month internship and three-stages examination. The latest is operated by the PEOs Qualification Commission at the MOJ and is consisted of automated multiple-choice test, automated practical task, and case study evaluated by the members of the QC. Finally, successful candidate should obtain insurance and duly equip the office. The entire process is disproportionately time and finance consuming for both candidates and state.

Since initial training as well as internship does not prepare candidates for the exam, there seems no value to have these two stages before it. Furthermore, taking into account low rate of candidates who have pass the examination successfully these days its structure should be reviewed providing zero human involvement into verification and simplified structure.

Recommendation

The admission process should start with the fully automated *one-stage test* of legal knowledge relevant to the topic of enforcement of judgements. Then, successful candidates should pass through *orientation course operated by the* APEO and consisted of initial theoretical training and internship. The course should be completely devoted to providing new PEOs with the knowledge and skills needed for effective enforcement from their first day in the office. Furthermore, while passing the course the candidate should obtain insurance and get APEO mentor helping him/her to arrange the office following all regulatory requirements.

Expected Outcome

Increased number of the lawyers entering the profession. Better trained candidates will enter the profession. Candidates will save time and finance they invest now in initial training and internship while the result of the exam is still unpredictable. Furthermore, candidates will be provided with better skills and knowledge for the effective possession of their duties. Orientation course operated by the APEO will further strengthen the capacity of the latest and increase its role as a key institution of the profession self-governance.

II-2. Business Empowerment of the PEOs

PEOs need more caseload in order to develop as a viable enforcement authority for Ukraine. They need to grow (in competitive environment, though) for being able to respond to the high expectations of the society. The immense outstanding judgment debt in Ukraine could be only handled properly by a big enough industry of PEOs.

Prospects for independent and competitive career path will bring more high quality members into the PEOs profession. Increasing the professional standing and integrity of the PEOs will settle the core of the problem of the SES throughout the decades of unsuccessful reform attempts – underqualified SEOs, low integrity levels and high people-flow.

PEOs need to develop their practices as viable enterprises. They should be able to delegate tasks to their staff, should have the flexibility to innovate and implement progressive business models to their enterprises in order to make these more efficient, should be allowed to organize their operations in forms other than the simplistic (and not always adequate) self-employed professional. The enforcement activity is not a one-man-show: it requires hiring staff, constant improvement of business processes, continuing standardization and automation of work-flows. All these are linked to considerable investments that require a fair taxation of the PEOs.

II-2A. Same mandates of SEOs and PEOs

Identified Gaps

На сьогодні приватні виконавці не мають права виконувати судові рішення та рішення інших органів, зокрема, за якими боржниками є державні та комунальні підприємства чи юридичні особи, частка держави у статутному капіталі яких перевищує 25 %, чи які фінансуються виключно за кошти державного або місцевого бюджету; рішення, за якими стягувачами є держава, державні органи; рішення, які передбачають вчинення дій щодо майна державної чи комунальної власності, рішення про виселення та вселення фізичних осіб.

Крім того, нещодавно було внесено зміни до законодавства, що регламентує стягнення аліментів. Цими змінами державних виконавців наділено повноваженнями щодо встановлення обмеження по виїзду за кордон, встановлення заборон на право керування транспортними засобами, володіння зброєю та полювання особам, які мають заборгованість по аліментам.

Приватних виконавців такими повноваження наділено не було, незважаючи на те, що і державні і приватні виконавці керуються одним і тим же процесуальним законом.

Таким чином, жодної мови про змішану систему виконання рішень в Україні не може йти, допоки будуть існувати будь-які обмеження щодо здійснення діяльності приватних виконавців, а отже – обидва сегменти системи виконання рішень (приватна і державна) будуть знаходитися у нерівноправному становищі.

Recommendation

Необхідно повністю зрівняти повноваження державних та приватних виконавців як щодо категорій рішень які вони можуть виконувати, так і у повноваженнях щодо вжиття заходів примусового виконання рішень, а також надати функцію контролю та можливість скасування тих або інших заходів примусового виконання у разі, якщо вони прийняті без додержання вимог законодавства, або порушують права та інтереси сторін виконавчого провадження чи третіх осіб (позасудове врегулювання спірних ситуацій).

Expected Outcome

Зрівняння повноважень приватних виконавців з державними сприятиме прозорій та добросовісній конкуренції між двома сегментами системи виконання рішень в Україні і як наслідок – підвищенню якості надання послуг населенню щодо виконання судових рішень.

Зрівняння повноважень також сприятиме зміцненню дисципліни виконання судових рішень як серед населення (завдяки ефективним стягненням на користь держави та місцевих громад, наприклад, адміністративних штрафів невеликого розміру), так і з боку держави та її органів – через невідворотне виконання ними своїх зобов'язань.

II-2B. Full authority of Assistant PEOs

II-2A. Same mandates of SEOs and PEOs

Identified Gaps

Currently, private enforcement officers are not allowed to enforce judgments and decisions of other bodies, in particular, in which state and municipal enterprises or legal entities whose state share in the authorized capital exceeds 25% are debtors, or which are financed exclusively from the state or local budget; decisions in which the state, state bodies are creditors; decisions involving actions as to state or municipal property, decisions on evictions and moving in of individuals.

In addition, the legislation governing alimony collection has recently been amended. With these changes, state enforcement officers are empowered to impose restrictions on traveling abroad, to impose bans on the right to drive vehicles, to own weapons and to hunt on persons who have alimony arrears. Private enforcement officers were not vested with such powers, despite the fact that both state and private enforcement officers apply the same procedural law.

Thus, a mixed enforcement system in Ukraine is out of the question as long as there are any restrictions on the conduct of activity of private enforcement officers, and therefore both segments of the enforcement system (private and state) will be disadvantaged.

Recommendation

The powers of state and private enforcement officers must be fully equated with regard to the categories of decisions that they can enforce and the powers to take enforcement actions, as well as to provide a control function and the possibility of canceling certain enforcement actions if they are not taken in line with law or violate the rights and interests of the parties to the enforcement proceedings or third parties (out-of-court settlement of disputes).

Expected Outcome

Equating the powers of private enforcement officers with those of state enforcement officers will promote transparent and fair competition between two segments of the enforcement system in Ukraine and, as a consequence, improve the quality of service rendered to the public in the enforcement of court decisions.

Equating the powers will also help to strengthen the discipline of judgments enforcement both among the public (through effective penalties charged for the benefit of the state and local communities, such as small administrative fines) and among the state and its bodies through inevitable performance of their obligations.

II-2B. Full authority of Assistant PEOs

Identified Gaps

To date, pursuant to applicable law, an assistant of a private enforcement officer has substantially limited powers, which include drafting enforcement documents, participating in welcoming visitors, maintaining records and archives, without the right to sign enforcement documents, file them, and receive them upon presentation of identification document, performance of other instructions of a private enforcement officer in pending cases other than those under the procedural powers (rights and duties) of a private private enforcement officer. The assistant of a private enforcement officer does not have any procedural rights in the enforcement proceedings. Thus, the assistant actually performs the functions of support staff at the level of secretary and printer, registering incoming and/or outgoing correspondence, welcoming visitors, etc.

However, the qualification requirements for the assistant of private enforcement officer are set at the level of requirements for the state enforcement officer.

Recommendation

It is quite logical to grant broader powers to an assistant of PEOs, limiting them by some exclusive powers of a PEO, and to assign the control function over an assistant to a PEO.

It is proposed to give PEO Assistant the authority to take all actions provided for by the Law on Enforcement Proceedings for state and private enforcement officers, including:

1) take enforcement actions and make decisions by issuing resolutions, making acts, filing requests, statements, notices, except otherwise provided by this Law; 2) conduct the inventory of the property (funds) of the debtor upon a separate written instruction of a PEO; 3) represent the interests of a PEO in court as to complaints on the actions/omissions of the PEO.

The sole powers of a PEO include: 1) deciding to open, refuse to open, suspend, terminate or resume enforcement proceedings; 2) making a decision to postpone carrying out of enforcement actions, suspend enforcement actions in enforcement proceedings, continue the enforcement of the decision, withdrawal of arrest from all or part of the property (funds) of the debtor; 3) distributing the funds collected by the PEO from the debtor (including those obtained from the sale of the debtor's property); 4) making decisions on the recovery of the principal remuneration of the PEO, the costs of enforcement proceedings.

Expected Outcome

Expanding the powers of PEO assistants will increase the speed and quality of service rendered by PEOs in the field of enforcement, as well as create new jobs in the legal profession.

With really empowered assistants, PEOs will be able to enforce more enforcement documents and, in a short period of time, take all necessary steps to find the debtor's assets, which will help unlock the potential of reform for the benefit of Ukrainian citizens and business.

II-2C. PEOs Business Organization and Taxation

Identified Gaps

According to the legislation of Ukraine, a PEO is a person engaged in independent professional activity.

The Law of Ukraine “On Enforcement Proceedings” stipulates that, for carrying out the professional activity, a PEO shall open accounts with banks, inter alia, for the purpose of crediting the funds collected from the debtors for their further payment to the claimants, as well as for the costs of enforcement proceedings. Part 3 of Article 44 of the said Law provides that the said funds are not the income of a PEO.

In turn, the Tax Code of Ukraine (hereinafter referred to as TC), which regulates the taxation of persons engaged in independent professional activities (PEOs), defining the concept of "taxable income" as the difference between income and costs, does not determine the composition (components) of such income. In doing so, it provides that all taxation issues are governed solely by it.

The bodies of the State Fiscal Service, based on the specified provisions of the TC, determine all the funds that are deposited into the deposit account of a PEO as his own income.

In addition, the amount of all taxes and fees currently paid by PEOs as persons engaged in independent professional activity, amounts to 41.5% of the income they receive, which is significantly higher than in the case of entrepreneurs to whom a simplified tax system applies. At the same time, the law prohibits PEOs from engaging in other paid activities or merging into corporate forms of carrying out activity, which also makes it impossible to reduce their tax burden.

Recommendation

To amend the TC as to definition of the composition (components) of income of individuals engaged in independent professional activity, to choose a simplified tax system.

To provide in legislation the possibility of PEOs to carry out their activities as a business entity, as well as to integrate into corporate forms of business activities.

The idea of allowing for simplified taxation of PEOs goes in line with the idea for allowing simplified taxation of all self-employed professionals (e.g. attorneys, notaries, etc.) that was in the genesis of the Draft Law No 2200 of Oct 2, 2019 submitted to the Parliament.

Nevertheless, the size of the business/enterprise of the self-employed professional should be taken into consideration. The simplified taxation is aimed at sole or micro entrepreneurs, it disregards the expenses for running the economic activity and may not be adequate for all organizational forms in which the PEOs will run their operations.

Expected Outcome

A clear, objective taxation procedure for taxpayers (PEOs), defined by tax legislation, will lead to legalization of the activity, compliance with tax requirements, which will, in turn, will facilitate timely

and full payment of taxes and the social security tax. Also, reducing the tax burden will contribute to the attractiveness of the profession and will increase the number of PEOs.

II-2D. Professional Liability Insurance of PEOs

a. Need for further regulation

The lack of regulation of important issues such as the sample insurance contract; the procedure of signing an insurance contract, definition of insured risk(s), the time when the insurer should be notify of insured risk occurrence; regulation of the maximum premium; defining a document giving grounds for the reimbursement etc.

In practice, there may be disputable situations concerning the PEO's right to insurance compensation in view of compliance with the obligation to inform the insurer of the insured risk occurrence. It often happens in this category of cases that the damage occurs (or becomes known) some time after the action took place. Therefore, some insurance companies may insist that the PEO should have reported the risk occurrence right after a particular event (e.g. enforcement actions) and not after having faced the claim or the judgement that came into legal force. Such an approach almost always will result in refusing the insurance settlement payment.

Adoption of a regulation similar to the Decree of the Cabinet of Ministers of Ukraine No. 624 of 19.08.2015 "On Approval of the Procedure and Rules of Compulsory Civil Liability Insurance of Private Notaries" is advisable. Such decree should regulate at least the following related items:

• Insurance risks and insurance events, exceptions from the insurance events

• Insured amounts and insurance tariffs

• Assessment and payment of insurance indemnity

• Insurance contract execution procedure or special aspects of compulsory insurance contracts (list of items to be agreed upon)

b. Insurance Time-line precision

The definition **of PEO obligation to purchase permanently supplementary insurance of professional liability** in case if the amount to be recovered under the writs of execution increases is set in Part 3.4 Art. of 24 of the Law of Ukraine "On Enforcement Officers" is ambiguous and unclear.

In Par. 3 of Art. 24 there is reference to one year period but it's unclear from when that one year period starts counting. The starting date should be linked to PEO's reporting periods as long as the base for calculating of the insurance amount would be the aggregate value of all claims for collection by that PEO – a figure that for sure will be presented into reports that each PEO should provide to MOJ on an annual/biannual/quarterly/monthly basis.

It would be useful to set it clear that the base for calculation of minimum insured amount should be calculated on pre-defined annual time span that starts and ends up on January 1st each year, for example.

In its Par. 4 of Art. 24 the law requires that a PEO should conclude additional insurance if the current insurance base exceeds the base on which PEO's current insurance was concluded for. It is not perfectly clear from that provision when precisely that additional insurance should be undertaken by the PEO. We believe that adding to the insured amount should be done once per year when the amount of the base would be calculated and provided to MOJ by the PEO. If we take same time schedule as suggested above, this would mean that the basis will be calculated as

per January 1st each year, so the insured amount will be updated as per that same date and the obligation of adding to insured amount will be effective as per January 1st each year.

In order to make that time-frame clear there is no need to change the current language of the law. As insurance schedule would be naturally linked to reporting, it can be set into the Regulation on PEO Reports: e.g.one paragraph saying:

“For calculation of insured base in accordance with par. 3 of Art. 24 of the Law on EOs the reported value of claims to collect as per January 1st of each year will be taken into consideration. The same value would be considered for application of par. 3 of the latter.”

c. Inequality between SEOs and PEOs in terms of recovery of the caused damage

Lack of insurance coverage for damage caused as a result of an intentional crime (art. 26 of the Law of Ukraine “On Insurance”), would hardly meet the concept of liability insurance of PEOs as agents endowed with coercive powers, which causes most of the concerns in the civil society.

Under part. 2, Art. 1166 of the Civil Code of Ukraine (applicable also to PEOs), the lack of guilt gives grounds for exemption of the person who caused damage from liability.

However, under Art. 1174 of the Civil Code of Ukraine, damage caused to natural or legal person by unlawful decisions, actions or inactivity of a civil servant or public official when in office, shall be recovered by the State irrespective of such person’s guilt.

It is advisable to implement the rule stating that the lack of the PEO’s guilt in causing damage shall not relief insurer from the obligation to recover, and that causing damage by committing an offense shall also be subject to insurance settlement payment.

d. Financial reliability of insurance companies

The lack of requirements to the **financial reliability (stability) ranking of insurance companies**, where a PEO may insure his/her liability may result in situation where PEOs will address to fake insurer with a high risk of insolvency.

Repeatedly, all stakeholders (e.g. notaries, bankruptcy trustees, lawyers, insurers, think-thanks, etc.) evidence the following situation that exists in Ukraine to date. There are some 300 and more insurance companies, licensed by the Regulator and operating in the country. Professional Liability Insurance is provided under the general Civil Liability Insurance license that most of the general insurance companies hold. There is a demand in the market for cheap insurance policies disregarding the fact that such policies may have no real coverage. Such policies are provided by formally licensed insurance companies that operate in a way to avoid any tangible obligation on their side vis-à-vis any infringed parties in the future. Professionals (notaries, bankruptcy trustees, lawyers, etc.) buy such policies because of the low price. With that they formally comply with the legal requirement to have professional liability insurance while in fact these policies cannot serve their ultimate goal: to protect all infringed parties against unlawful actions/inactions of the insured professional.

