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DISCLAIMER

Assessment of the effective Ukrainian legislation and procedures of enforcement of judgments (hereinafter – the Assessment) was carried out by experts of the charitable organization the Commercial Law Center (Ukraine) as a part of efforts set out in the Implementation Plan of the Strategic Objective Agreement between the Government of the United States of America and the Government of Ukraine for the Program to Reduce Corruption in the Public Sector, and for the implementation of the Millennium Challenge Account Threshold Program in Ukraine.

The efforts were financed by the US Agency for International Development (USAID) by the funds provided by Millennium Challenge Corporation.

Statements provided in the Assessment do not always coincide with the position of any of the above organizations and/or US public agencies.

BACKGROUND AND ACKNOWLEDGMENT

The Commercial Law Center (hereinafter – the Center) is a charitable organization, whose efforts are aimed at the development and streamlining of the legal framework in the area of economic relations in Ukraine, introduction of a legal system that would ensure economic freedoms in the state, create conditions for protection of an individual, his/her property, and protect competition. The legal drafting component of the Center includes: research of the current state of legal regulation of economic relations in Ukraine; analysis of practical application of laws; legal expertise of draft legislation; development of regulatory acts, amendments and proposals to draft laws; arrangement of public discussion of problem legal issues; coverage of legal initiatives and arrangement of comparative research of other states' legal systems.

For seven years the Commercial Law Center experts have been actively engaged in legal drafting efforts, specifically, in the development and revision of the Civil Code of Ukraine, the Laws of Ukraine "On Mortgage", "On Financial Leasing", "On the State Registration of Legal Entities and Physical Persons - Entrepreneurs", "On Organization of Formation and Turnover of Credit Histories", "On Judicial Enforcement", "On Restoring Solvency of the Debtor or Declaring It Bankrupt", the new wording of the Code of Economic Procedure of Ukraine, etc. For the purpose of expert assessment of the possible impact of draft legislation on legal regulation of social relations in Ukraine, the Center experts have developed about 80 legal opinions for draft laws, considered in the Ukrainian Parliament committees, and carried out a number of research efforts of the status of the effective legal regulation in different areas of social relationships.

In July 2007 the Commercial Law Center received the right to perform works under Strategic Objective Agreement between the Government of the United States of America and the Government of Ukraine for the Program to Reduce Corruption in the Public Sector, and for the implementation of the Millennium Challenge Account Threshold Program in Ukraine in the area "The reform of the system of enforcement of court judgments and notariat".

The Implementation Plan of the Threshold Program provides for assessment of the existing enforcement legislation and the process of judicial enforcement. The United States Agency for International Development (USAID) provided financing for the Assessment at the expense of the Millennium Challenge Corporation.

To understand the core of the Assessment, the criteria used in the research, and later in the assessment must be specified. Despite the document is titled "Assessment of the Effective Ukrainian Judicial Enforcement Legislation", the research, undertaken by the Center experts, does not cover the entire Ukrainian judicial enforcement system. The scope of the Assessment is limited to relevant institutions or relations in judicial enforcement, as set out by the Implementation Plan of the Threshold Program of the Millenium Challenge Corporation.

Thus, the Assessment was done in respect of the following:

- appropriateness and efficiency of the current solutions, proposed in draft laws of Ukraine "On Amending of the Law of Ukraine "On the State Executive Service" and the Law of Ukraine "On Judicial Enforcement", developed by the Government and/or considered by the Ukrainian Parliament;

- selection for the positions of state executive officers (introduction of special qualification exams, advanced training courses, etc.);

- adjustment of powers of state executive officers;

- mechanisms of control and supervision over activities of state executive officers;

- ensuring access of state executive officers to information on debtors' bank accounts to eliminate the possibility of concealment of such accounts or funds thereon;

- ensuring actual opportunity of foreclosing on moveable and immoveable property of debtors, specifically, state-owned enterprises;

- elimination of legal possibilities for debtors to avoid execution of court judgments;

- segregation of execution of court judgments in the judicial enforcement procedure and during the bankruptcy estate proceedings (bankruptcy cases);

- the procedure of auction arrangement (public sale);

- the status of the Unified State Judicial Enforcement Registry and its appropriateness to the needs of enforcement of court judgments.

The Assessment was performed by the Center experts in cooperation with representatives of the Ukrainian state authorities. Experts of the Commercial Law Center express their acknowledgement to the Ministry of Justice of Ukraine, specifically, to the State Executive Service Department (hereinafter - SES), for coordination of assessment efforts from the side of the Ukrainian government authorities.

We acknowledge our gratitude to the state enterprise of the Ministry of Justice of Ukriane "Information Center" for provided information.

We appreciate significant input of Emerging Markets Group, Ltd. to preparation of the Assessment.

Information used by the Center experts in writing this report, was taken from public sources: publications in Ukrainian and international media, as was as from the Internet.

SUMMARY AND RECOMMENDATIONS

Despite attempts of the Government to reform the system of governmental authorities responsible for enforcement of court judgment, and to improve the judicial enforcement procedure, the existing Ukrainian system of execution of court decisions does not meet the standards accepted in the EU member states.

GLOBAL PRINCIPLES OF ENFORCEMENT OF COURT JUDGMENTS AND BEST PRACTICES[1]

1. Clear and adequate institutional structure of enforcement authorities, including efficient judicial supervision.
2. Clear and adequate procedure and mechanisms of enforcement, including adequate, proportionate and practicable court sanctions, secured by judicial enforcement.
3. Clear and adequate administrative and legal requirements and procedures, including the right to judicial review.
4. Clear laws, governing rights and obligations of parties.
5. Transparent process of making payments and liquidation of property in respect of both individuals the state.
6. Clearly-defined and comprehensible functions and responsibilities of enforcement agents (bailiffs), practicable and binding Codes of Ethics.
7. Clearly-defined and comprehensible functions and responsibilities of judges, practicable and binding Codes of Ethics.
8. Access to justice, including the right to an attorney, transparent and reasonable legal fees, as well as the cost of judicial enforcement.
9. Efficient, fair and practicable service of notice and other documents.
10. Adequate resources for conducting of judicial enforcement, the system of compensation and training for judicial enforcement professionals.
11. Judicial enforcement within reasonable time.
12. Efficient access to information.

The Center shares standpoints of its experts, specifically, those carrying out research under the auspices of the US Agency for International Development (USAID), Tacis, The World Bank, IFC, the European Council, Ukrainian and international experts that to be able to strengthen the rule of law in Ukraine, a systemic reform of authorities responsible for judicial enforcement, material and legal regulation and judicial enforcement procedures, including bankruptcy procedures, is required. Such reform may be successful only where there is a political will and support by wide political community.

Thus, the fact is that the Ukraine legal system looks deficient. The problem has several aspects: laws are developed in a poor manner, draft legislation has excessive width and depth, leaving room for arbitrary interpretation and decision-making; laws do not fit the political context, nor proactively assessed for possible consequences of their application. The problem is constantly escalated by active and non-systemic drafting activities of the legislative authority.

[1] Henderson, Keith. Regional Best Practice: Enforcement of Court Judgments. From “Henderson, Keith et al., Bariers to the Enforcement of Court Judgments and the Rule of Law. IFES: Washington D.C.2003”. Available at http://www.ifes.org/rule_of_law/enforcement.html

The reason for this is an improperly built system of legal drafting in Ukraine. Draft laws proposed for consideration to the legislative authority, are developed by persons, who are not experts in legal drafting, but represent only interests of a political or economic sector. Such a procedure gives rise to acts that cause imbalance or even ruin the integrity of the legislative system.

There is a belief that the legal initiative mechanisms must be different in qualitative terms. MP's legal initiative must not be identified directly with legal drafting. At the initial stage of development of a legal draft the author of a legal initiative should be only responsible for a political or managerial decision on the direction of social and political development or improvement of one or another social and/or legal phenomenon. As regards the development of a specific legal toolkit, legal forms and contents of draft normative acts, they should be developed by highly professional legal community or institutions on the basis of cooperation with appropriate area experts and complex analysis of the existing problems and possible solutions.

Development of draft normative acts by such a scheme would ensure a systemic and professional approach to the development of legal regulation, prevent controversies or collisions of legal norms from happening, ensure their due formulation and designing under the canons of legal techniques. Such approach would result in a sustainable and uniform practice of application, specifically, legal practice, uniform legal understanding, lack of differing interpretations of norms, and this, accordingly, would ensure legal definiteness, proper level of exercising and protection of rights and lawful interests of parties to legal relationships.

Awareness of the rule of law in Ukraine does not reflect the fundamental concept of law as a means, due to which the society limits the power. Regulations are commonly beyond the ideas, incorporated in the primary sources – the Constitution of Ukraine and the laws, distorting their real legal meaning and objective set by the legislator. Judicial interpretation of legal norms is usually limited to the literal communication of their contents, whereby judges avoid their duty to clarify the real "spirit of law", and to apply the principle of the rule of law to protect rights against infringements form the side of the legislator. Institutional structure of the judicial system does not either due protection of rights, or uniformity in law enforcement.

The existing systemic problems in the Ukrainian legal system gives grounds to conclude that it is not yet the time for radical reforming of the system of execution of court judgments. That is why, the recommendation is that Ukraine take the following measures in the short- and midterm perspective.

SUMMARY OF RECOMMENDATIONS

I. Regarding selection for the positions of state executive officers

To ensure proper funding, logistics supply of the state executive service, salary increase for state executive officers and promotion of the profession, there is a proposal to cancel the executive charge, collected from the debtor for voluntary failure, and is a source of revenues for judicial enforcement, and introduce instead the payment for executive actions at the account of the parties to judicial enforcement, to whose interests the state executive officer acts:

- executive actions should be paid and tariff-based. Specific actions in the process of enforcement should be charged in the size proportionate to the cost of such actions;

- the recoverer, as a person, interested in the necessity of enforcement to its benefit, shall preliminarily pay the cost of judicial enforcement. The size of the payment shall be determined based on the actions, the state executive officer would have to perform upon request of the recoverer, and in accordance with the tariffs established for each executive action (the reservation should be made that for low-income individuals an efficient assistance system must be introduced in the state at the expense of the budget).;

- costs, incurred by the recoverer to pay for judicial enforcement, shall be further collected from the debtor and return of such funds to the recoverer. In the same case, where no assets are found with the debtor, the costs suffered by the recoverer, and the amount of debt, shall be left unsatisfied, and be treated as regular costs;

- the state executive officer shall be rewarded for successful enforcement of a court judgment (success fee).

The following should be put in place in the system of training and advanced training of state executive officers:

- in higher educational institutions – a training course on enforcement law and bankruptcy estate process (bankruptcy proceedings);

- in higher educational or training courses at the Ministry of Justice of Ukraine – a number of special courses on practical aspects of judicial enforcement as a part of mandatory advanced training program for state executive officers;

- prior to appointment to such position – mandatory testing and examination to check the knowledge received.

II. Regarding adjustment of powers of state executive officers

1. Treat the state executive officer in property collection as a sort of a debtor's representative rather than a subject of power, who in a authoritative and instructive manner redistributes the debtor's property.

2. Confer on the state executive officer fiduciary duties of good faith and prudence while exercising his powers of debtor's property administration.

3. Cancel the powers of state executive officers as to making resolution on rendering resolutions on collecting an executive charge, imposing of penalties and other social and legal powers of state executive officers.

III. Regarding mechanisms of control and supervision over the activities of state executive officers

The Code of Civil Procedure, the Code of Economic Procedure, the Code of Administrative Legal Procedure, the Law «On the State Executive Service» and the Law «On Judicial Enforcement» should be amended as follows.

1. In the laws the provision should be reproduced that the enforcement authority shall be the State Executive Service rather than state executive officers. State executive officers are not independent enforcement authorities, but perform their obligations being in relationships with the state executive service.

2. The Laws "On Judicial Enforcement" and "On the State Executive Service" should be reconciled with clause 9^1 of Article 116 of the Constitution of Ukraine through incorporation of clarifications, a part of authorities of which ministry the state executive service is, as well as clarifications regarding the structure of the ministry and the state executive service. Appropriate provisions hereby, specifically those about the structure of the Ministry of Justice, relations of internal control, defining the competency of one category of officers in respect of the right to inspect others, reporting to the former, bringing them to account, etc., should be transferred to regulations of the Cabinet of Ministers of Ukraine and the Ministry of Justice of Ukraine.

3. The procedural status of the prosecutor as a representative of one of the parties to judicial enforcement should be clearly identified, the possibility of exercising of controlling or supervisory functions beyond the scope of rights granted to the party representative should be eliminated.

4. Provide that in the event of violation of the rights of the parties to judicial enforcement from the side f the executive service:

- in case of appeal against actions or omission of the enforcement authority, an authority competent to consider cases shall be a local court of general proceedings, in whose jurisdiction (district) enforcement is conducted (usually, location of the debtor or property);

- subject matter of appeal is actions or omission of the enforcement authority;

- the defendant is the state of Ukraine, whose interests are represented by the executive service authority and the treasury authority (in the part of property charges from the state);

- for the time of consideration of the case judicial enforcement is not discontinued unless otherwise ordered by the court.

5. All procedural norms defining the competency of courts with regard to consideration of claims on decisions, actions or omission of the state executive service should be removed from the Law "On Judicial Enforcement".

6. The Law requirements on formalization of judicial enforcement should be reviewed (efficiency of making resolutions on various procedural issues shall be reviewed).

IV. Regarding ensurin access of state executive officers to the information on debtor's bank accounts

1. Authorities of the state executive service should be granted the right of full access to the information on debtor's accounts with financial institutions, and on the status of such accounts with obliging the state executive officers to treat the received information as confidential.

2. Tax authorities should be notified about opening of all bank account of both individuals and legal entities, as well as promptly provide such information upon request of state executive officers.

   Capture information on opened bank accounts of subjects of business in the Unified Registry of Legal Entities and Physical Persons – Entrepreneurs. Incomprehensive lists of means of perpetuation of evidence and the types of proof of claim are established. Amend the codes of procedure to clarify the types of proof of claim.

   It is necessary to eliminate the possibility to treat court resolutions as executive documents. For any court resolution, wherever it is subject to enforcement, a separate executive document must be issued. This is provided by a preliminary draft Law of Ukraine “On Amending Some Legal Acts of Ukraine Regarding Improvement of the Procedure of Enforcement and Increasing of the Status of State Executive Service Officers”, developed by the Cabinet of Ministers in consideration of a number of CLC proposals (see Section I hereof with regard to legislative initiatives of the Cabinet of Ministers of Ukraine).

   It should also be set forth in the codes of procedure, which exactly resolutions require an executive document, and which – do not. The executive document should be only issued for resolutions on foreclosure or on performing of certain actions by the debtor. In the case of resolutions, by which the court obliges the debtor to abstain from performing certain actions, the court should issue an executive document with an appropriate injunction, and the state executive officer should follow such resolution by servicing the document to the debtor. As far as other resolutions are concerned executive documents should not be issued (e.g. resolutions on invalidation the agreement or on recognition of the title). Additionally, a comprehensible list of resolutions, which require an executive document, should be established.

VII. Regarding segregation of procedures of execution of court decisions in judicial enforcement and bankruptcy estate process (bankruptcy proceedings)

1. Amend the Law of Ukraine “On Judicial Enforcement” and the Law “On Restoring Solvency of the Debtor or Declaring It Bankrupt”, aimed at making judicial enforcement impossible once bankruptcy proceedings are initiated.

2. Revise the Law “On Restoring Solvency of the Debtor or Declaring It Bankrupt” in the part of:

   2.1. providing for clear signs of insolvency and the procedure of clarification of the state of insolvency of the debtor’s property in the competition process to ensure the general order of satisfaction of creditor claims through judicial enforcement, and use bankruptcy proceedings only in the event of inadequacy of the debtor’s property for satisfaction of all creditors in a collective action, non-admission of unjustified initiation of bankruptcy proceedings;

   2.2. ensuring of establishment of the fact of declaring the debtor incapable through rendering a court judgment, linking the following legal implications to such court judgment:

- publication of announcement about declaring the debtor incapable and initiation of bankruptcy proceedings;

- ban on all collections in a forcible manner, and voluntary satisfaction of claims by the debtor in favor of some creditors, and cancellation of all measures targeted at securing of enforcement in favor of one creditor with simultaneous introduction of seizures, bans on alienation and other limitations applicable to all debtor's property, and carried out to the interests of all creditors;

- falling due of the date of performing all obligations by the debtor before creditors, the call to all creditors to apply to the court with the claim to the debtor (removal from the law of a similar provision linked to the fact of declaring the debtor bankrupt);

- partial restriction of debtor's capability and appointment of a receiver (property administrator) as a trustee;

2.3. conferring to the court of the obligation to cause publication of the announcement on declaring the debtor incapable at the cost of expenditures on information support of the judicial process, send an injunction (court decision) on declaring the debtor incapable to the department of the state executive service at the location of the debtor, to the state registrar of the Unified State Registry of Legal Entities and Physical Persons – Entrepreneurs at the location of the debtor;

2.4. conferring to the arbitrary manager an obligation to notify in writing all identified creditors on initiation of bankruptcy proceedings, falling due of the term of performing of the debtor's obligations before such creditors, and communication to them of the right to apply to the court with the claim to the debtor, as well as implications of failure to perform same;

2.5. adjustment of the procedure of satisfaction of salary claims of debtor's employees, the claims to compensate for the damage, caused to the life and health of individuals, payment of alimony in the course of bankruptcy proceedings; conferring to the arbitration manager of the obligation to make appropriate payments upon establishment of non-payment implications for the debtor – declaring it bankrupt or initiation of the liquidation procedure;

2.6. adjustment of the procedure of satisfaction of creditors' claims, obligations before which are secured by pledge of the debtor's property, participation of such creditors in the bankruptcy proceedings and the scope of their rights;

2.7. adjustment of the procedure of satisfaction of creditors' claims, associated with reclamation from the debtor of the property not owned by it or being in its temporary possession (similarly to removal of the property from the list);

2.8. indisputable entry in the registry of creditors' claims in the bankruptcy case in the part confirmed by court judgments that took legal effect, as well as those supported by writs (orders) of execution, and in respect of which judicial enforcement has been initiated, where they were received from recoverers or the state executive service;

2.9. strengthening of requirements to the persons willing to engage in activities associated with trust administration of the debtor's property, with regard to which bankruptcy proceedings have been initiated, replacement of the term "arbitration manager" with "bankruptcy manager", modification of the licensing terms, increase of liability of bankruptcy managers for losses that may be caused by their activities.

3. Amend the Law "On Judicial Enforcement" (in the part of property collections) as follows:

3.1. establish an appropriate ground for closing judicial enforcement in cases, where bankruptcy proceedings have been initiated in respect of the debtor, remove from the law a similar provision linked to the fact of declaring the debtor bankrupt;

3.2. where there are bankruptcy proceedings initiated by the court against the debtor, with regard to which judicial enforcement has been opened, establish an obligation for state executive officers to transfer executive documents for further processing to the court that considers a given bankruptcy case;

3.3. remove from the law provisions about discontinuance of judicial enforcement due to initiation of bankruptcy proceedings;

3.4. provide for the grounds for refusal to open judicial enforcement, where bankruptcy proceedings have been initiated in respect of the debtor;

3.5. cancel provisions that establish the priority of satisfaction of creditors' claims, and introduce the principle of full satisfaction of recoverer's claims instead, and provide for the priority subject to the term of giving effect to the decision on enforcement.

4. The Cabinet of Ministers of Ukraine shall transfer powers of control and supervision over activities of bankruptcy managers from the Ministry of Economy of Ukraine to the Ministry of Justice of Ukraine and attachment to the Department of Execution of Court Judgments.

VIII. Regarding the procedure of carrying out an auction (public sale)

The applicable Ukrainian legislation on public sale must be substantially modified. Sale of property at public sale should be based on the following principles:

- transparency of sale;
- predictability of trade implications;
- maximum reduction of corruption potential.

Compliance with the principle of transparency of sale provides for maximum possible broad and preliminary informing of potential buyers on future public sale, its conditions, and the property to be sold. Potential buyers should be provided with an opportunity to review the property through its examination, testing, etc. This also provides for putting in place transparent procedures of public sale, consistency of the rules to be achieved by their

uniformity. Specifics or differences in sale procedures should be established only where such specifics or differences are dictated by specific or differences of one or other type of property.

Compliance with the principle of predictability of implications of trade provides for establishing proper means of protection of rights of the recoverer, the debtor, the good faith buyer – winner of trades, and other trade participants. Special attention should be paid to the protection of rights of the good faith buyer, non-admission of the possibility of it being unable to purchase the property due to the circumstances, which the buyer was not aware of and could not have been aware of.

Following the principle of maximum reduction of the corruption potential in the context of legislation development suggests regulation, whereby neither misconduct of the state executive officer or the organizer of trade, nor receipt of insider information would not result in decisive advantages of one participant category against the other.

IX. Regarding the Unified State Registry of Judicial Enforcement

Amend the Provision on the Unified State Registyr of Judicial Enforcement, approved by the Order of the Ministry of Justice of Ukraine No.43/5 of 20.05.2003 as follows:

1. Normative formulation of purposes of setting up the registry, which is to:

    - increase labor efficiency;
    - ensure reliable accounting, safekeeping and handling of documents, as well as the information on legal entities and physical persons, objects of execution, appeals of individuals and organizations regarding judicial enforcement;
    - automate complicated information and analytical processing of statistical reporting according to performance of each executive officer or entire department by any area of activity and criteria during any period;
    - automatically form judicial enforcement documents (resolutions, inquiries, responses, applications, references, log books, payment documents, transfer and acceptance acts, etc.);
    - increase labor, financial and information culture of executive officers;
    - ensure due control from the side of the management over office discipline of executive officers;
    - carry out processing, analysis, transfer and safekeeping of received information in the central office of SES;
    - secure global search, including by incomplete data, simultaneously by several information systems (State Registries, containing information on legal entities and physical persons), their location, civil status, etc., and their rights to property, even if such registries are maintained by different government authorities);
    - provide the state executive officer with the opportunity to directly and quickly registers property liens or debtor accounts;
    - segregate the persons' access to information and the modes of its processing depending on their functional responsibilities in the judicial enforcement process, the status of participant of judicial enforcement, or a person interested in purchasing of property or exercising social control over the status of execution of court judgments in the state.

2. Specification of registry functions:

- registration of executive documents;
- initiation of judicial enforcement;
- registration of information on seizure and sale of property;
- suspension, delay and resumption of judicial enforcement;
- keeping account of deposit amounts;
- keeping account of penalty fines;
- keeping account of expenses on judicial enforcement;
- completion of judicial enforcement;
- transfer of a case from one officer to another;
- composing of any documents, provided for by judicial enforcement;
- composing of any reports and certificates;
- search for information in the database by random inquiries;
- keeping of accounting and statistical documents on judicial enforcement.

3. Identification of the clear procedure of maintaining and filling of the Registry, identification of responsible officers. It would be efficient to add to the Law of Ukraine "On Judicial Enforcement" with the norm on mandatory publishing through the Internet of the information on holding a public sale of seized property. The database of public sale should be unified and be placed n the web-site of the Unified State Registry of Judicial Enforcement. The relevant subsystem of seized property should contain information on: description of property; expert appraisal; ground for trade; date and time of trade; place of trade in property encumbrances; results of trade; other information.

