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Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights

ANALYSIS

Best practices of the Council of Europe member states and the Council of Europe standards pertaining to the judicial control over the execution of national judgments

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List of abbreviations

ADR	Alternative Dispute Resolution
APEO	Association of Private Enforcement Officers
CEPEJ	Council of Europe's Committee on the Efficiency of Justice
CEPEJ (2009) 11	Guidelines for a better implementation of the existing Council of Europe's Recommendation on Enforcement, European Commission on the efficiency of Justice (CEPEJ), CEPEJ (2009) 11 REV
CoE	Council of Europe
CM	Council of Ministers of the Council of Europe
CMS	Case Management System
CPC	(Ukraine) Civil Procedure Code
COMONEX	World Code on Enforcement; international principles on enforcement as developed by UIHJ, the International Union of Judicial Officers
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECtHR Ukraine report	Report on a mission to Ukraine for bilateral consultations with Ukrainian authorities concerning the improvement of enforcement proceedings, August 2018, within the project *Supporting Ukraine in execution of judgments of the European Court of Human Rights*
EU	European Union
ICT	Information-Communications technology
IT	Information Technology
Instruction	Instruction on Compulsory Enforcement of Decisions as adopted by the Decree of the Ministry of Justice of Ukraine of 2 April 2012 No. 512/5
Ivanov	ECtHR Case of *Yuri N. Ivanov vs. Ukraine*, 40450/04, 15 October 2009
LEP	Law on Enforcement Proceedings, 2 June 2016, No. 1404-VIII
LOBP	Law of Ukraine On the Bodies and Persons Authorised to Enforce Court Decisions and Decisions of Other Bodies from 2 June 2016 No. 1403/VIII
MoJ	Ministry of Justice of Ukraine, including the Division of Enforcement of Decisions
M&C	Monitoring & Control
Draft Strategy	Draft National Strategy for the implementation of general measures for execution of the pilot judgment in the case Yuriy Nikolayevich Ivanov v. Ukraine and the Grand Chamber judgment in the case Burmych and others v. Ukraine (May 2019)
NGO	Non-governmental organisation
PEO	Private Enforcement Officer
PI	performance indicator(s)
QA	Quality Assurance

Rec 17(2003)	Council of Europe Recommendation (2003) 17 of the Committee of Ministers to member states on enforcement (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies)
SES	State Enforcement Service
SOC	Socially owned company
SPC	Standards for Professional Conduct
TNA	Training Needs Analysis
UIHJ	International Union of Enforcement Officers

Executive summary

The Ministry of Justice of Ukraine requested an analysis of best practices of the Council of Europe member states and the Council of Europe standards pertaining to judicial control over the execution of national judgments. The analysis is prepared within the framework of the Council of Europe project "Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights" (the Project), which is funded by the Human Rights Trust Fund and implemented by the Justice and Legal Co-operation Department of the Council of Europe. The Project requested that Mr Jos Uitdehaag, who had previously prepared an analysis of the regulatory framework in the field of enforcement in Ukraine, would conduct this analysis and participate in related project events.[1]

The scope of this analysis is to provide sufficient background information for the Ukrainian authorities on different mechanisms of judicial control in the context of the implementation of general measures to be adopted by Ukraine for the execution of the judgments in the *Yuriy Nikolayevich Ivanov v. Ukraine*[2] and *Burmych and Others v. Ukraine* group of cases.[3]

By 2020, some progress has been made as to the execution of the mentioned judgements. A draft National Strategy for the implementation of general measures for the execution of the pilot judgment in the case *Yuriy Nikolayevich Ivanov v. Ukraine* and the Grand Chamber judgment in the case *Burmych and others v. Ukraine*[4] was drafted and presented to the Committee of Ministers of the Council of Europe in 2019.

However, at its latest meeting on 5 March 2020, the Committee of Ministers of the Council of Europe "…reiterated their utmost concern at the lack of further tangible action in adopting the relevant institutional, legislative and other practical measures for the execution of this group of cases and expressed serious concern that since the previous examination by the Committee the authorities have not submitted any information on the adoption of the National Strategy; reiterated their call to submit the information mentioned above" .[5]

Specific questions were posed by the Project, mostly related to the examination of the rules introduced in the Council of Europe member states on judicial control over the execution of judgments, ways of applying judicial control, assessment of the tasks of enforcement agents and judges at the stage of enforcing the judgments. Also, the Project requested to provide recommendations on the development of procedural and institutional tools for judicial control over the enforcement of judgments.

The analysis actually covers a larger range of issues than were initially established in the Project's terms of reference. The main reason for this is that the control over enforcement and the enforcement profession in most Council of Europe member states with systems similar to that in Ukraine (where enforcement is independent from the judiciary) is in hands of the judiciary only to a certain extent. Most Council of Europe member countries with a self-

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[1] Mr Jos Uitdehaag is the enforcement agent in the Netherlands, an international enforcement specialist, and Secretary of the International Union of Judicial Officers (UIHJ).

[2] Pilot judgment *Yuriy Nikolayevich Ivanov v Ukraine* (no. 40450/04), judgment of 15/10/2009, final on 15/01/2010

[3] *Burmych and Others v. Ukraine,* (Nos. 46852/13, 47786/13, 54125/13, 56605/13, and 3653/14), judgment of 12/10/2017

[4] See for the full text of the Draft Strategy of the Committee of Ministers, '1348th meeting (June 2019) (DH) - Rule 8.2a Communication from the authorities (31/05/2019) in the case of *YURIY NIKOLAYEVICH IVANOV v. Ukraine* (Application No. 40450/04) [anglais uniquement] [DH-DD(2019)632]' (2019).

[5] Ministers' Deputies 1369th meeting 3-5 March 2020 H46-36 *Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine* (Applications No. 40450/04, 56848/00, 46852/13) (Supervision of the execution of the European Court's judgments). Document CM/Del/Dec (2020)1369/H46-36

employed enforcement system have put the supervisory tasks in the hands of a body within the executive branch.

Misuse of the enforcement process is one of the main problems identified by the case law of the European Court of Human Rights. This especially refers to the misuse of legal remedies, such as objection or appeal in enforcement. In all countries, decisions regarding such legal remedies are in the hands of the judiciary.

International standards underline the importance of preventing and deterring abuses of legal remedies, which in the past have been a major cause of backlogs in enforcement in a lot of countries. The Council of Europe invited those countries to establish mechanisms which prevent procedural abuses by giving, for example, judges and/or enforcement agents more authority to penalise parties who are perpetrating these abuses (e.g. issuance of fines and increasing investigative powers): "States should set up a mechanism to prevent misuse of the enforcement process by either party which should not be considered as a re-adjudication of the case;[6] The judge may amend the enforcement and grant a stay of enforcement."[7]

This principle reasserts the importance of avoiding unnecessary delays, which may be brought about by the unnecessary postponement of enforcement. "There should be no postponement of the enforcement process unless there are reasons prescribed by law. The postponement may be subject to review by the court."[8]

In most countries with a private enforcement system, the role of the courts is limited only to those cases where the integrity or fairness of the enforcement proceedings is at stake. While providing for legal remedies to a limited extent, the main focus is directed at the preventive side of the monitoring and control system – effective supervision, code of ethics, professional standards, and disciplinary proceedings.

"The beneficiary of an enforceable judgment shall not be required to have recourse to other legal procedures to obtain enforcement."[9] A good example of the unnecessary involvement of the court can be found in Article 19, paragraph 2, Law of Ukraine on Enforcement Proceedings: "A peace agreement between parties needs to be approved by the court."

The analysis was prepared on the basis of the Council of Europe standards stemming from the Committee of Ministers' Recommendations with regard to enforcement, the documents of other Council of Europe specialised bodies (e.g. CEPEJ Guidelines on enforcement),[10] and the relevant European Court of Human Rights case law. The expert has also been provided with relevant documents by the Project. The written materials include judgments from the European Court of Human Rights, current Ukrainian legislation, and existing expert opinions related to the problem of the non-execution of judgments by national courts in Ukraine.