That issue does not belong to enforcement and rule of law areas strictly. It might be a result of financial market and financial regulators malfunctioning. As such, it needs special attention and addressing as financial markets dysfunctions drain down country economy and defer Ukraine’s sustainability and prosperity.

This issue has been successfully addressed by the Motor (Transport) Insurance Bureau of Ukraine that publishes quarterly assessments of the insurance companies on its website based on three

factors: (1) overall evaluation of the insurer's business activity; (2) quality of handling damages ; (3) number of complaints from victims and insured

Experts would recommend introducing a mechanism for public disclosure of relevant information on insurance companies that provide professional liability insurance products similar to the information publicly available for insurance companies on Motor Vehicle insurance. Such information should cover all professional liability products (insurance contracts) – both voluntary and mandatory ones; of all insured professionals: PEOs, notaries, bankruptcy trustees, constructors, doctors, lawyers, etc.

As of November 2019 the above findings and recommendations are still valid.

II-2E. Transfer of Enforcement Cases to another EO

II.5. Transfer of Enforcement Cases upon request by Enforcement Creditor

Thus, the Law No. 1404 (in particular, Articles 5, 24, 25, 27 and 37) and the Law No1403 (in particular, Articles 32 and 45) provide for the possibility of transmitting writs of execution from one executive officer to another one within the state enforcement service, or from a state enforcement service to a PEO.

Paragraph two of part five of Article 5 of the Law No1404 provides that the procedure for the transmittal of writs of execution shall be determined under the relevant MOJ regulation.

As reported to date, SES declines transfer of pending enforcement cases to PEOs. MOJ should remove any ambiguity and/or obstacles that prevent such transfer in practice.

An enforcement officer shall make a decision on the transmittal of the enforcement proceedings. As a rule, such a transmittal shall be carried out at the request of the claimant.

If it's true that the receiving EO will continue enforcement from the stage where it was while pending with transmitting EO, it is still unclear which EO would have authority to lift-off all property restraints registered by the first (transmitting) EO in case of termination/closure of enforcement case by the second (receiving) EO? This question should have clear explicit regulatory answer in order to avoid legal uncertainty and additional cost for interested parties.

The experts were not in measure to asses that field as **the MoJ failed to provide any statistics** on cases transferred from the SES to PEOs for the past 2 years.

Identified Gaps

The **statistics** on performance of the enforcement system in Ukraine are *de facto* not available. Despite the fact that all performance data is centrally collected via the АСВП, it's in practice impossible to access that data. From the communication the experts had on that issue with the MoJ team, it appears that the MoJ, being the principal of that data, is also not in measure to make HAIC do its job and provide statistical reports upon request and as needed.

Data gathering and keeping, statistics generation and interpreting (if happens at all) performed by HAIC, are not transparent and assumedly subject to manipulations.

Recommendation

HAIC should develop (or customize an existing solution) flexible **Reports Generation Tool** to be available for implementation by all key stakeholders of enforcement system: MoJ, APEO, High Judicial Council/Courts Administration. The tool would generate reports using the data kept at the АСВП database

MoJ should upload key enforcement performance data in the Government's **Open Data Cloud** for further free usage.

II-3. Oversight of the PEOs

Liberalization of the PEOs activity and their emancipation from the MoJ would not mean that the PEOs should be left uncontrolled. Exactly the opposite. Giving more freedom to the PEOs to do their job more efficiently should be balanced with more sophisticated and effective control of their activity by the MoJ.

There are no inspections carried out in the SES central and regional units. The compliance of the SEOs is only achieved by the hierarchical administrative mechanisms in place at the SES.

II-3A. MoJ Inspections

Currently, MOJ has no proper capacity to exercise the oversight on EOs activity as mandated by the law. MOJ Regulation on Inspections provides for inspections on PEOs activity to be carried out by the Regional State Enforcement Service employees. MOJ admits that in most cases inspections would be carried out by SEOs as regional SES lack other expert staff. On the other hand MOJ has a good record of work of its two other oversight units: those on notaries and on bankruptcy trustees. At the same time controlling the activity of PEOs would require much higher intensity than the same work with notaries and bankruptcy trustees.

Objective: Establishment of effective and risk-oriented oversight mechanisms on professional activities of State and Private Enforcement Officers

MOJ existing oversight system

There are separate MOJ departments responsible for overseeing activities of notaries and bankruptcy trustees (BT), respectively. While the central notaries department is somehow understaffed (10 experts are covering more than 6,000 notaries) the BT one is well organized, staffed and functioning properly. There are some 10 experts at the central unit which task is to control activity of not more than 600 acting BT (out of 1,500 licensed). On the regional level notaries departments and bankruptcy ones count some 5-8 experts in average.

BT inspectors have to pass a qualification exam (test, interview and situational exercise) while for the notary ones it is enough to have legal background in order to qualify. Trainings for inspectors are provided on occasional basis and are geared more at methodological aspects of controlling activity rather than at acquiring new and enhancing existing practical skills of inspectors.

In both systems inspections (on-site or off-site) are carried out primary by regional departments, although the central ones can do inspections as well. The central departments mainly provide methodological support to and control the work of regional units.

Inspections are scheduled and on complaints. Scheduled inspections are carried out once per 3 years for notaries and once per 2 years for BT. Both departments perform some kind of risk assessment when setting up inspection schedule although there is room for enhancement of assessment currently in place.

Standardization of inspection process (e.g. inspection protocols and procedures, forms, reporting, data analysis, etc.) is at very initial stage and needs considerable improvement. While the BT

department is equipped with electronic M&C system (build in 2006 by NAIS), notaries inspectors enter all controlling data in Excel spreadsheets.

Inspection findings are formalized in an administrative act of the Minister which is subject to self-standing appeal in court. It is questionable if such legal remedy can be justified from procedural economy principle standpoint. After all, that order of the minister just re-affirms the findings of the inspection which represent nothing more but simple evidence that can be used along with all other proves to be collected within eventual disciplinary proceeding to follow. Providing for a court review of an act listing facts only with no direct legal consequences seems to be an excess and should be reassessed.

Foreseen MOJ oversight on PEOs activity

Current MOJ Regulation on inspections provisions for inspections of PEOs activity to be carried out by employees of the MOJ State Enforcement Service. As stated on several occasions by all interlocutors, due to lack of resources at SES we can expect that those inspections would be carried out by State Enforcement Officers (and not by other dedicated expert staff at SES). Such situation would raise concerns at least into two directions: (i) conflict of interest and (ii) capacity of SES to properly exercise that function.

Assuming that SEOs and PEOs would compete on the same market, there would be a risk for conflict of interest situations under the current inspection rules. We can reasonably expect that at least some half of all PEOs would probably be ex-SEOs. Those new PEOs would be even more exposed to biased inspections carried out by their ex-fellow colleagues at SES: either in negative (disproportionately harsh inspections) or positive (unjustified loose inspections) sense.

Besides conflict of interest risk, the question of SES capacity for proper functioning if charged with PEOs inspections stands. Officials at SES shared their concern that new oversight tasks for SEOs would distort them from their primary job: enforcement of judgements. If the current inspection mechanism would be implemented, MOJ would risk having neither proper enforcement nor effective oversight on PEOs at SES.

RECOMMENDATIONS:

Experts would strongly recommend that MOJ builds its PEOs oversight capacity ideally **outside SES** as a self-standing unit with its proper administrative and expert staff. If not feasible (i.e. some policy and/or organizational constraints mandate for the oversight facility within SES), then SES should enhance its capacity to allow **dedicated and highly specialized expert staff** performing all new tasks associated with PEOs controlling functions.

Both options can be implemented at **no substantive additional cost for MOJ** if some resources from MOJ bankruptcy trustees controlling unit would be allocated and dedicated to the new PEOs controlling facility. Such re-organization would only require new inspection protocols set up and additional training of PEOs inspectors: tasks that can be accomplished with external technical assistance.

Future PEOs oversight MOJ facility should cumulatively comprise of the following **core elements**:

- High **Qualification** of inspectors: sound selection process, good performance incentives, ongoing training
- **Standardization and Automation** of inspection process: improved inspection work-flow, standard inspection forms and records, electronic M&C system in place
- Sophisticated **Risk Assessment** system based on qualitative and quantitative performance data checked against pre-determined performance indicators
- **Visibility, Transparency and Accountability** of MOJ oversight system: publication of annual reports, improved communication with complainants and PEOs

MOJ should develop SEOs and PEOs qualitative and quantitative Performance Monitoring Indicators (PMIs) and should adjusting regulatory and technical frameworks to allow collection of data to measure against adopted PMIs.

Further, the MOJ should: (i) draft oversight protocols and manuals, (ii) provide trainings on practicing risk-oriented oversight (including ToT if necessary), (iii) coach and provide methodological support to inspectors and (iv) commission an independent external audit of its (MOJ) oversight activity.

Once the MOJ oversight mechanism is stable and properly functioning, it can be adjusted, tailored, transposed and implemented at the PEOs Associationfor the exercise of internal profession scrutiny.

Identified Gaps

Since the enforcement reform launch in 2016 the MoJ had performed some **planned inspections** on PEOs' activity. During 2019 it is planned to conduct 78 such inspections. In same time no even one such audit of the work of the SES and SEOs had been conducted. MoJ planned inspections are arbitrarily initiated: the MoJ has no publicly available inspections schedule which is built on objective criteria/performance indicators. The inspections of PEOs are performed by employees of the SES which put doubts on the impartiality and objectiveness of inspection's findings. Results from inspections are not systemized, publicized and further analyzed to allow evidence-based policy making.

Recommendation

A dedicated **Inspection Unit** subordinated (and reporting) directly to the Minister should be established within the MoJ to monitor the activity of all regulated legal professions in the MoJ portfolio (SEOs, PEOs, notaries, bankruptcy trustees and registrars).

Inspections should check against predetermined and publicly known **performance indicators**. Annual inspection schedules should be built on objective criteria (i.e. previous performance against benchmarks) and made publicly available in advance.

The Inspection Unit **publicizes** annual reports on performance of each of the regulated professions that include qualitative (e.g. systemized findings from inspections) and quantitative (e.g. statistics) data against performance indicators.

Expected Outcome

Transparent, independent and professional oversight on all regulated legal professions in the MoJ portfolio. Evidence-based policy making by the MoJ.

II-3B. PEOs Disciplinary Process

The PEOs Disciplinary Process suffers from multiple flaws. Bad management of the DC on MoJ side results in questionable professional standing and integrity of the DC's members. The disciplinary process has no its proper regulation in the law, which creates legal incertitude for the parties and the disciplinary panel. The disciplinary decisions are not motivated and are not publicized, which brings suspects for bias. Despite all organizational and procedural flaws of the current disciplinary process, the disciplinary decisions are enforceable right after their adoption and before being subject to a court review. The judicial review is now carried out by the administrative court which is not necessarily a tribunal with full jurisdiction by the notion given in the ECHR's fair trial acquis.

Qualification Commission of PEOs

The Qualification Commission consists of nine members, four of them being appointed by the Ministry of Justice of Ukraine, including the Minister or Deputy Minister, another four – by the Congress of PEOs of Ukraine, and one member being appointed by the Council of Judges of Ukraine.

The Qualification Commission is chaired by the Minister of Justice of Ukraine or the Deputy Minister of Justice of Ukraine.

Disciplinary Commission of PEOs

The Disciplinary Commission consists of nine members, four of them being appointed by the Ministry of Justice of Ukraine, including the Minister or Deputy Minister, another four – by the Congress of PEOs of Ukraine, and one member being appointed by the Council of Judges of Ukraine.

The Disciplinary Commission is chaired by the Minister of Justice of Ukraine or the Deputy Minister of Justice of Ukraine.

In fact, the PEO professional activity undergoes double control. It is overseen by:

A) the Ministry of Justice of Ukraine through scheduled and unscheduled inspections. Alongside with routine (scheduled) inspections that then Ministry may hold no more often than once every two years, unscheduled inspections may be held on the basis of:

1) the PEO's request on holding an inspection;

2) written complaints of participants to criminal proceedings against decisions, actions or inactivity of a PEO;

3) the PEO's failure to submit in time a report or other information, and/or submission of unreliable information.

In case if any indices of disciplinary violation committed by a PEO are identified during the inspection, the Ministry of Justice of Ukraine shall submit a reasoned request to the Disciplinary Commission on bringing a PEO to disciplinary liability.

B) the Council of PEOs:

The Council of PEOs of Ukraine is entitled to examine the activity of a PEO, upon the request of a participant to enforcement proceedings or at its own initiative, so far as respect of:

1) the Statute of the Association of PEOs of Ukraine;

2) the Code of Professional Ethics of PEOs;

3) the decisions of the Council of PEOs of Ukraine and the Congress of PEOs of Ukraine related to activities of PEO.

The Council of PEOs is obliged to consider the documents submitted so far as the presence of indices of disciplinary offense within 30 working days upon the receipt of explanation from a PEO or since the day such explanation should have been submitted, and to make a decision on whether to submit to the Disciplinary Commission of PEO the motion of bringing a PEO to disciplinary liability.

Thus, both – the Ministry of Justice of Ukraine and the Council of PEOs have the powers to submit to the Disciplinary Commission of PEOs the motion on bringing a PEO to disciplinary liability.

The said double control and overlapping of powers may result in the situation where the same declarant (claimant) sends the same complaint to both bodies (MOJ and the Council of PEO), and both bodies would have to make their inspection upon the same address (the same violation). To avoid discrepancies in both controlling bodies' practices, experts would recommend establishment of effective communication protocol between the MOJ and the Association, which can be formalized within the Disciplinary Commission internal rules of operation when adopted.

Impartial and transparent procedure of disciplinary oversight; accountability of the Association

When considering a motion on bringing a PEO to disciplinary liability, the Disciplinary Commission:

1) *shall invite the PEO to the meeting and hear his/her explanation* on the issues giving basis for the submission of a motion on bringing a PEO to disciplinary liability;

2) is entitled to invite to the meeting a participant to the enforcement proceedings, whose complaint gave basis for the inspection of the PEO's activity and the submission of a motion on bringing him/her to disciplinary liability, so that the former provide additional explanations on the merits of the complaint;

3) is entitled to invite to the meeting and hear the opinion of representatives of public authorities, local self-government, and other persons, with their consent.

4. When considering a motion on bringing a PEO to disciplinary liability, the Disciplinary Commission shall make one of the following decisions:

1) to satisfy the motion and apply a disciplinary action toward the PEO;

2) to dismiss the submission and to send materials for the overall review of the PEO's activity;

3) to dismiss the submission and to refuse the application of a disciplinary action toward the PEO.

There are certain shortcomings within the said procedure. For instance, the question may arise on whether the Disciplinary Commission's decision would be valid and binding, if the PEO never showed up at the sessions and without any explanation?

It would be useful to amend the Law "On Enforcement Officers" as follows: "Failure of the PEO or the person, who initiated the disciplinary proceedings, to appear in a hearing of the disciplinary committee without a valid reason, provided there is an evidence of reasonably timely notice of such persons about the place, day and time of the hearing, shall not preclude the consideration of a disciplinary case.

Experts would suggest making all final disciplinary decisions (of the disciplinary panel as confirmed, amended or discarded by court in appeal) publicly available on internet with all personal data of parties involved deleted. This will benefit transparency and accountability of disciplinary process that on its turn will increase public trust in the new profession on one side and self-compliance of PEOs on another.