I. ASSESSMENT OF ADEQUACY AND EFFICIENCY OF SOLUTIONS, PROPOSED IN DRAFT LAWS OF UKRAINE "ON THE STATE EXECUTIVE SERVICE" AND "ON JUDICIAL ENFORCEMENT", DEVELOPED BY THE GOVERNMENT AND/OR CONSIDERED BY THE VERKHOVNA RADA OF UKRAINE

A. DRAFT LAWS, PROVIDING FOR AMENDING THE LAWS OF UKRAINE "ON THE STATE EXECUTIVE SERVICE" AND "ON JUDICIAL ENFORCEMENT", TABLED TO OR CONSIDERED BY THE VERKHOVNA RADA OF UKRAINE

General provisions

The Verkhovna Rada of Ukraine of the 5th convocation received 32 draft laws related to judicial enforcement.

Presently, the Verkhovna Rada of Ukraine does not operate in a proper mode, and that is why these drafts will not be considered by current MP's.

The new parliamentary election is to be held on September 30, 2007. This means that according to part 1 of Article 90 of the Regulation of the Verkhovna Rada of Ukraine, the new Parliament – out of the foregoing drafts – may only consider those, adopted by the previous Parliament at least in the first reading. The remaining drafts will be automatically called off vote.

Thus, 29 of the said draft laws will be called off vote as the ones rejected or unconsidered by the Verhovna Rada of Ukraine of the 5th convocation.

So, of the mentioned draft laws only three – No.1265, No.2693, No.2241 - may be considered later on.

The draf Law of Ukraine "On Amending Some Laws of Ukraine (regarding improvement of the procedures of restoring the debtor's solvency)" of 04.08.2006, registration No.1265

The draft law was tabled by MP's S. Matviyenkov and I. Bokiy of December 12, 2006 and was adopted in the first reading (taken as a basis).

The draft law provided for amending the Laws of Ukraine "On Judicial Enforcement", "On Restoring Solvency of the Debtor or Declaring It Bankrupt", "On Pledge" and "On the Procedure of Repayment of Taxpayers' Obligations before Budgets and State Special-Purpose Funds".

The draft law was aimed, first, at establishing a special procedure of selling property of the debtor – a legal entity – the state holding in the capital of which is in excess of 25%, second, at prohibition of foreclosing on immoveable property, equipment, raw and other materials, used in production by enterprises of strategic importance for the economy and safety of the state, especially by dangerous enterprises or natural monopolies.

Both lines of amendments are adverse and create additional impediments in execution of court judgments.

The Draft Law of Ukraine "On Amending some legal acts of Ukraine following the adoption of the Law of Ukraine "On freedom of movement and free choice of the place of residence in Ukraine" of 07.12.2006, registration no.2693

This draft law was proposed by the Cabinet of Ministers of Ukraine and approved in the first reading (taken as a basis) on 03.04.2007.

The draft provides for changing terminology in the Law of Ukraine "On Judicial Enforcement" and a number of codes and other laws of Ukraine, among which are: the Code of Criminal Procedure of Ukraine, the Code of Labor Laws of Ukraine, the Family Code of Ukraine, the Civil Code of Ukraine, the Laws of Ukraine "On the State Border of Ukraine", "On Pension Coverage", "On Notariat", "On Vacations", "On Resorts", "On the Status of the Member of Parliament", "On Mortgage", Decrees of the Cabinet of Ministers of Ukraine "On the State Duty", "On Local Taxes and Duties", etc.

The essence of the terminology changes is that the place of residence of an individual should be recognized not his/her address, but an administrative and territorial unit – oblast, district, etc., where an individual resides.

In the context of judicial enforcement such changes will result in specifying in an executive document of an administrative and territorial unit, where an individual stays, rather than his her address. This would impede the debtor identification, where the debtor is an owner of a commonly used name.

The draft law of Ukraine "On Amending the Law of Ukraine "On Judicial Enforcement" of 29.09.2006, registration no.2241

The draft was proposed by the Cabinet of Ministers of Ukraine, adopted in the first reading (taken as a basis) on 29.09.2006 and adopted in the second reading (on the whole) on 05.04.2007.

On June 13, 2007 the draft was returned by the President of Ukraine (vetoed). The President's proposals are not principal, but concern just the procedure of transfer of funds to the budget, and may be accepted by MP's. In such case, according to part 5 of Article 130 of the Regulation of the Verkhovna Rada of Ukraine the law would be deemed approved on the whole, if it receives a majority of MP's votes of the constitutional composition of the Verkhovna Rada of Ukraine.

The draft, approved in the second reading (on the whole), is aimed at clarification of the procedure of selling property seized in favor of the state (as a punishment).

Specifically, it provides for incorporating the following amendments to Article 75 of the Law of Ukraine "On Judicial Enforcement":

(i) where in a month from re-appraisal seized property is not sold, such property, including commodities and materials from the consumer goods category, business-to-business products, sale of which at a public sale, auctions is not possible or recommended according to the written expert opinion due to a significant level of tear-and-wear of such

property, damage, or where expenses associated with its sale at public trade and/or auctions are in excess of the amount, obtained from appraisal performed under the law, as well as disassembled vehicles forbidden for exploitation according to the opinion of engineering expert examination, is sold pursuant to the procedure established by legislation, through commodity exchanges or on commission terms through trade enterprises, entered in the Unified State Registry of Legal Entities and Physical Persons – Entrepreneurs, determined on a tender (competition) basis;

(ii) where in a month from delivery of property for sale through commodity exchanges or through trade enterprises the property is not sole, it shall be transferred free of charge and under the procedure established by the Cabinet of Ministers of Ukraine to:

- institutions, bringing up orphans and children without parent care, orphan homes, foster homes, children homes at correctional institutions;
- healthcare, educational and social security institutions;
- correctional institutions, detention facilities;
- military units;
- for charity purposes or to entities, engaged in processing or destruction (recycling) of property.

The intent to resolve the issue of sale of low-liquidity property is welcome.

Along with that, it should be noted that first, this problem concerns not only the property seized in favor of the state, but also any other property subject to sale the course of enforcement of court judgments. Thus, it is required to develop general rules of sale of any property, and only that seized in favor of the state.

Second, the mentioned rules contain a certain corruption potential. This concerns the rules regarding the sale at non-competitive terms of property, which sale at public trade and/or auctions according to the expert's written opinion is "inadvisable" due to a significant tear-and-wear of such property, damage, as well as disassembled vehicles forbidden for exploitation. Such property may and should be sold through public sale. The only ground for using non-competition procedures of sale may be the fact that the expenses, associated with the sale at public trades, are in excess of the cost of property.

B. ASSESSMENT OF THE DRAFT LAW OF UKRAINE "ON AMENDING SOME LEGAL ACTS OF UKRAINE REGARDING IMPROVEMENT OF THE PROCEDURE OF JUDICIAL ENFORCEMENT AND THE INCREASE OF THE STATUS OF THE STATE EXECUTIVE SERVICE OFFICERS", DEVELOPED BY THE CABINET OF MINISTERS OF UKRAINE

The draft was developed by the Cabinet of Ministers of Ukraine in consideration of a number of proposals from the Center. The draft is quite large in volume, and provides for amending a number of laws of Ukraine. Generally, the draft is not sufficiently worked out,

and needs further substantial revision. Below is the assessment of the draft by the following criteria[2]:

- selection of candidates for the positions of state executive officers after qualification exams and advanced training;
- adjustment of powers of state executive officers;
- mechanism of control and supervision over activities of state executive officers;
- ensuring access of state executive officers to the information on debtor's bank accounts to eliminate the possibility of concealment of such accounts or funds;
- ensuring actual opportunity of foreclosing on moveable and immoveable property of debtors, specifically, state-owned enterprises;
- elimination of legal possibilities for the debtor to avoid execution of court judgments;
- elimination of the conflict between bankruptcy proceedings and judicial enforcement procedures;
- improvement of the auction (public sale) procedure.

Selection of Candidates for the positios of state executive officers after qualification exams and advanced training

The draft does not contain any proposals as to selection of candidates for the positions of state executive officers after qualification exams and advanced training.

Adjustment of powers of state executive officers

The draft provides for amending procedural codes and the Law of Ukraine "On Judicial Enforcement", meant to establish that court approvals on taking preliminary measure, on security for claim, other court approvals that do not resolve the essence of the dispute, shall be executed not directly, but only on the basis of the executive document issued by the court. Thus, it would be solution to the problem that currently the state executive officer needs to independently decide, which exactly approvals he should and should not execute. This results in both a number of errors, and abuse. Once the proposed changes are in place, such decisions would be taken by the court through issuing or non-issuing of an executive document is support of the approval.

The draft provides for amending procedural codes and the Law of Ukraine "On Judicial Enforcement" to establish the following: where there are several plaintiffs and defendants to the claim, the judgment and the executive document should specify, which part of the judgment relates to each of the parties, or specify that the obligation to pay or the right to recover is joint and several. This will result in adjustment of powers of state executive officers in the part of execution of judgment in respect of several parties to the claim. Along with that, the text of the proposals needs further revision.

[2] The criteria are identified based on the Implementation Plan of the Millennium Challenge Corporation Threshold Program.

The draft provides for amending procedural codes to establish that the parties to amicable agreement shall be entitled to apply to the court that considered the claim, should they believe that the obligations under such amicable agreement have not been performed in part or in full. In such case the court shall render an approval based on consideration of the application. The said amendments are aimed at elimination of indefiniteness in the powers of the state executive officer, i.e. at resolution of the issue whether or not the state executive officer must execute the amicable agreement approved by the court, where its terms have been violated without an appropriate court judgment. The solution to this problem has been chosen mistakenly, as it entails introduction of different procedures for settlement of disputes regardless of whether the dispute arose from a "regular" or amicable agreement. Furthermore, for the latter case the procedure remains indefinite. In fact the said problem will be solved automatically in the event of adoption of the above amendments – specifically, after cancellation of direct execution of court approvals (including those issued in support of amicable agreements).

The draft provides for making amendments the Customs Code of Ukraine and the Law of Ukraine "On Judicial Enforcement", according to which the court (judge) resolution on imposing an administrative penalty for violation of the customs rules in the part of seizure in favor of the state shall be executed by the customs authority in keeping with the procedure established by the cabinet of Ministers of Ukraine. The said amendments provide for making the first step towards deprival of state executive officers of their uncharacteristic functions, specifically the function of selling the state property. Along with that, the chosen manner of implementation of the idea was inappropriate. The following concepts should be differentiated in this regard instead: (i) the very seizure of infringer's property in favor of the state (as a means of punishment), which suggests collection of the property from the infringer in favor of the state (which is an undisputable function of state executive officers), and (ii) sale of such property (such power suggests management of the state property and has nothing to do with the powers of state executive officers).

The draft provides for incorporating a number of amendments to the Law of Ukraine "On the State Executive Service" and the Law of Ukraine "On Judicial Enforcement", which would clarify which exactly divisions of the Department of the State Executive Service at the Ministry of Justice of Ukraine are the authorities of the State Executive Service, which exactly officials of such divisions are state executive officers. The procedure of appointment on and dismissal from the position of officers of the state executive service is clarified. These amendments significantly burden the law with artificial complications. Along with that they are erroneous, as in fact identification of such powers lies partially in the competence of the Cabinet of Ministers of Ukraine, and partially in the competence of the Ministry of Justice of Ukraine, and that is why they must not be included in the law at all. Thus, the said amendments are unnecessary, and the proposed solution is erroneous and needs reconsideration.

The draft provides for making amendments to the Law of Ukraine "On Judicial Enforcement", which would establish that the executive charge shall be collected from the debtor in the event of the debtor's failure to execute the court judgment voluntarily in the size of 10% from the amount to be collected or in the size of the cost of property subject to transfer to the debtor (currently this charge is collected in the same size of the actually collected amount or the cost of debtor's property, transferred to the recoverer). It should be noted that 50% of the executive charge is transferred to the disposal of the state executive service. Issuing of the resolution about collection of the executive charge, which under its

legal nature is an imposition by the state executive officer of a fine on the debtor, and collection of such fine (partially in favor of the state executive service), means performance by the state executive officer of functions being uncharacteristic of the position. Additionally, collection of the fine in a predetermined percentage ratio of the collected amounts or amounts subject to collection, with no account of the debtor's fault, is in no way in accord with the fundamentals of public liability. Generally, the existence of the institute of the executive charge is harmful for judicial enforcement and interferes with its practice. Thus, this institute must be eliminated, replacing it with the recoverer's payment for performing executive actions at approved tariffs depending on their number and level of complexity.

The draft provides for making amendments to the Law of Ukraine "On Judicial Enforcement", which would establish that the decision to prohibit certain actions or abstain from performing such actions shall be executed through communication by the state executive officer of the resolution part of such decision to the debtor, about which an appropriate act shall be composed, and judicial enforcement shall be discontinued. This proposal is positive, and will result in clarification of powers of state executive officers.

The mechanism of control and supervision over activities of state executive officers

The draft provides for making amendments to the Law of Ukraine "On the State Executive Service", which would clarify that the control over activities of officers of the state executive service authorities shall be exercised by the Ministry of Justice of Ukraine through the Department of the State Executive Service of Ukraine in the Autonomous Republic of Crimea, head justice administrations in oblasts, the cities of Kiev and Sevastopol – through relevant administrations of the state executive service. The said clarifications are made due to currently incorporated approach, according to which, on the one hand state executive officers are purportedly independent subjects of judicial enforcement, and on the other hand, are officers of state institutions. Meanwhile, one provision excludes the other. As state executive officers are employees of state institutions, the "control" over non-labor relations really means dependence of state executive officers on the army of various level state officials on the one hand, and irresponsibility of relevant state institutions on the other side. That is why the said approach should be modified to make the state executive service the subject of judicial enforcement, rather than state executive officers. Such approach would suggest the following: (i) responsibility over proper execution of judgments shall be imposed on the state executive service (on the state proper); (ii) control over state executive officers shall be exercised in the same manner as any other type of control over employees by the employee. On a later stage, when the institute of private executive officers is introduced, they will become independent subjects of judicial enforcement, so, that is why control and supervision from the side of the state will have to be introduced (may be similar to the control and supervision over private notaries or arbitration managers).

Securing state executive officers' access to information about debtor's bank accounts to preclude hiding such accounts or money thereon

The draft law contains no suggestions on how to secure state executive officers' access to information about debtor's bank accounts to rule out opportunities of hiding such accounts or money thereon.

Securing Real Opportunity to levy execution on movable and immovable property of debtors, specifically, on that of government-owned companies

The draft law gives no suggestions as regards securing valid opportunity to levy execution on movable and immovable property of debtors, particularly, on that of government-owned companies.

Elimination of legitimate possibilities for debtor to get away from enforcement of court rulings

The draft proposes introducing changes to the Law of Ukraine “On Judicial Enforcement”, whereby the list of mandatory information on an execution writ will be added with the following: (i) date and place of debtor’s birth and place of his/her work (for physical entities), (ii) bank accounts of recoverer and debtor (for legal entities), as well as (iii) identification codes of recoverer and debtor for legal entities (irrespective of whether such codes have been assigned). The proposed changes are wrongful as they may result in appearance of new legitimate possibilities for debtor to escape from enforcement of court ruling by challenging initiated execution process in case where the execution writ falls short on providing all required information (which may be altogether inexistent).

Also, proposed are changes to the Law of Ukraine “On Judicial Enforcement”, to effect leaving out of such premise for mandatory termination of execution process as filing by the prosecutor of a cassation petition against the court ruling. This would eliminate one of the legitimate possibilities for debtor to avoid execution of court rulings.

The draft proposes introduce changes to the Law of Ukraine “On Judicial Enforcement”, whereby the list of grounds for mandatory termination of a judicial enforcement will be supplemented with such ground as withdrawal or seizure of the execution writ or court orders in the manner provided for by the legislation. This proposal is extremely irrational as has been proven by practice. It is known that a similar ground existed in the Law of Ukraine “On Judicial Enforcement” for quite a long while, and while it was in effect, state executive officers raised numerous claims that investigators, driven by a possibility to receive a bribe or for other similar mercenary reasons, were abusing their powers in that they withdrew the documents with one and only purpose to stop judicial enforcement against certain debtors. The Law of Ukraine “On Making Changes to Certain Legislation Acts of Ukraine as Regards Coercive Entering to Dwelling Premises, Withdrawal and Seizure of Execution Writs” dated 15.03.2006 #3538-IV, had cancelled this ground and hence, this fraudulent practice was stopped. In case where the execution writs/court orders are withdrawn in the established by law order, there exist no barriers for continuation of such judicial enforcement on grounds of copies of these documents (and it is in effect under current legislation). Therefore, it would be very unwise to reinstate this ground as it would result in reestablishment of one more lawful possibility for the debtor to avoid enforcement of court rulings.

Elimination of conflict between receivership (bankruptcy administration) and Judicial Enforcement

The draft proposes changes to the Law of Ukraine “On Judicial Enforcement”, whereby termination of judicial enforcements due to the commencement by a court of a rival bankruptcy action would not apply to cases where assets seized from the debtors are being sold, where claim is levied against collateralized assets and if court rulings concern non-property-related disputes. Such proposals, first, disagree with today’s concept of bankruptcy

proceedings, second, in no way they resolve the problem of inconsistency between bankruptcy administration and judicial enforcement. A complex approach is needed to successfully resolve this problem.

There exists a proposal to make changes to the Law of Ukraine “On Judicial Enforcement” whereby to increase the quantity of priority ranks for recoverers from five to seven. This proposal exacerbates the conflict between bankruptcy proceeding and judicial enforcement because it fails to take into account that a judicial enforcement should be run only where there is no competition between creditors. Therefore, changes to legislation must be quite to the contrary than the proposed ones.

Improved procedure of holding public auctions

The draft law contains no suggestions on how the procedure of holding public auctions can be enhanced.

II. SELECTION OF STATE EXECUTIVE OFFICERS (AVAILABILITY OF COMPETENCY TESTS, PROFESSIONAL DEVELOPMENT TRAINING ETC.)

A. BACKGROUND

Current Ukrainian legislation provides for certain requirements to candidates for positions within the State Executive Service (SES). However, hard and stressful work in conditions of scarce financing and poor material and technical procurement of the state execution service coupled with low salaries, result in shortage and big turnover of personnel.

Certainly, the introduction of a professional development system and competency exams for staff has become a recognized need today. State executive officers do need to have special knowledge and skills to be able to execute courts ruling using modern hard and software and operating computer databases; their job also requires that they have high degree of responsibility and have their competency regularly checked up.

Given the existing shortage of staff, stricter requirements to candidates for positions of state executive officers and to their competency will not help to resolve the problem of selection of the best professionals for work in SES, because this problems stems right from the low prestigiousness of the profession of the state executive officer.

B. ASSESSMENT OF CURRENT LEGISLATIVE REGULATION OF COMPETENCY REQUIREMENTS TO STATE EXECUTIVE OFFICERS

According to article 8 of the Law of Ukraine “On State Executive Service”, eligibility criteria for state executive officer include: a citizen of Ukraine, having legal education and capable due his/her personality and business skill to duly perform job duties and responsibilities. Additional requirements are posed to candidates to managing positions within SES: permanent residency in Ukraine for longer than five year period, and 3+ years of work experience as a lawyer.

Only personal traits and business skills from the above list must be checked, because all other information can be backed up with appropriate documents. However, for now in Ukraine testing of candidate’s personality and business skills is of purely formalistic nature.

Meanwhile, if we look at European countries, personal traits and business skills of candidates for officers of the court are tested more thoroughly. This is due to the fact that officers of the court manage other people’s assets and that’s why they ought to have high level of credibility in the eyes of participants of judicial enforcement and community in general. For example, Bulgaria, Romania, Slovenia and Hungary have a number of additional requirements for candidates for positions in the bodies in charge of execution of court rulings. For instance, special efforts are made to make sure that the candidate is not registered with police offices as offender, and that is has not been recognized broke. Also reference check on candidate’s reputation is performed through telephone calls and personal interviews with referees. Also, Slovenia and Hungary administer exams to check competency levels of court officers, while in Romania they also conduct proficiency tests for court officers. These countries have also set up professional Chambers of Court Officers. One of the Chamber’s many functions is to give advisory vote in favor of a candidate for the position of an officer.

Qualification procedure for state executive officers in Ukraine cannot be considered satisfactory, even if we take as excuses some of the systemic reasons. At this moment, the profession of state executive officer is unattractive. Work in a stressful environment, insufficient financing and material procurement, low salaries of state executive officers, and very few incentives result in shortage and fast turnover of personnel. Thus, in the first six months 2007 instead of formally required staff of 7089 state executive officers, the SES actually had only 5973 employees. None of the territorial branches of the state execution service can boast of the number of employees fully matching the formal table of staff.

Lack of staff translates into huge workload per each state executive officer. Eventually, in many regions a state executive officer administers over 150 or even 200 judicial enforcements per month. However, average salary of state executive officers is only 800 UAH.

Work of state executive officers is made even harder by insufficient material procurement of SES: shortage of computers, lack of transportation vehicles and money for fuel. There are local branches of the State Executive Service that have one computer per five officers. In rural areas where law enforcement measures have to be taken at a significant distance from the location of the respective SES branch, lack of transport makes the execution next to impossible. So, improper material procurement badly exacerbates work conditions of state executive officers and holds back popularization of the profession.

It would be inappropriate to discuss the need to set stricter requirements to candidates for position and putting in place a competitive selection and competency exams, without revisiting overall principles of financing and material technical procurement of the State Execution Service and implementing a new payroll and incentive system that would encourage state executive officers to improve their performance and boost revenues. Good and positive changes may be expected only if the problem is addressed through a complex approach.

C. SUBSTANTIATION OF THE NEED TO ESTABLISH A TRAINING AND PERFORMANCE ASSESSMENT SYSTEM FOR STATE EXECUTIVE OFFICERS

A number of objective reasons underlie the need to set up a training system for state executive officers. To be efficient nowadays, in addition to legal knowledge a state executive officer must be a highly competent user of state registries and any electronic databases, skillfully search and find information about debtor, and be able to accurately and correctly make registry entries about the debtor.

Under the Guidelines "On Conducting Judicial Enforcement Actions" approved by the Ministry of Justice of Ukraine #74/5 as of 15.12.1999, data related to court orders received by a State Executive Service' branch, and those related to further stages of public judicial enforcements must be entered into the Single State Registry of Judicial Enforcements. The data must be entered into the Single State Registry by a state executive officer or an authorized official of SES body. The Registry per se is a complex database combining functions of registration of executive documents and law enforcement measures undertaken by state executive officers, with functions of filing, statistical reporting, control etc. To use this Registry and enter information into it, one needs to have special knowledge and skills.

Based on the example of training of notaries, one may forecast what types of training for state executive officers may be implemented in future. Thus, on 8.08.2007, the Ministry of Justice of Ukraine issued Order № 603/5, whereby all private and state notaries are mandated to go through a special training program on how to use common state registries. The program is administered by the State Enterprise of the Ministry of Justice of Ukraine "Informatsiyny Tsentr". In addition to notaries, other employees of notary offices using these Registries are also required to enroll into this program. Mandatory training will also be required for all users if the software supporting the Registry is upgraded (modernized) or if a new Registry is introduced.

If the Ministry of Justice of Ukraine detects that notaries incorrectly use State Registries, then notaries and their staff will need to take additional training how to work with the said registries.