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[6] Rec 17/2003 under III.1.E

[7] COMONEX Article 23

[8] Rec 17/2003 under III.1.F

[9] COMONEX Article 4

[10] Council of Europe Recommendation (2003) 16 of the Committee of Ministers to member states on execution of administrative and judicial decisions in the field of administrative law (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies) (hereafter Rec 16/2003)

Council of Europe Recommendation (2003) 17 of the Committee of Ministers to member states on enforcement (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies) (hereafter Rec 17/2003)

CEPEJ, Council of Europe's Committee on the Efficiency of Justice included enforcement of judicial decisions into the list of its priorities. On 17 December 2009, the CEPEJ published the Guidelines for a better implementation of the existing Council of Europe's Recommendation on Enforcement (hereafter CEPEJ 2009 Guidelines)

Council of Europe Opinion No 13 (2010) on "The role of judges in the enforcement of judicial decisions" of the Consultative Council of European Judges

This analysis explores the rules and best practices of the following three Council of Europe member states:

- *Serbia:* One of the reasons for the introduction of the 2011 Law on Enforcement and Security in Serbia (introducing private enforcement) was the enormous backlog of enforcement cases. In 2013, next to Russia, Turkey, Italy, and Ukraine, Serbia was the fifth on the list of states with the highest case count at the European Court of Human Rights. The majority of European Court of Human Rights cases relate to shortcomings in the enforcement system. Besides the introduction of private enforcement, the law focused on improving the system of legal remedies: a substantial number of such legal remedies were not (solely) used for substantive reasons, but very often for tactical reasons (delay). For that reason, court control over enforcement was reorganised.
- *Portugal:* The Portuguese system of private enforcement agents was introduced in 2003. However, there was insufficient attention to the development of a proper professional framework or adequate control. Besides, for a number of actions in the enforcement process, the private enforcement agent still had to ask for authorisation from the court. Such communication appeared complicated and the cause of numerous delays in the enforcement process.
- *The Netherlands:* This country traditionally has a private enforcement system. Yet, there is still a connection between the enforcement profession and the judiciary. Judicial control is visible when it comes to judging the ethical behaviour of the enforcement agent (disciplinary proceedings). On the other hand, the Netherlands is also an example, with regard to private enforcement, of when intervention in the enforcement process should concentrate on those cases where the integrity or fairness of the enforcement proceedings is at stake.

The overall conclusions from this analysis can be summarised as follows:

- The enforcement process should be sufficiently flexible to allow the (private) enforcement agent a reasonable degree of autonomy to make arrangements with the defendant. Such arrangements should be subject to controls that ensure the enforcement agent's impartiality, accountability, motivation and efficiency, and the protection of the (third) parties' interests;
- Enforcement agents should be subject to clearly stated rules of ethics and conduct. The controls could be set out in professional codes of conduct. Disciplinary procedures should be carried out by an independent authority, such as the judiciary;
- Adequate supervision of the enforcement process implies the responsibility and commitment of all authorities involved: the organisation of enforcement agents (Chamber), the executive branch, and the judiciary. A well-developed IT system may facilitate accountability through the use of indicators and management reports. These reports should enable the authorities involved to verify the enforcement of court decisions or, in case the judgment is not enforced, the justification for such non-enforcement within a reasonable time;
- The parties in the enforcement process should be enabled to challenge non-enforcement or enforcement measures within a reasonable timeframe. Such challenges should not halt or delay the enforcement proceedings. A well-organised system of judicial control should avoid unjustifiable halts or delays;
- In order to improve the efficiency of enforcement, professional standards (quality standards) could be introduced. These standards should be audited periodically through either judicial control or control by the supervisory bodies.

1. Introduction

Across Europe, the enforcement of civil and administrative judgments and other judicial decisions has been broadly underestimated by national and international stakeholders, which in the past focused more on the reform of the court systems and training and career development of judges. In 1997 the ECtHR found in its landmark case *Hornsby v. Greece*[11] that a right to a fair trial as mentioned in Art 6 of the ECHR, also refers to enforcement. The legal process should not only focus on court and adjudication but also on the development of an efficient and effective enforcement system: a legal process will not end with a final court decision, even when this decision may be considered fair. It also means that such a decision is implemented.

In the field of civil enforcement, Ukraine adopted new legislation and introduced private (self-employed) enforcement. A reform in the field of enforcement was a necessity since the existing enforcement system showed major deficiencies.

The adjustment of legislation is to be in line with international standards and principles in the field of enforcement, with a strong focus on the protection of human rights, the creation of an independent and fair judiciary as well as development of an impartial, accountable and efficient enforcement system. Needless to say, that a reliable enforcement system is also fundamental for the country's financial system and is a keystone for investments and the development of the economy and the social well-being of Ukraine. Ukraine may further benefit from best practices and lessons learned in other countries.

In this analysis, rules introduced in the CoE member states as to judicial control over the enforcement of judgments are analysed. Specific questions were posed by the Project, mostly related to the examination of the rules introduced in the CoE member states on the judicial control over the enforcement of judgments, ways of application of judicial control, assessment of tasks of enforcement agents and judges at the stage of the enforcement of judgments, recommendations on the development of procedural and institutional tools for judicial control over the enforcement of judgments. However, this analysis has actually covered a larger area of questions than initially established by the Project's terms of reference. The main reason is that control over enforcement and the enforcement profession in most CoE member states with a system similar to Ukraine (where enforcement is independent from the judiciary) is *not* in hands of the judiciary but in hands of a body within the executive branch.

For that reason, the analysis also pays attention to the monitoring and control as it is organised outside judiciary. In that respect, the statistics on control as mentioned in chapter 4 and 5 give a detailed overview how such control is organized. For those statistics, the analysis uses the data as gathered by UIHJ, the international organization of judicial officers. These statistics are based on a questionnaire that was filled in by 48 countries worldwide, among which 29 CoE member states: Albania, Belgium, Bulgaria, Denmark, England and Wales, Estonia, France, Georgia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxemburg, Northern Macedonia, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Scotland, Slovakia, Slovenia, Spain, Sweden and Switzerland. In case of the statistics mentioned, the data refer to the outcomes of those CoE member states only.

In view of this analysis, a special focus is given to the judicial control in Serbia, Portugal and the Netherlands.

[11] Hornsby v. Greece; ECtHR March 19, 1997; number 107/1995/613/7

2. International standards on supervision and control

2.1. Introduction

Though the organization of enforcement differs within the CoE member states, the CoE has identified common standards and principles:

- Council of Europe Recommendation (2003) 16 of the Committee of Ministers to member states on execution of administrative and judicial decisions in the field of administrative law (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies) (here after Rec 16/2003);

- Council of Europe Recommendation (2003) 17 of the Committee of Ministers to member states on enforcement (adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies) (here after Rec 17/2003);

- CEPEJ, Council of Europe's Committee on the Efficiency of Justice included enforcement of judicial decisions into the list of its priorities. On December 17, 2009 CEPEJ published the Guidelines for a better implementation of the existing Council of Europe's Recommendation on Enforcement (here after CEPEJ 2009 Guidelines)[12];

- Council of Europe Opinion No 13 (2010) on "The role of judges in the enforcement of judicial decisions" of the Consultative Council of European Judges.

The CoE Recommendations 16/2003 and 17/2003 contain merely the same principles as the case-law of the ECtHR, to which it expressly refers. Stating that enforcement procedures should be as effective and efficient as possible, the Recommendations outline ideas, which might be followed by the states that wish to improve the effectiveness of enforcement procedures and practices.

2.2. Scope of supervision and control

The enforcement agent's profession becomes more and more complex. The enforcement agent, within the limitations based on law, as an exponent of the State, is vested with the power to perform certain activities of public interest. At the same time, though the activities of the enforcement agent are not entrepreneurial, as a legal professional, the enforcement agent is responsible to run his office (Section 3 of the Law on Bodies and Persons Authorised to Enforce Court Decisions and Decisions from other bodies[13]). Society (i.e. State and parties) demands a guarantee that the enforcement agent acts with care, independence, and integrity. Claimants, defendants, and courts monitor closely the activities of the enforcement agent. Competition may influence the continuity of the office.

Enforcement agents in Ukraine also act as both a public servant and an entrepreneur. As a public servant, the profession is subject to a strict legal framework (LoBP and other legislation regulate the formal duties); as an entrepreneur, the enforcement agent will be influenced by what is happening in a (competitive) market. The enforcement agent will need to find a balance between these two functions. Safeguarding such balance is one of the aims of the supervision and control system.