Identified Gaps

Currently, the PEOs Disciplinary Committee (DC) is a body of the MoJ, yet composed of representatives of the APEO and the MoJ. The **members of the DC** are not motivated and committed to their work as being arbitrary appointed (no quality competition/election process) and not remunerated. The list of **disciplinary sanctions** consists only of the two extremes, reprimand (too soft) and deprivation from license (extremely harsh). It limits the DC's flexibility in choosing the most appropriate sanction to the violation in stake. The decisions of the DC are feebly motivated, are not publicly accessible and enter into force before being subject to **judicial review**. The judicial review is performed by the administrative courts that might not be regarded as tribunals with full

jurisdiction as defined in the ECHR case-law: the administrative courts, as a rule, could not decide on the proportionality of the sanction to the disciplinary violation.

As result, the DC's decisions proved to be of very **low quality**: in 2017-2019 the MoJ DC rendered in total 7 decisions, 5 of which were repealed by the court, the other 2 are still pending in review. Immediate entry into force of the disciplinary decision (consequently quashed by the court) infringes enforcement parties' and the PEO's legal rights disproportionately, creating turbulence in all pending enforcement cases with the PEO who was deprived of license.

Recommendation

The DC to be established as a 3-lateral body administrated by the **APEO** and composed of representatives of the MoJ, judiciary and the APEO. **Members** of the DC should be appointed following a quality competition/election/assignment process; should be remunerated for their work and hold accountable for underperformance. A **monetary fine** should be added to the list of disciplinary sanctions. All **decisions** of the DC should be fully motivated, publicized and entering into force after judicial review by a court with full jurisdiction.

Expected Outcome

Better administration of the DC by the APEO as well as enhanced transparency and accountability of the DC will improve the quality of its decisions. The 3-lateral composition of the DC will back up its impartiality and high professional standing. The APEO will turn into a full-body self-governing organization. The enlarged list of disciplinary sanctions will enable the DC's flexibility for better reflection of the severity of the violation committed by the PEO. Enforceability of the DC decisions after judicial review will safeguard PEO's and enforcement parties' legal rights and legitimate interests.

II-4. PEOs Self-governance

I.3. The Chamber: establishing PEOs independency safeguards

Comparative table of key instances co-regulated by the Ministry of Justice of Ukraine and the Associationof PEOs of Ukraine (bodies established under the Chamber):

Ministry of Justice of Ukraine	***PEOs Association of Ukraine through its authority – Council of PEOs of Ukraine:***
- formulates and implements the state policy in the field of forced execution of judgements; *- ensures initial and continuous training of PEOs;*	*- makes decisions related to self-governance, approves the constituent documents of the Association, the regulations on regional congresses of PEOs, ensures functioning of the bodies created by the Association of PEOs of Ukraine;* *- establishes the amount and the order of payment of membership fees of the PEOs Association of Ukraine;*

- issues the PEO license; *- defines the requirements to the PEO offices;* *- ensures functioning of the Qualification Commission of PEOs and the Disciplinary Commission of PEOs;* *- forms the Unified Register of PEOs of Ukraine, establishes the order of maintenance thereof;* *- establishes the form and order of submission of information about professional activities by the PEOs;* *- oversees activities of the PEOs, and defines the order of overseeing activities of the PEOs;* *- submits to the Cabinet of Ministers the proposal on the basic remuneration of PEOs;* *- puts into effect the decisions of the Disciplinary Commission of PEOs related to imposition of a disciplinary sanction on the PEO;* *- suspends and terminates the right to exercise the duties of PEO;* *- exercises other powers envisaged by the Law.*	*- participates in the development and agrees on draft regulations defined by law;* *- makes decisions on submitting to the Ministry of Justice of Ukraine motions on suspense of the PEO professional activity in the cases envisaged by the Law;* *- makes decisions on submitting to the Disciplinary Association motions on bringing a PEO to disciplinary liability;* *- contributes to respect of professional duties by PEOs;* *- makes decisions on the disposal of funds and property of the Association of PEOs of Ukraine in accordance with the budget approved by the Congress of PEOs of Ukraine;* *- ensures development and maintenance of the website of PEOs of Ukraine* *- exercises other powers envisaged by the Law*

The abovementioned table evidences that certain part of MOJ powers might be exercised by the Association, thus, sometime after the Association of PEOs of Ukraine be in place, certain part of powers may be transferred from the Ministry of Justice to the Association.

The goal of such transfer of powers would be to give the Association some real authority that will contribute to its legitimacy and organizational sustainability. Association with no authority would not be able to consolidate its membership and to give real value to it, which on its turn would decrease chances of the Association to act as watchdog for the new profession while stimulating self-compliance of its members (PEOs) at the same time.

It seems possible to transfer the following powers from the Ministry of Justice to the Association of PEOs:

- *ensuring initial and continuous training of PEOs: initial training can be provided by two providers – MOJ and Chamber, while ongoing training of PEOs should be a task for the Association only;*
- *print out of the PEO license plaques;*
- *defining the requirements to the PEO office;*
- *ensuring functioning of the Qualification Commission of PEOs and the Disciplinary Commission of PEOs: in terms of funding and logistics;*
- *maintenance of the Unified Register of PEOs: administration and funding;*
- *establishing the form and order of submission of information about professional activities by the PEOs;*
- *- overseeing activities of the PEOs (inspections): Association must be given an authority to carry out scheduled/ad-hock, onsite/offsite inspections of PEOs activity in parallel with inspection authority of MOJ;*
- *MOJ draft proposals on PEOs basic remuneration to be consulted with the Association prior to their submission to CoM for adoption*

However, this issue may be solved solely by the Parliament via amending the legislation, as the said powers of the Ministry of Justice are enshrined in the law “On the Authorities and Persons Exercising Forced Execution of Judgements and Decisions of Other Authorities”.

The best European practice shows that in countries where the enforcement is carried out by independent professionals (i.e. PEOs), their activity should not be unilaterally regulated by the executive, e.g. the MoJ. The State should regulate, take part into or back up only: (i) PEOs’ admission process (as the PEOs are exercising public authority), (ii) cost of enforcement to be recovered by the debtors, (iii) standardization of enforcement, e.g. record keeping, documenting, reporting, accessibility of enforcement cases and PEOs’ offices, etc., and (iv) PEOs oversight: inspections and discipline. All the rest should be left to the self-governance body of the profession.

On the other hand, the self-governing organization of the PEOs is still progressing slowly on its capacity building way. The genesis of the APEO (association with mandatory, as opposed to volunatry, membership) renders the process of common values and goals formulation extremely tense. At the outset of the profession, its members had very little in common and thus the APEO still have a lot a way to go.

Nevertheless, experts believe that the institutional development of the APEO has no alternative. It’s better to have an organization to develop rather to have no organization at all. The APEO has a unique chance to be supported by the international donors on its way to maturity, a chance that neither the Notaries Chamber nor the Bar had at the time. With the continuing support of the international donors the APEO has much better prospects to turn into the flagman of the so needed rethinking of the self-governance in Ukraine and to pave the way for establishing a real self-governance mechanisms and environment in all regulated legal professions.

A strong catalyst of that process might be the hand given by the MoJ. The MoJ should be ready to share regulatory and oversight authority with the self-governance organization of PEOs, the APEO.

The State should regard the self-governance organization of PEOs as an indispensable and valuable partner, an ally in all efforts geared at improvement of the enforcement system to the benefit of all citizen and businesses in Ukraine.

II-4A. Democratic and Independent Association of PEOs

Identified Gaps

The existing legislation contains provisions that impede further development of the APEO on the basis of transparency and accountability:

- the system of APEO bodies has a cumbersome structure, while the powers of its regional bodies are deprived of any real content;
- only delegates who are members of regional councils of PEOs have the right to vote at the congress of PEOs of Ukraine. In turn, heads of regional councils of PEOs are, at the same time, members of the Council of PEOs of Ukraine;
- the law does not provide for either hearings of reports by the congress of PEOs of Ukraine or the possibility of early withdrawal of members of the Qualification Commission of PEOs of Ukraine or members of the Disciplinary Commission of PEOs of Ukraine.

Recommendation

The statutory provisions that provide for the existence of regional APEO bodies shall be excluded (setup of such bodies should be voluntary and happen as display of self-governance).

All PEOs registered in the Register of PEOs of Ukraine, should be entitled, under the law, to vote at the Congress of PEOs of Ukraine, and to be elected to the Council of PEOs of Ukraine. The law should also make it impossible to combine several positions related to self-governance. In order to ensure transparency and confidence in the process of formation of the APEO bodies, voting should be secret and electronic.

The law should facilitate the Congress of PEOs of Ukraine to hear the reports of the members of the Qualification Commission of PEOs of Ukraine and members of the Disciplinary Commission of PEOs of Ukraine about their activities, and to withdraw them early from offices.

Expected Outcome

Changing statutory provisions will strengthen the democracy and independence of the APEO, namely: optimize its structure; introduce principle of accountability in a more systematical way; ensure the right of each PEO to participate in self-governance; and make it impossible to combine several positions.

II-4B. Continuing Professional Development of the PEOs

Identified Gaps

The law stipulates that PEOs should constantly increase their professional qualifications, while also taking an examination once every five years to confirm their professional compliance. The MoJ is entrusted to facilitate both of the abovementioned, as well as the initial training of PEOs.

Despite the efforts aiming at the conduct of the initial training of PEOs, continuous training of PEOs is not ensured (no relevant MoJ regulation has been approved yet).

At the same time, the best international practice is that the Continuing Professional Development of PEOs should be regulated and organized by their self-governing organization and not by the State.

Recommendation

Legislation should be amended to transfer the function of preparation and professional development of PEOs to the Association of Private Enforcement Officers of Ukraine, while giving the possibility to choose freely a provider of training services.

The regular qualification examination should be cancelled. Instead, regular annual review and continuous training of PEOs shall be implemented. The law shall specify the mandatory number of days / hours for training of PEOs.

Expected Outcome

Modern and independent PEOs' professional development is in place that falls under the responsibility of the self-governance body.

III. EFFICIENCY GAPS

III-1. Courts facilitate Judgement Enforcement

III.4. Simplified procedure of substitution of the debtor by his legal successor

There is a lack of clear solution to the issue of replacement of a party to the enforcement proceedings by a successor who received the rights and obligations under the contract. There is still no unified (homogeneous) practice of such replacement of a party.

There has been a long-time discussion on whether a party to the enforcement proceedings may be replaced by a successors, who received the rights and obligations under the contract (assignment clause, or cession clause), and not only due to the termination of a legal entity by merger, takeover, demerger, transformation, or dissolution, as well as inheritance. As a result, the banks purchasing, under the contract, claims to debtors from the bank under liquidation, could not fully exercise their right to make the debtor comply with their obligations within the enforcement proceedings.

Experts would recommend specifying the valid reason for replacing a party in the enforcement proceedings with their successor by amending the new Guideline of Enforcement Proceedings, adopted by the MOJ. In particular, it is advisable to determine the succession should be defined

as: transfer of rights and duties under a contract succession, termination of a legal entity by merger, takeover, demerger, transformation, or dissolution

III.5. Removal of obstacles to replace a mean of execution with another one – improving the court procedure

Among other ways to cease obligations under the parties' will, there is the fulfillment of obligations. Fulfillment of obligations is the normal way to cease obligations, a goal achieving of which gave the reason for initiating the imposition of obligations. However, fulfillment of obligations must be result of due – not just any – completion thereof. The requirement defining due completion of obligations are usually contained in laws and contracts, and if not, some common requirements should be applied.

The term "mode and procedure" of completion of a judgement has a specific meaning in the context of enforcement proceedings. It means a judicially defined sequence and content of enforcement actions to be taken by the enforcement authorities. The case law includes many judgements that cannot actually be enforced. The reason is that the remedies and the enforceability do not commensurate.

The mode of enforcement of a judgement is determined based on the remedies for protection of civil rights listed in Article 16 of the Economic Code of Ukraine. The remedies for protection of civil rights may, among others, include: ceasing an action that violates the right; restoration of the state of play existing before the violation; forced execution of an obligation itself; change in legal relations; ceasing of legal relations; recovery of damage and other ways of property recovery; recovery of moral (non-property) damage. Change of the mode and procedure of enforcement of a decision consist in the change of an enforcement measure for another one.

In this connection, enforcement authorities have to go to court with request for changing the mode and procedure of enforcement of decisions. Once the requests for changing the mode and procedure of enforcement of judgements are satisfied, the judicial authorities are actually obliged to amend the judgement on merits, which subsequently gives grounds for quashing such judgements by the higher courts.

The relevant problem is clearly determined in the Ruling of the HEC Plenum of 17.10.2012 No. 9, where paragraph 7.1.3 states that the judgement may be amended through changing the form (pecuniary or non-pecuniary) of execution specified in the judgement, i.e. in absence of the debtor's property or monetary funds adjudicated to the creditor to pay off the indebtedness. While changing the mode and procedure of execution of a judgement, the court "shall not change the latter on merits".

Even though the HEC's recommendation on this issue is quite disputable, since the criteria of "amendment of a judgement on merits" and "changing the mode and procedure" are not deemed to be sufficient and require additional detailing, it still makes evident the partly coincidence of the notion of remedy and the one of mode of enforcement of a judgement, which should be taken into account.

Meanwhile, as it becomes clear from these examples, changing the mode of enforcement may sometimes imply the possibility to choose a new remedy without changing the initial court decision. Thus, the remedy may coincide with the mode of enforcement of a judgement as a result of amending the mode of enforcement of a judgement.

To solve the issue, it is advisable to apply relevant foreign practices. For instance, Australian, Canadian and German court decisions suggest several different modes of enforcement of a judgement that should be applied simultaneously, while in the moment of ultimate execution of a court decision through a particular mode, all other modes will automatically no more be applicable.

Some changes in the process of making decisions on changing the mode and procedure of enforcement of a judgement would help to avoid amending judgments on merits at the stage of enforcement proceedings. Such amendments could be implemented through making a statement on change of the mode and procedure of enforcement of a judgement under a non-property action equal to the payment of a court fee.

III.9. Provisional Measures issued by courts

Securing of an action implies the application by the court of provisional measures to guarantee eventual execution of a judgement on recovery of certain assets in cases where the absence of such measures may make it difficult or impossible to execute a judgement.

The main task of procedural rules regulating the court's power to apply provisional remedies is to achieve a better balance between the plaintiff's right to protect his/her violated right, and the respondent's right to object against the claims addressed to him/her in any legitimate way.

However, despite the allegedly clear objectives of provisional remedies, there is still no unanimous practice of their application by courts. By the way, such a state of play is typical for all court jurisdictions.

These problems can be divided into two categories: the adoption of provisional measures by the court to secure an action, and the subsequent execution of a court decision on the adoption of such measures.

The first problem may be caused by the shortcomings of judicial practice: the absolute majority of experts note a significant number of court refusals in satisfying requests (motions) on the adoption of provisional remedies. There are many reasons for this: the risk for a judge to be brought to disciplinary liability for satisfying motions on provisional remedies; poor reasoning and evidence base provided by the plaintiffs; insufficient legislative regulation; limited list of such remedies, etc.

According to the information available, only 19 (about 6% of the total) out of 300 motions on the application of provisional remedies were satisfied in administrative cases, based on the analysis of judicial practice of 2015 carried out by lawyers.

In addition, when refusing to satisfy the relevant motions, judges often confine to the following reasoning - lack or inadequacy of the evidence provided by the plaintiff, which also makes it difficult to appeal against such refusals in higher courts.

The way out of this situation should consist in improvement of the legislative regulation of the provisional remedies institution.

Thus, it is necessary, in particular, the Judicial Reform Council under the President of Ukraine, while drafting the new procedural codes, envisages an expansion of the list of provisional measures, clarifies the procedure for filing relevant requests, and the requirements to the form and content thereof, and improves the procedural tools of consideration of such requests (motions).