To efficiently perform job duties, state executive officers need access to various information databases, state registries etc. Such access should be authorized only to officers and to other employees of SES who went through special training, had their knowledge and skills checked and performed well on mandatory tests, and received certificates and access codes. For example, authority to register information on liens on debtors' assets in the Common Registry of Bans on Immovable Property Alienations and in the Common Registry of Encumbrances on Movable Property may be granted only to an individual that graduated special training course, had his/her knowledge tested, possesses appropriate powers and bears responsibility for his/her performance, because his/her performance are associated with legally meaningful consequences for third parties' rights.

D. RECOMMENDATIONS REGARDING THE TRAINING AND PERFORMANCE ASSESSMENT SYSTEM FOR STATE EXECUTIVE OFFICERS

It is crucial to address the problem of staffing of SES bodies with highly skilled personnel and, in parallel, resolve problems related to material procurement and run a campaign aimed to promote the profile of the state executive officer.

The system of funding for the State Execution Service at the cost of the Central budget has not proven efficient, and it has been confirmed by experience of other countries. One shouldn't sit idle waiting until the Central budget has sufficient funds to boost financing, material and technical procurement of SES and pay good wages to officers. It is important to revise sources of financing to support the law enforcement actions. Particularly, the execution fee charged from the debtor for failure to fulfill court's ruling voluntarily, should not be the source of revenues generated by judicial enforcement, which is the case in today's Ukrainian legislation. Naturally, the state may establish certain criminal or administrative penalties, such as charging amount of money (fine) for disrespect to court, willful neglect of the ruling and for other violation of judicial enforcement rules. Notwithstanding, such sanctions, first, must be applied by the courts beyond the judicial enforcement provisions, second, they may not serve as the source of funding and must be charged and directed into the central budget.

Execution of rulings in private litigations must be viewed as service, rendered by the state to participants of judicial enforcement. Satisfaction of people's private interests cannot be paid for by money from the government budget. Cost of law enforcement actions must be borne by the interested party; if the large cost is a result of fraudulent actions of the other party, the

losses must be recuperated at the cost of such other party. This model was laid as the basis of the court ruling enforcement system that had existed in the Roman Empire until 1917 and is still existent in Western European countries. This system is based on the assumption that all law enforcement actions are priced. The price is set based on the specifics of law enforcement measures requested by a judgment creditor; and this amount should be paid by the recoverer upfront to the deposit account of the law enforcement body. After enforcement of the court ruling, expenses borne by the creditor in relation to payment for the enforcement, will be reimbursed to the creditor at the cost of the debtor. If the debtor was found to have no property, the expenses should be borne by the creditor, since all actions were performed by the officer of court at the creditor's request and in his/her interests. In case of a successful judicial enforcement, the officer will be entitled to a remuneration (honorary).

Certainly, this system must include safeguards from abuses associated with unjustified formulation of the cost of judicial enforcement, i.e. debtor's and creditor's right to challenge expenses borne by the opposite party recognized as costs in relation to the judicial enforcement. In addition, if a person cannot afford to pay for enforcement of court ruling, this payment may be paid by the government budget as a free legal aid (right of poverty).

Therefore, we suggest canceling the execution fee charged from the debtor for his/her failure to voluntarily fulfill the ruling, which now constitutes a source of revenues for judicial enforcement and implement in lieu of it a payment for law enforcement actions at the cost of participant of judicial enforcement in favor of which the executor acts, specifically:

- Executive actions must be provided on a paid for basis and consistently priced. Total amount of charges for specific actions in a judicial enforcement must be equal to the sum of prices for these actions;

- Recoverer as a person more interested in enforcement of court's ruling, must pay for judicial enforcement up front. Size of payment will be determined according to the established prices for measures that the executive officer will have to take at the creditor's request (it is important to make a reservation, that socially disadvantaged people will be eligible to considerable cuts in prices for the services (refunded at the cost of the central budget.);

- Expenses borne by the recoverer in relation to payment for judicial enforcement further will be refundable to the recoverer by the debtor. Where the debtor will appear having no assets, the expenses borne by the creditor, and the amount of debt due to him/her, will remain unsatisfied, and shall be treated as costs;

- The state executive officer should be entitled to a remuneration (honorary) for successful enforcement of court ruling.

The above listed measures should ensure financing of enforcement actions and decent payment for work of executive officers. Under such conditions, appeal of the profession of state executive officer shall considerably improve, which is likely to raise demand for the profession, and create objective opportunities to implement a competitive selection for the job.

Since requirements in terms of special knowledge are increasingly growing, the educational institutions should introduce special training course to train experts in enforcement of court rulings.

To check competency of state executive officers or candidates to state executive officers, competency tests should be instituted. In this respect, Ukraine could benefit from borrowing Bulgaria's experience, where the process of examination was very well thought-out. Lists of exam finalists based on anonymous ranking are submitted for consideration to the minister, who then selects the candidates for positions of civil servants on the basis of public credibility, rated by the Professional Chamber of Bailiffs.

Local community actively debate the possibility of granting state executive officers access to various registries to enable them enforce rulings in a quick and efficient manner. As was the case with training of notaries, additional training will be needed to competently use various registries. Also it will be important to introduce testing of state executive officers' skills in using registries, effective search of information and accurate and correct entry of information to registries. Therefore, competency improvement and appropriate testing will become the objective need on some future stage of the SES reform.

The following should be implemented in terms of training and professional development of the state executive officers:

- Higher educational establishments should have a specialized training course on law enforcement practices and bankruptcy proceedings;

- Higher educational institutions or the Ministry of Justice of Ukraine should administer professional development courses, i.e. a number of special training courses on various aspects of judicial enforcement as a compulsory professional development training program for state executive officers;

- Prior to appointment to office – all state executive officers should go through mandatory check of knowledge received.

III. STREAMLINING POWERS OF STATE EXECUTIVE OFFICERS

A. BACKGROUND

Poor performance on enforcement of court rulings in Ukraine may be explained by many various reasons with one of the most notable being unclear statement of powers of state executive officers, weak guarantees and safeguarding of the latter's rights. Streamlining of powers of state executive officers, creation of appropriate organizational and legal mechanisms for exercising of these powers could greatly contribute to more effective enforcement of court rulings in Ukraine. The National Action Plan in the area of ensuring proper enforcement of court rulings in Ukraine mandates that first changes to the Law of Ukraine "On Judicial Enforcement" included changes related to rationalizing of state executive officers' powers.

B. ASSESSMENT OF CURRENT LEGISLATIVE REGULATION

Legal Status of State executive officers

Under the current legislation of Ukraine, a state executive officer is a representative of government and he/she makes enforcement of court judgments delivered in the name of Ukraine, and of resolutions of other government bodies (officials), enforcement of which is delegated to the State Executive Service in the procedure prescribed by Law (art. 4 of the Law of Ukraine "On the State Executive Service" as of 24.03.1998 # 202/98-BP).

According to the above Law, state executive officers include:

- Deputy head of the Ministry of Justice's State Executive Service Department - head of the Law Enforcement Division, his deputy, Chief state executive officer, senior state executive officer and state executive officer of the mentioned division;
- Heads of Law enforcement units in the Executive Service Division of the Chief Department of Justice of the Ministry of Justice of Ukraine in the Autonomous Republic of Crimea, oblast-wide, Kyiv and Sevastopol City Directorates of Justice, their heads, chief state executive officers, senior state executive officers, and state executive officers of the mentioned units;
- Head, deputy head, lead state executive officer, senior state executive officer, state executive officer of rayon, city (oblast capitals), district in cities' units of the state executive service.

State executive officers are civil servants (art. 6 of the Law of Ukraine "On the State Executive Service" as of 24.03.1998 # 202/98-BP).

Powers of State executive officers

State executive officer's powers are legal opportunities granted to him/her under Ukrainian legislation to facilitate fulfillment of his/her job duties.

Duties of state executive officers specifically include:

- Make steps to ensure timely and full enforcement of the ruling specified in the document mandating enforcement of resolution (executive writ), in the manner and procedure specified by the executive writ;

- Enable parties to the judicial enforcement and their representatives to review material of the judicial enforcement;

- Accept and consider statements and petitions from parties and other participants of judicial enforcement;

- Explain rights and responsibilities to the parties;

- Conduct evaluation (reevaluation) of property in the procedure, established by the respective legislation on property assessment, and of property rights; conduct professional valuation activities.

To perform the said functions, legislation of Ukraine entitles state executive officers to do the following:

- Make inquiries, obtain explanations and other information necessary for conducting law enforcement activity; summon citizens and officials in relation to executive documents being in judicial enforcement, and in case where the debtor doesn't show up without a valid excuse, issue a resolution on his/her forcible bringing with help of police; use video, photo and movie recording during executive actions; inquire needed information and explanations from materially-responsibly persons and officials of debtors – legal entities, or from debtors – individuals, in relation to the failure to fulfill court rulings or legitimate demands of the state executive officers, or in connection to other violations of law enforcement legislation; for purposes of prevention notify government officials, NGOs, worker collectives and communities at the individual's place of residence or work, on violations of law enforcement legislation committed by such individual;

- Check how well resolutions were fulfilled by business people who act as debtors under executive documents, and check fulfillment by legal entities of resolutions regarding debtors among their employees.

- Freely enter premises and depositories owned or occupied by the debtors, inspect the premises and depositories, and if needed forcibly open them in the established order, seal such premises and depositories; and while enforcing court rulings, freely enter the land plots, residential and other premises of debtors-individuals, inspect such premises, and if needed, forcibly open them in the established order in the presence of employees of the bodies of internal affairs, seal the premises, arrest, seal and seize assets owned by the debtor and located there, provided such assets may be foreclosed under the law;

- Foreclose/arrest debtor's assets, seal, seize and transfer such assets for storage and sell them in the procedure established by law; arrest money and other valuables of the debtor, including money kept on accounts and deposits in banks and other lending

institutions, on securities accounts, and to seal cash registers, premises and places where money is kept;

- Subject to consent of premise owner, including premises in communal ownership, use the premises for keeping seized property, as well as to use transport of the creditor or the debtor to move such property;

- Contact the body that issued the executive document, for explanation of the resolution, with a request to issue a copy of the executive document, file solicitation to set or change the order and manner of enforcement, postpone or prolong the time for enforcement of ruling;

- Solicit with court the search/ tracing of debtor-individual or a child, or solicit the issue of a well-grounded ruling on forcible entry to home or another real estate of the debtor-individual or another person in possession of the debtor's property, assets or money owed to the debtor by other persons, or the child if there exists the executive writ on removal of the child;

- Engage into enforcement actions witnesses, employees of internal affairs authorities and other individuals, in the established order, as well as experts, specialist, and for evaluation of property – valuator businesses, and, if needed, for conduct or organization of enforcement activity, engage on a paid-for basis, including at the cost of upfront payment of the creditor, business entities legally licensed for the following activities: 1) construction activities (research and project design for construction and installation of engineering and transportation networks); 2) rendering load and passenger transportation services in general purpose automobiles (except services on transportation of passengers and luggage in taxi); 3) handling hazardous waste; 4) rendering services related to safeguarding government and other ownership, rendering bodyguard services; 5) conduct of land organization and land evaluation works;

- impose fines on citizens and officials in cases stipulated by law;

- perform other duties, foreseen in the Law of Ukraine "On Judicial Enforcement" and other laws.

C. ISSUES IN PERFORMANCE OF DUTIES BY STATE EXECUTIVE OFFICERS

Analysis of the above listed powers of the state executive officer demonstrates that state executive officers perform two groups of powers: first, as representatives of participants of civil relationship, second, as government authorities. Thus, exercising their powers aimed at obtaining information about the debtor's property, selling it and satisfying creditor's claims (i.e. the powers aimed at enforcement of decisions), state executive officers act as representatives of participants to civil relationship. Whereas imposing fine, and issuing a resolution to charge executive fee clearly represent authoritative powers of state executive officers. It is important to remember that the civil and legal representation functions may be exercised only by state executive officers (civil servants), while the representation function exercised by private individuals is not stipulated by law.

Generally, this concept of the judicial enforcement model is known to the world practice (e.g. post-Soviet states, USA etc.), although it is not the only one possible. This model is logical

for USA, taking into account specifics of the institute “guardianship”, which provides for closing agreements regarding property owned by incapable person under supervision of a court. Whereas, the continental Europe has in place a somewhat different institute – the institute of legal representation (power of attorney). A legal representative of an incapable person (i.e. a trustee or guardian) is usually appointed by a state or communal authority or court, and hence such trustee or guardian acts as if he has been authorized to represent interests of the constituent by the constituent (as if he were capable); court supervision of any closed deals by the representative in the name of incapable person is not provided for (which, certainly, does not preclude appealing such representative’s actions in court in case of a misdeed of the latter). Therefore, in countries of the continental Europe, a common practice is enforcement of court rulings by private individuals (e.g. in France, Belgium, Italy and other) whom the state authorizes to enforce court rulings. Procedure and conditions of such activity are strictly regulated by legislation of respective countries. In Ukraine there are conceptual proposals to engage private professionals to enforcement of court rulings. It is important to note that this approach has been already implemented by Ukrainian legislation in a variation of executive process, such as bankruptcy proceeding. However, replication of this approach in judicial enforcements requires fundamental reform of the existing law enforcement system.

It is common knowledge that the model of court rulings enforcement existing in Ukraine is in bad need of reform. Having given to state executive officers a rather broad range of rights to enforce court rulings, the legislator failed to provide proper legal mechanisms to ensure enforcement of rulings, primarily, effective mechanisms to levy claims against bank accounts, and to search information on debtor’s property and revenues.

D. RECOMMENDATIONS AS REGARDS STREAMLINING POWERS OF STATE EXECUTIVE OFFICERS

WAYS OF STREAMLINING POWERS OF STATE EXECUTIVE OFFICERS AS REPRESENTATIVES OF PARTICIPANTS OF CIVIL RELATIONS

Major problem in exercising powers of state executive officers as representatives of participants of civil relations is not constituted by legislative inefficiencies (although they do exist), but rather, by insufficient understanding of the nature of administration by the state executive officer of the debtor’s estate.

Experts of our Center have already discussed legal nature of the state executive officer’s[3] functions in legal press of Ukraine. A state executive officer fulfills on behalf of the debtor the debtor’s obligations to creditors only in cases where the debtor has legal and actual capability to do it, but does not do so due to the lack of will. It means, that the state executive officer is the debtor’s legal representative, because temporary restriction of the debtor’s capability to accrue rights and responsibilities with his/her own deeds (implied by the legislative arrest of the debtor’s assets and subsequent sale of these assets by the state executive officer) is in fact a temporary restriction of the debtor’s legal capability. Therefore, by actually administering debtor’s assets the state executive officer creates legal consequences for the debtor. However, the Law of Ukraine “On Judicial Enforcement” fails to fully cover the legal nature of state executive officer’s administration of other person’s

[3] Y. Popov. Legal nature of State executive officer’s powers // Yuridicheskaya Praktika weekly – 2003. - #17. – p.10

assets, particularly, executive actions undertaken by the state executive officer are sometimes misconceived as actions of the trading organizations selling debtor's assets.

So, proper regulation of the above mentioned problem depends on how well the legislators, particularly Ministry of Justice of Ukraine, take into consideration the legal nature of the state executive officer's powers in the area of private legal relationship while drafting new laws, as well as on whether the state executive officers receive appropriate training and whether this approach is explained to a wide circle of lawyers, primarily to judicial community.

It is important to note, that the Center made some steps in that direction. Specifically, this approach was explained to judges of the civil appellate courts, who participated in a seminar arranged by the Center in cooperation with the Academy of Judges of Ukraine on April 26-27, 2007 within the professional development program for judges.

Should the state executive officers be treated as a legal representative of debtor, it would also remove some pressing problems accompanying enforced seizure of assets. These are particularly, the problems of obtaining by state executive officer of information about the assets owned by the debtor, specifically when obtaining this information is demanded from subjects of private law, i.e. financial and credit institutions. These institutions would have grounds to disclose information required by the state executive officer as if he were the debtor-client (of course, taking into account limits of the state executive officers' legitimate powers).

Another problem that would be automatically addressed through the above mentioned approach is connected to the protection of a good faith buyer of the debtor's property. Thus, according to article 388 of the Civil Code of Ukraine, if assets were purchased under a paid-for agreement from a person that was not entitled to alienate it, and the buyer was not aware and could not be aware of that (a good faith buyer), the owner is entitled to repossess these assets from the buyer only in cases where the owner, or the person whom the owner had given the assets, was deprived of these assets against the owner's or such person's will; the assets may not be repossessed from a good faith buyer if they had been sold to him in the procedure established for enforcement of court rulings. Unfortunately, often these provisions are interpreted in such a way that in case of breach of rules of judicial enforcement the assets should be repossessed from a good faith buyer because they had been placed for sale not by the debtor, but by the executor, in other words, the debtor (owner) was deprived of his/her assets against his/her will. If the legal nature of state executive officer's powers is duly taken in consideration, it would exclude possibility to use this erroneous approach.

Finally, we should tackle the problem related to taxation. Particularly, it is not at all clear whether the VAT should be payable on transactions of sale of the assets seized from the debtor or not. The above approach would automatically solve this problem, as all taxation-related questions in connection to sale of debtor's assets should be handled from the standpoint of the debtor's legal status not that of the state executive officer or the state executive service.

It should be noted that legal nature of state executive officer's powers mandates that he exercised fiduciary obligations with integrity and prudence while administering debtor's assets.

It appears that the above perception of the legal nature of the state executive officer's powers may be the basis for expanding the circle of decisions that may be enforced without direct

involvement of the debtor, if he/she is an individual, or without the manager or other members of governance bodies of the debtor if this is a legal entity. The decisions may include those that require submission by the debtor of information to the state registries. Proposals on implementing the system of issuing to the state executive officer of a warrant for activity in the name and at the cost of the debtor for purposes of enforcement, still require additional discussion. This warrant could be a written document, entitling a state executive officer to represent the debtor in relations with third parties. It would be comparable with Power of Attorney for executing legal deeds by the constituent's representative or certificate issued in the established order[4] to confirm powers of a legal representative, i.e. guardian or trustee appointed by child welfare agencies.

Ways of Streamlining the Powers of State Executive Officers as Government Authorities

From what was discussed above, it becomes clear that the best way to streamline powers of state executive officers as government authorities is to eliminate these powers altogether. Exercising these powers is aimed at penalizing the debtor rather than at enforcement of decisions, and in fact distracts the state executive officers from achieving the goal of enforcement. In this regard, Peter L. Kan, a USAID legal expert, neatly pointed out that a creditor is ultimately interested in receiving the compensation, and is unlikely to be content with news that someone will be penalized as long as the initial court decision mandating recovery of assets in creditor's favor remains unsatisfied[5]. Therefore, possession of public legal powers by state executive officers appears detrimental.

It is primarily true for resolutions to charge executive fee. The executive fee is actually a fine equal to 10% of the value of assets recovered from the debtor, which is charged from the debtor for failure to voluntarily fulfill the court's ruling by the deadline established by the state executive officer. 50% of the collected executive fee is used to finance the enforcement, while the remaining 50% go to the central budget. This method of financing appears faulty at least due to the fact that size of the executive fee depends on the recovered value, and not at all on the complexity and quantity of actions performed by the state executive officer. This, particularly results in state executive officers being more interested in collecting large amounts from large and well-off corporates, because collection of funds from a wealthy debtor's bank accounts is a lot easier task than, say, arrest and sale of debtor's assets, while the executive fee is excessively big compared to relatively small efforts of the state executive officer. Moreover, a great number of rulings require collecting small amounts of money (e.g. fines for violation of traffic rules), and still the executive fees for these are way too small to cover costs of their enforcement.

It should be noted that collection of executive fee has another serious deficiency. It constitutes the breach of one of the major principles of imposing public legal penalties, i.e. the principle of taking into consideration guilt of the offender.

Therefore, we believe that the executive fee should be eliminated. Instead, we would suggest implementing a system whereby the recoverer would be required to pay for the number and complexity of enforcement actions that a state executive officer should perform in a specific

[4] The procedure was established by Rules of Guardianship and Trusteeship, approved by a decree of the State Committee of Ukraine on Issues of Family and Youth, Ministry of Healthcare of Ukraine, Ministry of Labor and Social Policy, of 26.05.1999 № 34/166/131/88.

[5] Kan P.L. Enforcement of rulings of civil courts in Ukraine. – K. – 2006. – c. 22

proceeding, based on the pricelist for such services. It appears that the first step in this direction may be done during reform of rules of collecting money from debtors' accounts.

As for the imposing by state executive officers of other fines stipulated for violation of enforcement rules, it is important to note that the problem of these fines is the reflection of the general deficiency of Ukrainian legislation related to prosecuting people or holding them answerable for administrative or administrative business liability. Contrary to many other countries worldwide, Ukrainian legislation distinguishes between two groups of criminal offences. First group includes grave felonies (killings, robbery, theft etc.), called crimes, with punishments conferred solely by courts on the basis of the Criminal Code of Ukraine. The other group includes less grave offences (breaches of traffic or fire safety rules etc.), called administrative (administrative and business) offences. Elements of the administrative offences and penalties for these are regulated both by the Code on Administrative Offences, and other numerous laws. Punishment for administrative offences may be assigned both by court, and many other government authorities and civil servants. Namely, state executive officers may issue a resolution whereby assign a penalty for breach of some rules of judicial enforcement in the size established according by the law.

This situation is unacceptable first of all, because it is in violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (article 6 of the Convention - "Right to a Fair Trial"). Imposing a penalty, authorities and civil servant usually combine powers of investigation, prosecution and justice. It should be noted that such combination bears in itself a significant corruption danger. In addition, collecting by such authorities and officials of fines (which constitute a confiscation of a part of offender's assets), represents a violation of article 41 of the Ukrainian Constitution, according to which confiscation may be exercised exclusively based on court resolution in cases, extent and procedure, established by law. Therefore, Ukraine's legislation insofar as administrative liability is concerned, must be revised on the conceptual level.

Here one should also remember that it won't be sufficient to transfer penalizing functions from authorities and civil servants to courts to resolve this problem, because it may cause a new (practical) problem, overloading the courts with tons of minor offences. In addition, one should take into consideration the likely aggravation of another problem tackled earlier, which is the problem of a huge number of resolutions on collecting small fines, which would represent an almost unfeasible task.

It looks as though resolution of both problems simultaneously (overloading of courts with minor cases, and overloading of state executive officers with resolutions on small collections) may be found in the following. It may be sensible to develop the institute of relief of offender from administrative liability after the offender takes certain actions. Evidence of this institute already may be found in the current Code of Administrative Offences. Thus, according to article 44, para.2 of this Code, a person that voluntarily handed over small quantities of drugs or pshychotropic agents which he/she possessed, which he/she had produced, manufactured, acquired, kept, transported or sent without the purpose of further sale, will be exempt from administrative liability for actions, provided for by this article.

Therefore, it is important to develop this institute in the following way. First, to establish a possibility for a person to be relieved from administrative liability for minor offences in case of payment by such person of certain amounts set by the law. Second, raise size of fines for these offences and establish that fines will be applied by the court in cases where the person failed to use the opportunity to be relieved from administrative liability and was recognized

guilty in committing the offence. These measures would encourage offenders to voluntarily pay the above stated amounts and in this way would significantly reduce the number of minor cases in courts, and hence, the number of resolutions on collection of small amounts to be enforced by state executive service.

Implementation of this mechanism would enable to eliminate inappropriate functions that give room to rent-seeking activities of the government bodies and officials in general, and those of state executive officers in particular.

It should be understood that cancellation of public powers of state executive officers is an absolutely essential measure within the framework of preparation to implementation of the institute of private bailiffs. A good example of this is the existing in Ukraine institute of court appointed managers, who have been granted no public powers at all.