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[12] Guidelines for a better implementation of the existing Council of Europe's Recommendation on Enforcement, European Commission on the efficiency of Justice (CEPEJ), CEPEJ (2009) 11 REV

[13] Law of Ukraine "On the Bodies and Persons Authorised to Enforce Court Decisions and Decisions of Other Bodies" from 2 June 2016 No. 1403/VIII (here after LOBP)

When discussing the supervision and control system, we need to make a distinction between supervision and control:

- *Supervision of activities* is the process whereby an authority makes observations to the enforcement agent on his or her working methods (scheduling problems, lack of courtesy, *etc*.); it is a sort of simplified control that does not involve actual examination of a complaint, but the aim of which is to guarantee a proper administration of justice.

- *Control of activities* means control of the lawfulness of the actions carried out by enforcement agents. Judiciary control falls within this category.

As we have seen, when looking at the European standards, the monitoring and control system should be transparent and predictable. This means at least:

1. Setting a clear standard to check against,
2. Establishing a comprehensive and clear distribution of roles and responsibilities within the Monitoring & Control system and
3. Carrying out intensive on-going public awareness efforts to ease understanding and usage of the complaint mechanism by the general public.

In this respect, of course, the legislative framework (LOBP and Law on Enforcement Procedure[14]) as well as the regulative framework, e.g. the Code of Ethics and the Instruction on Compulsory Enforcement of Decisions[15] should serve as a reference tool for defining desired conduct and misconduct. In addition, it is important to mention that a number of European countries meanwhile introduced (or will introduce) professional standards, a set of quality norms to be implemented in each individual enforcement agent's office, and a basis for the audit of such offices.

The regulative framework is mandatory for and enforceable against each and every enforcement agent. For this to be possible the appliance to the regulative framework is monitored by the national organization (like the Association of Private Enforcement Officers, here after APEO), the Ministry of Justice, and courts. Each body has its role and responsibility in the monitoring and control system. Ideally, the co-ordination of the monitoring activities is done through information sharing, joint planning, and joint policymaking between representatives of these controlling bodies.

The status of the enforcement agents in the CoE member states influences the way supervision and control system is organised. Supervision in the CoE member states with a similar system as in Ukraine (with both State and self-employed enforcement agents), the supervision is carried out both externally (normally, by the Ministry of Justice) and internally (normally, by the Chamber of private enforcement agents).

With regard to these supervisory activities, a distinction can be made between regular inspection and extra-ordinary inspections. Regular inspections are done on a periodic base. Here there is an additional role of the judiciary when it comes to extra-ordinary inspection: (for example) the President of a respective court for the territory covering the activity of the private enforcement agent may request such extra-ordinary control based on signals that have been received. Normally, a court will address such requests for control to the external or internal controlling bodies.

[14] Law on Enforcement Proceedings, 2 June 2016, No. 1404-VIII here after LEP
[15] Instruction on Compulsory Enforcement of Decisions as adopted by the Decree of the Ministry of Justice of Ukraine of 2 April 2012 No. 512/5; here after: Instruction

In most countries, private enforcement agents are obliged, on a periodical base, to submit a report on their activities. Such a report might refer to the total number of handled cases; the total number of disposed cases or the total number of unprocessed cases at year-end. In addition, most countries oblige the enforcement agent to submit financial reports of incomes realized through enforcement and the total number of claims.

The court intervention in the enforcement process concentrates mainly on such cases where integrity or fairness of the enforcement proceedings is at stake. In those cases, upon a complaint (legal remedies such as an objection or appeal against a decision of the enforcement agent) the court plays an active role. Such a role takes place *a posteriori* and only with regard to enforcement measures or refusal of enforcement measures that are disputed by one of the parties. Here there is no initiating role of a judge.

Those countries that opted for control of the enforcement process by the judge *(a priori)* are mainly countries where judges are also enforcement agents (e.g. Bosnia-Herzegovina, Croatia, Denmark) or countries where enforcement agents are state servants. In such case judges usually share their tasks with other authorities (e.g. Ministry of Justice, e.g. Croatia). Some countries enable courts to control the procedural activities of the enforcement agents (e.g. Moldova) or are able to impose a fine on enforcement agents for delayed enforcement.

2.3. Judicial control in enforcement

Regarding the relationship between courts and enforcement agents, the CoE Recommendation 17/2003 states that the powers and responsibilities of enforcement agents in relation to the judge should be clearly defined to ensure a clear delineation of authority in carrying out the enforcement process.[16]

The CEPEJ Guidelines 9-12 also refer to the role of courts in the enforcement process. Guideline 10 confirms the principle from the CoE Recommendation 17/2003:

> *10. Notwithstanding the role of the court in the enforcement process, there should be effective communication between the court, the enforcement agent, the claimant, and the defendant. All the stakeholders should have access to information on the ongoing procedures and their progress.*

Guideline 9 and 11 refer to the transparency of enforcement:

> *9. Member states should take measures to ensure that information is available on the enforcement process and there is transparency of the activities of the court and those of the enforcement agent at all stages of the process, provided that the rights of the parties are safeguarded.*
>
> *11. Member states should provide the potential parties to enforcement procedures with information on the efficiency of the enforcement services and procedures, by establishing performance indicators against specified targets and by indicating the time different procedures might take.*

Guideline 12 refers to the supervision (control) over the profession:

> *12. Each authority should provide for the adequate supervision (having regard to any relevant case law of the ECtHR) of the enforcement process and should bear*

[16] Rec 17/2003 under IV.5 and explanatory memorandum under 58

responsibility for the effectiveness of the service. Accountability may be achieved by management reports and/or customer feedback. Any reports should allow for verification that the judgment has been executed or (if not) that genuine efforts have been made within a reasonable time whilst respecting the equality of the parties.

Most CoE member states have introduced in their enforcement legislation legal remedies as a method for court intervention against irregularities in the enforcement process. Judicial control in the enforcement process in most countries is limited to this role.

Such role of judiciary as the competent authority to rule on disputes in enforcement proceedings is confirmed by international standards. In this respect, the CoE states the following:

The enforcement procedure must be implemented in compliance with fundamental rights and freedoms (Articles 3, 5, 6, 8, 10, 11 of the [ECHR], data protection, etc.). The decision to be enforced must be precise and clear in determining the obligations and rights engaged in order to avoid any obstacle to effective enforcement. In order for judges to fulfil their tasks, the judiciary should be entrusted with the following missions concerning enforcement:

- *[...] an appeal to a judge if the enforcement is not initiated or is delayed by the relevant bodies; a judge should also be involved when fundamental rights of the parties are concerned; in all cases, the judge should have the power to grant just compensation;*
- *[...] an appeal or complaint to a judge if there is any abuse in the enforcement procedure;*
- *[...] an appeal to a judge in order to settle litigation concerning enforcement and to give orders to state authorities and other relevant bodies to enforce decisions; at the final stage, it should be up to the judge to use all possible ways to ensure enforcement;*
- *[...] to identify and take due account of the rights and interests of third parties and members of the family including those of children*.[17]

Also, the COMONEX refers to such principles: *Only a judge can rule on disputes arising from the enforcement and order the measures necessary for its implementation at the request of one of the parties or of the enforcement agent. The judge to whom an application is made by the debtor, an interested third party, the judicial officer or enforcement agent may suspend or cancel an enforcement measure should a sound reason justify such.*[18]

Though a reference to supervision is done in the paragraph on courts, supervision is worked out further in detail in other Guidelines (see paragraph 2.4).

2.4. Supervision in the field of enforcement

The legislator has an important role in the establishment of the working environment of the enforcement agent. The CEPEJ 2009 Guidelines come with concrete suggestions, such as defining certain quality standards:[19]

[17] Council of Europe Opinion No 13 (2010) on "The role of judges in the enforcement of judicial decisions" of the Consultative Council of European Judges; points 8,9 and 18
[18] COMONEX article 22
[19] CEPEJ 2009 Guidelines under 75-77

In order to undertake quality control of enforcement proceedings, each Member State should establish European quality standards/criteria aiming at assessing annually, through an independent review system and random on-site inspection, the efficiency of the enforcement services. Among these standards, there should be:

a) *Clear legal framework of the enforcement proceedings establishing the powers, rights and responsibilities of the parties and third parties;*
b) *Rapidity, effectiveness and reasonable cost of the proceedings*
c) *Respect of all human rights (human dignity, by not depriving the defendant of a minimum standard of mere economic subsistence and by not interfering disproportionally with third parties' rights, etc.)*
d) *Compliance with a defined procedure and methods (namely availability of legal remedies to be submitted to a court within the meaning of Article 6 of the ECHR)*
e) *Processes which should be documented*
f) *Form and content of the documents which should be standardised*
g) *Data collection and setting up of a national statistic system, by taking into account, if possible, the CEPEJ Evaluation Scheme and key data of justice defined by the CEPEJ*
h) *Competences of enforcement agents*
i) *Performances of enforcement agents*
j) *The procedure, on an annual basis:*

- *the number of pending cases,*
- *the number of incoming cases,*
- *the number of executed cases*
- *the clearance rate,*
- *the time taken to complete the enforcement*
- *the success rates (recovery of debts, successful evictions, remittance of amounts outstanding, etc.)*
- *the services rendered in the course of the enforcement (attempts at enforcement, time input, decrees, etc.)*
- *the enforcement costs incurred and how they are covered*
- *the number of complaints and remedies in relation to the number of cases settled.*

The performance data should be based on representative samples and should be published.