At the same time, in the case of enhanced opportunities for the application of provisional measures, it is extremely important to implement counter-security instruments against possible abuse by the plaintiff of the right to collateral, which may have negative consequences, including financial, for the respondent. It often so happens that the action is filed with purposes of application of provisional measures aimed at interference with the economic activities of the respondent.

In order to avoid such abuses, many lawyers propose to introduce a counter-security mechanism, which would be, actually, a guarantee of compensation for possible losses of a respondent, caused by unreasonable application of provisional remedies.

Possible counter-security measures may imply, for example, depositing money on the bank account or providing a bank guarantee, bail or other financial safeguard the amount of which shall be established by court, etc.

Identified Gaps

Current procedural law contains provisions that give much room for abuse to the parties of an enforcement case, which affects the enforcement procedure:

- parties of an enforcement case are entitled to go before court if they believe that their rights or freedoms have been violated by the decision, actions or omission of an EO;
- the court recognizes the writ of execution as not enforceable in whole or in part if the debtor's obligation is absent in whole or in part due to its termination, voluntary execution by the debtor or another entity, or for other reasons;
- the court that has been hearing the case as a first instance court may set or change the manner or procedure of execution.

Besides, Ukrainian judicial practice proves that it is not uncommon that a court suspends the enforcement of decisions rendered by another court.

Recommendation

Courts should intervene in enforcement on disputable matters only
The parties' right to appeal against actions of the EO before court should be limited so that only substantive (material law) grounds were admissible: distribution of the amount recovered among claimants, enforcement on exempted assets, the determination of the amount of costs of enforcement proceedings (remuneration) etc.

The EO shall be empowered to recognize the writ of execution as not enforceable in connection with the termination of the debtor, the voluntary execution of obligation by the debtor or another entity. Such decision may be subject to judicial review.

The EO shall be able to determine independently the manner and procedure of execution of an obligation by way of using enforcement means that are envisaged in law.

The EO should be allowed to apply procedural substitution rules without referring to the court in cases of individual or universal succession.

Suspension of enforcement
There are two scenarios where enforcement could be suspended by the court: (1) suspension of the enforcement of a court decision which has not entered into force (but is enforceable) and (2) suspension of enforcement as a security measure.

Our reading of the 2006 Ruling of the Plenary Chamber of the Supreme Court is that the SC aimed to discontinue mismatching of these two procedures by the courts. As a security measure, courts could only suspend particular enforcement action/mean and not the enforcement of the biding and final court decision in general. This interpretation of the law would not prevent the courts to suspend a particular enforcement action, for example. Thus, even if we just mechanically transpose the SC's language in the text-body of the CPC, we believe this would not prevent abusive suspensions of enforcement in the future.

What we would suggest instead, is to discipline the requesting party, the one who is requesting suspension of enforcement, by provisioning for mandatory bond guarantee (Зустрічне забезпечення) to be provided to the court. This guarantee could be further utilised by the creditor, for compensating the delay in enforcement caused by the abusive/not grounded suspension.

It should be envisaged that, when filing a claim on securing another claim by way of forbidding to execute any decisions in respect of certain assets that have been issued by other courts, the claimant must deposit in the court's deposit account the amount which is equivalent to 25% of the value of disputed assets, as counter-security.

It should be envisaged that when filing an application to the cassation court to suspend the enforcement of a judgment, the claimant must deposit in the court's deposit account the amount which is equivalent to 100% of the value of disputed assets.

Expected Outcome

More flexible and prompt enforcement of decisions. Increased professionalism and responsibility of performers. Protection of the rights and interests of the PEOs in the course of an enforcement proceeding. Introduction of the secured amount tool will reduce the abuse of procedural rights by the parties intended to suspend the enforcement of a judgment that has entered into force.

III-2. Formalism and Bureaucracy in Judgement Enforcement: Overregulation and Statutory Procedural terms

Violation of procedural terms by enforcement officers was one of the key issues when the previous draft of the Law of Ukraine "On Enforcement Proceedings" was applicable. There were many reasons explaining that situation – from an excessive workload of state enforcement officers, down to corruptive elements of their activities.

With this in mind, the new Law No. 1404 pays much more attention to the issue of terms. Thus, the relevant provisions are set out in Articles 13, 26, 28, 34, 35, 36, 37, 39, 43, 50, 56, 57, 59, 61 etc. of the Law No. 1404. These articles govern the fundamental enforcement actions.

Besides, in accordance with Article 13 of Law No. 1404, the enforcement officers shall be held fully liable for the violation of terms for decision-making envisaged by law.

Such liability shall be primarily deemed as disciplinary liability of both - state and private enforcement.

Meanwhile, it should be noted that the legislator has provided an important provision that should delineate the EO's liability for violation of the terms of completion of enforcement actions, and the possibility of cancelling any enforcement actions exercised within these terms as having no legal force. Thus, according to the same article of the Law No. 1404, violation of the terms of decision-making and of exercising of enforcement actions by enforcement officers shall not give grounds for the quashing of such a decision or enforcement, except in cases where they have been adopted or committed in violation of the procedure provided for in this Law.

The enforcement officer's compliance with the terms of decision-making and performance of enforcement actions shall be controlled by the parties of an enforcement proceedings, as well as by the automated system of enforcement proceedings itself at the software level.

Oversight of the terms by the participants in enforcement proceedings may be exercised through challenging the EO's omission (at the relevant SES authority, the Association of PEOs in Ukraine, or in court).

Besides, the oversight of the SEOs' compliance with the terms implemented through the automated system of enforcement proceedings shall be exercised by the head of a relevant SES authority.

It is presumed that a PEO should not allow violation of the terms, since s/he has a great interest, including financial one, in the timely and prompt implementation of enforcement proceedings. When assigned with a case, a PEO shall not be subject to any oversight by MOJ, except for the check of a PEO's compliance with law in the framework of scheduled or unscheduled inspections.

Should a PEO adhere to the above terms? Yes, he should. Since not all enforcement proceedings entail a significant enforcement fee, first of all it comes to the so-called "social recovery" category, especially in view of the fact that a PEO has no right to refuse accepting of an enforcement document.

With regard to "commercial recovery", the risk of a PEO's omission is mitigated by the risk of "losing" such enforcement proceedings, since the creditor, in connection with the PEO's omission, has the right to decide, any time, on the transfer of enforcement proceedings to another PEO or SES authority.

Therefore, the obligation to comply with the terms of completion of enforcement actions and decision-making is commensurate for both - state and private enforcement officers.

2.

As to mediation, it should be noted that the initial design of draft laws No.No. 1403 and 1404 suggested including mediation in the scope of responsibilities of PEOs.

It should be noted that mediation falls under the scope of PEOs' responsibilities in many European countries, as he anyway has to communicate with both – a creditor and a debtor. When completing his/her other functions, a PEO becomes aware of the debtor's and the creditor's financial situation, thus, a PEO is able to ensure proper mediation in order to solve the issue of indebtedness, including through applying the instrument of settlement agreement, which would allow to improve the state of play in satisfaction of the creditors' requirements.

However, at the stage of adoption of the said laws, it was decided that granting PEOs with the mediation function would be premature.

Alongside with that, on March 3, 2016, the Parliament adopted the draft Law on mediation No. 3665 in the first reading, which allows Ukraine to implement mediation in the area of debt recovery.

In this connection, in case of the adoption and effective application of the draft law on mediation in Ukraine, it would be reasonable to come back to the issue of granting PEOs with the mediation powers.

Terms within the enforcement proceedings.

According to Article 11 of the Law of Ukraine "On Enforcement Proceedings", the terms stipulated by this Law shall be calculated in working days, months or years, or can be determined by reference to an event that must inevitably occur.

However, it is weekdays that some articles of the said Law (paragraph 4 of Article 4, paragraph 3 of Article 9, paragraph 3, 4, Article 13, etc.), refer to, while the rest (paragraph 2 of Article 23, paragraph 8 of Article 48, paragraph 1 of Article 52 ....) do not contain such reference.

Thus, it is unclear how the terms referred to in Articles 23, 48, 52 of the Law of Ukraine should be calculated either as weekdays or as calendar days.

In this view, the Law of Ukraine "On Enforcement Proceedings" should make appropriate amendments and decide on how the terms within the enforcement proceedings should be determined.

Dealing with no-assets cases: rendering back the writ of enforcement to the judgement creditor

According to paragraph 2 of Article 37 of the Law of Ukraine "On Enforcement Proceedings", the writ of execution shall be returned to the creditor if the debtor *has no assets that may be seized, and all the enforcement officer's efforts exerted within a year and aimed at tracing such property were unsuccessful.*

However, under the Law, "return of the writ of execution to a creditor" does not mean "termination of the enforcement proceedings". Which means that the writ of execution returned under paragraph 2 of part 1 of Article 37 of the Law, the debtor cannot enjoy the consequences of ending of the enforcement proceedings (lift of restrictions on travelling abroad, the person's removal from the register of debtors, etc.)!

On one hand this will increase the cost of enforcement for judgement creditors as they need to re-initiate enforcement subsequently to avoid expiration of statutes of limitation of the claim. Filing of each subsequent new enforcement case would require payment of 2% upfront enforcement fee. On another hand, this will continuously increase the overall amount due by the judgement debtor as long as all enforcement expenses should be recovered by him/her in first set of priority. Such situation will throw both the creditor and the debtor into a perplex scenario which is far from being compliant with the legal certitude principle.

However, we cannot exclude the possibility of the enforcement proceedings not being handled anymore by the enforcement officer in connection with the return of the writ of execution to the creditor pursuant to lack of the debtor's property subject to foreclosure. This is particularly true if we look at this 'automatic' discharge from further enforcement activity (by rendering back the writ of enforcement to the creditor) as a kind of relief for insolvent individual debtors. In the event that there is no dedicated procedure for personal bankruptcy in Ukraine yet this perspective should not be neglected.

In strict sense, from legal stand point, such automatism is inconsistent with the nature of the judgement enforcement proceedings. The proceedings were initiated by the judgement creditor and should stay under his/her control until being terminated in occurrence of circumstances explicitly and exhaustively provided for in the law. Course of action of judgement enforcement proceedings should always stay of direct dependence to creditor's initiative or absence of activity. Upon application of the creditor the execution might be terminated and the writ of execution rendered back. In the event that the creditor is inactive for a particular time-period (e.g. did not apply for any enforcement action to be undertaken), the law may build a legal fiction that such creditor had lost interest in enforcement of his/her claim. In that case the act for termination of the proceedings will be notified to the creditor and if not objected, will enter into force and proceedings terminated. Both procedures would be in strict sense termination of the enforcement proceedings with all legal consequences avoiding any ambiguity that exists now.

A solution that stands in-between existing automatic handing back of the writ of execution and no-automatic discharge from the proceedings could be found in the Finnish legislation on enforcement proceedings.

Thus, in Finland, in case of unsuccessful recovery, the creditor may leave their case under the enforcement officer's supervision for two years. Such enforcement proceedings are called "passive case". While passive registration of seizure may be imposed to the identified property and income while the case is passive.

In Ukraine, the concept of "passive proceedings" may be introduced, while noting that "passive proceedings" shall not imply the general requirement on checking out the debtor's financial situation (at least once every two weeks - to identify accounts, at least once every three months -

to identify real and personal property, property rights, to find information about the debtor's income), or such checks should be carried out less frequently.

Reflection in the Register of Debtors

The writ of execution was handed back to the creditor. However, the respective debtor will remain in the Unified Register of Debtors despite the fact that there is no pending enforcement case against him/her. We are facing a situation where the debtor is in the RoD because he/she appears in the debtor side in an enforceable title/court decision and not because he/she is a party of pending enforcement proceedings. This is inconsistent with the nature of the RoD – this is a register of debtors against whom enforcement proceeding was initiated (thus a record in the Register is made upon inception of an enforcement case by the EO) and not a register of debtors with issued court decisions against (in that case entry into RoD should be automated consequence of court judgement entry into force). This is an important distinction and current regulation should be coherent and consistent in defining RoD nature.

The law (Article 9) also provides that if a notary, a state registrar or an authority in charge of the registration of property is addressed to commit any transaction in respect of property or assets owned by a person registered in the Unified Register of Debtors, the said authorities shall inform the enforcement officer on the same day.

Such cases are quite possible because the debtor may address, for instance, for the registration of the property right on a newly created property, or with a statement on inheritance etc.

Meanwhile, the enforcement officer shall make a decision on the seizure of such property.

It should be noted that certain terms have been established in law for submission of writs of enforcement, and the terms defaulted, the creditor loses their right to enforcement of the judgment.

The law does not envisage how the enforcement officer shall proceed under such circumstances. Shall he inform the creditor that the debtor's property has been identified, and suggest to resubmit the writ of execution? But, what if the creditor, for example, did not submit the writ of enforcement, or defaulted the term of submission, and the court refused to reinstate in that term? On which basis and for which purpose shall the debtor's property be seized then?

Experts recommend amending the Law of Ukraine "On Enforcement Proceedings" to avoid any uncertainty and ambiguity that exists now in respect with the legal consequences of writ of execution rendering back to the judgement creditor.

Identified Gaps

Both the Law on Enforcement Procedure (LoEP) and the Law on Enforcement Bodies (LoEB) mandate for issuance of multiple **sub-normative acts**. The existence of multitude ministerial rulings and regulations renders their proper application extremely difficult, jeopardizing the legal certainty in enforcement. Adoption of regulations by the MoJ is unilateral act, no consultation with the self-governing body of the profession, the APEO.

The 2012 MoJ Instruction on Enforcement (**IoE**) is strictly oriented to regulate the operations of the SES which by all means differ dramatically from the way the PEO's office should work. The IoE mechanically transfers all inefficiencies of the SES to the PEOs work hampering their performance and efficiency.

The LoEP stipulates for **procedural terms** in which the PEOs should undertake certain action (e.g. Art. 13, Art. 26, par 5 of LoEP). Such instructive and formalistic statutory provisions represent an

overregulation of the PEOs' routine operations. PEOs do not need statutory established deadlines for prompt performance of their duties in due time – they have much stronger incentive for such doing – their performance fee and customers' satisfaction. In the same time, the no-compliance with these deadlines can serve as a basis for formalistic and disproportionate scrutinizing of PEOs by controlling bodies.

Recommendation

Smart Regulation. Remove all sub-normative delegations that currently exist in the LoEP: the enforcement process should be governed by the Law only; existing sub-normative acts implementing the LoEP represent clear overregulation and should be dismissed. Frame properly the MoJ's sub-normative mandate in the Art. 17 of the LoEB to avoid any overregulation and improve the quality of the rules governing PEOs activity. All regulations should be: (1) proportionate to their legitimate goals and (2) adopted in concordance or in consultation with the APEO. Within a six months *vacatio legis* period revisit all existing MoJ sub-normative acts on PEOs to make them fit into the new frame established by the Art. 17 of the LoEB as amended.

Discontinue the application of the **IoE** to PEOs work. Replace it with sets of MoJ established minimum standards (e.g. on record keeping and reporting, accessibility of PEOs office, documenting of enforcement actions and financial transactions, samples of core documents with pre-defined formatting and content, etc.) that are necessary to maintain uniformity and predictability of PEOs operations and outputs. The mandate for establishing such standards should be given to the MoJ by the same Art. 17 of the LoEB.

Replace all **statutory deadlines** (set forth in the LoEP) for undertaking certain actions by the EO with a general rule establishing the duty of the EO to undertake all necessary procedural actions in reasonable time, by amending accordingly the Art. 13 of the LoEP.

Expected Outcome

Improved quality of MoJ issued regulations. Fostered PEOs' efficiency, independence and self-compliance. Sustainability backed up by the APEO's participation in the regulatory process.