IV. CONTROL AND SUPERVISION OF STATE EXECUTIVE OFFICERS

A. BACKGROUND

Assessment of relationship arising in connection with control and supervision over activity of state executive officers is based on clarification of the following issues: meaning of the terms "control" and "supervision"; difference between the two; ***object*** of control and supervision, ***subjects*** of control and supervision; ways and forms of exercising control and supervision.

Definition of the terms "Control" and "Supervision"

Laws of Ukraine "On State Executive Service" and "On Judicial Enforcement" do not provide definitions of terms "control" and "supervision". And hence it is very difficult to clearly interpret these terms and explain differences between the two in the current legislative framework of Ukraine.

Thus, the Law of Ukraine "On Main Principles of State Supervision (Control) in the Area of Business" of April 5, 2007 #877-V (to come into effect on January 1, 2008), defines *supervision (control)* as «activity of authorized bodies aimed at detection and prevention of business entities' incompliance with legislation and securing interests of the society." Therefore, control and supervision are not separated and are recognized identical.

Some scholars believe that supervision and control are different forms of oversight activities performed by duly authorized government bodies or community[6]. Namely, according to academician L.G.Konyakhin, *supervision* takes place where special government entities observe how well executive-administrative bodies, businesses, institutions, organizations and individuals comply with rules, established by legislative acts. While essence of control is that the subject of control takes records and checks how the object under control fulfills incumbent tasks and exercises his/her functions[7].

Specialists from the Ministry of Justice – B.Y.Bachuk, O.P.Botezat, M.M. Shchupenya believe that *control* over activity of state executive officers means supervision and testing of their activity against requirements established by the law, and in prevention and correction of possible mistakes and illegitimate actions that may hinder such activity. Subject matter of control over activity of the state executive officers is legitimacy, completeness and timeliness of enforcement of rulings.[8] These scholars, however, do not discuss the term *supervision*.

Therefore, we may agree to the conceptual system offered by L.G.Konyakhin, that *supervision* is a narrower type of *control*, close to *monitoring*.

However, what is important is not a well or poorly formulated definition of the term, but rather, the contents of the term. Considering practical importance, we should give definitions both to subjects of control and their powers, as well as to objects of control and ways of its exercising. As for the differences between control and supervision, in practice this point is disclosed through definition of ways in which control is performed. Therefore, if control (supervision) is performed with the aim of safeguarding rights of private persons by a judicial

[6] L.G. Konyakhin. Supervision and control over compliance with labor legislation. - M., 1982. - p. 11
[7] V.K.Kolpakov. Administrative law of Ukraine: Textbook. - K.: Yurinkom Inter, 1999.- p. 675
[8] .Y.Bachuk, O.P.Botezat, M.M. Shchupenya. Undertaking control over legitimacy of judicial enforcement // available in the Internet on the Ministry of Justice official website: http://www.minjust.gov.ua/0/5178

enforcement body and of legislation requirements during the judicial enforcement, than in this case it is more important to know who actually enforces a court ruling and who may be held liable for possible violations.

B. ASSESSMENT OF CURRENT LEGISLATIVE REGULATION

STATE EXECUTIVE SERVICE AND STATE EXECUTIVE OFFICERS: ENFORCEMENT AGENCIES

Historically, in the regions of Ukraine that were part of the Russian Empire in the period between 1864 and 1917, and in Ukraine that was part of the Soviet Union since 1919 and until it collapsed, enforcement of court rulings was the responsibility of court officers, which were recognized a judicial enforcement authority. Court officers were appointed by institutions of justice, but they worked under the auspices of rayon courts; the same rayon courts exercised direct control over their performance, and the court officers reported to chairmen of their respective courts. Control over accuracy and timeliness of court rulings enforcement was administrative and procedural. Goal of administrative control was to ensure correct organization of activities of court officers, timely detect and prevent mistakes in performing by court officers of their job duties, preclude abuses by court officers and create normal work conditions for the officers. The control was not prescribed by the civil and procedural legislation, since it was clearly administrative control in the procedure of reporting.

The principal thing is that court ruling enforcement agency was formed of physical entities, court officers, and ways of control of their activity and extent of their accountability depended on their status.

With adoption in 1998 of the Law of Ukraine "On State Executive Service", the status of the court ruling enforcement agency underwent fundamental changes. A principally new body was established in the system of executive bodies, i.e. State Executive Service which was made part of the Ministry of Justice of Ukraine.

According to article 1 of the Law of Ukraine "On State Executive Service", the State Executive Service which is part of the system of bodies of the Ministry of Justice of Ukraine, is in charge of enforcement of court rulings. Main objective of the State Executive Service is timely, complete and unbiased enforcement of decisions made under the law.

Also, the law states that enforcement of court rulings is performed by a government body called State Executive Service, while article 4 of the Law specifies that coercive enforcement of court rulings is performed by state executive officer, who is a representative of the government. Article 2 of the Law "On Judicial Enforcement" essentially repeats the provisions of the Law of Ukraine "On State Executive Service".

Article 2 of the Law of Ukraine "On Judicial Enforcement" and article 4 of the Law of Ukraine "On State Executive Service" lists subjects of the Ministry of Justice that are state executive officer.

Article 3 of the Law of Ukraine "On Judicial Enforcement" indicates that executive documents under respective decisions are subject to enforcement by the State Executive Service, as opposed to state executive officers, however, according to article 5 of this Law, measures on coercive enforcement are taken by state executive officer (article 5 of the Law).

Article 5[1] of the Law of Ukraine "On Judicial Enforcement" discusses powers of the head of division (subdivision) of enforcement of resolution of the bodies of State Executive Service. However, here the question arises who namely is in charge of enforcement of court rulings – is it the Ministry of Justice (and its structural subdivision the State Executive Service) or individuals, possessing powers of government, i.e. state executive officers? Answer to this question is principal because it will be laid as the foundation of the building of the legislative regulation, and establishment of ways of control and liability.

The basis for any conclusions is analysis of laws regulating legal proceedings and legal practices, specifically those that define defendant in cases related to unfulfilled court rulings. Article 85 of the Law of Ukraine "On Judicial Enforcement" provides for challenging in court of actions of officials of the State Executive Service. So, the government official acts as a respondent. Notwithstanding prescriptions of the Law of Ukraine "On Judicial Enforcement" commercial courts according to article 121[2] of the Commercial Procedural Code, shall review complaints raised against actions or inertia of bodies of the State Executive Service, not of state executive officers. Likewise, the Code of Administrative legal proceeding, explicitly states that in case of challenging decision, actions or inactions of state executive officer or another official of SES, respondent in court will be the body of public executive service. The Civil Procedural Code does not specify directly who will be the respondent. However, it looks as though the CPC implies quite opposite position, because section VII of the Code regulates the procedure of reviewing challenges against actions and inactivity of state executive officers and other officials of the State Executive Service.

The Plenary Meeting of the Supreme Court of Ukraine has resolved the contradictions between legislative acts. It mandated that while reviewing suits from physical and legal entities on indemnification of damage (losses) caused by actions (inactivity) of state executive officers, courts must be guided by clause of article 11 of the Law of Ukraine "On State Executive service", article 86 of the Law of Ukraine "On Judicial Enforcement" and take into consideration that in these litigations, respondents will be respective units of the SES which employ the challenged officers, and respective territorial branches of Ukraine's Treasury Department[9].

This position appears quite reasonable. Considering that the SES was created within the system of executive bodies, its organization should not be different from organization of other bodies. In legal sense, private entities enter into relationship with Tax Service, Ministry of Internal Affairs of Ukraine, Ministry of Economy of Ukraine, rather than with a tax inspector, head of tax inspection of the respective district or another representative of the government body.

Therefore, legislation should define that body of judicial enforcement is a body of state power, the State Executive Service.

State executive officers are not independent law enforcement agencies, they only perform certain duties assigned by the State Executive Service.

Minister of Justice should define internal structure, competency of officials and methods of internal control over their performance, because for third parties all these make no difference

[9] Resolution of the Plenary Meeting of the Supreme Court of Ukraine "On Practice of Considering by courts of Complaints against resolutions, actions or inactivity of bodies and officials of SES, and solicitations of participants of judicial enforcement" dated 26.12. 2003, N 14.

from the legal standpoint. All third parties deal with a state body which is liable to them for possible flouting of their legitimate rights and interests.

However, current Law of Ukraine “On Judicial Enforcement” as well as other legislative acts offer various ways to exercise control and supervision over legitimacy of judicial enforcement. Consequently, they distinguish three forms of control: intergovernmental (administrative) control, prosecutor’s supervision and judicial control.

Intergovernmental (administrative) control

Taking into consideration, that SES falls within the system of bodies of the Ministry of Justice of Ukraine, it is lawful to implement intergovernmental control over its activity. Accordingly, article 5 of the Law of Ukraine “On State Executive Service” determines that the Ministry of Justice of Ukraine, via the Department of State Executive Service of the Ministry of Justice of Ukraine, manages bodies of the State Executive Power and exercises control over their performance, staffs it, provides methodical guidance to officers, facilitates their professional development, performs financial and technical procurement of SES bodies, reviews complaints at actions of state executive officers, organizes enforcement of rulings in compliance with law, provides explanations and recommendations as regards enforcement by the officers of rulings in the procedure established by law.

The Law also contains detailed regulation of internal operational managing activity of the Ministry, particularly, in what way and in what manner territorial divisions of the Ministry of Justice of Ukraine (Main Directorates of Justice of the Ministry of Justice of Ukraine in the Autonomous Republic of Crimea, oblast, Kyiv and Sevastopol City Directorates of Justice, rayon, cities (oblast capitals), rayon in cities Branches if the State Executive Service) exercise control and supervision over performance of another subdivision – the department of the State Executive Service, and subdivisions of this subdivision (“subdivisions”) – rayon in cities branches of the State Executive Service of the respective Directorates of Justice).

In addition, the Law of Ukraine “On Judicial Enforcement” states, that the Ministry of Justice of Ukraine may approve the structure, composition and functional duties of its own subdivision – Department of the State Executive Service of the Ministry of Justice of Ukraine, department of the State Executive service of the Main Directorate of Justice of the Ministry of Justice of Ukraine in the Autonomous Republic of Crimea, oblast, Kyiv and Sevastopol city directorates of justice, rayon, city (oblast capitals), rayon in cities departments of the State Executive Service of the respective Directorates of Justice.

The Law of Ukraine “On Judicial Enforcement (articles 8-8^3) regulates in detail internal issues of relationship as regards control between officials of the State Executive Service. Thus, this Law states that control over timeliness, correctness, completeness of enforcement of decisions by state executive officer is exercised by the Head of department of the State Executive Service to whom this officer reports directly, and by the head of the higher ranking body. If, while exercising control over actions of the state executive officer, Head of the SES body finds out that such actions contradict the law, he/she may revoke the resolution, act or another procedural document issued by the officer or force the officer to do enforcement actions in the procedure, established by this Law.

The Law of Ukraine “On Judicial Enforcement” regulates in detail, in what way, through which structural subdivisions, the Ministry of Justice of Ukraine exercises control over lawfulness of judicial enforcement, what officials of the Ministry of Justice of Ukraine are

entitled to conduct inspections, procedure and timeline for such inspection, if requirements of these officials are mandatory for state executive officers who report to such officials.

As was noted earlier, relationship arising in the area of intergovernmental control, does not require regulation on the legislation level. The law must define the circle of rights and responsibilities of state bodies and private persons. If private persons enter into relations with a government body, it doesn't matter legally who is entering this relationship on behalf of the body, because in any case, it is this government body that bears responsibility.

Therefore, it is wrong and unjustified to try to regulate in the Law the issues of internal structure of the Ministry and its structural subdivisions, methods of management and control in relationship between structural subdivisions of the Ministry of Justice of Ukraine.

The opposite approach is in conflict with clause 9^1, article 116 of the Ukrainian Constitution (with changes made by the Law of Ukraine as of 08.12.2004, № 2222-IV) and para.3 of part 1 of article 45 of the Law of Ukraine "On the Cabinet of Minister", which establish that powers regarding creation, reorganization and liquidation of ministries and other central bodies of executive power will be the competence of the Cabinet of Ministers of Ukraine. According to the said clauses, it is this highest ranking authority within the system of bodies of executive power, that must define powers of any central body of executive power, define its structure and prescribe methods of control.

In view of consistency with the Constitution of Ukraine, clauses of the Provision on the Ministry of Justice of Ukraine, approved by the Decree of the President of Ukraine dated December 30, 1997 #1396/97, and another Provision on the Ministry of Justice of Ukraine approved by the CMU's Resolution dated November 14, 2006, #1577 were formulated quite correctly. These clauses are almost identical in their definitions of structure, methods of management and control. Thus, according to para. 19 of point 4 of the Provision dated November 14, 2006, #1577 the Ministry of Justice of Ukraine, according to its duties, should organize in the established order a timely, complete and unbiased coercive enforcement of rulings of courts and other bodies (officials), through its executive officers. Ministry of Justice of Ukraine exercises its duties directly and indirectly, through established in the prescribed order Main Directorates of Justice of the Ministry of Justice of Ukraine in the Autonomous Republic of Crimea, oblasts, cities of Kyiv and Sevastopol, as well as rayon, rayon in cities, city (oblast capitals) Directorates of justice, enterprise, institutions and organizations, that fall within the area of its management (clause 6 of these Provisions).

Under clause 9 of this Provision, the minister manages Ministry of Justice of Ukraine; upon approval of the Prime Minister of Ukraine, makes decisions on creation, reorganization, liquidation of territorial bodies of the Ministry, appoints to and dismisses from office their managers, as well as approves bylaws on these bodies or their statutes (clause 17); motions in the established order to the Cabinet of Ministers of Ukraine suggestions on appointments for office and dismissal from office of heads of government bodies of public administration acting within the Ministry (clause 21); approves suggestions from heads of government bodies of public administration, acting within the Ministry and subject to agreement with the Prime Minister of Ukraine, the maximum quantity of staff, and approves structure, list of staff and budgeted expenses of these bodies (clause 22).

Attempts to regulate in a legislative act issues that belong to internal management, are erroneous and illogical, considering dynamism of changes in this area. Each time when names or reporting lines of structural subdivisions change, and, as a matter of fact, it happens

quite often, there arises the need to make changes to the law. Article 2 of the Law of Ukraine "On Judicial Enforcement" which defines bodies and officials entitled to enforce rulings is a good example of how since 1999 it has been changed three times (by laws dated 10.07.2003, № 1095-IV, dated 23.06.2005, № 2716-IV and dated 22.12.2006, № 521-V), with corrections made not in relation to revised essence of regulation, but in connection to the change in names and reporting lines of the structural subdivision of law enforcement agencies within the system of the Ministry of Justice of Ukraine.

The fact that trying to work out in detail the methods of intergovernmental control within the Ministry of Justice of Ukraine, during drafting these laws, the drafters not only duplicated clauses of the Law of Ukraine "On State Executive Service" and Law of Ukraine "On Judicial Enforcement", they committed textual discrepancies between clauses similar in contents, is not worth much of the discussino if we look at the generally erroneous approach to legislative regulation of relationship of control in the area of judicial enforcement.

Therefore, it is quite obvious, that Law of Ukraine "On Judicial Enforcement" and "On State Executive Service" must be brought in agreement with clause **9^1 article 116 of the Constitution of Ukraine by means of including indications of specific Ministry where State Executive Service belongs to, and what should be the structure of such Ministry and State Executive Service. While doing that, all respective clauses, specifically dedicated to structure of the Ministry of Justice of Ukraine, relationship of internal control, definition of competencies of officials regarding their right to exercise control over other officials' performance, and holding them liable, must be transferred to subordinate legislation of the Cabinet of Ministers of Ukraine and the Ministry of Justice of Ukraine.**

Due to that, the provision, that the State Executive Service of the Ministry of Justice of Ukraine is the body of coercive enforcement, as was stipulated by para. 6 of the current Provision on the Ministry of Justice of Ukraine approved by the CMU's Resolution as of November 14, 2006 #1577 should remain unchanged.

Reservation regarding private bailiffs/Officers of court

It is important to make a reservation that the above proposals will be valid only in case if the State Executive Service is an internal structural subdivision of the Ministry of Justice. Should these be independent private individuals, for example, private bailiffs, who, organizationally will not fall within the Ministry of Justice of Ukraine and will be entitled to enforce court rulings in the name of the State, means of control must be regulated in the law, and the model of organization of such system should be borrowed from countries, which have gone a long way of reform from state service to private law-enforcement agencies/bureau, or have experience of successful coexistence of the two (private-public system). For example, according to the Law of Ukraine "On Officers of Court", an officer of court is an independent person holding a public legal position, is neither a business person nor a civil servant, and performs assigned duties in his/her own name and under his/her responsibility.

Officers of court report to the Minister of Justice, which may issue rulings regarding organization of their job duties, specifically, appoint to and dismiss from office in cases provided for by the law, establish their number and geographic areas of their competence, requirements to organization of work, accounting, and caps on size of remuneration.

Court officers' performance on their territories will be supervised by head of rayon or city court, while the minister of justice will supervise performance of all officers of court. Officials shall effect direct supervision, inspecting compliance of bailiffs with legislative requirements, operation procedures of the law-enforcement bureaus, their financial performance, usage of information system and organization of information and technological work, filing and archiving documents by bailiffs and their meeting requirements to executing professional liability insurance agreements.

Minister of justice will be entitled to open a disciplinary proceeding at the request of the head of a rayon or city court. The minister may open a disciplinary proceeding in case where results of supervision of the bailiff's performance, a complaint or another document, or a notification from a person raise suspicions with regard to bailiffs' committing disciplinary misconduct.

Upon results of the disciplinary proceeding, the minister of justice issues an order whereby states either that the disciplinary misconduct had place and a penalty (rebuke, fine or dismissal from position) must be imposed, or that no disciplinary misconduct was detected and that the proceeding is stopped.

The bailiff concerned may lodge a complaint against decision of the minister on imposing disciplinary penalty, in an administrative court.

Appeals against procedural decisions of bailiffs shall be lodged with rayon or city courts, in the jurisdiction of which the enforcement of court ruling is taking place.

Prosecutor's Supervision

The following should be specified with regard to control functions of prosecution authorities during judicial enforcement. Pursuant to Article 121 of the Constitution of Ukraine, prosecution authorities perform specific control functions in the form of supervision. In case of detection of violations of legislation during the process of supervision, a prosecutor shall issue the acts of prosecutor's response in the form of protest, prescript, solicitation and resolution.

Interim provisions of the Constitution of Ukraine stipulate that prosecution authorities continue to perform, in accordance with current laws, the function of supervision over the compliance and enforcement of laws and the function of preliminary investigation until the laws that regulate the activity of state agencies responsible for control over the compliance with laws have been enacted, the system of pre-trial investigation has been formed and the laws that regulate the functioning of the above system have been enacted.

The Law of Ukraine dated July 10, 2003, # 1095-IV introduced amendments to the Law of Ukraine "On Judicial Enforcement" (Article 8 – 8^3) that attempt to put in order the relations related to control over the legitimacy of judicial enforcement, define the officials authorized to inspect the judicial enforcement, specify the procedure for calling on execution proceedings, and specify the procedure for inspection of judicial enforcement.

In order to protect state executive officers from interference of other state authorities (prosecution authorities, Ministry of Internal Affairs and other law enforcement agencies) with the enforcement of court decisions, it has been established that other state and non-state

authorities and their officials are banned from interfering with judicial enforcement except for the cases stipulated by the Law of Ukraine “On Judicial Enforcement”.

However, the desired result was only partly achieved, since a number of other laws still include the provisions authorizing prosecution authorities to inspect the activity of State Executive Service. For example, pursuant to Article 121 of the Constitution of Ukraine, prosecution authorities exercise control over the compliance with laws during the enforcement of court decisions under criminal cases. State Executive Service performs the enforcement of verdicts under criminal cases in the part related to seizure/recovery against property. However, Article 21 of the Criminal Executive Code of Ukraine directly stipulates the right of prosecution authorities to conduct inspections in the part related to seizure and enforcement of penalties by state executive service authorities.

When determining the role of prosecution authorities and its attempts to exercise supervision over the enforcement of court decisions it should be born in mind that a prosecutor can be the participant of judicial enforcement – the representative of a recoverer or a debtor. Under clause 2 of Article 121 of the Constitution of Ukraine, prosecution authorities represent in the court the interests of a citizen or those of the state. The objectives, grounds, and forms of such representation are specified in Article 36[1] of the Law “On Prosecutor’s Office”. During the enforcement of court decisions under the lawsuits initiated by prosecutors, prosecution authorities are the participants of judicial enforcement and simultaneously mandated to control the enforcement of such decisions. Therefore, the conflict is obvious: performance of representative functions on the one hand, and control functions on the other.

Problem in relations between prosecution authorities and State Executive Service is mostly predetermined by legislative collision. This, specifically, is evidenced by the provisions of Article 8 of the Law of Ukraine “On Judicial Enforcement” and Articles 8 and 20 of the law of Ukraine “On Prosecutor’s Office”. Under the fist law, other state and non-state bodies are banned from interfering with judicial enforcement and taking out or withdrawal of writs of execution can be performed only upon respective decision of the court. However, provisions of the Law of Ukraine “On Prosecutor’s Office” vest prosecutors (when exercising prosecutor’s supervision) with unlimited access to documents and materials. The collision of the above mentioned provisions not only creates favorable conditions for abuse on the part of administrative authorities, but also makes it possible to altogether ignore legislative requirements.

In order to regularize the activity of prosecution authorities during the investigation of criminal cases (and related need to obtain any judicial enforcement documents) and secure unhampered activity of state executive officers with regard to enforcement of court decisions, the Law dated March 15, 2006, # 3538-IV introduced amendments to Article 178 of the Criminal Procedure Code of Ukraine under which taking out or withdrawal of writs of execution can be performed only upon a justified decision of a judge.

Illegitimate interference with enforcement activity of state executive officer (Article 14 of the Law of Ukraine “On State Executive Service”) and undertaking of other actions that hamper the performance of his/her duties shall entail criminal, administrative, or other liability stipulated by the law.

Thus, over the last years significant steps have been taken in terms of securing the balance between the independence of State Executive Service during the enforcement of

court decisions and the needs of criminal prosecution undertaken by prosecution authorities. However, the function of general supervision still remains a problem, which, in certain cases, leads to abuses on the part of prosecution authorities and interference with the activity of State Executive Service.

As stated in the Concept on the improvement of court practices for the establishment of fair justice in Ukraine in line with the European standards (approved by the Decree of the President of Ukraine dated May 10, 2006, # 361/2006), prosecution authorities should not enjoy general supervision powers since these powers are close to those exercised by justice authorities. In addition, it should be taken into account that control over the compliance with laws in specific areas is also exercised by respective state authorities.

Overall, in terms of limiting prosecution authorities' functions in judicial enforcement, Ukrainian legislation is progressing. However, resolution of problems in relations between State Executive Service and prosecutor's office will not lead to the expected positive result unless the place of State Executive Service within the system of state power agencies is clearly defined, comprehensive reform of prosecutor's office is implemented, and general supervision function of the prosecutor's office is revoked.

Court Supervision

The substance of court supervision is when the court uses its authority to restore legitimate rights and interests in case illegal, ungrounded or unjust actions are found.