These assessment criteria could be defined at a European level, in order to strengthen confidence between member states, particularly given the prospect of a growing number of international enforcement cases.

Additional to defining quality standards the control over the activities of the enforcement agents is also of importance. CEPEJ 2009 Guidelines define control as follows:

Control of activities means control of the lawfulness of the actions carried out by the enforcement agents. It may be carried out a priori (before the enforcement agents act) or a posteriori (after the enforcement agent acts) by a "disciplinary" authority.[20]

Such supervision or control might result, when necessary, in disciplinary sanctions.

Preferably the assessment is performed by a body outside the profession:

[20] CEPEJ 2009 Guidelines, glossary

The authorities responsible for supervision and/or control of enforcement agents have an important role in also guaranteeing the quality of enforcement services. The Member states should ensure that their enforcement activities are assessed on an ongoing basis. This assessment should be performed by a body external to the enforcement authorities (for example, by a professional body) The Member states' authorities should clearly determine the control procedures to be performed during inspections.

Member states should ensure that the arrangement for monitoring the activities of enforcement agents does not hamper the smooth running of their work.[21]

2.5. Code of ethics

During the last decades, it has become a commonly accepted practice to develop professional ethical standards for many different groups of professionals in order to serve the dramatic increase in the ethical expectations of the society towards civil servants and entrepreneurs. It is undisputed that such a set of rules is of even bigger importance, wherever professionals have the state-given right to interfere with the rights (e.g. property rights) of others. The development and promotion of a Code of Ethics for enforcement agents is therefore an important tool on the way to lift the profession to higher standards and bigger acceptance within the population.

Also, the CoE recommendations and CEPEJ Guidelines make obvious reference to the need to develop binding ethical guidelines.

"A profession's ethical standard must be compatible with civil society's common morality, but at the same time go beyond this common morality in the way that it has to interpret those general rules for the specific details of the work of a particular occupational group. The very exercise of developing a code is in itself worthwhile; it forces a large number of people to think through in a fresh way their mission and the important obligations they have as a group and as individuals with respect to society as a whole. At the same time, it can be observed, that ethical regulations, tailor-made for a specific profession, are able to "...enhance the sense of community among members, of belonging to a group with common values and a common mission."[22]

The enforcement agent is able to perform certain actions, based on his/her training and appointment that the general public cannot. The enforcement agent is given a certain state power. This means that it is important to lay down how this power and authority are used in service to the creditor, the debtor, and society. In order to preserve the exploitation of the creditor or the debtor and to preserve the integrity of the profession, enforcement agents should lay down Codes of conduct for themselves, either via the respective (private) sector itself or via the national government. The codes of conduct should draw standards of conduct to ensure that every enforcement agent meets those standards, by disciplining if they do not meet those standards or do not practice accordingly.

Another reason for the development of such codes is the fact that the enforcement agent has a complete monopoly on civil enforcement. To avoid private justice and to maintain the public's trust in the profession it is important that the performance of the duties of the enforcement agent is well observed and that an independent disciplinary committee can impose sanctions.

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[21] CEPEJ 2009 Guidelines under 78-79

[22] Kultgen J, 1988. Ethics and Professionalism**.** Philadelphia; University of Pennsylvania Press. pp. 212-213.

At the same time, one has to be aware that professional behavior/ethics encompasses a much greater part of the professional's life. *"If a professional is to have ethics then that person needs to adopt that conduct in all of his dealings."*[23]

Judicial control is also performed when it comes to infringements on the ethical framework for enforcement agents. The private enforcement agent has disciplinary liability if upon exerting the activities, the agent infringes the provisions of law and other regulations and infringes the prestige of the profession of private enforcement agents. Also, activities carried out outside professional activities can be subject to disciplinary proceedings. See in this respect the CEPEJ 2009 Guideline 80: *"Breaches of laws, regulations or rules of ethics committed by enforcement agents, even outside the scope of their professional activities, should expose them to disciplinary sanctions, without prejudice to eventual civil and criminal sanctions"*. For example, in the Netherlands, the majority of the members of the disciplinary body are members among judges. In Latvia, a judge of the Supreme Court is appointed in the disciplinary body.

2.5. Professional standards

During the last decades, it has become a commonly accepted practice to develop professional (ethical) standards for different groups of (legal) professionals. It is undisputed that such a set of rules is of even bigger importance, wherever professionals, such as enforcement agents, have the state-given right to interfere with the rights (e.g., property rights) of others. The development and promotion of the Code of Ethics and professional standards are, therefore, important tools on the way to lift the profession to higher standards and bigger acceptance within the society.

More countries have started with the development of professional standards, a set of quality norms for enforcement agents to be implemented in the office. As we have seen in the previous chapter 2 also the CoE recommendations and CEPEJ Guidelines make obvious reference to the need to develop binding ethical guidelines and professional standards.

Both the Code of Ethics and the professional standards define accepted and acceptable behavior of the profession and promote the standards of practice. This way a framework for professional behavior and responsibilities is created that functions as a benchmark for the enforcement agents to use for self-evaluation.

Once this framework is in place it will also function as an audit instrument for supervisory bodies, checking the compliance of enforcement agents with those norms and, if necessary, initiates proper measures in case the norms are not respected.

Such a review is done through an audit system. The organizing and testing of the regular audit is the responsibility of the supervisory bodies. On a regular base (e.g., every two years) a formal review on compliance with the Professional Standards is carried out. If an enforcement agent does not meet the standards or does not have a positive assessment report, this is to be considered a disciplinary offense.

2.6. Performance reports

In order to measure the progress and efficiency of enforcement, the collection of data regarding the enforcement process is important. In most CoE member states, legal provisions also refer to the obligation of the enforcement agent to submit periodic reports to the national organization (Chamber) and/ or the Ministry of Justice. These reports are used for the

[23] Wikipedia on Professional ethics

monitoring and control by the supervisory bodies. Provisions on the performance reports may also include the obligation to disclose information on the assets.

Contrary to most countries there is no obligation of the Ukrainian private enforcement agent to deliver periodic financial reports (in order to control the money flow within the office and to prevent money disappearing from the special account) and for example the annual balance sheet and profit and loss account. Article 27 paragraph 7 of the LOBP just in general wordings refers to the obligation of the private enforcement agent to submit information to the Ministry of Justice.

It is, however, important on a regular base to control the financial position of the enforcement agent. As we will see in the next chapter, for example, in the Netherlands on a periodic basis (quarterly) a private enforcement agent is obliged to report to the supervisory authority on the money flows within the office. This is done through a template obligatory for all private enforcement agents and needs to safeguard:

- That money entrusted to the private enforcement agent in connection with enforcement is transferred to the creditors;
- That no deficit in the balance of the special account exists (presently not in Ukrainian law)
- That the private enforcement agent is not taking any financial risks.

If a private enforcement agent does not meet these obligations, this is considered a disciplinary offense (in most countries, including the Netherlands, immediately resulting in immediate suspension of the private enforcement agent). In that respect, we recommend adding this as a disciplinary violation in the LOBP.

3. Judicial control in enforcement

3.1. Judicial control in Ukraine

In the pilot judgment (2009) *Yuriy Nikolayevich Ivanov v Ukraine*[24]*,* the ECtHR stressed the urgency to adopt specific legislative and administrative reforms to resolve the systemic problem of the non-enforcement or delayed enforcement of national court decisions in Ukraine. The deadlines that were set for the creation of an effective national remedy remain without success.