III-3. E-services in Judgement Enforcement

III.1. Debtor's Identification: lack of Unique Identifier for all individuals in Ukraine

According to the third part of Article 18 of the Law of Ukraine "On Enforcement Proceedings" (previous draft), the writ of enforcement shall specify *inter alia* the business identification code of a creditor and a debtor (for legal entities), the individual identification number of a creditor and a debtor (for individual tax payers), or the passport number and series of a creditor and a debtor, who are citizens of Ukraine and who refused to have an identification number based on religious or other beliefs, notified officially the relevant public authorities, and have the stamp in their domestic passports, as well as other data if they, the court or other authority issuing the writ of execution are aware of, that identifies the creditor and the debtor or may contribute to the enforcement, in particular, the debtor's date of birth and place of work (for individuals), the location of the debtor's property, the creditor's and the debtor's accounts etc.

Part one of Article 369 of the Code of Civil Procedure of Ukraine states that the writ of execution must meet the requirements to executive documents established under the Law of Ukraine "On Enforcement Proceedings".

Thus, the SES authorities used to refuse to open an enforcement proceedings based on the writs of execution issued by courts of general jurisdiction and not containing the individual or business tax payer number of a creditor or a debtor.

However, the situation has changed after two preliminary decisions of the Supreme Court of Ukraine (№6-45цс14 of 05.21.2014 and № 6-62цс14 of 25.06.2014), where the SCU indicated that in the absence of the debtor's identification number on the writ of execution shall no more give grounds for refusal to open an enforcement proceedings.

These said SCU decisions have been implemented in the text of the Law No. 1404, and the requirement in question was canceled. However, it did not allow to solve the issue of the debtor's proper identification within the enforcement proceedings, as in this case (especially true for a default judgment), the recovery may be imposed on another person's property.

An enforcement officer has indeed enough features to establish the debtor's identity, and is interested in doing so, but in this case, one should pay attention to the fact that the judgment giving basis to the issuance of a writ of execution, becomes impersonal, and as if rendered in respect of an unlimited range of "respondents", which challenges its legitimacy.

It should be noted that this problem does not exist, for example, in the economic legal proceedings. Thus, paragraph 2 of part two of Article 54 of the Economic Code of Ukraine stipulates that the legal action shall contain the denomination (for legal entities) or full name (surname, first name and patronymic if available for individuals) of the parties, their location (for legal entities) or place of residence (for individuals), business identification codes, if any (for legal entities) or the number of a taxpayer individual registration card, if any.

Besides, the Ruling of the Higher Economic Court Plenum "On the Judgment No. 6 of 23.03.2012 stipulates that in the absence of any information on the denomination (full name) of a creditor and a debtor, location (place of residence) and identification code (individual identification number) thereof, etc. in the legal action, the economic court shall request the necessary information from the plaintiff and the respondent in accordance with paragraph 4 of Article 65 of the Code of Civil Procedure. If the plaintiff has not submitted the requested information, the court shall leave the claim without consideration on the basis of paragraph 5 of part one of Article 81 of the Code of Economic Procedure (paragraph 9.13.2).

Thus, for the purpose of proper identification of parties in court and within the enforcement proceedings, it is advisable to include such provisions in the Code Civil Procedure of Ukraine. .

Despite this, the Verkhovna Rada of Ukraine has again decided to take the easy way and, by adopting the Law of Ukraine "On the High Council of Justice", actually backed on to the previous draft of the Law of Ukraine "On Enforcement Proceedings", re-implementing the mandatory specification of the details about an individual tax identification number or a series and number of passport (for individuals who refused, under the established procedure, to have an individual taxpayer identification number because of their religious beliefs, notified the relevant authority and have the stamp in their domestic passports) of a debtor (for individual tax payers).

Thus, the Verkhovna Rada of Ukraine re-implemented in the text of the Law No. 1404 the legal collision that will result in excessively long court proceedings, and protraction of enforcement proceedings.

III.2. Access to Information about Debtors and Debtor's Assets. Register of Debtors: a temporary solution of current dispersity of property rights information

1.

When enforcing a judgement, a PEO is entitled to immediate access to information on debtors, their property, income and assets, including personal data contained in public databases and registers, including electronic.

However, there is a number of registers for various types of movable property of the debtor. The drawback of the current system is that seizure in the register of movable property does not imply the impossibility to transfer the title to all movable property from the debtor to another person. In other words, the EO has to send a separate inquiry to each public authority to identify the debtor's property, and to prohibit its alienation (via re-registration) in the registers.

To work around the existing dispersion of registers, one should start with “inventory” thereof. That is to establish a full list of state bodies carrying out registration of movable property, and prescribe to them certain statutory rules of registration. To establish that a notice in the State Register of Movable Property Encumbrances about the encumbrance of property by an enforcement officer or by court, and/or the person’s being registered in the Unified Register of Debtors, gives the reason for non-taking any registry actions to movable property.

For this purpose, the said authorities should be given access to the State Register of Encumbrances of Movable Property and to the Unified Register of Debtors.

Register of Debtors should be regarded only as a palliative solution to the existing dispersity of property rights information among variety of registers. This is even more true as under the current regulation the RoD contains data for new debtors only, i.e. those from January 2017 onwards, and not for all debtors that have pending cases in ASEP (old debtors). Experts see in that different treatment of individuals’ property rights an issue that needs to be further addressed. Experts would recommend all debtors in Ukraine to appear in the RoD.

All of the abovementioned registers should be eventually unified, and a single authority responsible for the maintenance should be define.

On September 8, 2016 the Cabinet of Ministers of Ukraine adopted the Decree No. 606 “Certain Issues of Interoperability of the State Electronic Information Resources”.

The said Decree defines common principles of electronic data exchange from the state electronic information resources, except for information that constitutes a state secret, between public authorities, when providing with administrative services and exercising other powers.

The Decree specifies that the holder and the client of the System is the State Agency for E-government.

The Appendix of the mentioned Decree enlists the top-priority of the state electronic information resources to be made interoperable.

These include:

Land Register;

Unified Register of Enterprises under the Bankruptcy Procedure;

Unified State Register of Legal Entities, Private Entrepreneurs and CSOs;

State Register of Real Rights on Immovable Property;

State Register of Civil Records if Citizens;

Register of VAT payers;

Unified State Register of the Ministry of Interior in Relation to Registered Vehicles and Owners Thereof;

Unified Register of Powers of Attorney;

Automated Information System of the State Treasury Service of Ukraine on account of income and expenditure of budgets at all levels;

Unified State Register of Court Decisions;

Experts encourage all further efforts geared at achieving full interoperability of data processed in all relevant to enforcement registers. Harmonization of data would allow interconnectivity and automated exchange of data of all related to enforcement registers that would decrease operational costs and improve judgement enforcement overall.

II.4. Enforcement Cases Archiving

The Law of Ukraine "On enforcement proceedings" stipulates the operation of the automated enforcement system. (Article 8 of the Law; to implement the relevant provision of the Law, the Ministry of Justice of Ukraine issued on 05.08.2016 the Regulation No. 2432/5 "On Approval of the Regulation on the Automated System of Enforcement Proceedings".

The Automated System of Enforcement Proceedings (ASEP) should ensure, in particular:

- providing information on the enforcement proceedings to the parties;

- drafting of the documents of enforcement proceedings;

- centralized storage of the documents of enforcement proceedings;

- producing of statistics;

- registration of incoming and outgoing correspondence, and its stages;

- transfer of the documents of enforcement proceedings to electronic archives;

Electronic archive is the part of the system containing information about completed enforcement proceedings, hardcopies of which are transferred to the archive.

Chapter VIII of the Regulation No. 2432/5 "On Approval of the Automated System of Enforcement Proceedings" regulates the transfer of the documents of enforcement proceedings to electronic archives. Scanning of all paper documents and converting now existing paper-based archive into electronic one will require considerable resources. Experts encourage that effort on the part of MOJ.

The enforcement cases that were terminated or dismissed without enforcing, and subsequently transferred for storage, should be stored for the period of ten years.

The system generates acceptance descriptions of enforcement proceedings that were terminated or dismissed without enforcing, in accordance with the Law of Ukraine "On Enforcement Proceedings", and subsequently transferred for storage to the electronic archive.

Online-access of parties to e-files

Access to information on the enforcement proceedings is provided through the automated system of enforcement proceedings.

According to the Regulation of the Ministry of Justice of Ukraine No. 2432/5 "On Approval of the Automated System of Enforcement Proceedings", the Ministry of Justice of Ukraine ensures free and free-of-charge access to the information contained in the System, on the Internet on its official website facilitating the possibility to review, search, copy and print information (on the basis of common web browsers and editors) without any restrictions, and any time round the clock, in the form of open data. To the best of experts' knowledge the information available to users online would be metadata only and not the content that stands behind that, i.e. images of the very (scanned) documents.

The PEO should enter to the System all details about the exercise of any enforcement action, or making any procedural decision.

The system should also contain information about all documents received upon request of the PEO, statements of the parties of enforcement proceedings, relevant responses, and scanned copies thereof.

However, the Regulation states that the System provides the parties of enforcement proceedings with the possibility to form ***aggregate information*** about the decisions (enforcement actions) made (committed) by the PEO, indicating the date of making (committing) them, and ***with the possibility of printing out such information***.

A reference extracted from the System, and provided to the parties of the enforcement proceedings, contains information on actions related to registration of incoming and outgoing correspondence, and on decisions, enforcement actions (including modified and removed) the date and time of making such decisions, and taking relevant actions, being displayed in the System.

Thus, the online access directly to electronic files of the enforcement proceedings is not provided. This is a “step backwards”, as far as up to date, the ASEP provides with such a possibility.

Experts believe that if there is any technical possibility, parties should be provided with direct access to electronic files of the enforcement proceedings. This issue can be addressed through appropriate amendments of the Regulation of the Ministry of Justice of Ukraine № 2432/5 “On Approval of the Automated System of Enforcement Proceedings”. Nonetheless, experts would like to stress that such remote access to e-documents of large number of users would be very expensive to maintain both from technical and organizational standpoint. Thus, MOJ should further explore all viable options for creation and maintenance of the judgement enforcement electronic archive in order to achieve scalable and thus sustainable solution.

Standardization and Automation of Business Processes in Judgement Enforcement

Experts reviewed and assessed existing Automated System of Enforcement Proceedings (ASEP). As ASEP is mandated to be the CMS for all EOs (state and private) all over Ukraine, its business logic, processing and functionality can be used as a handy tool for spreading out good practices through all EOs in the country and for controlling bodies to better exercise their task. Thus, ASEP enhancements will achieve not only better efficiency but also better compliance of all EOs with the law.

ASEP quick review

a. Registration of incoming documents. Settlement of files

Requests to accept the enforcement document and the enforcement document data is entered into ASEP manually by filling in certain fields. The process of filling the data takes quite a long time, in addition the document data is duplicated. Once entered, the data is not stored and does not automatically retrieve the registers of received documents and enforcement documents.

In order to optimize the work of bailiffs and their assistants, changes must be made to the document registration module. Upon receipt of an application for an enforcement record and an enforcement document, the register of received documents and enforcement documents would automatically be filled up. In addition, in this perspective and the fact that some of the courts already have a pilot Electronic Court process project and issue electronic enforcement documents, it is necessary to consider the issue of creating an inclusive interface between the ASEP and the Electronic Court. In this way, the creditor would automatically be able to submit it to the selected bailiff in the ASEP upon the receipt of an electronic enforcement document issued on the basis of

an enforceable decision. The bailiff, after the reception of an electronic enforcement document in ASEP, would not have to enter the document data manually, the documents would automatically be registered and all the required fields would be filled in. The bailiff would only have to consider the question of the reception, refusal of reception or return for revision of an enforcement document. The built-in integration interface would ensure the process of data and document exchange. For example, when a court makes a decision to open a bankruptcy case, the data would be automatically transferred to the bailiff. In addition, the courts dealing with disputes regarding bailiff proceedings would ensure access to the electronic enforcement file.

b. Preparing and printing of procedural documents

ASEP procedural documents are generated from file data in each case separately. There is no tool for the bailiff to massive draw up of the documents in the system. It is suggested to create a tool for downloading a selected set of files, generate documents one at a time, validate them electronically and print. Documents are generated from file data, so there is no need to enter manual additional data. Such a tool would speed up the work of the bailiff.

c. The integration with other registers

ASEP has the opportunity to request the Pension Fund and the State Tax Inspectorate concerning the debtor. Responses from these registers are only received within a few days, and there are also incorrect responses. In order to optimize the work, it is necessary to address the issue of the creation of direct inclusive interfaces between the Tax Inspectorate and the Pension Fund, also to create new integration interfaces with self-running registers. With the help of built-in integration with registries, EOs would have the opportunity to submit a request and receive an answer immediately. This would ensure a prompt, effective search of the debtor's assets and allow immediate execution of all proceedings related to the seizure of assets or funds.

d. The electronic signature. The review of outgoing documents

In the ASEP documents are only generated from the file and printed out. Documents are not signed using electronic signature. In the system such document without a signature has no legal force, it simply remains a draft. At the time the system has generated a document, the code generated by the system with the certain link is displayed on the document. A person who receives a procedural document may review this document in accordance with the specified link. The document review moment is not captured and is not displayed in the system. It is also important to mention, that reviewing is only for a draft of a document without a signature, there is no possibility to review all file information. It is suggested to resolve the issue on the introduction of an electronic signature.

e. Electronic means of document exchange

There is no possibility in the ASEP for electronic document exchange. It is proposed to create an opportunity for the bailiff to choose by what means he wants to send the document to the parties of the proceeding. When creating a document in the system, the bailiff indicates the recipient's e-mail, postal address. After confirming such document by electronic signature, the recipient receives the notification by e-mail regarding the procedural document addressed to him, and the document link after pressing which the recipient is directed to the document review. Security of the data review is ensured by the fact that the person must verify oneself. Therefore, even if the e-mail address is incorrectly indicated, the person will not be able to view the correspondence not addressed to him. In addition, with the help of this tool, the bailiff could submit a procedural document to another bailiff, indicating only the e-mail in the document and the document would automatically be submitted to the bailiff's ASEP and registered. In addition, bailiff would receive the notification about the document assigned to him by e-mail.

f. Transmission of enforcement documents to another bailiff

Section 7, paragraph 7 (No. 489/20802) of the instructions for implementation of decisions approved by the Ministry of Justice of Ukraine, states that an enforcement document may be transferred from one EO to another. The ASEP does not automatically transfer the enforcement document and the entire electronic enforcement file. It is suggested to create a tool by which the bailiff, after having received a request from the debtor to forward the enforcement document to another bailiff, transfers the file to another bailiff in a single procedural document. This would ensure fast and efficient data transfer. In addition, the bailiff, having received the transmitted enforcement document, would promptly be acquainted with the file in the system as a whole and would immediately take enforcement measures against the debtor. The file transfer process of the ASEP must be ensured by systematic means and provided for cases where, after the expiration of the bailiff's mandate, incomplete files are transferred to another bailiff or distributed to several bailiffs.

g. Execution of forced e-auctions. Integrating the CETAM interface

Forced e-auctions are not held in ASEP. All the arrangements adopted by the enforcement officers regarding the process of forced auctions, is sent by post or e-mail to CETAM system, which is administered by State enterprise ”System of seized property sale by electronic means” (under the Ministry of Justice of the Republic of Ukraine). Taking into consideration, that enforcement officer does not perform any actions in the system of forced auctions himself, after making urgent decisions regarding forced auctions, all the public information will be delayed. It is suggested to create the interface with CETAM, thus ensuring a fast, prompt data transfer and exchange process between information systems.

Analysis

As a rule deployment of automated case management systems in justice sector (and thus in judgement enforcement as well) should be aimed at least three main objectives:

1) Reliable data gathering (statistics) to be used for monitoring and control, for grounding policy decisions and overall for management of the system

2) Enhanced efficiency, performance, compliance and customer service

3) Better access to information for interested parties and general public at large.