A recoverer or a debtor may submit an appeal in judicial enforcement against actions (inactivity) of state executive officer and the other State Executive Service (SES) officials regarding enforcement of the decision or refusal to perform actions stipulated by this Law. An appeal shall be submitted to the chief of the respective SES body whom the state executive officer is directly subordinate to, or to the court. If in the (Article 85 of the Law "On Judicial Enforcement").

Jurisdiction. An appeal in judicial enforcement of court decisions against actions (inactivity) of the state executive officer or the chief of the respective SES body shall be submitted to *the court which issued the executive document*. Appeals on other decisions shall be submitted to the court in whose jurisdiction the respective SES body is located, except for appeals against actions (inactivity) of state executive officers and officials of the SES Department of the Ministry of Justice of Ukraine and SES bodies of the Main Department of Justice of the Ministry of Justice of Ukraine in the Autonomous Republic of Crimea, oblast, Kyiv City and Sevastopol City Departments of Justice, which shall be submitted to the court of appeals in whose jurisdiction the respective SES body is located[10].

Furthermore, the Law of Ukraine «On Judicial Enforcement» establishes the possibility to submit appeals against procedural actions of state executive officers, in particular, resolutions issued by state executive officers including the resolution to open judicial enforcement (Article 18 of the Law); the resolution to refuse to open judicial enforcement (Article 26); the resolution to adjourn enforcement actions (Article 32); the resolution to suspend or to resume judicial enforcement (Article 36); the resolution to terminate judicial enforcement (Article 37); the resolution to return the executive document (Article 40); the resolution to return the executive document to the issuing court in case of the

[10] Bachuk B.Ya., Botezat O.P., Schupenya M.M. Overseeing the legitimacy of judicial enforcement. // *Ibid*

term for filing appeal against the decision is renewed by the court and this appeal has been accepted for consideration (Article 40[1]); the resolution to refuse to search the debtor's property and to recover search expenses (Article 42); the resolution to recover the funds spent for organization and performing of executive action (Article 45); the resolution to recover the executive fee (Article 46); the resolution to attach funds or property of the debtor (Article 55); valuation of the debtor's property (Article 57), etc.

It must be noted that the oversight system has significantly deteriorated after 1998 compared to the system of procedural forms of judicial oversight of state executive officers that existed prior to 1999 and required procedural actions of state executive officers to be sanctioned by court in advance and made it possible to appeal against actions of state executive officers following the procedure. Of all the civil procedure forms of the oversight, only one is left – appealing against decisions, actions or inactivity[11].

The legislative regulation has the following shortcomings associated with the judicial oversight (supervision) relations:

1. The collision between norms of the Civil Procedure Code, Economic Procedure Code, Administrative Judicial Code and the Law of Ukraine "On Judicial Enforcement" regarding the question who is the defendant in cases related to actions by the body executing court decisions – state executive officer or the SES? Although this collision has been addressed by a plenary session of the Supreme Court of Ukraine (the SES must be the defendant), the uncertainty still exists and courts of general jurisdiction continue to process appeals against state executive officer actions.

2. The subject of appeals is not defined. Pursuant to the Civil Procedure Cod eof Ukraine, Economic Procedure Code of Ukraine, Administrative Judicial Code of Ukraine and the Law of Ukraine «On Judicial Enforcement», appeals may be submitted against actions, inactivity and decisions of the SES. Instead of improving the protection of rights, this wide choice of the subject of appeals allows abusing the right to appeal by appealing against an action or inactivity and decisions at the same time. This negatively affects the enforcement process, delays execution of decisions, creates unnecessary costs for the judicial system and the SES, increases the workload in courts and distracts the SES from efficient execution of court decisions.

   To resolve this problem, it will be necessary to amend the legislation by establishing that appeals may be submitted only against actions or inactivity having to do with violation of the rights of participants of judicial enforcement. A decision or an act of the SES are only the procedural form of registering actions or inactivity constituting the subject of appeal.

   An important component of this problem is the excessive regulation of the enforcement process (i.e. the resolutions which state executive officers may issue when enforcing a court decision), and the possibility to challenge resolutions issued by state executive officers. The Law of Ukraine «On Judicial Enforcement» defines 12 types of state executive officer resolutions that may be appealed in court. This situation creates wide possibilities for abusing the right to appeal. For instance, if the debtor uses the right to appeal in all the 12 cases under this Law, and each appeal is

[11] Pikula V. Court control over the execution of court decisions // Yurydychny Radnyk #4 (12), August 2006 – p. 105

considered by at least three court instances, compulsory enforcement of the decision is highly unlikely.

Is this formalization of judicial enforcement justified? Prior to 1998, when it did not exist, the system of enforcement of court decisions did not have such problems with the enforcement level, and violation of the rights of judicial enforcement participants by state executive officers were not systemic.

The pre-1917 legislation of the Russian Empire, the laws and by-laws of Ukrainian Soviet Socialist Republic, as well as the current legislation of Western European countries required and require that all actions of the state executive officer be registered in a log (undoubtedly, there are exceptions and some actions must be registered, e.g. the Official Court Document Service Protocol, the Distrainment Protocol, etc.) and actions limiting the debtor's rights require to be sanctioned by court separately and in advance.

The process followed by notaries in succession cases is not less formalized but it does not require the number of resolutions typical for judicial enforcement. And violations committed by notaries are not systemic.

Therefore, it is necessary to review the requirements to judicial enforcement in order to eliminate the possibility for submitting appeals against state executive officer resolutions. The subject of appeals must be only actions or inactivity of the SES associated with violation of the rights of the participant of judicial enforcement.

3. The intricate and unclear jurisdiction of courts concerning complaints against actions of the SES. The European Court of Human Rights has defined the right to a fair trial. According to the essence of this definition, if the court jurisdiction norms (by territory or by subject) do not allow to clearly and unambiguously identify the court where protection of infringed rights must be sought, such a situation violates the right to a fair trial.

The national judicial system of Ukraine is currently built on the specialization principle, i.e. there are general jurisdiction, economic and administrative courts.

However, the SES is not a part of the judicial branch of power. It is a part of the system of the Ministry of Justice of Ukraine. Departments of the SES were established in accordance with the territorial principle. Also, special departments were created in the SES for dealing with specific categories of debtors and different amounts of debt.

For instance, the department of enforcement in the Central Office of the SES enforces decisions where debtors are the Apparatus of the Verkhovna Rada of Ukraine, the Administration of the President of Ukraine, the highest or central bodies of executive power, the Constitutional Court of Ukraine, the Supreme Court of Ukraine, high specialist courts, etc., or decisions where the debt amount is at least UAH 10 million or an equivalent in a foreign currency.

Decision enforcement departments of territorial offices of the SES at the oblast level enforce decisions where debtors are territorial offices of the central bodies of public authorities, local courts, city or rayon councils or rayon state

administrations, city/rayon/interrayon or equal bodies of prosecution, military prosecution bodies in garrisons and other territorial offices of public authorities; or decisions where the debt amount is between UAH 5 and 10 million or an equivalent in a foreign currency.

Other court decisions are enforced by regular rayon departments of the SES.

Given the fact that the judicial system and the SES have different specializations built on different principles, the system used for appealing against actions or inactivity of the SES is quite intricate. After frequent conflicts in the application of the norms by different court instances the Plenary Session of the Supreme Court of Ukraine adopted the Resolution «On Practical Guidelines for the Courts Considering Appeals against Decisions, Actions or Inactivity of Bodies and Officials of the SES and Petitions of Judicial Enforcement Participants» of 26 December 2003 N 14.

The general rules of jurisdiction of different courts in the consideration of appeals against actions, inactivity or decisions of the SES can be formulated as follows. Appeals against decisions or actions (inactivity) of a state executive officer or other officials or bodies of the SES, which concern enforcement of court decisions must be submitted to the *court which issued the executive document*. Appeals that concern *other decisions must be submitted to a local court on the territory where the corresponding body of the SES is located.*

This position of the Supreme Court is justified and in line with the executive right theory, according to which appeals against actions of a state executive officer must be submitted within two weeks either to the court that approved the decision or to the court in whose jurisdiction the decision is being enforced. The court that approved the decision also has jurisdiction over complaints about incorrect interpretation of decisions by the state executive officers who enforce them. Obviously, only the court that approved the decision can consider such complaints. In other cases appeals and complaints must be submitted to the court in whose jurisdiction the enforcement is taking place[12].

However, it is hard to understand the position of the Supreme Court of Ukraine which failed to prevent the application of the legislative error in Article 85 of the Law of Ukraine «On Judicial Enforcement» and confirmed that appeals against actions (inactivity) of state executive officers and officials of the Department and bodies of the SES of the Main Justice Department of the Ministry of Justice of Ukraine in the Autonomous Republic of Crimea, oblast, Kyiv and Sevastopol city justice departments shall be submitted *to the appellate court where the respective SES body is located*. But courts of appeals have no jurisdiction over first instance cases, and this position of the Supreme Court is contrary to the judicial system of Ukraine and the judicial procedure as set forth in the Constitution and other laws of Ukraine, in particular the procedural codes.

Therefore, it is necessary to remove from the Law of Ukraine «On Judicial Enforcement» any procedural norms defining the jurisdiction of courts over appeals

[12] Vaskovsky E.V. Civil Process Manual / Unde the editorship of V.A. Tomsinov – M.: Publishing house “Zertsalor”, 2003. – p. 381

against decisions, actions or inactivity of the SES as this must be regulated in the judicial procedure laws.

4. With respect to appeals against actions or inactivity of the SES, which are not related to clarification or explanation of court decisions and are submitted to a court where the respective SES body is located, it is necessary to define the competent court given the existing specialization of the first instance courts. This decision must be governed by the nature of relations associated with the enforcement of a court decision. Apparently, this nature is in the sphere of public law, therefore administrative courts must have jurisdiction in this case, in particular rayon courts of general jurisdiction as administrative courts.

C. RECOMMENDED IMPROVEMENTS IN THE LEGISLATIVE REGULATION

The Civil Procedural Code of Ukraine, the Economic Procedural Code of Ukraine, the Administrative Judicial Code of Ukraine and the Law of Ukraine :On Judicial Enforcement" must be amended as follows.

1. To restore in the laws the provision that the enforcement authority is the SES, not state executive officers. state executive officers are not independent bodies of enforcement, they merely fulfill their duties as employees of the SES.

2. The Laws of Ukraine «On Judicial Enforcement» and «On the State Executive Service» must be brought in compliance with Paragraph 9[1] of Article 116 of the Constitution of Ukraine by way of defining the ministry to which the SES shall report and the structure of the ministry and the SES. At the same time, some norms, in particular regarding the structure of the Ministry of Justice of Ukraine, internal control relations, the authority of officials to check their subordinates and take action against them, etc., must be transferred to by-laws of the Cabinet of Ministers of Ukraine and the Ministry of Justice of Ukraine.

3. It is necessary to clearly define the procedural status of a prosecutor in judicial enforcement as a representative of one of the parties; to rule out the possibility of carrying out controlling or oversight functions beyond the scope of rights foreseen for a representative of a party; to cancel the provisions of the Law of Ukraine «On Prosecution» that concern general oversight.

4. Establish the following rules for cases in which the SES violates the rights of participants of judicial enforcement:

- If actions or inactivity of an enforcement body are appealed, such appeals shall be considered by the general court on whose territory the enforcement is taking place (as a rule, the location of the debtor or the property);

- The subject of appeals shall be actions or inactivity of an enforcement body;

- The defendant is Ukraine whose interests are represented by bodies of the SES and bodies of the State Treasury (when state debts are being recovered);

- Consideration of a case shall not suspend the enforcement unless the court rules otherwise.

5. All procedural norms that define the jurisdiction of courts in the consideration of appeals against decisions, actions or inactivity of the SES must be removed from the Law of Ukraine «On Judicial Enforcement».

6. It is necessary to revisit the requirements of the Law of Ukraine «On Judicial Enforcement» concerning the formalization of judicial enforcement (whether or not it is necessary to adopt resolutions on certain procedural matters).

V. ENSURING THE STATE EXECUTIVE OFFICER ACCESS TO INFORMATION ABOUT BANK ACCOUNT OF DEBTORS IN ORDER TO RULE OUT THE POSSIBILITY OF HIDING SUCH ACCOUNTS OR MONEY IN THEM

A. BACKGROUND INFORMATION

Access to information about bank accounts and money in them is key to improving the efficiency of enforcement of decisions about property penalties or pledging the debtor's property. Arresting bank accounts and money in them, as well as foreclosure of such moneys is directly dependent on the availability of information about the debtor's bank accounts to the state executive officer.

It must be taken into account that ensuring access to the information about the debtors' bank accounts does not have independent value, but serves rather as an enforcement tool. Therefore, when the rules of access to bank accounts of debtors are reformed, the rules of foreclosure and arrest of funds must also be reformed.

B. ASSESSMENT OF THE EXISTING LEGISLATIVE REGULATION OF THE STATE EXECUTIVE OFFICER ACCESS TO FINANCIAL AND ECONOMIC INFORMATION ABOUT DEBTORS

GENERAL OVERVIEW

Today in Ukraine the level of the state executive officer access to the debtors' bank information is quite low. On one hand, this is due to the current state of legislative regulation of relations in the sphere of information exchange, on the other hand – due to the insufficient development of information infrastructure in the sector. As stated in the analytical report prepared by the Ministry of Justice of Ukraine on the enforcement of decisions of courts and other authorities (public officials) by the SES bodies in the 1st half of 2007, the enforcement of executive documents is hampered in particular by circumstances such as delayed replies from bodies of the State Automobile Inspection, the Bureau of Technical Information, the Tax Inspection and other authorities regarding the debtors' registered property, concealing arrested property by debtors, etc.

PROBLEMS ASSOCIATED WITH THE DEBTOR'S VOLUNTARY DISCLOSURE OF INFORMATION ABOUT ITS PROPERTY AND MONEYS

Pursuant to Part 6 of Article 11[1] of the Law of Ukraine «On Judicial Enforcement» a debtor is obliged to give, within the term established by a state executive officer, reliable information about his accounts in banking and financial institutions. However, the debtor

himself is not a reliable source of information about his bank accounts since he is not interested in the enforcement of the decision. Moreover, the Law does not oblige the debtor to confirm his information in any way. The mechanism of the penalties for the failure to provide or provision of inaccurate information is not operational de-facto, and the size of the penalties is insignificant to some debtors (between UAH 170 and 510). For example, if a debtor is summoned by court to disclose information about his property and its whereabouts fails to appear or to provide necessary information, he may be arrested for contempt to the court.

Other sources of information about the debtors

state executive officers need additional sources of information about the debtors' bank accounts and moneys therein. First of all, such sources include the financial institutions managing the debtors' accounts, tax authorities, bodies of financial intelligence and the authorities that combat legalization of illegal proceeds. However, state executive officers currently may exchange information only with the first two types of institutions.

Problems associated with the state executive officer's receipt of information about the debtors accounts and moneys from banking institutions: private and public aspects

Information about bank accounts and financial standing of clients constitutes a bank secret. Banks are obliged to protect the bank secrets, in particular by way of restricting the number of persons who have access to information that constitutes a bank secret and by way of using special procedures for handling documents that contain it.

Pursuant to Article 1076 of the Civil Code of Ukraine, information about transactions and accounts may be disclosed to public authorities and their officials only in cases and following the procedure established by the law on banks and banking activity.

In was not until May 2003 that the SES bodies were included in the list of agencies to which banks may disclose bank secrets upon a written request (Article 62 of the Law of Ukraine «On Banks and Banking Activity» as amended pursuant to the Law of Ukraine of 22.05.2003 N 835-IV). Pursuant to Paragraph 6 of Part 1 of Article 62 of the said Law, the information about legal and natural persons that constitutes a bank secret may be disclosed to the SES bodies upon their written request in connection with the enforcement of court decisions related to accounts of a given legal person or a given natural person pursuing entrepreneurial activity.

However, the conditions of the information disclosure to the state executive officers limit the state executive officer functions and powers excessively and do not facilitate the purpose of judicial enforcement, i.e. full execution of decisions. These conditions include:

- Firstly, only information about *the status* of bank accounts may be disclosed to the SES bodies. The information about whether or not the debtor has accounts, regardless of their status, in a given institution is not subject to disclosure. This legislative approach is unjustified because state executive officers often need information about the existence of bank accounts and do not need information about their status;

- Secondly, the information about the status of bank accounts may be disclosed to the SES bodies only in connection with the enforcement of *court decision*s. Thus, banks have no legislative grounds to disclose this information to the state executive officers

if it is requested in connection with the enforcement of executive documents which are not based on court decisions, e.g. notary writs, etc.;

- Thirdly, banks may disclose to the SES bodies information about the status of accounts of *only a given legal person or a given natural person pursuing entrepreneurial activity*. Thus, information about bank accounts of natural persons who opened them not as subjects of entrepreneurial activity may not be disclosed to the state executive officers.

The above norms of the Law of Ukraine «On Banks and Banking Activity» acquired a special nature (Clause 2 of the Final Provisions of the Law). Laws (in particular, the Law of Ukraine «On Judicial Enforcement») and other normative and legal acts apply to the extent where they do not contradict these provisions. Therefore, the right of a state executive officer to get explanations, notes and other information necessary for enforcement as well as the mandatory nature of state executive officer claims (Paragraph 1 of Part 3 of Article 5 and Article 6 of the Law of Ukraine «On Judicial Enforcement») in relation to banking institutions in Ukraine is restricted. The legal status of banks prevails over the legal status of state executive officers.

This legislative decision had an adverse effect on the state function to protect rights of persons and to maintain order because the final stage of the legal procedure is blocked. Banks received the right to verify validity, relevance, legitimacy and formal compliance of the SES requests and to make decisions on whether or not to provide such information. The fact that the SES bodies are enforcing a court decision aimed at protecting rights of a person has no meaning. In addition, banks may potentially make arbitrary decisions in processing the state executive officer requests since the workload of state executive officers is so large that they do not bring bank and their officials to courts for non-disclosure or improper disclosure of information about accounts and moneys of debtors.

The situation with the access of state executive officers to bank information about debtors is also contrary to Ukrainian legislation on information. Pursuant to Articles 9 and 10 of the Law of Ukraine «On Information», all public authorities have the right to information, which means they have the right to freely receive, use, spread and store the information they need to exercise their rights and legitimate interests as well as to carry put their tasks and functions.

C. REVIEW OF LEGISLATIVE PROPOSALS REGARDING RECEIPT OF BANKING INFORMATION BY STATE EXECUTIVE OFFICERS

The draft Law "On Improvement of the Procedure of Coercive Enforcement of the Decisions and Raising the Status of Employees of the State Executive Service" which was drafted by the Ministry of Justice of Ukraine, with active participation of the Center, in fulfillment of the

National Plan on Ensuring Proper Enforcement of Court Decisions, envisages specification of terms for obtaining by the state executive offices of information necessary for enforcement of the decision. In particular, the following wording is suggested for item 1, part 3, Article 6 of the Law of Ukraine "On Judicial Enforcement": [the state executive officer shall have the right] "to receive explanations, notes and other information necessary for enforcement actions from the bodies, institutions, organizations, officials and parties of judicial enforcement, with obtaining of the regime of access to information similar to that which the source of information has". The suggested version of Article 6 "Responsibilities and Rights of State Executive Officers" adds to the legal status of a state executive officer an obligation to observe the regime of restricted access to information received for enforcement of the court decision. Information with restricted access (confidential information) includes a banking secret – information on bank accounts and their status. At the same time, the aforesaid draft Law does not introduce more open and efficient mechanisms for obtaining by the State Executive Service bodies of banking information on the debtors.

INTERACTION OF THE STATE EXECUTIVE SERVICE WITH TAX BODIES REGARDING RECEIPT OF INFORMATION

In addition to the financial institutions, the state executive officers may receive information on bank accounts of the debtor from the state tax service. A notice on opening of every account in a financial institution is sent to tax authorities[13] where the registry of such accounts is maintained. But it should be mentioned that tax authorities register only accounts of the subjects of business, i.e. legal entities and natural persons – entrepreneurs. Moreover, tax authorities while having information on existence of certain accounts do not have data on the status of these accounts.

In order to ensure proper enforcement of the decisions of courts and other bodies (officials) and simplification of the procedure to provide state executive officers with information on account numbers of legal entities and/or natural persons – entrepreneurs, the Procedure for Providing Information by the Bodies of the State Tax Service on Requests of the Bodies of the State Executive Service (hereinafter – the Procedure) was drafted and approved by the joint Order of the State Taxation Administration of Ukraine and the Ministry of Justice of Ukraine (# 209/153/5 dated 3 April 2007). The procedure relates to mutual exchange of information on account numbers of the debtors which the bodies of the state tax service receive from the banking institutions and transfer on requests to the bodies of the State Executive Service. The reply is returned to that body of the State Executive Service which made the request, within three days from the moment of receipt of such request (item 1.5 of the Procedure). Information exchange is conducted in electronic form by the telecommunication channels, with the use of e-mail, after introduction by the State Tax Administration and the Ministry of Justice of Ukraine of electronic digital signatures (hereinafter – EDS). Prior to introduction by the parties of EDS, information exchange is conducted with the use of magnetic data carriers (item 1.7 of the Procedure).

[13] The Order of the State Tax Administration of Ukraine # 306 of 1 August 2001 "On Approval of the Procedure for Filing with Tax Authorities of the Notice on Opening (Closing) of Accounts in the Financial Institutions" and Order of the State Tax Administration of Ukraine # 301 of 1 July 2002 "On Approval of the Procedure for Transfer by Banks of Information on Opening (Closing) of Own Correspondent Accounts, Closing and Change of Accounts of the Clients – Payers of Taxes and Duties (Mandatory Payments) to the State Tax Service via Electronic Means and Filling Out of Settlement Documents in Case of Payment (Recovery) of Payments to the State Budget or Return of Payments from the State Budget".

According to the Procedure, the Ministry of Justice of Ukraine and the State Tax Administration of Ukraine guarantee use of the received information exclusively for official purpose. This information is not subject to dissemination and transfer to the third party (item 1.11 of the Procedure). Responsibility for keeping and non-disclosure of information on account numbers of the debtors – legal entities and natural persons – entrepreneurs in calculation networks of the bodies of the State Executive Service is laid on the bodies of the State Executive Service according to the effective legislation (item 1.12 of the Procedure).

Regarding information on accounts of the natural persons who are not entrepreneurs, the only source of information on them in Ukraine today are the financial institutions which keep those accounts. But as it was mentioned above, bodies of the State Executive Service lack legal mechanisms for receiving such data, even if requests are sent to all banking institutions of Ukraine. Because the banks are entitled to disclose to the bodies of the State Executive Service information on status of the accounts only of the particular legal entity or natural person – subject of entrepreneurial activities. Information on the status of bank accounts of natural persons opened by them not as the subjects of entrepreneurial activities is not subject to disclosure to the state executive officers.

D. RECOMMENDATIONS ON IMPROVEMENT IN ENSURING ACCESS OF THE STATE EXECUTIVE OFFICERS TO INFORMATION ON BANK ACCOUNTS OF A DEBTOR AND FUNDS ON THEM

Elimination of possibility for the debtor to conceal its bank accounts or funds on them should be ensured by the organizational and legal system of information exchange between the financial institutions, bodies of the state tax service, bodies of registration of legal entities and natural persons – entrepreneurs, as well as the State Executive Service.