On 12 October 2017, another judgment ECtHR delivered another judgment against Ukraine in the case of *Burmych and Others v. Ukraine*[25]. 12 148 Ivanov-type cases were removed from the list of pending cases against Ukraine at the ECtHR. ECtHR concluded that since the Ivanov judgment, the required general measures were still not implemented and an effective remedy with regard to the non-enforcement of judicial decisions was still missing. The ECtHR further noted that the root causes of the problems were of a fundamentally financial and political nature.

Until now (2020) some progress has been made. A *draft National Strategy for the implementation of general measures for execution of the pilot judgment in the case Yuriy Nikolayevich Ivanov v. Ukraine and the Grand Chamber judgment in the case Burmych and others v. Ukraine"* was drafted in 2019.

[24] Pilot judgment *Yuriy Nikolayevich Ivanov* v Ukraine (no. 40450/04), judgment of 15/10/2009, final on15/01/2010

[25] *Burmych and Others v. Ukraine,* (Nos. 46852/13, 47786/13, 54125/13, 56605/13, and 3653/14), judgment of 12/10/2017

However, as was the conclusion of the Committee of Ministers of the Council of Europe on 5th March 2020[26]: *"… noted the recent legislative amendments and other measures undertaken; reiterated however their utmost concern at the lack of further tangible action in adopting the relevant institutional, legislative and other practical measures for the execution of this group of cases and expressed serious concern that since the previous examination by the Committee the authorities have not submitted any information on the adoption of the National Strategy, the mandate of the Legal Reforms Commission and the body, at the highest political level, which should be responsible for taking the lead in this matter; reiterated their call to submit the information mentioned above".*

As mentioned in paragraph 2.2, the role of the judiciary in enforcement in most CoE member states is limited to the decisions in case of infringements during the enforcement process, opposition to the enforcement or attachment, to decide on the challenges to the enforcement agent or to decide on other issues raised by the enforcement agent, by parties or by third parties.

The main provisions regarding the use of legal remedies in Ukraine can be found in Section 10 of the LEP. Both the legal remedies as well as the role of the courts must be clear. A delay in the execution of a judgment may be justified in particular circumstances, but this delay may not be such as to impair the essence of the right protected under Article 6 paragraph 1 of the ECHR.[27]

In that respect, we need to mention the wide discretionary powers of the Ukraine Bailiff Service. This is not in line with other countries. Errors or lack of information in the documents submitted to the Bailiff Service or "unclear" formulation in the court decisions (as mentioned in the Draft Strategy) should be addressed to the court. It should not be a reason to immediately refuse the enforcement of judgments.

3.2. Judicial control in CoE member states: Serbia

3.2.1. Introduction

The enforcement system in Serbia is comparable with the Ukraine enforcement system. Serbia introduced a new Law on Enforcement and Security (LoES) in 2011. This law introduced a parallel system of self-employed (private) enforcement agents, in addition to the existing system of enforcement through the courts. The law intended to introduce a more effective and efficient enforcement system. The newly appointed enforcement agents started their offices in May 2012. With the introduction of the new law, improvements became visible; the backlog of enforcement cases decreased; however, it was also obvious that the LoES needed further improvement. Despite the new law, some major challenges remained.

3.2.2. The 2011 Law on Enforcement and Security (LoES 2011)

One of the reasons for the introduction of 2011 LoES was to contribute to a higher degree of judicial efficiency in the light of an enormous backlog of cases, especially of enforcement cases. The need for this was obvious, based on the case-law of the ECtHR against Serbia. In

[26] Ministers' Deputies 1369th meeting 3-5 March 2020 H46-36 Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine (Applications No. 40450/04, 56848/00, 46852/13) (Supervision of the execution of the European Court's judgments). Document CM/Del/Dec (2020)1369/H46-36

[27] See *Fuklev* v. *Ukraine*, ECtHR 7 June 2005, no. 71186/01 and *Jankulovski* v. *FYROM*, ECtHR 3 July 2008, no. 6906/03. Another example is the case *Pakom Slobodan Dooel* v. *FYROM*, ECtHR 21 July 2010, no. 33262/03

2013, next to Russia, Turkey, Italy and Ukraine, Serbia was the fifth on the list of states with the highest case-count (per 31 December 2013 there were 11250 pending cases or 11,3% of the total number of pending cases). All these cases dated from the time prior to the introduction of the self-employed enforcement system. The major part of ECtHR cases relates to shortcomings in the enforcement system: lengthy proceedings (backlog of cases)[28], lack of effective legal remedies[29], responsibility of the State for enforcement[30] and non-enforcement of judgments rendered in respect of socially/State owned companies (the Serbian State was one of the major debtors).

The law focused on improving the system of legal remedies: a substantial number of such legal remedies was not (solely) used for substantive reasons, but very often for tactical reasons (delay). For that reason, court control over enforcement was reorganized.

Regarding the legal remedies, the Serbian legislator opted for an objection against the decision as a general remedy. Revision and request for retrial, (both extraordinary remedies), were excluded (Article 39 paragraph 6 LoES 2011). The main features of objection as a legal remedy was the remonstration effect: the higher court did not decide on the objection, but the same court that issued the enforcement decision. In addition, as a rule, the objections did not suspend enforcement. A suspensive effect was found only in case this was mentioned in law (a complaint against the decision on enforcement based on an authentic document, except when the decision was issued on the basis of a bill of exchange (Article 42 paragraph 2 LoES 2011); a complaint against the decision on registration in the register of enforcement debtors (Article 63 paragraph 4 LoES 2011); a complaint against the decision to impose a penalty in the proceeding of obtaining the declaration of assets (Article 59 paragraph 3 LoES 2011) and a complaint against the decision on counter-enforcement, under the condition that the guarantee was deposited (Article 79 paragraph 4 LoES 2011).

The objection was admissible only against the decision (not against a conclusion), and only when it was specifically prescribed by law (Article 39 paragraph 2 LoES 2011). In addition, the LoES contained special provisions on admissibility of the complaint for specific situations (for example the objection against the decision on determining enforcement on the basis of an enforceable document could be filed only by an enforcement debtor, while the enforcement creditor may do the same only in the part rescinding decision on the costs of the proceedings (Article 40 paragraphs 1 and 2 LoES 2011) or the objection against the decision to refuse or reject a proposal for execution could be submitted only by the enforcement creditor (Article 40 paragraph 3 LoES 2011).

The general deadline for filing an objection was set on five working days from the day when the decision was delivered to the party submitting the objection (Article 39 paragraph 3 LoES

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[28] The backlog was one of the arguments that the Serbian authorities used in the case *Samardžić and AD Plastika v. Serbia*, 17 July 2007 (Application no. 28443/05). The ECtHR concluded: *" [...] a chronic backlog of cases is not a valid explanation for excessive delay [...]. Moreover, article 6 § 1 imposes on the Contracting States the duty to organize their judicial systems in such a way that their courts can meet each of its requirements"* Other cases: *Ilić* v. *Serbia*, ECtHR 9 October 2007, no. 30132/04; *Dimitrijević and Jakovljević* v. *Serbia*, ECtHR 19 January 2010, no. 34922/07; *Marčić and others v. Serbia*, No. 17556/05, 30 October 2007; *Bulović* v. *Serbia*, ECtHR 1 April 2008, no. 14145/04; *Kostić v. Serbia,* 25 November 2008, No. 41760/04

[29] See e.g. *V.A.M. v. Serbia*, final 13 June 2007 (Application no. 39177/05); see also: *M.V. v. Serbia*, 22 September 2009 (application 45251/07); *EVT Company vs. Serbia*, 21 June 2007, (Application no. 3102/05)

[30] See e.g. *EVT Company* v. *Serbia*, ECtHR 21 June 2007 (application no. 3102/05) in which case the ECtHR decided that irrespective of whether a debtor is a private or a State actor, it is up to the State to take all necessary steps to enforce a final court judgment. In this respect the ECtHR underlined that the State is responsible for securing the support of its entire apparatus, including the police, and of other bodies such as the land registry or a national bank.

2011). In case of an untimely complaint, the law exclusively allowed *restitutio in integrum*, providing there is a justified reason (Article 30 paragraph 2 LoES 2011).

For reasons of efficiency, the possibility of appeal was removed from law.

Did the increase of the efficiency of judicial control have its effects in practice?

With regard to the abolition of appeal, experts advised the re-introduction of the appeal through a higher court as a devolutive legal remedy, in order to provide:

- Harmonization of case-law in a wider area;
- More effective protection of debtors in cases in which the enforceable document was not created in a court proceeding;
- Elimination of the situation that judges in the same instance "cross decide" on complaints against their decisions;
- Elimination of the possibility for judges who are not involved in the enforcement matter or have little judicial experience decides on complaints.