Existing ASEP is not targeted to achieving any of these three objectives. Despite that, users are charged some 40 EUR/month by NAIS + one-time fee of 2 EUR/case upon case registration in the system. Establishment of legal monopoly of a business company in the present case is disproportionate to the extent that such restriction is unable to achieve any of the three public order objectives above.

ASEP is not able to fulfill its determination in rendering reliable statistics and serving as a proper monitoring and controlling tool as long as data collected through it is unreliable

There are no simple automated checks like for correctness of personal identification numbers: if the number entered by the user is correct, i.e. its composition algorithm proves to be right.

System allows for unstructured entry of addresses that also make that information hardly manageable and less useful. Data that can be structured is left unstructured (e.g. issuing authority of enforcement document, dates, etc.) while in the same time some nomenclatures that might need user customization (e.g. nature of claim) are pre-defined and not editable by users.

Users lack understanding and commitment for filling up the right data into right fields which additionally spoils the quality of data. More targeted trainings, coaching and supervision is needed in that respect.

ASEP encumbers efficiency and performance of EOs, does not contribute to better compliance and higher level of professional service rendered by EOs

No business functionality to facilitate daily operations of users except the tool for automated checks with Social security for wages and pensions and Tax authorities for bank accounts of legal entities.

Navigation is not intuitive that leads to more time for registration and more mistakes in data entries. Too many data of no value (no further use) need to be registered.

No PEOs customization: some processes and mandatory data attributes are applicable to SEOs only.

Lack of user administration: PEOs cannot create sub-users with variable credentials. In current version of ASEP there are only three user roles: enforcement officer, record keeper (деловод) and inspector. Thus, PEO's assistant can only perform the function of registering and sending documents. Assistant PEO can not perform any other actions related to the preparation of procedural documents. Optimizing the work requires system changes that allow the assistant to work to the full amount. Therefore, it is being proposed to resolve the issue regarding the changes to the user subsystem. PEOs assistants should be assigned separate roles. In this way, PEOs assistants as system users could carry out all statutory actions.

No simple financial accounting tools. Received and recovered debtors' amounts are recorded, distributed in the ASEP and transfers are handled manually in electronic banking. ASEP does not have a consistent module for financial accounting. There is no data export from the system to the bank tool, there is no data import from the bank to the system tool either. Expert reccommend creation of a separate financial accounting module covering the entire process of distribution and transfer of funds recovered. A tool for importing a bank statement into ASEP and to auto-processes is necessary. After the EO allocates the recovered funds, the bank transfer orders would be created automatically to the parties of the proceeding. Accordingly, if several orders are formed in favor of the beneficiary, they can be grouped together. This would save the money on associated bank fees. Automatically generated bank transfer orders could be exported to the bank, i.e. uploading the corresponding file to the bank system, so the bailiff would not need to manually enter the data. Automatic data processing minimizes the probability of errors, saves costs for bank orders and optimizes EO's work. In addition, the deposit account balance is checked both in the system and in electronic banking.

No enforcement cases pairing tool, i.e. linkage of different cases against the same debtor/s

No tools for:

- bulk import of data, e.g. debtors (names, ID numbers, addresses), claims
- bulk generation of standard documents, e.g. attachments, summons
- for registering of claim's augmentations and pay-offs, balance of outstanding amount due
- flexible Report generation allowing reports customization on variable data charts
- assigning and scheduling of tasks to users, build-in monitoring for procedural terms compliance, flagging of already existing debtors in pending cases, etc.

In its current form the ASEP represents a simple registration application with no real functionality and logic behind it. It is not even a proper registration system as it currently involves too many repetitive inputs of same data which causes inefficiency but also creates conditions for mistakes in data inputs. Instead of being retrieved from the database users are required to enter same data each time when needed. Examples are numerous but most critical are repetitive input of persons and their attributes (name, identifiers and addresses) and enforcement case numbers.

ASEP does not provide proper access to information on enforcement cases to parties and thus does not facilitate enhanced access to justice for citizens and businesses in Ukraine

Not all documents that are generated or uploaded to ASEP by EOs are visible for the parties via their remote access via their personal URL link.

External electronic file portal

The ASEP does not have an external enforcement file portal that ensures the parties to the process automatically submit requests, complaints or inquiries to the bailiff, access to the material of the enforcement file. It is suggested to create an external file portal with an opportunity to view the entire file. A tool is also necessary to capture the moment of document viewing and the moment of its display on EO's screen. The party to the enforcement proceedings intending to lodge a complaint regarding bailiff's actions or a free request form would have the opportunity to fill in the document form on the external portal, as well as upload the document, confirming it by electronic signature. The documents would be automatically submitted to ASEP and registered. The EO would only need to review them and resolve issues by adopting the relevant procedural document. In addition, when the parties to the process review the procedural document submitted by the EO to their account, a review moment with a specific time is recorded automatically. Such data is automatically transmitted to the EO's dashboard.

Conclusion

Currently ASEP is a mere registration system (with all shortcoming listed above). Turning it into a real management and performance monitoring system would be a challenge as long as ASEP administrator (HAIC), to date, shows no organizational ability for prompt action in that regard. On the other hand the law provides for mandatory use of ASEP by all EOs in Ukraine. Beyond considerations on compliance of such provision with the competition law, experts preserve that rule as putting major impediment to PEOs daily work and thus raising their compliance costs considerably.

As an immediate intervention, NAIS should provide customer-oriented training inscription and delivery process for PEOs. In addition, NAIS should make available online staging version of ASEP where all PEOs and their staff can do test entries before they make such records in the production system. NAIS should provide sound first level user support for the monthly fee it charges.

Further, organizational safeguards for prompt development and sustainability of ASEP at NAIS should be designated and implemented.

Finally, ASEP should be upgraded with all new functionalities immanent in a modern case/content management and performance monitoring system.

ITC services liberalization for PEOs

Identified Gaps

Currently, the PEOs are obliged by law to use the Case-management System (АСВП), administrated by ДП НАІС, and the online Auctioning Platform, administrated by ДП СЕТАМ. PEOs could not choose other ITC providers for case-management automation and electronic auctioning.

Having the same business functionality of the CMS for all PEOs narrows down their competition field; on its turn this impedes the continuous improvement of PEOs services' quality and efficiency. Limited possibilities for further and in-depth standardization and automation of core business processes in enforcement through the PEOs CMS, hampers further optimization of costs in enforcement for the benefit of both debtors and creditors.

There are number of issues linked to the organizational and financial capability of HAIC to further develop the business functionality of the АСВП. CETAM price for admitting transactions to its online Auctioning Platform is disproportionately high in comparison to existing market analogues. Administrative regulation of CETAM fees is not a solutionл

In that regard we are questioning the value of the currently law-established monopolies of HAIC and CETAM in provisioning ITC services to PEOs. We believe that opening the Case-management System and Electronic Auctioning markets to competition will enable the sustainable continuous improvement of these two core ITC services, will level their prices to the market which will further contribute to lowering down the cost of enforcement in a mid- and long-run. Setting up a competitive environment would also contribute to further development of the АСВП by HAIC and the Auctioning Platform by CETAM. These two services will be available on the market along with the new ones that would eventually step-in after the suggested market liberalization.

Recommendation

Discontinue the mandatory use of *АСВП business functionality* (user-end) by PEOs. Still, those PEOs who opted for that would be able to use its full functionality as of now. Keep the АСВП as data warehouse and interconnection/access point for the PEOs who opted for other business functionality (client-end) systems. АСВП will gather key performance data for making it available to the general public or interested parties and will serve as access point for those other systems to state/local governments run data registers. The protocol for that communication (АСВП-PEOs CMS) will be pre-established and published by the MoJ.

Allow for PEOs to use ProZorro and the online *Auctioning Platform* to be developed and administrated by the Association of PEOs (APEO). A PEO would be able to run a public auction of a particular asset on one of these *three alternative platforms*: CETAM, ProZorro or on the APEO platform; one sale is taking place on one only platform at a time, no parallel sales on different platforms.

Expected Outcome

Enhanced (and tailored) business functionality of PEOs CMS will contribute to decrease of cost of enforcement; will improve the quality and the efficiency of PEOs services rendered to their clients. The access to key data on enforcement cases by the parties and performance data gathering will be safeguarded through the АСВП acting as centralized data warehouse.

The fees of online Auctioning Platforms will be set in a competitive market environment that additionally will contribute to decrease of cost of enforcement.

Access to property registers. Transparency of assets
Identified Gaps

The EOs' communication with the Population (Demographic) Register is cumbersome, slow and inefficient.

The EOs have no access to information about debtors kept by the Tax Authority

Recommendation

The responsible state agencies should undertake immediate actions for allowing remote and electronic access of EOs to the Population Register.

The EOs should have electronic access to at least the following information kept by the TA:

- VAT sales reports submitted by VAT-registered companies, where the clients/debtors of the debtor can be identified
- Financial accounts of the company-debtor, submitted to the Tax Authority
- Debtor's declared, for taxation purposes, movables and immovable (if applicable)
- Registered places of sales (fiscal appliances) of the company-debtor, e.g. shops, warehouses, etc. (if applicable)

We would recommend instead of trying making such a list exhaustive, to formulate a general rule allowing access to EOs to information kept by the TA to identify debtor's property, place of business and financial status.

III-4. Automation of Bank Accounts Garnishment process

The full automation of bank account garnishment process was subject to an in-depth study by the IMF. In the current report the experts are focusing on just two elements of the eventual future automated bank accounts blocking and write-off system: (1) fully electronic communication on accounts blocking and (2) establishing a one only simple rule for seizable amounts on individuals' bank account that can be easily further formalized and implemented into a machine algorithm.

The electronic communication between the EOs and banks is currently under development and will be piloted for alimony cases only. Experts would expect that if such piloting proves to be successful, the electronic communication will be rolled out over all types of enforcement cases.

Creating one only rule for exempted from enforcement amounts/income of the debtor, natural person, will achieve: (1) better protection of financially vulnerable debtors, (2) better compliance of all participants in the process – banks, EOs and (3) ability for further formalization of that rule and translating into machine algorithm.

III.6. Bank Accounts Garnishments

There is no mechanism for automated attachment of funds in the Law of Ukraine "On Enforcement Proceedings" of 02.06.2016 No. 1404-VIII.

Currently the enforcement officer shall submit to the bank a hard (paper) copy of the freezing order in order to seize bank accounts.

This approach also leaves room for evasion from blocking the debtor's accounts, as s/he be able to open new ones, that the enforcement officer will not be aware of for some time.

Amendments to the Law on Enforcement Procedure introduced by recently adopted new Civil Procedure Code provide for electronic exchange of documents between EOs and banks in regard with bank accounts garnishment.

Experts would urge for prompt implementation of that electronic document exchange mechanism between the enforcement officers and banks in relation to attachment of bank accounts, moving

away from the practice where the bank needs to receive a hardcopy of the enforcement officer's attachment order.

Introduce a mechanism for the rapid attachment of the debtor's accounts based on the "all existing and eventual accounts belonging to the debtor within the amount of debt" principle, moving away from the practice of attachment of a specific account only after having received its details.

In the transitional period, until an integrated system of automated attachment of funds is implemented, it may be helpful to introduce a mechanism for distribution of enforcement officers' attachment orders via email using the infrastructure of the National Bank of Ukraine.

In particular, there is a NBU regulation in place – the Regulation on E-mail system of the National Bank of Ukraine (Decision of 29.12.2004 No. 689).

It is advisable to address this issue through joint regulation of the National Bank of Ukraine, the Ministry of Justice of Ukraine and the Ministry of Finance of Ukraine.

To involve the Ministry of Finance of Ukraine as a central executive body governing the State Fiscal Service (is currently holding summary on bank accounts of enterprises, institutions and organizations), and the State Treasury Service (serving managers and recipients of budget funds) into the process of automated attachment of funds.

Experts believe that the design, creation and deployment of the future system of automated bank accounts garnishments should take place in line with the following core principles:

Economic sustainability of the system: it should emancipate form the state budget. The entity that will build and ran that system should have tools for independent budgeting (investments and incomes) beyond the state budget allocations

Intensive interinstitutional cooperation: involve all core stakeholders, e.g. Central Bank, Tax Authority and Treasury, commercial banks

Interconnectivity/interoperability of the new system with corresponding existing systems: at the front- (connectivity with end-users of the system) and back-end (connectivity with Central Bank ran inter-bank payment/settlement system)

Step-by-step approach:

Phasing system's development into at least two stages would benefit reach of tangible results in reasonable time

Phase I would consist of:

- Establishment of a Task Force lead by a Champion (individual) capable of consolidating expert and political support for the ABAGS creation
- Elaboration of viable Policy Options by the TF to be presented to policy makers
- Policy Decision for the creation of the ABAGS formalized
- Design, Development, Physical Infrastructure set up and Deployment of ABAGS communication module (web-gate/portal) allowing **automated arrest of bank accounts** (see system's process-flow chart in Appendix 1)

Phase II would consist of:

- Design, Development and Deployment of ABAGS new functionality allowing **automated write-off of funds seized** and their transfer to the seizing authority

Attached to this report is a short SWOT analysis based on viable options for creation of the ABAGS that are currently under discussion (see Appendix 2).

Currently **IMF** is commissioning a dedicated comprehensive **Study along with a Road Map** on current state of affairs of bank accounts garnishment system in Ukraine. Keeping that in mind project experts will limit their recommendations to the ones above leaving room for more thorough review of the existing system and more sophisticated and detailed descriptions of viable policy options by the IMF commissioned report.

Identified Gaps

The arrest and write-off of funds from the individual debtor's bank accounts takes place following the paperwork document flow between the Enforcement Officer (EO) and the debtor's bank. This process has a number of drawbacks which leads to the delay in the recovery of the debtor`s funds, as well as the debtor's avoidance to respect its obligation under the writ of execution.

The current procedure of protection of vulnerable debtors, due to some legislative shortcomings, does not provide for any secured amount that cannot be recovered, which violates their rights and, as a consequence, results in litigations. A similar situation arises in cases of double collection under the same document (collection of salaries at the debtor's place of work and subsequently from his bank account into which such salaries are credited).

Recommendation

A new procedure of standardized electronic communication between the EO and a bank (detection of accounts, garnishment, and write-off shall be introduced), which should apply to all categories of enforcement proceedings (and not only of alimony as of now). On the part of the EOs, such communication should be facilitated through the Automated System of Enforcement Proceedings.

In order to protect the rights of individual debtors, the following should be done:

- Enshrine in law the minimum amount, related to the official minimum wages that cannot be recovered. The minimum amount may vary depending on the debtor's social status;
- Change the approaches and procedure of collecting funds from the debtor: any funds, regardless of the place they were detected in or their legal status, shall be subject to recovery, except for the minimum monthly amount that cannot be recovered.

Expected Outcome

A modern mechanism for seeking and collecting funds from debtor's bank accounts, which covers all categories of enforcement proceedings and ensures the protection of the rights of debtors.

III-5. Enforcement of no-monetary claims

III.8. Enforcement against Administrative Body/Agency (pecuniary and non-pecuniary claims)

The PEO is not entitled to enforce decisions where the debtor is the State, state agencies, the National Bank of Ukraine, local governments and their officials, state and municipal enterprises, institutions, organizations, legal entities, where the State's share in the authorized capital exceeds 25 percent, and/or which are funded exclusively at the expense of the state or local budget.

As to enforcement of decisions regarding an administrative body, decisions on non-pecuniary claims shall be executed on a general basis without any limitations.

The decision on recovery of funds from state agencies and the State shall be executed as provided by the Law of Ukraine "On the State Guarantees of Execution of Court Decisions".