Principles of interaction of the state executive officers with the institutions – sources of financial information on the debtor

Information interaction between the aforesaid categories of the subjects should be based on the following principles:

- complete disclosure regarding financial and economic situation of the debtor for the bodies of coercive enforcement of court decisions;
- unimpeded and efficient access of the state executive officers to the relevant data;
- inevitability of liability for non-providing or concealment of information requested by the state executive officer;
- ensuring by the bodies of coercive enforcement of the decisions on confidentiality of received information on financial and economic situation of the debtor.

Required organizational and legal reforms for increased accessibility of banking information on debtors for the state executive officers

It appears that introduction of the aforesaid principles is possible upon the condition of taking of the following organizational and legal measures:

1. Providing the bodies of the State Executive Service with the right of full access to information on accounts of the debtors in the financial institutions and on the status of such accounts. This right should be universal in the subject circle of its force, i.e. the state executive officers must be able to receive banking information on the subjects of business and on the natural persons. Moreover, information powers of the state executive officers should not depend on the fact whether they enforce a court decision, or conduct enforcement of some other legislative document.

   Actually, the legislation on enforcement of the decisions gives such a right to the state executive officers (Articles 5 and 6 of the Law of Ukraine "On Judicial Enforcement"), but it remains restricted by the provisions of Article 62 of the Law of Ukraine "On Banks and Banking Activities". These legislative restrictions must be removed. Moreover, in case of implementation of the legal concept of the state executive officer as the debtor's representative or a trustee or property curator of the debtor, the state executive officer must obtain access to the financial and economic information on the debtor like the debtor itself.

2. Creation of the mechanism for unimpeded access of the state executive officers to banking information on the debtors should be accompanied by introduction of the organizational and legal guarantees for observance of confidentiality of the collected information. The bodies of State Executive Service should not turn into the channel of outflow and unlawful gathering of financial information on legal entities and natural persons. Abuse of information powers of the officers should be made impossible. The legal foundation for this will be fixation in the Law of Ukraine "On Judicial Enforcement" of prohibition to the state executive officers who received any confidential information on the debtor to disclose this information or to use it, except cases of use for judicial enforcement in respect of such debtor.

   Today, there is no direct prohibition in the Ukrainian legislation, but this statement derives from Articles 231 and 232 of the Criminal Code of Ukraine – "unlawful gathering for the purpose of use or use of data constituting commercial or banking secret" and "disclosure of the commercial or banking secret, respectively".

3. Appliance of the rule on mandatory notification of tax authorities regarding opening of accounts in the financial institutions not only to the subjects of business, but also to the natural persons who are not the subjects of business. Accordingly, information on all accounts of both natural persons and legal entities should be quickly accessible to the state executive officers through the mechanism of requests to the tax authorities, and through direct access to the relevant electronic data bases.

4. Development of information infrastructure and implementation of the mechanisms of information interaction with the state executive officers should take place within the system of state registration of legal entities and natural persons – entrepreneurs. In particular, it is suggested to include information on opened bank accounts of the relevant subjects into the Unified State Registry of Legal Entities and Natural Persons – Entrepreneurs. Quick access of the state executive officers to this Registry must be guaranteed.

5. Establishment of the procedure according to which opening of new accounts by the borrowers on whose funds an arrest was imposed is only possible with simultaneous imposition of arrest on such accounts. Implementation of this procedure is possible

upon the condition of functioning of the Unified Registry of Judicial Enforcements and access of the financial institutions to it.

6. Cancellation of the term of voluntary enforcement in judicial enforcements on property foreclosures. Within this term established by the law, the debtor is able to conceal non-cash funds, transfer them into another economic form etc. instead of enforcement of the decision. Therefore, the term for voluntary enforcement in the judicial enforcement has transformed into the legislative prerogative for concealment of funds on the bank accounts. For instance, the National Action Plan on Ensuring Proper Enforcement of Court Decisions envisages the necessity to cancel the institute of voluntary enforcement by the debtor of the decision on recovery of funds or reduction of the term for such decision enforcement.

7. Proceeding from the fact that ensuring access to information on the accounts has no independent meaning, it is necessary to reform the rules on such access simultaneously with reforms of the rules of foreclosure on funds and imposition of arrest on them as an element of such reforms.

A number of the proposed measures have a systemic nature and can be implemented within the terms of a complex reform of judicial enforcement and significant development of the state's information infrastructure. At the same time, as it is envisaged by the Law of Ukraine "On Information", the state is obliged to strive for timely creation, proper functioning and development of information systems, networks, banks and data bases in all the directions of information activity. According to part 6, Article 30 of the Law of Ukraine "On Information", the legal regime of banking information is established by the Verkhovna Rada of Ukraine, upon submission of the Cabinet of Ministers of Ukraine. But today there are no legislative initiatives of the Government aimed at taking the aforesaid measures.

VI. ENSURING ACTUAL POSSIBILITY TO FORECLOSE ON MOVABLE AND IMMOVABLE PROPERTY OF THE DEBTOR, PARTICULARLY, STATE-OWNED ENTERPRISES

The effective Ukrainian legislation contains numerous deficiencies which complicate or even make impossible foreclosure on movable and immovable property of the debtors.

Moratorium on coercive sale of property of state-owned enterprises

The Law of Ukraine "On Introduction of Moratorium on Coercive Sale of Property" # 2864-III dated 11/29/01 established a moratorium on application of coercive sale of property of the state-owned enterprises and business associations in the statutory funds of which the state's stake is not less than 25% "until improvement of the mechanism of coercive sale of property which is defined by the laws of Ukraine". The moratorium is applied to alienation of real estate objects and other fixed assets of production (equipment) which ensure carrying out of production activities by these enterprises, as well as shares (stakes) owned by the state in property of other business associations and transferred to the statutory funds of these enterprises, if such alienation is conducted through, in particular, foreclosure on property of the borrower according to the decisions subject to enforcement by the State Executive Service, except the decisions on payment of salaries and other payments owed to the employee in connection with labor relations.

In the final provisions of the law of Ukraine "On Introduction of Moratorium on Coercive Sale of Property", the Cabinet of Ministers was instructed to submit within one month and according to the established procedure the draft Law on introduction of amendments to the Laws of Ukraine "On Judicial Enforcement", "On Restoring Solvency of the Debtor or Declaring It Bankrupt" in which to envisage improvement of the mechanism of coercive sale of enterprise property. The Cabinet of Ministers has not submitted this draft Law yet.

As a result of this, for many years, first of all, significant part of property of the state-owned enterprises and other business associations in the statutory funds of which stake of the state is not less than 25% is protected from foreclosure. Secondly, different rules of enforcement of court decisions in respect of the debtors are applied depending on the debtor's form of ownership, which per se is harmful and anti-market.

Thus, the indicated moratorium should be cancelled. At the same time, it should be taken into account that the moratorium was introduced in connection with numerous facts of abuses by the state executive officers which sometimes were conducted in confederacy with the debtor's management, in order to avoid application of legislation on privatization of state property and sale of property at underestimated price in favor of certain persons. Therefore, the moratorium should be cancelled simultaneously with adoption of the law on public tenders which will establish clear procedures for sale of property which should not depend on who is the owner (the state or another subject).

Legislation on liens on movable and immovable property

The legislation of Ukraine on liens of movable and immovable property is characterized by contradictions which cause significant difficulties during foreclosure on movable and immovable property of the debtors. It is worth to mention lack of coordination between the

norms of the Civil Code of Ukraine, Laws of Ukraine "On Liens", "On Securing Claims of the Creditors and Registration of Encumbrances", "On State Registration of Proprietary Rights to Movable Property and Their Restrictions", "On Mortgages", "On Mortgage Bonds" etc. For instance, the Civil Code of Ukraine recognizes as bona fide a purchaser who did not know and could not know of the faults in alienation of property, while the Law of Ukraine "On Securing Claims of the Creditors and Registration of Encumbrances" ties bona fide status only to registration of encumbrances. It is necessary to conduct work on approval of the indicated legislative acts.

Uncoordinated are the Laws of Ukraine "On Securing Claims of the Creditors and Registration of Encumbrances" and "On Mortgages", and the Law of Ukraine "On Judicial Enforcement" in part of possibility to foreclose on the pledged property and procedure of such foreclosure. Thus, according to Article 52 of the Law of Ukraine "On Judicial Enforcement", for satisfaction of the claims of recoverers who are not the lien holders, foreclosure on pledged property of the debtor may be conducted in case of appearance of the lien right after the court decision on recovery of funds from the debtor. This does not coordinate in any way with the system of priorities established by the aforesaid laws.

Moreover, introduction of the rules on coercive foreclosure on property in any laws, except the Law of Ukraine "On Judicial Enforcement" does not contribute to proper execution of the decisions. Therefore, it is necessary to introduce amendments to legislation and concentrate the indicated rules exclusively in the Law of Ukraine "On Judicial Enforcement".

Lien of movable and immovable property of the debtor according to court decision on recovery of cash

The Ukrainian legislation lacks a mechanism for establishment of lien of movable and immovable property of the debtor according to court decision on recovery of cash. This lien is established by the creditor on its own desire, unilaterally (i.e. through execution of a unilateral contract) if the creditor has a court decision on recovery of funds. In the countries where such lien exists it encourages the debtor to voluntary fulfillment of monetary liabilities.

Introduction of the relevant mechanism is envisaged by item 3 of the National Action Plan on Ensuring Proper Enforcement of Court Decisions approved by the Decree of the President of Ukraine # 587/2006 dated 27 June 2006. The indicated Decree was drafted with the Center's participation.

Accessibility of information from the state registries

The state registries play a very important role in search of both the debtor and its property, and in clarification of existence or non-existence of rights of the third persons to this property. That is why the state registries are extremely important for actual possibility to foreclose on the debtors' movable and immovable property.

But for this purpose the state registries should be, first of all, complete, secondly – accessible, and thirdly – there should exist non-contradictory rules on the procedure and results of making entries in them. Besides, the state executive officers should be well aware of the mechanisms of registry work.

1. The registry in which information on the debtor could be found – is the **Unified State Registry of Legal Entities and Natural Persons - Entrepreneurs**. According to part

1, Article 18 of the Law of Ukraine "On State Registration of Legal Entities and Natural Persons – Entrepreneurs", if data subject to inclusion in the Unified State Registry were entered into it, these data are considered reliable and can be used in a dispute with a third person, until the relevant changes are introduced to them. This conceptual provision should be considered when using data from the registry. Nevertheless, it should be taken into account that this registry is still incomplete, it does not contain data on all legal entities and natural persons – entrepreneurs. Thus, it is desirable to complete the work on filling the registry as soon as possible.

The indicated registry does not contain data on the natural persons who are not entrepreneurs. That is why it is necessary to create also the relevant registry (maybe through expansion of the existing registry).

2. According to the Law of Ukraine "On State Registration of Proprietary Rights to Immovable Property and Their Restrictions" (adopted on 07/01/2004), the **State Registry of Rights to Immovable Property and Their Restrictions** should be functioning. But this registry has not been created yet. Instead, not all immovable property is registered now in the Bureaus of Technical Information (BTI) – communal enterprises which conduct now the procedure of registration. This is a significant impediment in revealing of such property.

3. A significant problem is proper use of the **State Registry of Encumbrances on Movable Property** which is maintained according to the Law of Ukraine "On Securing Creditors' Claims and Registration of Encumbrances ". Not all state executive officers understand the status of data from this registry. Meanwhile, the majority of data in the registry are entered simply according to data of the creditors, i.e. without any check. Therefore, these entries should be viewed as notices from the creditors on their rights to property, and not as confirmation of existence of these rights. Moreover, the relevant legislation requires careful review.

4. **Registration of cars, sea ships and aircrafts** is conducted in the registries procedure of maintenance of which is established by the Cabinet of Ministers of Ukraine and by the Order of the State Service of Ukraine on Oversight over Safety in Aviation[14]. These registries, first of all, are not open, and secondly, the rules of their application do not even envisage introduction of data on encumbrances. That is, the indicated registries are completely inappropriate for use for the civil and legal purposes, in particular, for purposes of foreclosure on such property.

Summing up the aforesaid, it is possible to state that situation with the state registries is such that it does not allow to effectively locate the debtor and foreclose on it. It is necessary to conduct significant work on improvement of work of these registries.

[14] Resolution of the Cabinet of Ministers of Ukraine # 1388 dated 7 September 1998 "On Approval of the Rules of State Registration of the Automobiles, Buses, as Well as Self-Propelled Machines Constructed on Automobile Frames, Motorcycles of All Types, Makes and Models, Trailers, Semi-Trailers and Motorized Carriages"; Resolution of the Cabinet of Ministers of Ukraine # 1069 dated 26 September 1997 "On Approval of the Procedure for Maintenance of the State Ship Registry of Ukraine and the Ship Book of Ukraine"; Order of the State Service of Ukraine on Oversight over Safety in Aviation # 67 dated 31 January 2006 "On Approval of the Rules for Registration of Civil Aircrafts in Ukraine".

VII. REMOVAL OF LEGAL POSSIBILITIES FOR THE DEBTOR TO AVOID ENFORCEMENT OF COURT DECISIONS

The effective Ukrainian legislation provides the debtor with certain legal possibilities to avoid enforcement of the decisions. There are different reasons why these possibilities exist – from willful "protection of state interests" (as understood by the legislator) to simple omissions in legislative work. The most significant legislative faults which may be removed in order to exclude legal possibilities for the debtors to avoid enforcement of the decisions are listed below.

RECOVERY OF FUNDS FROM THE STATE BUDGET OF UKRAINE, BUDGET OF THE AUTONOMOUS REPUBLIC OF CRIMEA, LOCAL BUDGETS

The effective legislation allows the state and territorial communities to avoid easily enforcement of the decisions on recovery of funds from their budgets. There are several reasons for this phenomenon.

The first reason is non-compliance of the procedural codes of Ukraine with the Civil Code of Ukraine in part of defining the subjects of the relevant trials and civil rights, respectively. An exception is only the Civil Procedural Code of Ukraine which envisages participation of the state as a party of the judicial trial. Other procedural codes define the state authorities and not the state as participants of the trial. Besides, all the codes, without exception, envisage participation in the trial not of the territorial communities as parties but of their bodies. This leads to the situation when court decisions are adopted not against the state of Ukraine or certain territorial community but against certain state bodies or local self-government bodies (for example, the ministries, committees, commissions etc.) Meanwhile, financing of the bodies is such that the funds are allocated only for execution by them of their powers (salaries of employees, purchase of stationery etc.) Besides, the indicated bodies do not even have bank accounts, the State Treasury is paying for their expenses from its own accounts. There also exists a problem with deciding on the future of the court decision adopted by a body, in case of liquidation of this body. Therefore, it is necessary to bring the procedural codes of Ukraine in compliance with the Civil Code of Ukraine through the decision that the state of Ukraine itself and territorial communities may be the parties in judicial trials.

The second reason is lack of the legislative mechanism for recovery of funds from the State Budget of Ukraine, budget of the Autonomous Republic of Crimea, local budgets. This mechanism needs to be created. At that, it is necessary to take into account that enforcement in the case of recovery of funds from the budgets cannot be completed in connection with absence of funds in the budget for these purposes. When such funds for the current year are exhausted, the decision should be enforced next year as priory.

The third reason is that the laws on the state budget which are adopted annually do not envisage allocation of funds for enforcement of court decisions. It is necessary to plan annually such expenses with taking into account amount of debt remaining from the decisions non-enforced last year.

Introduction of the relevant mechanism is envisaged by item 7 of the National Action Plan on Ensuring Proper Enforcement of Court Decisions approved by the Decree of the President of Ukraine # 587/2006 dated 27 June 2006: it is envisaged to draft the Law on establishment of

the procedure for fulfillment of court decisions on recovery of funds from the State Budget of Ukraine, budget of the Autonomous Republic of Crimea, local budgets. Moreover, item 9 of this Decree establishes that "in order to ensure proper enforcement of court decisions regarding compensation of damage caused to the natural persons and legal entities by the state power bodies, in cases when recovery is made from the State budget of Ukraine, to envisage annually in the draft Law on the State Budget of Ukraine for the relevant year the funds for such purposes". The indicated Decree was drafted with the Center's participation.

Unjustified grounds for termination of judicial enforcement

According to item 7, Article 34 of the Law of Ukraine "On Judicial Enforcement", submission to the court of the claim on exclusion of property from the act of inventory and arrest is the basis for mandatory termination of judicial enforcement. This creates possibility for the debtor to evade easily from enforcement of the decisions for quite a long period of time through initiation of claims to court from different persons who allegedly consider valid their rights to property which is subject to sale according to the procedure of judicial enforcement. The debtors must lose this opportunity. Simultaneously, in order to protect rights of the real right holders, it is necessary to establish that should they go to court, judicial enforcement may be stopped by the court.

According to item 10, Article 34 of the Law of Ukraine "On Judicial Enforcement", the following ground is envisaged for mandatory termination of judicial enforcement: submission of the prosecutor's cassation appeal against the court decision. This not only causes unjustified delay of judicial enforcement but also creates a significant corruption incentive.

The draft Law of Ukraine "On Introduction of Amendments to Some Legislative Acts of Ukraine Related to Improvement of the Procedure for Coercive Enforcement of the Decisions and Raising the Status of Employees of the State Executive Service" drafted by the Cabinet of Ministers of Ukraine with incorporation of a whole number of proposals from the Center, envisages introduction of amendments to the Law of Ukraine "On Judicial Enforcement" which exclude this ground for mandatory termination of judicial enforcement which removes one of legal possibilities for the debtor to avoid enforcement of court decisions.

Decision enforcement in case of liquidation of a debtor – legal entity

An obligation to transfer enforcement document to the liquidation commission in any case when the decision on the debtor's liquidation is adopted (Article 65 of the Law) provides a debtor with possibility to avoid coercive enforcement of the decision through adoption of the decision on its liquidation, appointment of the liquidation commission consisting from the participants (shareholders) of the debtor – legal entity, management etc. Thus, coercive enforcement of the decision by a state body is replaced with voluntary enforcement of the decision by the debtor itself, and the recoverer is deprived of the right to apply the mechanism of coercive decision enforcement.

If in case of debtor's liquidation not connected with application of bankruptcy procedures the debtor may satisfy the creditors' claims in full volume, coercive decision enforcement does not infringe on the rights of other creditors, therefore in this case there is no need to transfer enforcement document to the liquidation commission. But if in case of the debtor's liquidation not in connection with bankruptcy procedure, it is established that the debtor is unable to satisfy claims of the creditors in full volume, the debtor shall be obliged to go

within one month to the commercial court with application on initiation of bankruptcy proceedings according to part 5, Article 7 of the Law of Ukraine “On Restoring Solvency of the Debtor or Declaring It Bankrupt”.

Thus, it is necessary to establish a rule that liquidation of a debtor – legal entity against whom judicial enforcement is conducted should not be allowed, except cases when such liquidation is conducted within the procedure of bankruptcy proceedings.

Non-coordination of norms of the Civil and Commercial Codes of Ukraine in respect of proprietary rights

The Civil Code of Ukraine, along with the right of ownership, envisages existence of the “right of economic management” which is known only to the former USSR republics. The essence of this pseudo-institute is that the state, communal and some other private legal entities which carry out entrepreneurial activities allegedly have no property in ownership. Instead, they use property which allegedly belongs to the founder (participant) of a legal entity according to the right of ownership (though the founders in this case have no powers of an owner). The right according to which this property belongs to the legal entity itself is called “the right of economic management”. This right, just like the ownership right envisages ownership, use, disposal of property but it is not called the ownership right, instead, the aforesaid term is used. This causes violation of regulation in respect of the ownership right, mistakes in our legislation and, generally, has extremely negative impact on judicial enforcement.

The so-called “right of economic management” (invented in the middle of the 20th century in the USSR for justification of the existing ideology) according to its legal nature is nothing else than the ownership right. At the same time, rights of the founders are not the rights of owners, they are rather corporate rights (right to dividends, right to appoint the management, right to exercise control etc.)

And the idea that “the right of economic management” and ownership right are different rights belonging to different subjects in practice and in the context of judicial enforcement leads to the following. Immovable property of the debtor to whom it allegedly belongs according to “the right of economic management” is registered in the registry as property of the founder (the state, territorial community, private person) but not of the debtor. Thus, enforcement of the decisions against the borrower become impossible on the legal grounds and for purely formal reasons which is not only unnatural but also harmful for legal system of the country with market system of economic relations. The right of economic management remained in the Ukrainian legislation as an attribute of planned economy with the only owner of the whole economy – the state, and was inherited from the Soviet legal system.

Therefore it is recommended to remove obsolete terminology from legislation and replace the term “right of economic management” with “ownership right” which corresponds to the legal nature of these relations.

Quality of court decisions and procedural problems

A court decision which is subject to coercive enforcement must be clear. The state executive officer must understand what actions he should take.

Quite often, the courts adopt the decisions and issue orders contents of which is unclear. For example, on obligation of the debtor to fulfill its liabilities under the contract (with specifying the actions to be taken by the debtor), on stopping violation of the recoverer's rights (without specifying the actions to be taken by the debtor or the actions he should refrain from), on providing the recoverer with an apartment in a certain building construction of which is not finished and it is not in operation yet (and sometimes the construction has not even started), on providing the recoverer with a land plot (not distributed in kind and on which there is no land allotment project) etc. This obscurity of the decisions gives to the debtor wide opportunities to avoid fulfillment of its liabilities to the recoverer.

The reason of this phenomenon is, in the first place, non-compliance by the courts with the requirements of Article 19 of the Constitution of Ukraine according to which the state power bodies and local self-government bodies and their officials are obliged to act only on the basis, within the powers and in a way envisaged by the Constitution of Ukraine and the laws of Ukraine. The courts are the state power bodies (judicial power). Thus, the courts may apply only those ways of right protection which are mentioned in the law.

Thus, the court is entitled to satisfy the claim only upon the condition that the claim is such that its satisfaction is possible through application by the court of one of the ways of right protection mentioned in the laws. As application of the judicial way of protection envisages taking of measures of state coercion to the right infringer, the state establishes these ways imperatively.

But this does not mean that a participant of the relevant disputable legal relation sometimes is unable to protect his interests in court. This only means that a participant of the disputable legal relation should find a way of protection mentioned in the law, and go to court with application of this law.

There is an opinion that if, according to part 2, Article 124 of the Constitution of Ukraine, court jurisdiction applies to all legal relations arising in the state, the plaintiffs may go to court with any claims, in particular, the claims which do not correspond to the ways of protection established by the law, for instance, those "invented" by the plaintiffs themselves, particularly, established by the court, and the court must consider these claims in substance. This opinion is erroneous as it is based on mixing of the notions "legal relations" and "ways of protection" which are not equal. It follows from the requirements of both mentioned constitutional norms that the plaintiff is entitled to go to court regarding any legal relations (part 2, Article 124 of the Constitution of Ukraine) but with application of only those ways of protection which are envisaged by the law (part 2, Article 19 of the Constitution of Ukraine).

Instead, the courts often consider in substance the claims on protection of rights in the ways which do not correspond to the ways of right protection established by the law. For example, there are numerous cases when courts recognize contracts valid, concluded, non-concluded; recognize actions of the party to a civil or commercial contract unlawful, illegal; recognize term of the contract expired; recognize powers of the company's body terminated; cancel the documents, recognize them invalid or non-complying with the law and established rules; recognize accounting documents invalid; recognize business activities invalid; expel a participant from the business association, oblige to take part in the shareholder meeting etc. For enforcement of such decisions, often enforcement documents are issued, and they are submitted by the recoverers to the State Executive Service.