The general rule of inadmissibility of complaint (for example the decision on termination or conclusion of enforcement could not be objected) resulted in courts finding different ways to overcome this rule, which results in non-harmonized case-law on the same procedural issues[31].

Specific reasons for an objection were limited to a few typical cases of termination of obligations but did not cover all situations which were, according to the rules of civil law, substantive and relevant for the occurrence or termination of the obligation, which significantly reduces the effectiveness of this remedy both with enforceable, and with authentic documents.

The approach of LoES 2011 towards legal remedies was very restrictive. The reasons for filing an objection were also listed in a restrictive way. One would expect that introducing such restrictions would result in a more effective enforcement process and would reduce the backlog of enforcement cased. However, it appeared counterproductive:

- The rules of proving the existence of reasons for an objection significantly reduced the effectiveness of this remedy, because they did not take into account the fact that not all enforcement documents are not incurred as a result of court proceedings and that therefore it is necessary to enable the debtor to effectively rescind the documents and review them;

- The rules did not take into account the fact that the deadline for filing a complaint is five working days and that within this period it is often not possible to collect and provide some evidence;

- The system relied on a well-functioning system of service of documents. In practice, however, there are numerous problems with the correct service of documents;

- The law prohibited presenting evidence by experts (article 30 LoES 2011). However, it was quite obvious that the court did not have the expertise to solve certain disputable

[31] Some courts allow filing an objection against the decision on conclusion or termination of enforcement, while other courts dismiss such complaints, but allow for the decision to be rescinded by a request for removal of irregularities in conducting enforcement. The non-harmonized jurisprudence created legal uncertainty.

issues indicated in a complaint or that is necessary to determine in the course of conducting the enforcement (e.g. evaluation of real estate or other object/right; checking the accuracy of the calculation of receivables when there is a need for imputation of fulfillment; determination of geodetic points to examine the measures and boundaries of the real estate on which the enforcement is conducted, and the like);

- The competence to decide upon this objection shall be vested to the same court that has rendered disputed ruling. There was a question of the impartiality of the decision upon objection that is to be rendered by the colleagues of the judge that has rendered the disputed ruling. The same judges that make mistakes when deciding in the first instance are expected to repeat those mistakes when deciding in second instance proceedings. Furthermore, there is a very important issue of conflicting decisions coming from the same basic and commercial courts since there is no way of creating uniform practices.

3.2.3. The 2015 Law on Enforcement and Security (LoES 2015)

Since their introduction, an increasing number of (self-employed) enforcement agents (starting with 59 in 2012), have been operating in parallel with the old system of court-based enforcement officers. In line with the 2011 LoES, the self-employed enforcement agents had exclusive competence over monetary claims for debts owed to utility service companies, whereas court-based enforcement officers are exclusively in charge of enforcing decisions in family matters and decisions regarding the return of an employee at work. In all other areas of enforcement, creditors had the possibility to choose between the court and "private" enforcement. The introduction of the self-employed enforcement system resulted in a reduction of the backlog of enforcement cases. Yet, the fact that the Supreme Court of Cassation, in 2012, issued a Legal Position meant that utility cases subject to enforcement ruling before the enactment of the LoES (i.e. all cases prior to June 1, 2012, which amounts to a total number of approximately 1.9 million cases) could not be transferred to the new self-employed enforcement system.[32]

Consequently, a large backlog of cases remained within the judicial system and slowed the efficiency of the entire judiciary. This meant that the Courts continued facing enormous challenges related to the reduction of a backlog of enforcement cases – classification of cases, establishing databases, providing necessary infrastructure, physical and electronic case filing, available human resources – and transferal of cases from the Court to the Private Enforcement System.

Another attempt to strengthen judicial control was done with the Law on Enforcement and Security 2015. The Serbian legislator still considered that the legislation could be improved and decided to give the exclusive jurisdiction for enforcement to the private enforcement agent (with the exception of the joint sale of real and moveable property, the enforcement of enforceable documents ordering the enforcement debtor to perform, refrain from performing or suffer an action and enforcement of enforceable documents related to family relations and reinstatement of an employee (article 4 LoES 2015).

This decision had a positive effect on the reduction of the backlog in enforcement cases in Serbian courts: the Supreme Court of Cassation reports that during 2016, the number of enforcement cases in the courts was reduced by 811 322 cases.

The 2015 LoES has transferred part of the decision-making powers to the self-employed enforcement agents. This may be considered positive since the system of private enforcement

[32] Supreme Court of Cassation, Legal Position Number 8/2012; September 25, 2012

may only become effective in case such a person is also entrusted with authority. However, the transfer of authority was just limited; still, the overall position of the court was visible.

Through the general (re-) introduction of appeal and the affirmative principle of permission to appeal (articles 24-27 LoES 2015) the legislator introduced a legal remedy by means of court intervention into the enforcement process. At the same time objection as a remedy is maintained. Yet, the legal provisions regarding legal remedies in 2015 LoES are rather complicated, unclear, and not transparent. Contrary to the 2011 LoES, there is a substantial number of legal actions (appeals and objections) that can be undertaken against enforcement rulings at almost any given time in the enforcement process.

The 2015 LoES has exceptionally short time limits and even disciplinary sanctions for judges who do not meet the deadlines. However, those time limits cannot be considered reasonable. Taking into account the backlog in the objection procedures, the increasing number of legal remedies at the disposal of parties, the exceptionally short time limits, and the second instance review, the system resulted in more lengthy proceedings.[33]

3.2.4. Judicial control and supervision

Through the express introduction of "standards of professional conduct" (article 497 LoES 2015) the Serbian legislator aimed at introducing a quality system that will be defined through a bylaw of the Ministry of Justice (see also chapter 4). The aim to improve the quality of enforcement service delivery went hand in hand with reformulating the provisions of the Code of Ethics by the Chamber of private enforcement agents, improving measures related to disciplinary violations, and the enforcement of such disciplinary sanctions. The elaboration of provisions related to coordination and competences of the Ministry and the Chamber of private enforcement agents in the supervision of the profession was an important step to establish a fully functioning and efficient system of enforcement that is credible, transparent, and reliable.

The determination of quality standards for the enforcement profession is a powerful tool for control if implemented accordingly. It provides for a pillar of control outside of legal remedies and therefore takes on a preventive function: implemented and supervised efficiently and effectively, the quality system is supposed to have a positive effect on the use of legal remedies in the enforcement system.

That is why the balance between monitoring and control of a self-regulatory system through preventive measures (introduction of professional standards, effective disciplinary measures, monitoring and control, and ethics) on the one hand side, and effective protection via judicial control, through legal remedies (appeal and objection, counter-enforcement etc.) on the other hand is of great importance for a functioning efficient enforcement system.

A preventive periodically review of the case-flow will be much more efficient to avoid lengthy proceedings than judicial control through an extensive system of legal remedies.

Reason that in our opinion court intervention in the enforcement process should concentrate on such cases where integrity or fairness of the enforcement proceedings is at stake.[34] While

[33] Based on 2011 LoES in 2013 36,945 objections were received by the basic courts. A decision was rendered in only 28,703 objection procedures (78%). In 2016 18.741 were received by courts. Only in 7.312 cases a decision was taken (Source: report *Analiza Sistema Izvršenja U Postupcima Pred Javnim Izvršiteljima U 2016. Godini* and the annual reports of the private enforcement agents. LoES obliges the enforcement agents yearly to produce such report.

[34] A good example of the needless interference of courts in the enforcement process in Ukraine is article 19 paragraph 2 LEP: a peace agreement between parties needs to be approved by the court.

providing for legal remedies to a limited extent (introduction of appeal), the main focus should be put on the preventive side of the control system – professional standards, effective supervision, code of ethics and disciplinary proceedings. Court intervention should be limited to such cases where the integrity or fairness of the enforcement proceedings is at stake.

The overall conclusion is that despite the clear and legitimate intent of the Serbian legislator to expand the control of procedures conducted by first instance authority (court and enforcement agent) and the intent to unify the judicial practice and the enforcement practice, a careful balance between preventive (professional standards etc.) and reactive (remedies) tools as methods to control the (self-regulatory) system is likely to have a more positive systemic outcome on both enforcement and court system than the introduction of legal remedies against basically any decision taken in the enforcement process.