According to the abovementioned Law, execution of court decisions on recovery of funds from the debtor which is a state body, shall be exercised by the central executive body implementing the state policy in treasury service of budget funds, within their respective budget allocations by debiting the state body's accounts, and in the absence of the appropriate allocations, or by using the funds provided under the budget program for execution of court decisions.

We may recommend the legislature to provide court with the right (obligation) to specify the person obliged to enforce the judgement by which the debtor is required to take certain actions, in case if the judgement is issued in respect of a state body.

For instance, court would be able to specify, in the resolutive part of the judgement, the Head of body, or other person obliged to enforce the judgement, as well as the deadline.

Such specification of a person obliged to enforce the judgement against a body or an organization, would discipline debtors, and would allow application of various statutory sanctions to specific person, who fail to execute the judgement.

Identified Gaps

Pursuant to Article 63 of the Law of Ukraine "On Enforcement Proceedings" (hereinafter referred to as the Law) if the debtor fails to execute a decision under which he/she is obliged to personally perform certain actions or refrain from committing them, the EO shall impose a fine, and after the debtor's repeated failure to comply with the decision, shall send a notification of the debtor's criminal offence to the pre-trial investigation authority, and issue a decision on the termination of the enforcement proceedings.

Systemic problems relating to the execution of such decisions have been repeatedly stated by the European Court of Human Rights, in particular in the cases *Zhovner v. Ukraine* (application no. 56848/00), *Yuriy M. Ivanov* (application no. 40450/04), and *Burmich and others v. Ukraine* (application no. 46852/13), namely the state's (state bodies', enterprises', institutions', and organisations') failure to comply with decisions of national courts. Many of such decisions are the ones where the Pension Fund is a debtor and is obliged to recalculate regular payments to a person and actually make payment. As a rule, in practice, only the first part of the judgement is executed, which is to recalculate, while the second part remains unexecuted.

Pursuant to the same Article 63 of the Law, if the debtor fails to comply with a decision that can be enforced without his/her participation, the EO shall impose a fine, and after the debtor's repeated failure to comply with the decision, shall send a notification of the debtor's criminal offense to the pre-trial investigation authority, and take measures to enforce the decision as provided by this Law. However, these statutory provisions being poorly developed, they cannot be genuinely put in practice, so that, for example, the EO cold actually enforce a decision at the enabling the debtor's expense.

In addition, pursuant to section 60 of the Law, when enforcing decisions on the transfer of certain items, as listed in the writ of execution, to the creditor, the EO shall seize such items from the debtor and transfer them to the creditor, which shall be formalized in the form of a statement of transfer. In case if an item which should have been handed over to the creditor in kind is destroyed, the EO shall draft a document stating that the decision cannot be executed, which gives basis for the termination of the enforcement proceedings.

The said legal tool is not complete and does not protect the creditor's right to have his/her court decision enforced, since no alternative way of actual enforcement is provided.

Recommendation

The Law should be amended to provide for: 1) imposition on the debtor of a fine, which will gradually increase after each debtor's failure to execute the decision within the time allowed by the EO in accordance with the law, until the decision is fully enforced; 2) change of the procedure of execution of decisions which are now considered as ones that just impose some obligations and where the state is a debtor (example from paragraph 1 regarding decisions against the Pension Fund), under which the EO (after having the first part of the decision – so far as the recalculation – executed by the Pension Fund) has to apply to court with the request to change the previously rendered decision on the recalculation to the one stating the amount of arrears to be collected; 3) possibility of execution by the EO of a decision that can be executed without the debtor participating, with further recovery of respective enforcement expenditures from the debtor; 4) possibility of changing the mean of enforcement of in case of destruction of an item that should have been handed over to a creditor in kind, by way of determining the cash equivalent of such item, with subsequent collection of the respective amount from a debtor and transferring it to the creditor.

Expected Outcome

Existing legislation contributes to the effective enforcement of decisions imposing certain obligations and non-monetary decisions.

III-6. Competing Creditors in Judgement Enforcement

III.7. Competing Creditors: Special Confiscation, State, Bankruptcy creditors, Secured and non-secured creditors

The previous draft Law of Ukraine 'On Enforcement Proceedings" has governed the issue of competing creditors.

The said issue was governed under Articles 2 and 33 stating that if the SES authorities have initiated several enforcement proceedings in respect of one creditor, they should be merged in a joint enforcement proceedings. In case if enforcement proceedings in respect of one debtor have been initiated in several SES authorities, the proceedings shall be merged in accordance with the procedure established by the Ministry of Justice of Ukraine.

Besides, the enforcement groups, composed of enforcement officers of one or several SES authorities, may be formed to carry out a joint enforcement proceedings in accordance with the procedure established by the Ministry of Justice of Ukraine.

Thus, the previous draft Law envisaged the joint enforcement proceedings and the enforcement by enforcement groups, the MOJ deciding on the procedure of merging proceedings and formation of enforcement groups.

Since the Law No1403 came into force and the PEO profession was established, the preliminary legal regulation of multiple creditors for one debtor is no more needed.

It may happen in practice that several enforcement proceedings have been initiated by a SEO and different PEOs in respect of one debtor.

The issue of multiple creditors under the writs of execution submitted to SES authorities, may be solved under the Law No. 1404. Under Article 25 and 30 of the said Law, several court decisions against one debtor may be merged in a joint proceedings. Enforcement groups may be formed, as envisaged by MOJ, in SES authorities to carry out a joint enforcement proceedings.

It should be noted that, at the difference from the previous draft, the Law 1404 does not envisage anymore the powers of MOJ to define the procedure of merging enforcement proceedings into a joint enforcement proceedings, while such a merging shall be carried out by the SEO, who initiated the first enforcement proceedings in respect of the debtor in question.

The question shall be solved in the same way, if a PEO enforces several court decisions in respect of one debtor. In this case such a PEO shall merge such proceedings in a joint proceedings.

The problem arises in the event if the creditors submitted their writs of execution to various private enforcement officers and an SES authority.

In this case, none of the enforcement officers is in the position to merge all enforcement proceedings (carried out by other enforcement officers) into a joint enforcement proceedings.

The Ministry of Justice does not also have any authority to solve this issue by adopting a relevant regulation, since there is no relevant legal provision in the new wording of the Law, which has been mentioned above.

Thus, based on the analysis of Law No. 1404, there is a competition between the creditors, or rather between the enforcement officers holding the writs of execution; i.e. one, who is prompter to take measures aimed at enforcement of a judgement, will become one to satisfy the demands of “his/her” creditor, and to receive the remuneration.

While the secured creditor (holder of collateral) is relatively safe, since, in accordance with Article 51 of Law No. 1404, s/he will anyway have his/her claims satisfied through selling the collateral (excluding the advanced payment made by another creditor to another enforcement officer, and enforcement costs), the creditors, whose claims shall be satisfied next, in accordance with Article 46 of Law No. 1404, would fully depend on the efficiency of the enforcement officers holding their writs of enforcement.

This problem was intended to be solved by adopting a regulation under which the distribution of recovered funds shall be carried out by the enforcement officer, who collected these funds, among all existing creditors in the order of priority defined under Article 46 of Law No. 1404, despite whether such an enforcement officer is a party to the enforcement proceeding within which the recovery was carried out.

Indeed, in accordance with Article 46 of Law No.1404, if the distribution of monetary funds under the circumstances in the case provided for in paragraph 3 of part one of Article 45 of this Law, reveals that the amount collected is not sufficient to satisfy the claims of all creditors having submitted writs of execution, the funds shall be distributed among all enforcement officers in the order of priority.

That is, it may appear that the enforcement officer is obliged to distribute funds among all the creditors in the order specified by law.

However, certain attention should be paid to the reference provision of Article 45, which deals specifically with the distribution of funds collected by the enforcement officer within the enforcement proceedings. That is, within the particular enforcement proceedings where such a recovery occurred.

In addition, the MOJ's attempts to settle this issue in bylaws goes beyond the scope of powers defined by Laws NoNo. 1403 and 1404, which would violate Article 19 of the Constitution of Ukraine.

Thus, in both cases, the probability of a considerable number of litigations between the creditors of different priority being initiated, irrespective of the order in which the funds are distributed, is quite high.

Given the foregoing, it is advisable to pay attention to this issue when amending the Law No. 1404.

Lack of prompt mechanism for enforcement by more than one EO against one and the same debtor

The enforcement process is a sequence of separate enforcement actions on individual assets of the debtor: receivables (wages, bank accounts), movable (vehicles, equipment, household) and immovable assets, etc. in that sense the competition among all the creditors of the same debtor should take place on the level of enforcement on a particular asset only (compete only those creditors who have a lien on the foreclosed asset – registered or by *traditio*). This is the core difference between individual enforcement, carried out by the EO, and the insolvency procedure.

There are legal systems that allow for a mixture of those two elements: by default the competition among creditors takes place at the distribution of receipts from the foreclosure of a particular asset BUT the creditors can also join a pending enforcement case and further participate in the foreclosure of all assets of the debtor. The latter option gives the possibility of all creditors with claims that stand above in the list of preferences established by the law to get satisfied before the other creditors of the same debtor. Such joining of a creditor should be provided only as an option, opportunity and should not take place *ex officio* or *ex lege*; otherwise we would turn the individual enforcement into universal (insolvency) which is not desirable by all means.

APPENDICIES:

Appendix 1: Bank Accounts Garnishment System SWOT analysis

SWOT ANALYSIS
OF CENTRALISED AUTOMATED CASH RESTRICTION AND WRITE-OFF INFORMATION SYSTEM

1. *Background Issues and Context*

A. The Minister of Justice of Ukraine has indicated the Registers reform as a *top priority* for the Ministry of Justice (MOJ) reform. MOJ has delegated the administration of 22 registers to the state-owned entity - s*tate enterprise "National information system" (NAIS)*. The NAIS main functions are to administrate main state registers and information systems. NAIS have certification authority (electronic signature). A few registries are under development (Unified Register of Private Enforcement Officers, Unified Register of Debtors, **Automated System of Enforcement Proceedings etc.)**[6]. New challenges are waiting in cybersecurity[7] and e-government[8]. Future systems should be based on principles of integration, consolidation and synergies. Technology is the important source of effectiveness of registries. Indeed, the Registers reform is based on IT reform. There is no doubt that main focus is on capacity and initiative of NAIS.

B. In the past years, the Ukrainian system of enforcement proceedings has become notorious for its rigidness and low efficiency. According to the Minister of Justice of Ukraine, only 20% of court decisions are enforced nowadays in the country. Therefore, a reform in this area has been among the most awaited ones. On June 2, 2016, the Ukrainian Parliament adopted a new Law on Enforcement Proceedings and a new Law on the Bodies and Persons Involved in the Enforcement of Judgments and Decisions of Other Bodies, introducing major changes to the system and the procedure of compulsory enforcement of court decisions.

C. In 2016, Ukraine introduced a new institute of private enforcement officers, having the same powers as those of the state enforcement officers. The enforcement system is undergoing a number of important changes, including generating an open, unified register of private enforcement officers. The unified register of debtors was established, i.e. a systematized database of debtors, constituting a part of the automated enforcement system. The Automated System of Enforcement Proceedings where all documents of the proceedings shall be drafted, registered and stored by the enforcement officers, and which shall ensure the impartial allocation of enforcement writs among enforcement officers, was set.

D. President of Ukraine submitted to Verkhovna Rada a Proposal to introduce *an automatic system for the seizure of funds in civil and commercial cases*. On January 14, 2016 the Verkhovna Rada registered the draft of the Law № 3768. The draft of the Law was

[6] See, a new Law on Enforcement Proceedings and a new Law on the Bodies and Persons Involved in the Enforcement of Judgments and Decisions of Other Bodies.

[7] On March 15, 2016 the Ukrainian National Security and Defense Council's resolution "On the Cyber Security Strategy of Ukraine" has been enforced by Ukrainian President's Decree. According to the Strategy development of potential of security and defense sector in the field of cyber security must include the realization, in particular, the following main measures: development and implementation of protocols of joint actions, including information exchange in real time; realization of state strategic planning and program-oriented software in the field of electronic communications, IT, information protection and cyber defense etc.

[8] In 2014, the Cabinet announced its intention to launch e-government in Ukraine until 2017. The Cabinet plans to adopt a law on unified system of electronic interaction and to completely abandon paper document circulation.

returned for reconsideration. According of this Draft Law, the State Judicial Administration (SJA) of Ukraine shall be the holder of the system of automated attachment of funds.

E. The Verkhovna Rada seeks a consensus on the new legislation governing the enforcement proceedings, as well as taking into account the procedural amendments to the Code. *Adoption of the Draft of the Law is aimed at implementation of an efficient, fast and prompt arrest of debtors' funds, eliminating any provision of paper queries for credit institutions, to automate the process of fund seizure*. Transmission of data is expected to be performed electronically without the intervention of the Bank employees into the system.

F. The primary purpose of the missions was not to oversee the process of enforcement proceedings, but to consult on the possibilities to *implement the most suitable bank account garnishment solution*. We prepared a mini SWAT analysis (see Chapter 1) and comments on the draft of the Law № 3768.

G. In this analysis, we look at *several aspects of* NAIS (see Chapter 2). We have not considered all aspects of the NAIS and our recommendations do not touch on every component we study. Our task was to analyse the NAIS strengths and weaknesses, and the opportunities and threats as a *Stakeholder* in future projects. The analysis is meant to identify some of the most important problems that need attention in the short term, and that can set the stage for continuing reforms and progress.

2. Activities

A. Experts met with the Ministry of Justice, the State Enforcement Department, the State Registration Department, state enforcement officers, notaries, Independent Association of the Banks of Ukraine (NABU), banks, Kyiv city administration and the NAIS, etc. We had discussions with knowledgeable Ukrainian officials, experts, public and civil servants, and with foreign advisers to Ukraine.

B. We reviewed Ukrainian laws, existing literature, the information we collected from the NAIS, etc.

C. We presented, demonstrated and tested Lithuanian Integrated Enforcement information systems (**Enforcement officers' information system (AIS) and Cash restriction information system (PLAIS) as an example of** the best practice. In Lithuania, an enforcement officer can *automatically seize all bank accounts* of a debtor in the country by merely updating an entry in the Cash restrictions information system. Cash restrictions information system (PLAIS) aims at centralized processing of data about the process of debtors' cash restrictions, at giving orders to banks on restrictions and write-offs and proportional allocation of debtor's cash among the entities giving orders to write-off, as well as at automating the debtor's cash restrictions/write-off processes and their control, at summarizing the debtor's cash restrictions/write-off processes, their analysis and statistics. Entities give orders on restrictions and write-offs only in a centralized and electronic way as well as on their changes or cancellations. This system generates enquiries to registers and information systems (Registers of Legal Entities, Population, Real Property, Property Seizure Acts, etc.). It generates orders on restrictions to credit institutions and sends them.

D. We reviewed the technical/graphical map of the enforcement process together with the Ukrainian enforcement officers, comparing it with the Lithuanian enforcement process map.

E. We provided recommendations on the **System of the Enforcement Proceedings and etc.** Many of these recommendations are based on observations of effective practices in other countries[9].

[9] Mostly based on the *best Lithuanian practice.* Globally, Lithuania stands at 2 in the ranking of 190 economies on the ease of registering property. For the registering property topic, along with New Zealand, Lithuania is among those that combine high efficiency and high quality. Supporting this efficiency is a high-quality land administration system. Property registration and its transfer from one company to another are comparatively simple, fast and cheap in Lithuania.

F. Planning *strategic steps*, including offer to the Ukrainian side for piloting Lithuanian **Enforcement officers information system and Cash restriction information system**.