In this situation, according to Article 28 of the Law of Ukraine "On State Executive Service", a state executive officer may ask the court which adopted the decision for explanations. The court is obliged to consider application of the state executive officer within 10 days from the moment of its receipt. The court provides its explanation only when it considers it necessary.

Practice proves that the judges are reluctant to give explanations regarding enforcement of their decisions. And this is clear. This often happens when a judge when adopting a decision never thinks how it may be enforced, or whether it could be enforced at all. After receipt of the request from the state executive officer on explanation, a judge finally realizes that he adopted an inappropriate decision, the one which cannot be enforced, and even issued an enforcement document on it but cannot do anything because has no powers to cancel or change his decision.

Often, erroneous practice of adoption of unclear decisions which do not envisage application of the ways of protection established by the law is used for corruption purposes. For example, a judge who is in confederacy with a plaintiff adopts such a decision. It is rather difficult for the defendant to appeal against it because the decision does not envisage taking by the defendant of the actions with which the defendant disagrees. When the decision comes into force, and enforcement document is issued and judicial enforcement begins. On this stage, the state executive officer or the recoverer himself asks the court to explain the decision. The court "explains" it in such a way that the decision actually transforms into another decision which the debtor could not even envisage. Appealing against such "explanations" is very difficult for the debtor. In addition, even after successful appeal it is difficult to compensate negative results of enforcement of the "explained" decision.

It appears that such deficiencies may be overcome only through improvement of qualification of the judges and elimination of corruption. At the same time, it is possible and necessary to create a legislative basis for facilitation and channeling of court practice towards adoption of the decisions in substance of only those claims which comply with the ways of protection established by the law, and to decrease significantly possibility to apply corruption mechanisms. For this, it is necessary:

1. To correct the mistake of Article 16 of the Civil Code of Ukraine where it says that the court may protect civil right or interest in another way, not envisaged by the law, in particular, the one which is established in the contract.

2. It is necessary to correct the mistake of part 2, Article 133 and part 2, Article 152 of the Civil Procedural Code of Ukraine which establishes inexhaustible lists of ways to ensure evidences and types of securing a claim, as well as to introduce changes to the procedural codes in order to specify the types of securing claims.

3. It is necessary to exclude a possibility to consider decisions of the courts to be enforcement documents. On every court decision if it is subject to mandatory enforcement it is necessary to issue a separate enforcement document. This is envisaged by the draft Law of Ukraine "On Introduction of Amendments to Some Legislative Acts of Ukraine on Improvement of the Procedure for Coercive Enforcement of the Decisions and Raising Status of Employees of the State Executive Service" which was drafted by the Cabinet of Ministers of Ukraine with incorporation of a number of proposals from the Center (see Section I of this assessment regarding legislative initiatives of the Cabinet of Ministers of Ukraine).

4. It is necessary to define in the procedural codes on what decisions an enforcement document should be issued, and on what – should not be issued. It is expedient to issue an enforcement document only on the decisions on recovery or on taking by the debtor of certain actions. In case of adoption of the decisions on which the court obliges the debtor to refrain from certain actions, the court should be obliged to issue this decision through handing it to the debtor. On other decisions, enforcement documents should not be issued (for example, on the decisions on recognizing a contract invalid or on recognizing the ownership rights). It is also necessary to envisage an exhaustive list of decisions on which an enforcement document may be issued.

VIII. ENFORCEMENT OF COURT DECISIONS AS JUDICIAL ENFORCEMENT AND BANKRUPTCY PROCEEDINGS

A. PREREQUISITES

The current Ukrainian practice of legislation application which defines the procedure of judicial enforcement and bankruptcy proceedings causes numerous problems and questions both for direct participants of these processes and other specialists involved in this process.

On the one hand, state executive officers – the persons charged with the obligation to conduct coercive enforcement of court decisions – complain at appearance of significant difficulties and obstacles in enforcement of court decisions in the case when a bankruptcy proceeding is initiated against the debtor along with judicial enforcement. On the other hand, bankruptcy commissioners – who during bankruptcy proceedings perform the functions on protection and management of the debtor's property, as well as on satisfaction of the creditors' claims – inform on the numerous conflicts with the State Executive Service which is caused by actions of the state executive officers regarding foreclosure or imposition of arrest on property or funds of the debtors who violate the rights of creditors – participants of the bankruptcy proceedings, or hamper conducting of the procedures for recovery of the debtors' solvency.

B. ASSESSMENT OF THE CURRENT LEGISLATIVE REGULATION

JUDICIAL ENFORCEMENT

The fundamental legislative act which defines the procedure for coercive enforcement of court decisions and satisfaction of the recoverers' claims is the Law of Ukraine "On Judicial Enforcement" # 606-XIV dated 21 April 1999.

This Law (part 2, Article 25) establishes a term within which a state executive officer is obliged to take enforcement measures for decision enforcement. Usually, this term is six months from the day of adoption of the resolution on opening of judicial enforcement, and for enforcement of non-property decisions – two months.

But in case of initiation by the commercial court of bankruptcy proceedings in respect of the debtor in case if, pursuant to the law, the moratorium introduced by the commercial court is applied to the recoverer's claim, judicial enforcement is subject to mandatory termination (item 8, part 2, Article 34). If the moratorium is not applied to the recoverer's claim, recovery on enforcement document is conducted according to the general procedure, simultaneously with bankruptcy proceedings.

Judicial enforcement remains terminated until the moment when the circumstances which caused such termination disappear (moratorium will be terminated), or until the debtor is recognized bankrupt by the commercial court. In the last case, all existing judicial enforcements (both terminated and those to which the moratorium is not applied, i.e. where enforcement actions during bankruptcy proceedings are conducted as usual) are subject to closing, the cases are transferred to the liquidator (bankruptcy commissioner) and further recovery takes place within the bankruptcy proceedings.

Bankruptcy proceedings

Bankruptcy proceeding is also a special procedure aimed at satisfaction of claims of all debtor's creditors. The fundamental legislative act which defines the procedure for consideration of bankruptcy cases by the commercial courts is the Law of Ukraine "On Restoring Solvency of the Debtor or Declaring It Bankrupt" # 2343-XII dated 14 May 1992.

Consideration of bankruptcy cases is within the competence of commercial courts, bankruptcy proceedings are initiated by the commercial court on the creditor's or debtor's initiative. Materially, a legal ground for case initiation is the fact of recognizing of debtor's insolvency by the court.

Simultaneously with initiation of bankruptcy proceedings, the commercial court usually introduces a procedure for disposal of debtor's property, appoints the property manager (bankruptcy commissioner) and introduces a moratorium on satisfaction of the creditors' claims (part 1, Article 11, part 4, Article 12 of the Law # 2343).

Essence of the moratorium on satisfaction of the creditors' claims is in stopping of fulfillment by the debtor of monetary liabilities (liabilities which appeared on the civil and legal grounds) and obligations to pay taxes and fees (mandatory payments) which were due before the date of introduction of the moratorium, as well as in termination of measures aimed at ensuring coercive enforcement of the indicated liabilities. Within validity period of the moratorium on satisfaction of the creditors' claims, it is prohibited to conduct recoveries based on enforcement documents pursuant to which recoveries are conducted according to the legislation (part 4, Article 12 of the Law # 2343).

Moreover, the moratorium is applied to claims of the creditors regarding compensation of losses caused by introduction of the moratorium, i.e. during bankruptcy proceedings, in connection with the debtor's refusal from fulfillment of liabilities according to the procedure envisaged by the law.

Action of the moratorium on satisfaction of the creditors' claims is not applied to payment of salaries, alimonies, recovery of damage caused to health and life of citizens, royalties (part 6, Article 12 of this Law). Moreover, the moratorium is not applied to any other debtor's liabilities which were due after the date of introduction of the moratorium (current liabilities), as well as satisfaction of the creditors' claims which is conducted according to the plan of rehabilitation approved by the commercial code, or in liquidation procedure in order of priority established by the law.

The moratorium is valid during bankruptcy proceedings and is terminated from the day of termination of the proceedings.

Enforcement problems

There exists an opinion which is actively discussed at the Ministry of Justice of Ukraine that *initiation of bankruptcy proceedings hampers enforcement of court decisions*. According to the statistics of enforcement of court decisions for the first six months of 2007, out of the total number of enforcement documents which were enforced by the State Executive Service, enforcement was terminated on 59,303 documents (36.5%) for the amount of UAH 7,273,376,458, or 40% of the amount of terminated enforcements.

These data have caused existence among the specialists of the Ministry of Justice of the position that in the majority of cases the period of enforcement of the national courts' decisions depends on initiation of bankruptcy proceedings against the enterprise-debtor[15]. In connection with this, the Ministry of Justice of Ukraine states on the official level that the State Executive Service has practically no possibility to enforce the court decision as after initiation of bankruptcy proceedings it is actually impossible to enforce the court decision outside the bankruptcy procedure. This situation causes violation by Ukraine of Article 6, paragraph 1 of the Convention on Protection of Human Rights and Fundamental Freedoms.

It appears that the procedural order according to which bankruptcy cases are considered is harmful because it impedes enforcing of court decisions. That is why it is clear that the Ministry of Justice requires as a solution that the moratorium on satisfaction of the creditors' claims which is introduced in respect of the debtor's property in connection with initiation of bankruptcy proceedings should not apply to foreclosures conducted as judicial enforcement, and should not hamper the State Executive Service to carry out its powers on enforcement of court decisions in respect of the debtor.

But the real problem is the fact that *judicial enforcement does not solve the problems of removal of preferences of one creditor over other creditors*. For example, in the cases when one of the debtor's creditors started recovery prior to others, or when actions of one of the recoverers are "more active", or when a debtor as a result of confederacy voluntarily transfers its property to a "friendly" creditor to the detriment of the others in order to remove assets from recovery by other creditors.

Practice of application of the institute of combined enforcement which is opened if there are several recoveries against the debtor appeared to be inappropriate for solution of the aforesaid problems because in the combined enforcement:

- satisfaction is received only by those recoverers who received a court decision and have enforcement documents, there is no identification of creditors;
- there are no institutes removing possible preferences of one creditor over the others and preventing mala fide actions of the debtor in favor of one of the creditors against interests of the others;
- there are no institutes ensuring equality of procedural opportunities of the creditors and representing their interests in the case;
- there are no institutes ensuring fair distribution of the whole property collation of the debtor;
- there are no institutes for denial of contracts on transfer of property to other persons which were concluded by the debtor against the interests of other creditors.

Legislative initiatives

Numerous complaints of the participants of enforcement in bankruptcy proceedings and judicial enforcement (recoverers, creditors, debtors) connected with appeal against actions of

[15] I. Koval. Violation of Article 6, § 1 of the Convention on Protection of Human Rights and Fundamental Freedoms: Duration of Enforcement of Court Decisions in the Bankruptcy Procedure // http://www.minjust.gov.ua/0/4486

the state executive officers and bankruptcy commissioners, striking contrast in positions of the attorneys and other lawyers who represent interests of their clients in the trials explain the diversified and contradictory court practice, and impossibility to reach legal certainty in these issues through the court causes active lobbying of interests of these persons in the country's legislative body and certain legislative activity of the deputies and representatives of the Ministry of Justice and the Ministry of Economy.

Dynamics of the legislative process shows the correlation between judicial enforcement and enforcement in bankruptcy cases. For instance, since 1999, provisions of item 8, part 1, Article 34 of the Law "On Judicial Enforcement" which call for mandatory termination of judicial enforcement in connection with initiation of bankruptcy proceedings were changed three times (pursuant to the Laws of Ukraine # 327-IV dated 11/28/2002, # 1095-IV dated 07/10/2003 and # 1255-IV dated 11/18/2003).

During all this time, the legislators continued their attempts to regulate the provisions of the Law "On Restoring Solvency of the Debtor or Declaring It Bankrupt" which define legal relations to which the moratorium on satisfaction of creditors' claims in bankruptcy cases is applied, and those to which the moratorium is not applied, i.e. judicial enforcement is allowed. Since 1999, definition of the moratorium was changes twice (Laws of Ukraine # 3088-III dated 03/07/2002 and # 672-IV dated 04/03/2003), and Article 12 which specifies in detail the procedure of moratorium application was changes three times (Laws of Ukraine # 3088-III dated 03/07/2002, # 672-IV dated 04/03/2003 and # 3108-IV dated 11/17/2005).

The number of draft Laws registered by different subjects of legislative initiative but not adopted by the Parliament is more than twenty.

Imperfect legislation on separation between judicial enforcement and bankruptcy proceedings, contradictory court practice, legislative initiatives aimed at solution of the existing problems but contradictory in their essence testify to the lack of clear understanding of the nature of indicated legal institutes in perception of the legal community.

Thereby, provision of practical recommendations in order to remove collisions in enforcement connected with co-existence of judicial enforcement and enforcement on bankruptcy cases is impossible without return to the fundamentals of enforcement law and insolvency (bankruptcy) law, and clarification of their legal nature.

C. THEORETICAL SUBSTANTIATION

Mandatory fulfillment of contractual obligations is one of the fundamental principles of economic system. In case of dispute in relations between private persons/entities, the state gives them the right to apply to it for settling such dispute and performs one of the elements of law enforcement function – execution of justice (settlement of issue of law). Moreover, in addition to the settlement of issues of law, the state also assumes the obligation on enforcement of court decisions and application of enforcement measures to a debtor aimed at securing the fulfillment of debtor's obligations to a creditor.

In case of delay in satisfaction of creditor's claims a debtor runs the risk of coercive foreclosure on its property. Naturally, any country has its own specifics in legislation that regulates coercive fulfillment of obligations, and different legal institutions responsible for this function exist under different names. However, in general theoretic terms, the procedure of coercive fulfillment of obligations looks as follows.

Under the general rule, for the enforcement of court decision the decision should come into effect and the person in favor of which the court issued the decision regarding certain property ("the recoverer"), should apply to the court requesting forced recovery of such property. A recoverer should apply to the court that adopted respective decision with a solicitation to issue the so-called "enforcement document" (enforcement order, writ of execution, etc.) Further, the recoverer should take this document and address to the court at the place of enforcement of decision for appointment of the specific officer of justice (court enforcement officer, bailiff, marshal, state enforcement officer etc.) who is a natural person – representative of a state power body who enforces the decisions and applies to the debtor or its property the measures which allow the officer of justice to fulfill for the debtor its obligations to the recoverer. At that, the officer of justice acts for the debtor as its lawful representative.

The general procedure of coercive enforcement for the debtor of its obligations to the recoverer (or coercive enforcement of court decision) is called a *judicial enforcement*.

Enforcement in bankruptcy cases is a special type of judicial enforcement which is used for fair and equal satisfaction of claims of not one creditor as in enforcement process, but of all debtor's creditors in the conditions when there are sufficient grounds to believe that the debtor's property will not be sufficient for satisfaction of all claims.

Issue on the nature of enforcement in bankruptcy case and its correlation with judicial enforcement was discussed on the pages of professional editions already by the pre-revolutionary lawyers. For example, at the end of the 19th century, an outstanding Russian civil lawyer G.F. Shershenevich mentioned that in connection with opening of judicial enforcement foreclosure is made on the debtor's property which is sold within short period of time for expedient satisfaction of the recoverer's claims. In connection with quick sale, the property usually significantly reduces its value, and the debtor's business, if not ruined completely, is significantly out of order. Should there appear other creditors who are late with their claims, they face the risk of finding a broken business which is unable to satisfy their claims. The creditor who was the first to start the recovery, or is the closest to the debtor's location, or is in close relationship with the debtor will try to obtain full satisfaction of its claims, without thinking of other creditors at all.

In order to prevent such priorities for the recoverer who was the first to start recovery, there appeared an objective need to establish a special procedure of more equal and fair distribution of the debtor's assets among all its creditors. It is clear that such procedure of distribution may be applied only in the case when there are sufficient grounds to state that the debtor's property is insufficient for satisfaction of all creditors' claims, those already presented to the debtor, and those presentation of which is expected. Similar status of property which is established according to the court procedure and gives the grounds to believe that the debtor's property is insufficient for satisfaction of all creditors' claims, is called **incompetency**. Incompetency of the debtor's property is the ground for opening of **bankruptcy proceedings**[16] (enforcement in bankruptcy case), i.e. procedure for equal distribution of the debtor's property between all its creditors[17].

Thus, the purpose of bankruptcy proceedings (enforcement in bankruptcy case) is elimination of random priorities of one creditor over others and equal satisfaction of claims of all debtor's creditors. Therefore, **bankruptcy proceedings** pertain only to property

[16] Originates from *concursus* – combination of several monetary claims to insolvent debtor.
[17] G.F. Shershenevich. Bankruptcy Process. Moscow, 2000. p. 87.

inventory, management, alienation and distribution of debtor's assets, and are a **special type of enforcement process**.

This thesis is confirmed by the law science, history of law institutes development, and also is reflected in the legislative acts of other countries. For example, in the Civil Procedural Code of the Russian Soviet Federal Social Republic of 1923, Chapter 27 "On Insolvency of Private Natural Persons and Legal Entities" was included in Part 5 "Enforcement of Court Decisions". In connection with this, A.F. Kleiman suggested to attribute the procedure for clarification of the status of property insolvency to the regular court consideration, and after the fact is established, all actions connected with location of creditors, property disposal etc. to be attributed to the enforcement process, to its special type – liquidation process[18].

The majority of contemporary researchers support the aforesaid position. For instance, V.F. Popondopulo and O.V. Chyrkunova believe that there is certain correlation of enforcement in cases on insolvency, bankruptcy proceedings and judicial enforcement, that is why it may be concluded that bankruptcy proceedings are a special judicial enforcement[19]. At that, the authors attract attention to the fact that unity of judicial enforcement and bankruptcy proceedings is determined by their legal nature of final stages of the court trial connected with enforcement of court decisions[20].

As the researcher P.V. Lotarev states, a peculiarity of bankruptcy proceedings, unlike judicial enforcement, is the fact that it is opened irrespective of the will of the interested parties, imperatively, and has a priority over judicial enforcement. Within the framework of bankruptcy proceedings, not only implementation of the decision on recognizing the debtor insolvent (bankrupt) takes place, but also enforcement of all court acts adopted in respect of the claims considered in the case of insolvency (bankruptcy) and according to the general rules of legal procedures takes place. Bankruptcy proceedings accumulate enforcement of all court acts, therefore it requires special additional legislative regulation, as well as defining whether bankruptcy proceedings have priority over judicial enforcement, and what limits are established in connection with this[21].

Researcher G.F. Shershenevich said about the priority of bankruptcy proceedings: "Elimination of random priorities of certain creditors over other creditors is the main priority of bankruptcy proceedings over the general enforcement procedure"[22].

Modern legislation of the majority of foreign countries contains a prohibition for coercive enforcement of court decisions after opening of the bankruptcy proceedings. In Germany, the General Regulation of Judicial Enforcement announces all the measures of coercive enforcement in favor of certain creditors invalid from the moment of opening of bankruptcy proceedings[23]. In Great Britain, the Law on Insolvency envisages a possibility, in case of insolvency, to open or continue coercive enforcement of court decisions, impose

[18] A.F. Kleinman. On Insolvency of Private Persons in the Soviet Procedural Law. // Irkutsk, 1929. p. 8.
[19] Ye.V. Chyrkunova. Peculiarities of Consideration of Cases on Insolvency (Bankruptcy) of Citizens in Arbitration Courts: Synopsis of thesis. … Candidate of legal sciences. // St. Petersburg, 2001. p. 6.
[20] V.F. Popondopulo. Bankruptcy Law. Moscow, 2001. p. 136-137.
[21] P.V. Lotarev. Legal Nature of Bankruptcy Proceedings // Law, Society, Power and Contemporaneity. - Moscow., 2005. - p. 9 - 10
[22] G.F. Shershenevych. Bankruptcy Process. Moscow, 2000. p. 87.
[23] Gerhard Pape. Institute of Insolvency: Common Problems and Peculiarities of Legal Regulation in Germany. Comments to the Current Legislation. Moscow, 2002. p. 89.

arrest on the company property if the administrator does not give consent to this or there is no special court decision allowing this enforcement on the terms specified in this decision[24].

Priority of bankruptcy proceedings over judicial enforcement is completely determined by the purpose of introduction in legislation of this special form of enforcement process. Because the main purpose of bankruptcy proceedings is fair and equal satisfaction of the claims of all debtor's creditors in the conditions when debtor's property is not sufficient for all, and elimination of random priority of one creditor over the others. Thus, this process includes all creditors, all debtor's property and absolutely excludes existence of an ordinary enforcement process in which satisfaction is received by only one or several creditors.

Research of correlation between enforcement in cases on bankruptcy and judicial enforcement allows to conclude that bankruptcy proceedings are a universal and special form of enforcement process during which the creditors collectively receive satisfaction of their claims. Opening of bankruptcy proceedings must exclude simultaneous existence of judicial enforcement in which individual satisfaction of claims of a certain recoverer is conducted. Therefore, **opening of bankruptcy proceedings entails termination of judicial enforcement**[25]. Bankruptcy proceedings should not conflict with judicial enforcement because judicial enforcement should be absorbed by bankruptcy proceedings in case of their opening.

In construction of the Ukrainian legislation regulating judicial enforcement and enforcement in case on bankruptcy, a couple of systemic mistakes were made: uncertainty of purpose of two forms of enforcement process – judicial enforcement as a form of individual satisfaction of creditors' claims, and enforcement in case on bankruptcy as a form of collective satisfaction of the claims of all creditors in the conditions of property insolvency. As a result of this, no clear distinction of these procedures was achieved. Instead, an unjustified and unsystematic implementation into legislation on judicial enforcement of the institutes of collective satisfaction of claims took place, though these institutes are characteristic only to bankruptcy proceedings (cumulative judicial enforcements, priority of claim satisfaction etc.) Also ignored were those peculiarities for the sake of which the bankruptcy legislation was created – prevention of random priorities of certain creditors over others. A number of exceptions allowing separate creditors to receive satisfaction beyond the limits of bankruptcy proceedings were introduced along with a prohibition to satisfy the claims of other creditors. An aggregate of these phenomena leads to the negative consequences in enforcement.

D. RECOMMENDATIONS ON REFINEMENT OF LEGISLATION

1. To amend the Law of Ukraine "On Judicial Enforcement" and the Law of Ukraine "On Restoring Solvency of the Debtor or Declaring It Bankrupt" in order to make judicial enforcement impossible after the initiation of bankruptcy proceedings.

2. To improve the Law of Ukraine "On Restoring Solvency of the Debtor or Declaring It Bankrupt" in the part related to the following:

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[24] Ye.A. Kolinichenko. Protection of Interests of Insolvent Debtor in Bankruptcy. Comparative and Legal Analysis. //Moscow, 2002. p. 53.

[25] Ye.V. Chyrkunova. Peculiarities of Consideration of Cases on Insolvency (Bankruptcy) of Citizens in Arbitration Courts: Synopsis of thesis for obtaining the degree of Candidate of legal sciences. Specialty 12.00.15 – Civil Process; Arbitration process / V. V. Chirkunova; Scientific tutor. V. A. Musin; St. Petersburg State University // St. Petersburg, 2001. p. 18.