The judicial control as regulated in 2011 LoES and 2015 LoES, indicated the weakness of a system that to a large extend focuses on judicial control through legal remedies:

- Enforcement proceedings became more inefficient due to the numerous possibilities of the debtor to intervene in the enforcement process, not for substantive reasons, but very often for tactical reasons (delay);

- The court system (currently characterized by a high degree of inefficiency and a large backlog of enforcement cases) was overburdened with procedures based on the new system of legal remedies. This results in a higher degree of inefficiency;

- Parties in enforcement proceedings were confronted with additional costs arising from legal proceedings related to remedies.

- The time limits set for decision-making in the legal remedy process were unrealistic, taking into account the length of ordinary court proceedings and objection proceedings;

- The creditors' interests in the quick recovery of his claims are endangered. This has a (major) impact on the improvement of the business and investment climate.

3.3. Judicial control in CoE member states: Portugal

The Portuguese system of private enforcement agents was introduced in 2003. However, there was insufficient attention to the development of a proper professional framework or adequate control. Most countries introducing a private system, also have clear rules on the supervision over the profession and disciplinary sanctions. Besides, for a number of actions in the enforcement process, the private enforcement agent still had to ask authorization from the court. Such communication appeared complicated and the cause of numerous delays in the enforcement process.

In support of their economic reform program, in 2011, in the wake of the financial crisis, the Portuguese authorities requested financial assistance from the IMF, European Central Bank, and European Commission. Partly the measures that Portugal committed to implement as a requirement for the financial support referred to a restructuring of the enforcement system.

A reform of the enforcement system was a necessity to stimulate economic development and growth. There was a substantial, and increasing, number of pending enforcement cases; the average duration of completion of enforcement cases increased from 15 months (1991) to 45 months (2009); a large number of cases was pending already for more than five years to enforce and a substantial number of cases was inactive for more than 12 months. On the positive side,

there was a well developed IT infrastructure (Citius) in the legal system. This system enabled analysis of the performance of the judicial system, including enforcement.

Portuguese authorities, assisted by IMF, EC, and ECB staff, started a reform of the judicial system, including enforcement. The focus was not only on the improvement of the legal framework, but also focused on the organization and management of the institutions that were involved.

This is also related to judicial control.[35] The Portuguese system had a dominant role of the courts in enforcement. This appeared the main reason for the delay: court practice and legal rules were rather complex. For example, certain enforcement actions required a (continuous) intervention of courts (e.g. in case of attachment of the bank account).

With the reform, judicial control still remained, but became more efficient:

- Regarding the pending enforcement cases (in May 2011, there were 1.2 million pending enforcement cases):
  - A task force was set up that included members of the High Council of the Judiciary, the Chamber of private enforcement agents, and the Ministry of Justice;
  - The task force reviewed all pending enforcement cases on a case-by-case basis. All cases that were inactive or pending for a longer period (due to lack of assets) were closed;[36]
  - Certain administrative procedures were improved: for example, the requirement of a court order certifying non-payment for VAT recovery was removed.
- Increased efficiency of the enforcement proceedings in new enforcement cases:
  - In 2015 a new instrument was introduced in enforcement (PEPEX). This instrument enables the creditor, prior to the enforcement, to verify the debtor's assets. In case the debtor does not have any (valuable) assets, enforcement will not be initiated;
  - The access to the (enforcement) case management system CITIUS still enables courts to monitor enforcement case on a 24/7 general and case by case base;
  - Private enforcement agents can work more independently from the courts. The number of court orders has been reduced;
  - A new, independent, agency (CAAJ) was introduced to supervise and monitor the activities of the enforcement agents. The access of the agency to the (enforcement) case management system Citius, enables constant monitoring of the performance of the profession.

[35] It needs to be mentioned that the reform did not only focus on the enforcement process. A substantial reform was also done in civil proceedings.
[36] Decree Law No. 4 of 2013

3.4. Judicial control and supervision in CoE member countries: the Netherlands

Judicial control

With regard to the judicial control in enforcement in the Netherlands a distinction needs to be made between:

1. The role of the courts with regard to disputes in the enforcement process;
2. The role of judiciary with regard to the behavior of an enforcement agent

Ad 1: The role of the courts with regard to disputes in the enforcement process;

Disputes in the enforcement process are regulated by Article 438 of the Dutch Civil Procedure Code. According to this provision, the debtor may request the termination or suspension of enforcement. The dispute may relate, for example, to the significance and scope of the enforceable document, the impact of facts emerged after the judgment (the enforceable document), the validity of an attachment, or the question of ownership of the attached assets.

The enforcement dispute may only relate to the facts and circumstances related to enforcement (including the statement that the debt has already been paid).

In an enforcement dispute, the debtor may argue that the executor is abusing his rights or that the attachment is disproportionate to the judgment, for example. The debtor (the party against whom enforcement action is being taken) cannot put forward any further substantive objections to the judgment at this stage. To do this, he must institute opposition, appeal, or cassation proceedings, which are legal remedies.

It is important to mention that the enforcement agent can also apply directly to the judiciary if faced with a dispute in the enforcement process that needs a direct decision of the court.

The court with territorial jurisdiction is the court that is competent under the general rules of law on jurisdiction. This is either the court in the territorial jurisdiction within which the attachment has been or will be imposed, the court in the territorial jurisdiction within which the property concerned is located, or the court in the territorial jurisdiction within which enforcement will take place.

The District Court has jurisdiction to hear all enforcement disputes, regardless of the court that pronounced the judgment to be enforced. This means that the District Court is also competent in case the Court of Appeal or Supreme Court of the Netherlands issued the judgment.

Enforcement disputes are usually settled in summary proceedings. A decision will be given either immediately or within a few days.

Ad 2: The role of judiciary with regard to the behavior of an enforcement agent

The Dutch enforcement agent and deputy enforcement agent are subject to disciplinary law in terms of any act or omission in violation of a provision of the Dutch Law on Enforcement Agents and in terms of any act or omission that does not befit a diligently acting enforcement agent or deputy enforcement agent. These disciplinary proceedings are conducted in the first instance by the Disciplinary Committee.

The Disciplinary Committee (Article 35 of the Dutch Law on Enforcement Agents) comprises of five members, including the President, and ten deputy members, including two or more deputy Presidents. Three members, including the President, as well as six deputy members,

including the deputy President, are appointed by the Minister of Justice out of members of the judiciary.

The role of the judiciary in the disciplinary proceedings is considerable:

- Decisions need to be taken by a panel of at least three members of which at least to members should be members of the judiciary (Article 37 of the Dutch Law on Enforcement Agents);

- If the President (who is a member of the judiciary) is of the opinion that a complaint respectively a request is susceptible to an amicable settlement, then he calls the complainant respectively the Minister of Justice and the enforcement agent concerned in order to try this kind of settlement (Article of the 37 Dutch Law on Enforcement Agents);

- The Disciplinary Committee (whom in the majority are members of the judiciary) is authorised, whether or not at the request of the Minister of Justice, the board of the Dutch Chamber of Private Enforcement Agents or the Supervisory body, pending a decision, to suspend an enforcement agent against whom grave suspicion has arisen that he has committed one of the acts or omissions that does not befit a diligently acting enforcement agent or deputy enforcement agent, for six months maximum (which period can be extended for another six months) (Article 38 of the Dutch Law on Enforcement Agents);

- Without further investigation by the Disciplinary Committee the President (a member of the judiciary) may by a well-reasoned decision dismiss manifestly inadmissible and manifestly unfounded complaints as well as complaints that in his opinion are of insufficient consequence (article 39 Dutch Law on Enforcement Agents);

- An appeal against the decision of the Disciplinary Committee on a complaint against an enforcement agent is considered by a division of the Court of Appeal in Amsterdam entrusted with civil matters. The members of the Court of Appeal only consist of members of the judiciary (Article 45 of the Dutch Law on Enforcement Agents).

Supervision

The Financial Supervision Office

The Dutch system places responsibility for monitoring the accounting and financial behavior of enforcement agents in an independent government agency (the Financial Supervision Office), and not only in the professional association of enforcement agents. The Financial Supervision Office is entrusted with any investigation into the business and personal records of the enforcement agent (Article 32 of the Dutch Law on Enforcement Agents). Under the Dutch law (Article 30A of the Dutch Law on Enforcement Agents), this supervisory authority is authorised to claim insight into personal data and documents, to the extent that they are related to the personal financial administration of the enforcement agent.