Chapter 1

Cash Restriction Information system

General comments

A. The development of *automatic system for the seizure of funds in civil and commercial cases* was started in Ukraine without having chosen a clear management model.
B. Different local institutions and authorities have different views, who should be the 'owner' (administrator) of the *system for the seizure of funds* in Ukraine (MOJ/NAIS, Central Bank (CB), or possibly the State Judicial Administration (SJA). For example, in Lithuania PLAIS is linked to commercial banks and other credit unions operating in Lithuania via LITAS-KART system (Central Bank), however PLAIS system is administered by SE Center of Registers (manager of the system is the Ministry of Justice). Currently is unclear potential list of Ukrainian users and data providers (MOJ/State Enforcement Service, PEOs, Asset Recovery and *Management Office (that* Agency is acting as the criminal enforcement service with regard to any proceeds of crime – whether seized or confiscated), SJA, tax authorities, customs, etc.).
C. Local stakeholder (member of parliament Ruslan Sydorovych) stated against The State Fiscal Service participation despite the State Fiscal Service is currently holding summary on bank accounts of enterprises, institutions and organizations and the natural persons' tax payer code. The State Fiscal Service as the possible participant or data transporter is not suitable due to its huge aparatus and the cooperation is not possible at the moment. It is stated, that the reform for the institution is necessary.
D. Ukraine has a two-tier banking system, comprising the central bank (National Bank of Ukraine) or CB) and commercial banks. The CB main function is to ensure the stability of the national currency of Ukraine. Other functions, such as banking sector regulation, include the issue of money and arrangement of money circulation, regulation of banking transactions, a consolidated banking regulation and supervision. The role of the National Bank is quite possible, but just in case of proper legislation.
E. Commercial banks operate upon the authorization and the supervision of the CB. They are established as public joint-stock companies or as mutual saving banks, and require a license from the CB to operate. The National Bank of Ukraine announced a target of approximately 80-100 banks at the market. There are state-owned banks like Oshadny, Ukrexim or Ukrgas, but the fast majority of banks is in private property.There are some problems in banking system recently (Ukraine nationalizes the biggest Ukrainian bank called Privat Bank to maintain financial stability).
F. The orders to write-off should reach the system by the order of the court representatives, courts, the State Fiscal Service, etc. It is necessary to evaluate that the biggest order providers and the biggest flows of orders should be initiated by the **Enforcement officers** and not by the courts themselves. That is why the information system should be linked to Enforcement Proceedings IS, and the courts should only appear as the participants of the system.
G. The new system should be reached by the data of the court decisions (or e-courts), mortgage register, Residents' register and Legal persons' register etc.

Scenario I

Cash Restriction Information system created on NAIS side by the integration of Enforcement officers' information system

- ✓ **The Administrator of the system is NAIS.**
- ✓ **MOJ is Manager of the register.**

Strengths	**Weaknesses**
❖ Consolidation of IT resources (MOJ delegated to the NAIS administration of 22 registers); ❖ Experience and competence in administration registers and IS; ❖ NAIS administrates registers and IS, which are necessary for communication with other registers and IS; ➢ Enforcement officers are the main and biggest users of the system (with reference to the number of enforcement officers and the number of seizures), ❖ Accumulated registers' data which can be transferred into the new systems; ➢ Established infrastructure and sufficient number of employees. ➢	➢ Lack of Financing; ➢ Functionality of the administered systems (registers) of Enforcement Proceedings is not clear, as well as the use of their interface with the creation of Cash Restriction Information system; ➢ It is not clear if the newly created system could be linked to already existing registers and IS; ➢ The existing dispersion of registers.
Opportunities	**Threats**
➢ Creation of a single system with direct inclusive interface with information system of operators; ➢ Creation of interface with other administered registers ➢ Appropriate conditions for infrastructure development; ➢ Ensuring data security; ➢ Experience in data archiving, keeping etc; ➢ Appropriate preparation of technical base; ➢ Creation and development of future inclusive interface with other system users (courts, customs, tax inspectorate, etc.).	➢ Insufficient legislation; ➢ Attitude of NAIS specialists to the creation of new IS; ➢ Limited financing threatens appropriate IS supervision. ➢ Possible technical failures and inadequacies.

Scenario II

Cash Restriction Information system created within the infrastructure of the National Bank

✓ Central Bank- The administrator of the system.

SWOT

Strengths	Weaknesses
➢ Storage and collection of data about the accounts of natural and legal persons; ➢ Experience in collection, storage, processing, protection, supervision of information; ➢ Provision of information about natural and legal persons to state institutions. ➢ Established relationship of trust with commercial banks. ➢ Established relationship of trust with commercial banks ➢ Inter-bank settlement operator	➢ Uncertain financial possibilities; ➢ Lack of experience of system administrator; ➢ Infrastructure is not suitable for IS realisation, having too many participants and users. ➢ No mechanism for automated attachment of funds.
Opportunities	**Threats**
➢ Use of the copy of accumulated data or exchange with other IS; ➢ Improvement of infrastructure and application to newly created IS. ➢ Flexibility in setting up financing mechanisms for running and upgrade of IS: has independent budgeting process	➢ Insufficient legislation; ➢ Possible delay of data provision; ➢ Problems of IT security and reliability ➢ Cost for IS end-users might be relatively high.

Scenario III

Cash Restriction Information system created on E-court platform

✓ The administrator of the system is SJA or a unitary enterprise appointed by the State Judicial Administration of Ukraine.

A. The E- court pilot project is implemented in accordance with the Decision No. 74 of the Council of Judges of Ukraine dated July 22, 2015, with the support from USAID New Justice Project together with the State Judicial Administration of Ukraine, territorial department of SJA in the Odessa region and in cooperation with the Odessa Regional Centre on providing free secondary legal aid.
B. The main goal is to establish quick electronic exchange of information between judicial institutions, participants of the court proceedings, and other government agencies to ensure a fair and impartial justice in Ukraine.

C. Three court of Odessa region (namely Ovidiopol District Court of Odessa region, Kyiv District Court of Odessa city and the Court of Appeals of Odessa region) were chosen to participate in this Project by decision of the Council of Judges of Ukraine. They received an updated technical basis for the implementation of idea on the electronic document flow.
D. The results of the Pilot Project were presented in Odessa on July 18, 2016.

SWOT

Strengths	**Weaknesses**
➢ Creation of direct interface between E-Courts and Cash Restriction Information system; ➢ Automated and electronic data transfer via inclusive interface.	➢ "Human factor" issue: conservative approach, lack of openness to novelty; ➢ Court activities is extremely formalized and regulated procedure; ➢ Uncertain financial possibilities; ➢ Lack of experience of system administrator; ➢ Infrastructure is not suitable for IS realisation, having too many participants and users; ➢ There would be new duties for the users of the system – judges and their legal secretaries; ➢ Courts are not ready to accept the fully electronically created process.
Opportunities	**Threats**
➢ Further development of the court portal for electronic services adding new functionalities and electronic services; ➢ Creation of Interface with Enforcements officers' information system and automatic process of the delivery of enforceable documents; ➢ Improvement of infrastructure and application to newly created IS;	➢ Coordination and administration of all users and participants; ➢ Ensuring control process; ➢ Lack of computer literacy, conservative attitude to E-Courts system; ➢ Avoiding new innovation for IS; ➢ Problems of IT security and reliability; ➢ Lack of unanimous and common policy.

Conclusions and Follow-ups:

1. Based on the best practices of other countries while implementing automated fund seizure system, it is necessary to carry out an analysis of the legislation and to make recommendations for automatic fund seizure system implementation.
2. To resolve the question regarding the creation of automatic fund seizure system as a unified, interconnected system operating on the basis of appropriate and safe infrastructure.

3. To clearly define the issue of financing and to foresee resources for the appropriate system administration. The entity that will build and ran that system should have tools for independent budgeting (investments and receipts) beyond the state budget allocations (if any at all)
4. To accept amendments or additions of the legal acts guaranteeing the availability of funds to which automated fund seizure is directed (social and other benefits).
5. To clearly define the process, conditions, algorithm of fund distribution and other factors for automatic fund seizure.
6. Extensive inter institutional cooperation is necessary. Such project would be successful only if it gets banks' buy-in; all others: enforcement officers, courts, tax admin, etc. are end-users only, so their buy-in would be easier to achieve if the service is of good quality and at acceptable price. Banks would come on board if at least the following is presented: (i) the admin of the system enjoys banks' trust – preferably this should be an entity (organization or company) with well-established line of trust with all banks and (ii) new system's integration requires minimum changes to the systems currently running at banks – to decrease system integration costs for banks.

Chapter 2

NAIS SWOT

Strengths	**Weaknesses**
➢ Subordinated to the MOJ with clearly delegated tasks; ➢ Experience in administration of registers and other IT services for public sector and general public; ➢ Experience and competence in administration of main state registers (Civil Status Acts Register, Register of Rights to Real Property, Register of Legal Entities and Individual Entrepreneurs); ➢ Administrates other registers and IS, which are necessary for communication with other registers and IS; ➢ Consolidation of IT resources (MOJ delegated to the NAIS administration of 22 registers); ➢ Accumulated registers' data which can be transferred into the new systems; ➢ Established infrastructure and facilities covering whole territory of Ukraine; ➢ Established work procedures; ➢ Sufficient number of employees; ➢ Reform of personnel staffing in territorial divisions (initiated consolidation of financial and personnel management).	➢ Insufficient budgetary funding; ➢ Surplus top management apparatus (e.g. deputy director for one department); ➢ Overlapping functions of certain departments and unclear division responsibilities among them; ➢ Outsourcing of IT specialists for IS development and modernisation considering huge number of IT specialists working in the enterprise; ➢ Limited resources for raising qualification of employed IT staff; ➢ Non-competitive IT staff salaries in comparison to private market; ➢ Plausible frequent turnover of IT staff; ➢ Long decision-making process; ➢ Targeted to this day, limited awareness of long-term perspectives; ➢ Lack of interest in the adoption of innovations (reluctance to change or develop the current registers, IS etc.) ➢ Unreasonable fear (unawareness of new IS, of interest in helping etc.).
Opportunities	**Threats**

➢ Consolidation of State's Information Resources; ➢ Development and handling of eGovernment services & IS; ➢ Integration of data from different state registers and IS thus expanding number of e-services for citizens and governmental sector; ➢ Use of available international financial assistance for institutional building and development of IT systems; ➢ Raising staff qualification using international and bilateral funds.	➢ Insufficient legislation governing state information resources; ➢ A significant political influence; ➢ Lack of political will in taking necessary decisions; ➢ Limited budgetary funds assigned to NAIS puts at risk proper maintenance of current IT assets; ➢ Global demand for IT specialists might lead to further loss of better-skilled personnel to private sector thus deteriorating quality of provided services.

Main problems and Recommendations

A. Having analysed human resources of the NAIS following facts were observed:

1. The total number of staff of NAIS is 643 (248 are employed in the central office, 395 work in the branch offices).
2. Formally, out of the number of the total staff 458 are IT specialists (117 are employed in the central office, 395 work in the branch offices).
3. Having completed detailed analysis of the staff of NAIS we found out that in fact only 195 specialists directly work with the maintenance of IT systems (77 in the central office and 118 in the branch offices).
4. There are 6 deputy directors in NAIS.
5. Overlapping of functions among different departments/divisions, unclear divisions of tasks.
6. No strategic planning, project management or similar division.
7. Insufficient salary funds (non-competitive salaries in comparison to private market), frequent turnover of IT staff.

Recommendations:

1. The overall recommendation is to carry out performance audit of NAIS (either by the auditors of the Ministry of Justice or by independent auditors) with the aim of assessment of the structure of the entity, management practices, number of employees, functions of staff, activities of departments and divisions.
2. NAIS should review the concept of an IT specialist and make a clear distinction between IT staff of the entity and other employees. As a result, job descriptions of IT staff should be prepared and approved. This will facilitate highlighting of weak spots in IT systems management and will help to determine how many of IT specialists are required to administrate all 24 registers and IS assigned to NAIS;
3. As all IT systems are administrated in the central office the need to have 395 IT specialists in the branch offices (or according our findings, 118 IT specialists) is doubtful. This issue should be addressed having completed performance audit mentioned in point 1.
4. We recommend to establish within NAIS Strategic Planning Division or similar (including Project Management Subdivision) which would be responsible for preparation of mid-term/ long-term performance strategies of NAIS, their follow up and control, also will be

delegated with the task to search for available international funds (e. g. EU, World Bank, etc.) for financing modernisation of IT systems, development of e-services, and other tasks.

5. Upon the results of the performance audit issues of financing of staff and size of salaries should be addressed looking for possibilities to make salary level competitive with existing market salaries.

B. *General observations on the financial mechanisms of the NAIS:*

1. NAIS has the legal **status** of state enterprise, but *on the other hand is a budgetary organisation, since NAIS receives majority funding from the State budget* (most of operations are paid for by the State). Majority of payments return to the State budget[10], which means that Registers' administrator cannot earn money from these services and operations. In such case State is obliged to finance NAIS.
2. NAIS returns 75 percent of annual revenue to the State (after deduction of revenue taxes). For the period from the 3rd quarter of 2016 and the first two quarters of 2017 NAIS is allowed to pay 30 percent of the revenue to the budget.
3. When majority operations are paid for by the State (budgetary financing), it is difficult for institutions operating in this way to respond to changes in the market because of the need to seek governmental approval for any variation to their budgets.
4. When organization is funded by the State, it "works to the budget" and as a rule shows no incentive to seek efficiency. Even when organization seeks to make improvements, limited assigned budget might hinder to take up foreseen tasks.
5. NAIS works strictly within the limits of its budget (MOJ determines annual budget for NAIS). MOJ allocated NAIS 378.000.000 UAH (approximately 13.964.349 EUR) for 2016 for operating of State Registers.
6. The MOJ commenced the registers reform by opening the registers information to the public. The data in some registers are free. User do not pay full cost of registers work and services.
7. NAIS has the right to invest only in infrastructure.

Recommendations:

1. *NAIS should be reorganised on the basis of business-oriented model*, where the State will not have obligation to finance its activities from the state budget. Such reform would encourage NAIS to search for alternative sources of funding and will reduce the State share of the burden of maintaining similar entities.
2. The NAIS should be a self-financed organisation and minimally use (or not use at all) the state budget. Self-financing basis means that the collected funds are used for improving the system, promoting operation progress and satisfying client needs.
3. Information should be available in a form that fulfils customers' needs and expectations, i.e. what they want and what prices they are prepared to pay taking into consideration *cost-recovery principles*. Some countries have freedom of information acts, but *data are not "free"* (for example, Lithuania). Payment must come from either from the user or from taxes. Except where there are statutory requirements for free exchange or supply of information, *all users should pay for data, information or services*. Register information may be very costly to collect and to keep updated. The user or taxation should fully fund the collection and maintenance of registers' data. The availability of financial mechanisms to ensure efficient makes the administration system more resilient. Before a pricing strategy and the setting of fees and charges are defined, the real costs of the operations concerned

[10] According to the Law of Ukraine 15.05.2003 № 755-I9, Resolution of The Cabinet of Ministers of Ukraine № 1272 14.07.1999, the money earned from providing the access, usage, entering and receiving information from registers that are held by the MOJ *goes to the state budget*.

have to be identified. The charges should be set to recover costs plus a reasonable return on investment, wherever this is allowed.

Appendix 2: 2019 Legislative Package on Enforcement

The 2019 Legislative Package on Enforcement was developed by the EU PRAVO JUSTICE experts in intensive consultations with key stakeholders: MoJ, Association of Private Enforcement Officers, National Banks Association, UBA and business associations – the ACC and EBA.

It consists of: (1) Draft Law on Enforcement, (2) Comparative Table for amendments in other relevant laws and (3) 17 Positioning Statement Pagers summarizing the issues, suggested changes and expected outcomes.

The Legislative Package was presented at a public event on November 7th, 2019 where all stakeholders urged for prompt consideration and processing of the Package by the Government and the Parliament.