2.1. To define clear characteristics of insolvency and procedure for determining the status of debtor's insolvency in the course of competition process/competitive tendering in order to secure the general procedure for satisfaction of creditor's claims not through judicial enforcement but through bankruptcy proceedings – only in case of insufficiency of debtor's property to satisfy the claims of all creditors in case of collective recovery and prevention of unjustified initiation of bankruptcy proceedings;

2.2. To secure recognition of a debtor to be insolvent through the adoption of respective court decision with the following legal consequences resulting from such decision:

- Publication of notice on recognition of a debtor to be insolvent and initiation of bankruptcy proceedings;

- Prohibition of all forced recoveries in favor of separate creditors and voluntary satisfaction of separate creditors' claims by a debtor, as well as termination of all measures aimed at forced execution/enforcement in favor of a separate creditor with simultaneous implementation of seizures and prohibitions on alienation of property and introduction of other limitations that apply to all debtors property in the interests of all creditors;

- Starting the term for fulfillment of all debtor's obligations to the creditors through the notice to all the creditors to apply to the court with claims to a debtor (exclusion from the law of a similar provision related to the fact of recognition of a debtor to be bankrupt);

- Partial limitation of debtor's legal capacity and appointment of bankruptcy commissioner (asset manager);

2.3. Mandating the court to publish the notice on recognition of a debtor to be insolvent at the expense of expenditures on information support of litigation, as well as to send the court decision on recognizing a debtor to be insolvent to the respective department of State Executive Service at actual location of a debtor and to the state registrar of the Unified State Registry of Legal Entities and Natural Persons – Entrepreneurs at actual location of a debtor;

2.4. Mandating court-appointed manager/arbitration managers to notify in writing all identified creditors on initiation of bankruptcy proceedings, beginning of the term for fulfillment of debtor's obligations to the creditors, and explain to the creditors their right to apply to the court with the claims to a debtor and consequences resulting from non-applying to the court;

2.5. Settlement (during bankruptcy proceedings) of the procedure for satisfaction of salary related claims of debtor's employees, claims related to compensation of damages caused to the life and health of citizens, and payment of alimony; mandating the arbitration manager to perform respective payments and establish respective consequences for a debtor in case of non-payment – recognizing it to be bankrupt and initiation of liquidation procedure;

2.6. Settlement of the procedure for satisfaction of creditors' claims obligations to which are secured by the pledge of debtor's property, as well as the procedure for participation of such creditors in bankruptcy proceedings and the scope of their rights;

2.7. Settlement of the procedure for satisfaction of creditors' claims associated with obtaining of property which is not owned by a debtor or is temporarily possessed by a debtor (similar to withdrawal of property from inventory);

2.8. Undisputed inclusion to the registry (i.e. the registry of creditor's claims under bankruptcy proceedings) of those claims which are certified by respective court decisions that came into force, as well as those claims for the enforcement of which writs of execution have been issued and judicial enforcement has been initiated if they were submitted by the recoverers or State Executive Service;

2.9. To increase eligibility requirements for the persons willing to perform the activity related to fiduciary management of debtor's property with regard to which bankruptcy proceedings have been initiated, replacement of the term "court-appointed manager/arbitration manager" with the term "tender procurator", as well as to amend licensing requirements and increase the accountability of tender procurators for losses that might result from their activity.

3. To amend the Law of Ukraine "On Judicial Enforcement" (in the part related to recovery of property) as follows:

3.1. To specify respective grounds for closing of judicial enforcement in case of initiation of bankruptcy proceedings against a debtor and exclude from the law a similar provision related to the fact of recognizing a debtor to be bankrupt;

3.2. in case of initiation by the court of bankruptcy proceedings against a debtor against which judicial enforcement has been initiated, state executive officers should be mandated to transfer writs of execution for their subsequent enforcement to the court that deals with the bankruptcy case;

3.3. to exclude from the law the provisions regarding the termination of judicial enforcement in connection with initiation of bankruptcy proceedings;

3.4. to specify the reasons for denying the initiation of judicial enforcement if bankruptcy proceedings have been initiated against a debtor;

3.5. to invalidate the norms that establish the sequence of satisfaction of creditors' claims, introduce the principle of complete satisfaction of recoverer's demands and establish the order of precedence depending on the date of the beginning of judicial enforcement.

4. The Cabinet of Ministers of Ukraine shall delegate the functions with regard to control and oversight over the activity of tender procurators from the Ministry of Economy of Ukraine to the Ministry of Justice of Ukraine and specifically to the Department for the Enforcement of Court Decisions.

IX. CONCEPTUAL FOUNDATIONS FOR IMPROVING THE PROCEDURE ON HOLDING AN AUCTION (PUBLIC SALE)

A. PREREQUISITES

The goal of selling debtor's property at a public auction is to receive maximum price for such property by engaging maximum possible number of potential buyers that compete with each other. This is in the interests of both the recoverer and the debtor. Achievement of this goal facilitates complete fulfillment of decisions and, therefore, is important for judicial enforcement.

However, it should be taken into account that sale of debtor's property by a person who is not the owner of this property (auction organizer, state executive officer) represents a significant corruption danger. Therefore, proper regulation of relations related to public auction deserves very careful attention.

B. ASSESSMENT OF CURRENT LEGISLATIVE REGULATION OF PUBLIC AUCTION

Fist of all it is worth noting that relevant Ukrainian legislation is characterized by terminological chaos. Some laws use the term "public auction", while others use the term "public sale". This creates certain inconvenience in terms of enforcement.

Relations related to *public auction* or *public sale* are regulated by a number of laws. Specifically, in the context of forfeiture of debtor's property[26] these laws include the following: Civil Code of Ukraine; Laws of Ukraine "On Judicial Enforcement", "On Collateral", "On Mortgage", "On Enterprise Profit Tax", "On the Procedure for Discharging Taxpayers' Obligations to the Budgets and State Special-Purpose Funds"; Resolution of the Cabinet of Ministers of Ukraine dated December 22, 1997, #1448 that approved the Regulation on the procedure for holding auctions (public sale) on sale of pledged property; Order of the Ministry of Justice of Ukraine dated December 15, 1999, # 74/5, that approved the Instruction on conducting execution/enforcement activities, Order of the Ministry of Justice of Ukraine dated July 15, 1999, # 42/5 that approved the Procedure for the sale of seized property, Order of the Ministry of Justice of Ukraine dated October 27, 1999, # 68/5, that approved the Interim regulation on the procedure for conducting public auction on sale of seized real estate.

The existence of numerous laws and regulations that (either partially or in full) deal with the same subject of regulation creates inconsistency and leads to confusion. Excessive regulation is usually even more harmful than inadequate regulation since it leads to different interpretation of legislative provisions' priorities.

One should also take into account such specific aspect of Ukrainian legislation as an explicit trend to establish different rules regarding public sale (at public auction) of pledged property on the one hand, and public sale of not pledged but foreclosed property on the other hand. In our opinion this division is unjustified and unified rules for holding a public auction

[26] That is, without taking into account the acts that regulate public sale of state owned property that was transferred in state ownership as a result of seizure of property which serves as the method of punishment of a criminal.

should be established. This will enable the application of unified procedures. However, specifics related to the sale of different types of property should be specified.

Common flaw of all the laws related to public auction is non-establishment or inadequate establishment of mechanisms for protection of the rights of recoverer, debtor, honest buyer (auction winner) and other auction participants. The direct result of this flaw is the fact that the goal of a public auction – that is the receipt of maximum price for the sold property – is not achieved due to a high risk for auction participants. Specifically, rather often the courts rule to invalidate the agreements on the purchase of property acquired by an honest buyer (auction winner who offered the highest price) based on the grounds that a debtor was not the owner of the sold property, or that judicial enforcement was initiated with violations of legislative requirements, or that a debtor actually repaid the debt prior to a public auction but the auction was still conducted, etc. Thus, property purchased by an honest buyer at a public auction can be seized due to the circumstances that were not known and could not be known to a buyer. As a result, few buyers venture to participate in public auctions. Therefore, rather often the property either remains unsold during a public auction, or is sold at a price, which is much lower than the one that could have been received under other circumstances. Moreover, it leads to corruption, since it is mostly potential buyers that have access to insider information who are willing to take part in a public auction.

Current legislation of Ukraine also includes other shortfalls that facilitate corruption. For instance, according to Article 46 of the Law of Ukraine "On Mortgage", public auction is deemed not to have taken place if auction winner refused to sign the protocol and the second highest bidder is absent or refused to purchase the property. In this case, pursuant to Article 48 of the above mentioned law, mortgage holders and other creditors of a debtor are entitled to purchase mortgaged property at the initial price. These rules provoke the following corruption scheme. An unscrupulous creditor gets into conspiracy with a state executive officer and property valuator to understate the price. Then two unscrupulous participants take part in a public auction and bid in such a way that one of them becomes the winner and another one – the second highest bidder (in this case the final auction price does not matter). The "auction winner" refuses to sign the protocol and the second highest bidder refuses to purchase the property. Then the unscrupulous creditor receives the property at understated initial price.

Current procedure for selection of "specialized organizations" that conduct public auctions on the sale of seized property is also associated with certain corruption risks. According to Article 61 of the Law of Ukraine "On Judicial Enforcement" these organizations are engaged on tender (competition) basis. In reality, the use of tenders (competitions) for such purposes means that the commission (established pursuant to the procedure established by the Ministry of Justice of Ukraine) can at its own discretion allow or ban this or that organization to conduct a public auction. Naturally, this creates the danger of corruption. The approach to the procedure for selection of specialized organizations is wrong. The tender (competition) can be held when the volume of specific services is already known and the executor for provision of such services needs to be selected. If the volume of specific services is unclear, we have the case of allowing certain entity to provide services in the market (that is granting the permit to perform certain activity). The method for letting only qualified entities (that can provide high quality services) to perform certain activity is well known. This, of course, is not tender but licensing.

Therefore, special attention should be paid to the flaws of current legislation that facilitate corruption in the area related to public auctions.

C. RECOMMENDATIONS ON IMPROVEMENT OF LEGISLATIVE REGULATION OF PUBLIC AUCTION

Considering the above, current Ukrainian legislation related to public auction should be significantly refined.

Based on the objective of property sale at public auction, it is possible to define the guiding principles for improvement:

- Transparency of sale;
- Predictability of auction consequences;
- Maximum reduction of potential corruption.

Observance of sale transparency principle envisages provision of timely and complete information to potential buyers about future public auction, its conditions, and property to be sold. Potential buyers must enjoy an opportunity to get familiar with the property through its examination, testing, etc. This means that the procedures for conducting a public auction must be transparent and the rules must be consistent (which can be achieved through unification of the rules). Specifics of differences in the sales procedures must be established only if they are dictated by the specifics or differences of respective types of property.

Observance of the principle related to predictability of auction consequences envisages the establishment of proper mechanisms for protection of the rights of recoverer, debtor, honest buyer – auction winner, and other participants of the auction. Special attention should be paid to protection of the rights of an honest buyer and prevention of mechanisms that make it possible to deprive an honest buyer of acquired property due to the circumstances that were not known and could not be known to a buyer.

Observance of the principle of maximum reduction of corruption potential in the context of legislative development envisages the establishment of regulation under which neither the unscrupulous behavior of state executive officer or auction organizer, nor the receipt of insider information can result in decisive advantages of certain auction participants over the other participants.

In our opinion, the implementation of the above fundamental principles will help engage the maximum number of potential buyers and create competitive environment favorable for the establishment of a fair price on the property to be sold.

In addition, the method for selection of specialized organizations for conducting of public auctions should be changed. In other words, the selection of such organization on tender (competition) basis should be replaced by licensing.

X. STATUS OF THE UNIFIED STATE REGISTRY OF JUDICIAL ENFORCEMENT AND ITS ADEQUACY TO THE NEEDS FOR ENFORCEMENT OF COURT DECISIONS

A. PREREQUISITES

The unified state registry of judicial enforcement (hereinafter – the Registry) was created in 2003 by the order of the Ministry of Justice of Ukraine dated May 20, 2003, # 43/5 in order to enhance the effectiveness of management of State Executive Service and secure access to the required information for state agencies and their officials, as well as natural persons and legal entities – participants of judicial enforcement.

The Ministry of Justice of Ukraine was determined to be the registry holder. “Information Center” - the state enterprise of the Ministry of Justice of Ukraine – is the Registry administrator (hereinafter – Administrator). It administers access to computer database and is responsible for database creation, functioning, technological support and maintenance, as well as protection and storage of Registry data. Local (district, city, etc.) departments of state executive service are registrars (i.e. they keep the Registry and populate the database).

The Registry secures the provision of required information to State Executive Service and statistics authorities, notaries, as well as natural persons and legal entities based on respective agreements with Administrator or through written request to Administrator.

B. ASSESSMENT OF CURRENT LEGISLATIVE REGULATION

LAWS AND REGULATIONS THAT REGULATE THE PROCEDURE FOR KEEPING AND USING THE REGISTRY

The activity related to keeping and using the unified Registry of judicial enforcement is regulation by a number of laws and regulations, specifically the Law of Ukraine “On State Executive Service”, the Law of Ukraine “On Judicial Enforcement”, Instruction on conducting of judicial enforcement activities approved by the order of the Ministry of Justice of Ukraine dated Dec. 15, 1999, #74/5. These normative acts establish general rules and obligations of officials with regard to collection of information, its entry to respective registries, as well as define the rights of persons on receipt of required information. Major legislative instrument that regulates in detail the procedure for population, administration, and use of the Registry is Regulation on the unified state registry of judicial enforcement, approved by the Ministry of Justice of Ukraine dated May 20, 2003, #43/5 (hereinafter – Regulation).

The Regulation establishes the procedure for registration of executive documents data and stipulates the data that must be recorded in the Registry. It specifies the information on judicial enforcement that must be recorded in the Registry, as well as the time period during which such information should be recorded. It separately stipulates the procedure for the receipt of information from the Registry, as well as the form for provision of such information. It provides for a fee to be paid for the receipt of information in the amount that must be determined by the Ministry of Justice of Ukraine. The Regulation specifies the

persons responsible for completeness and accuracy of information recorded in the Registry, as well as liability for the loss of information due to the fault of Administrator’s personnel.

Procedure for populating the registry with information

The registrars – departments of State Executive Service – populate the Registry with information. Pursuant to the requirements of the Regulation, the following data is entered in the Registry: information on the date of receipt of judicial enforcement document/writ of execution by state executive officer; name of the writ of execution, its number and date of issuance; name of the agency/official that issued writ of execution; full name of recoverer and debtor, their addresses, and, if available, identification number of a natural person – tax payer or identification code under the unified state registry of enterprises and organizations of Ukraine – for legal entities; data on collection of funds in favor of the state; information on refusal to initiate judicial enforcement or postponement in the initiation of judicial enforcement specifying the date of adoption of respective resolution and registration number of judicial enforcement; on levy of judicial enforcement fee; on recovery/foreclosure of funds at debtor’s accounts; on property inventory and seizure of debtor’s property; on relief of property; on conducting expert assessment; on transfer of property for sale and status of sale; information on revaluation of property, withdrawal of property from sale, amount of funds transferred to respective department of state executive service; information on completion of judicial enforcement and other data stipulated by laws and regulations.

Procedure for receipt of information from the registry

Information from the Registry is provided in the form of extracts.

Information from the Registry is provided free of charge upon written request of the court, economic court, prosecution authorities, inquiry and investigation authorities, as well as other state agencies and their officials in connection with performance of their duties stipulated by current legislation of Ukraine.

Legal entities and natural persons are also entitled to receive extracts from the Registry regarding a debtor or seized property. Extracts are provided upon written application to Administrator or based on respective agreement concluded with Administrator.

Legal entities and natural persons must pay a fee for the receipt of extracts from the Registry. The amount of fee must be approved by the Ministry of Justice of Ukraine. Currently the amount of fee payable for the receipt of information from the registry is not approved. Therefore, legal entities and natural persons are actually unable to use this service and receive extracts from the Registry.

Only state executive officers can use information from the Registry. The database is built in such a way that information on judicial enforcement can be received by the state executive officer who works at the same department of State Executive Service in which judicial enforcement was initiated. Password access to specific judicial enforcement is also possible in cases when state executive officers from different units or different departments of State Executive Service are responsible for the enforcement process.

Description of technical specifics of the registry

The Registry is a unified database placed at Administrator's server and continuously updated with information on judicial enforcement through clients' modules installed in the computers of State Executive Service departments.

Data base volume is extremely large since it includes the data not only on the writs of execution, but also on the actions of state executive officers and documents drawn up in the course of judicial enforcement.

Based on expert assessment, database software meets the requirements established by current laws and regulations related to judicial enforcement. It allows to enter additional information on certain documents and actions of state executive officers, which are not mandatory for inclusion in the Registry but considered to be important for the enforcement process.

Work with the Registry is based on "client-server" principle. It means that information on judicial enforcement is forwarded to the database directly from the clients' modules of respective departments of State Executive Service.

Client programs can also be installed in the computers of legal entities and natural persons. Such programs cannot change information in the registry. They can only perform search function and form the extracts. Due to the lack of tariffs on the receipt of extracts, currently client programs are not installed for legal entities and natural persons.

Currently it is impossible to get access to the Registry through the Internet without using the client's program. Considering the fact that this service should be a paid, the implementation of this function requires the technology that would secure identification of the recipient of Registry's services. For example, one of the options includes the use of "electronic digital signature". However, such signature is not used in Ukraine, although the Law of Ukraine "On Electronic Digital Signature" was adopted back in 2003.

State executive officers directly add to the Registry the information regarding each judicial enforcement. The official responsible for entry of information to the Registry can also be appointed in respective department of State Executive Service. Each state executive officer has individual user name and password. Therefore, it is always possible to clarify who and when entered or changed respective data.

If several state executive officer or state executive officers from different department of State Executive Service are engaged in the enforcement process, the person who initiated judicial enforcement and made respective entry in the Registry can set a password access to this entry for specific state executive officers. All other state executive officers can search the Registry for information on a debtor or his property, but cannot introduce changes with regard to such judicial enforcement without special access.

Client program for state executive officers is implemented on a rather high level. It has a variety of options regarding the search of Registry information on the identity of a debtor or his/her property, allows to compile required documents for state executive officers that can be saved as files and/or printed. If all departments of State Executive Service use this Registry and populate it with data, the enforcement of court decision will be greatly facilitated.

As viewed by the specialists of State enterprise "Information Center", there are no technical barriers for further improvement or modernization or software and implementation of all functions required for judicial enforcement.

State enterprise "Information Center" created a training module/version of the Registry . State executive officers are constantly trained to use the Registry. Registry software is regularly improved and/or modified in case of changes in legislative regulation of judicial enforcement.

Barriers that hamper normal FUNCTIONING of the registry

Problems that hamper normal functioning of the Registry can be subdivided into objective (economic and technical) and subjective.

Economic Problems

The unified state registry of judicial enforcement turned out to be a resource consuming database in terms of both data volume and cost of its creation and administering.

The Registry was created upon the state order and at the expense of the state budget of Ukraine. Eventually funding was reduced. Currently there is no funding at all.

When the Registry was created it was envisaged that entry of information to the Registry will be done free of charge and only the receipt of information from the Registry will be a paid service. Since the amount of such payment has never been approved, the Registry, in fact, is used free of charge.

Lack of funding hampers upgrading of software. As a result, the Registry cannot accommodate 100% of documents created by state executive officers during the enforcement process (inquiries, letters, etc).

Economic problems also include inadequate funding of State Executive Service and, as a result, lack of the required number of computers for the activity of state executive officers.

According to the "Information Center" only 650 of 727 departments of State Executive Service are connected to the Registry. Of 7000 state executive officers only 700 officers have computers and can independently work with the Registry.

This has a negative impact on information content of the Registry. Given this low level of technical support it is impossible to mandated form state executive officers that they properly populate the Registry with required data.

Subjective Problems

Not all state executive officers has an adequate qualification level and computer literacy. Most of them got used to paper form of judicial enforcement documents and are unwilling to use computer based system. The Registry has not replaced paper-form execution of executive proceedings and state executive officers perceive it as an additional work.

Prior to introduction of the Registry, State Executive Service (SES) departments submitted reports on judicial enforcement with the help of local data bases created with Microsoft Excel or Microsoft Access. These data bases are not interlinked and do not make it possible to search for information in data bases of other SES departments. Currently certain SES department still submit their reporting in this format.

There also exists certain unwillingness with regard to entry of information on all judicial enforcements. As a rule, information on collection/recovery of insignificant amounts is entered in the Registry. As for the recovery of large amounts from a debtor, rather often are the attempts to “hide” the information and enforce the decision without reflecting all actions and documents in the Registry.

Due to the similar reasons information on a seized debtor’s property which is subject to the sale at a public auction is also not always entered in the Registry.

Thus, about 1/5 of judicial enforcements are actually registered. If the Registry is not populated at 100% capacity its use will be meaningless since it will not guarantee the accuracy of information received from the Registry.

However, it is impossible to oblige all state executive officers to populate the Registry with information due to the lack of the required number of computers.

C. RECOMMENDATIONS ON IMPROVEMENT OF THE REGISTRY

To amend the Regulation on the Unified State Registry of Judicial Enforcement approved by the order of the Ministry of Justice of Ukraine dated May 20, 2003 #43/5. The amendments should include the following:

1. Normative stipulation of the objective for creation of the Registry that must:

   - Enhance work capacity;
   - Secure reliable recording, storage, and processing of documents and information on legal entities and natural persons – subjects of enforcement, as well as that of citizens’ applications with regard to judicial enforcement;
   - Computerize a complicated information and analytical processing of statistical reporting resulting from the work of each state executive officer, subdivision of SES or SES in general under any area of activity and any criteria during any period of time;
   - Automatically form writs of execution/judicial enforcement documents (resolutions, inquiries, responses, applications, certificates, log books, payment documents, acceptance acts, etc.);
   - Enhance labor, financial, and informational culture of state executive officers;
   - Secure proper control of managers over the discipline of state executive officers;
   - Perform processing, analysis, transfer and storage of accumulated information at the central body of SES;
   - Secure global search (specifically, based on incomplete data) simultaneously under several information systems (under state registries that include the information on legal entities and natural persons, their actual location/place of

residence, civil status, etc., and their rights on the property even if these registries are kept by other state agencies);
- Secure for a state executive officer the possibility to directly and promptly register the encumbrance on a property or accounts of a debtor;
- Separate the access of persons to information and its processing modes in accordance with their competence and functional duties in the process of judicial enforcement, their status as that of participant of judicial enforcement or person interested in the purchase of property or exercising of public control over the enforcement of court decisions.

2. Specification of Registry functions:

- Registration of writs of execution/court orders;
- Initiation of judicial enforcement;
- Registration of information on seizure and sale of property;
- Suspension, postponement, and renewal of judicial enforcement;
- Recording of deposit amounts;
- Recording of fines;
- Recording of expenditures on judicial enforcement;
- Completion of judicial enforcement;
- Transfer of cases from one state executive officer to another;
- Formation of any documents envisaged by judicial enforcement;
- Formation of any reports or certificates;
- Search of information in a database under user-defined queries;
- Keeping of recording and statistical documents with regard to judicial enforcement.

3. Stipulate clear procedures for keeping and populating of the Registry.

4. Define the persons responsible for populating of the Registry.

It would also be expedient to supplement the Law of Ukraine "On Judicial enforcement" with the provision on mandatory publicizing in the Internet of information on conducting of public auction on sale of seized property.

The database of public auctions on sale of seized property should be unified and placed at the web page of the Ministry of Justice of Ukraine. The respective sub-system covering the sale of seized property must include the following information:

- Property inventory;
- Expert valuation;
- Grounds for holding a public auction;
- Date and time of holding a public auction;
- Auction venue;
- Encumbrance of property;
- Auction results;
- Other information.