If during the performance of the supervision the Financial Supervision Office takes note of facts or circumstances that give cause to the imposition of a disciplinary measure, then it can submit a complaint to the Disciplinary Committee (whom as mentioned, as a majority consists of members of the judiciary). Alternatively, they can impose an administrative fine and an order subject to a fine on the violator. The fines are connected with the fines as mentioned in the Criminal Code (Article 30B of the Dutch Law on Enforcement Agents).

The role of the certified accountant

The Articles 17 and 31 of the Dutch Law on Enforcement Agents state the following:

> **Article 17**
> *The judicial officer shall keep records both with regard to his work and with regard to his business assets. These records shall at all times show his rights and obligations. He shall also keep records with regard to his personal assets, also including the wealth of a community of property in which he is married of in which he has entered into a registered partnership. Every year the judicial officer shall draw up a balance sheet both with regard to his business assets and his personal assets as well as a statement of income and expenditure with regard to his business.*
>
> ***Article 31***
> *Within six months after expiry of every financial year, the judicial officer shall submit to the Financial Supervision Office the documents referred to in Section 17, […] which with regard to the firm's annual accounts shall at least have the character of an assessment.*

It is important to notice that these provisions *also relate to the personal records* of the enforcement agent. The agent must disclose his personal financial assets and liabilities as well as those of his business. Since creditors place a high degree of trust in the enforcement agent by allowing the enforcement agent to handle funds belonging to them, the financial probity of the enforcement agent must be beyond question. If the enforcement agent's personal assets become inadequate, there is a risk that the enforcement agent may temporarily misappropriate clients' funds for the purpose of covering his personal debts or expenses. For that reason, enforcement agents undergoing personal financial difficulty warrant a higher degree of scrutiny and concern from regulators. The need for this higher scrutiny cannot be observed without knowledge of the personal financial status of the agent. Some knowledge of the agent's personal financial status is therefore critical to ensuring the safety of client funds and public trust in the agent. For this reason, the agent should disclose his personal financial assets and liabilities as well as those of his business.

Reporting obligation

In addition to the annual reports, more frequent reporting is also introduced in the Netherlands. This reporting also is mandatory, though of different content.

While the Dutch law does not currently mandate more frequent reporting, the national Chamber of Private Enforcement Agents decided that an ongoing control on the (financial) accounting of the enforcement agent was necessary. The Dutch Chamber adopted a Regulation stating that each enforcement agent must provide every three months to the Financial Supervision Office:

(1) an overview of the liquidity and solvency of the office and
(2) an overview of the funds received on behalf of creditors.

The internal accounting and organization of each office is also examined by the Financial Supervision Office on a regular basis; this official examination is made more frequently when problems arise in the reports on liquidity and solvency and thus the three-month reports are an essential supplement to the annual reporting system.

When supervision of the finances of enforcement agents occurs only on an annual basis, there is a significant danger that the public will be endangered by agents at risk of bankruptcy, mismanagement, or fraud. Supplementing the legally mandated reports through more frequent

association-mandated reporting thus plays a valuable role in assuring the public of the trustworthiness of the enforcement system.

If problems arise, the Financial Supervision Office has to possibility to file a complaint with the Disciplinary Committee.

Professional standards

Already for a number of years, the Netherlands has introduced professional standards within the profession. These standards are audited on a 2-year basis. The audit is concluded with the issuing of the audit report. This report has a validity of two years. The audit report is either positive or negative. In case of a negative audit, the agent is given a period to correct and adjust the negative points. In order to work as integer and transparent as possible the audits are performed by an independent organization. This organization is mandated by the national chamber to carry out the individual audits.

The appointment of an undisclosed administrator (article 33A Dutch Law on Enforcement Agents)

If the continuity of the practice of an enforcement agent threatens to be prejudiced due to the manner of operational management then the President of the Disciplinary Committee can, ex officio, following a complaint or at the request of the Chamber or the Financial Supervision Office, after having heard the enforcement agent appoint an undisclosed administrator for a period of at most one year.

This undisclosed administrator advises and counsels the enforcement agent during his operational management and is also authorised to give the enforcement agent binding instructions in connection therewith. The fee for the undisclosed administrator is to be paid by the enforcement agent.

The President of the Disciplinary Committee, who is a member of the judiciary, can give the undisclosed administrator instructions with regard to the administration. He is authorised to always suspend or terminate the administration, whether or not at the request of the enforcement agent.

4. Monitoring and control within the profession of private enforcement agents

4.1. Monitoring and control

As we have seen in chapter 2 when discussing the supervision and control system we need to make a distinction between supervision and control:

- *Supervision of activities* is the process whereby an authority makes observations to the enforcement agent on his or her working methods (scheduling problems, lack of courtesy, *etc*.); it is a sort of simplified control that does not involve actual examination of a complaint, but the aim of which is to guarantee the proper administration of justice.
- *Control of activities* means control of the lawfulness of the actions carried out by enforcement agents.

The question arises: who is responsible for supervision and control? From an international perspective, different authorities can be involved in monitoring and control.

When it comes to *external* supervision (outside the profession), the Ministry of Justice or courts

seems to be the most common authority. However, also other authorities are possible. For example, in the Netherlands, there is an independent Government agency (Financial Supervision Office) that is responsible for control over the profession.

Since in most countries the professional body (Chamber) is a self-governing and regulating body the second, *internal* authority, is normally the professional association. Prerequisites for such a role of the Chamber are (1) mandatory membership of all (deputy) enforcement agents and (2) the monitoring and control powers of the Chamber are regulated by law.

Coordination between external and internal control bodies is necessary. Coordination does not necessarily imply cooperation. Both bodies may work independently or parallel with each other. When looking at CoE member states with a system of private enforcement, the model that prevails is based on the split of monitoring and control responsibilities between two different bodies: an internal mechanism (the professional body) and an external mechanism (either the Ministry of Justice or a special body or authority). This way, if not prevents, at least it will decrease possible protectionist attitude and practices (if only internal) or misuse of monitoring and control body (if only external).

The internal and external body should co-ordinate their efforts in order to reach better efficiency but at the same time should work independently and in parallel by preserving their autonomy.

Within each authority, a division should be made, as in criminal law, with those dealing with an investigation (data collection) and those judging based on the data collected (corrective actions).

Who is performing the control? In general, in one country different bodies are involved.

	Europe
The profession itself through a professional body consisting only in judicial officers	16
A professional body consisting in judicial officers and other professionals	5
A professional body not consisting in judicial officers	2
The Ministry of Justice	17
The Public Prosecutor or equivalent	6
A competent judge	11
A special jurisdiction	2
The police authorities	2
A special body or authority	2
Other	2

* Number of countries; various answers are possible

Table 1: Who is performing the control over the activities?

	Europe
The profession itself through a professional body consisting only in judicial officers	England and Wales, Belgium, Bulgaria, Scotland, Spain, France, Hungary, Latvia, Lithuania, Luxembourg, Northern Macedonia,

	Moldova, Romania, Russian Federation, Slovakia, Slovenia
A professional body consisting in judicial officers and other professionals	Estonia, Georgia, Moldova, Slovenia, Czech Republic
A professional body not consisting in judicial officers	Slovenia, Switzerland (Canton de Genève)
The Ministry of Justice	Germany, England and Wales, Bulgaria, Scotland, Finland, Georgia, Italy, Lithuania, Northern Macedonia, Moldova, Romania, Russian Federation, Slovakia, Slovenia, Slovenia, Switzerland (Canton de Genève), Czech Republic
The Public Prosecutor or equivalent	Belgium, Scotland, Georgia, Italy, Luxembourg, Swiss (Canton de Genève)
A competent judge	England and Wales, Belgium, Bulgaria, Scotland, Georgia, Hungary, Northern Macedonia, Portugal, Romania, Slovenia, Czech Republic
A special jurisdiction	Portugal, Switzerland (Canton de Genève)
The police authorities	Georgia, Slovakia
A special body or authority	Norway, Netherlands, Sweden
Other	Finland, Sweden

* Number of countries; various answers are possible

Table 2: Who is performing the control over the activities?

The role of courts mainly refers to enforcement disputes (legal remedies) and disciplinary proceedings. An exception is Latvia where the regional court is actively involved. Since 2012, a judge appointed by the president of the regional court controls the files of the enforcement agent. The court may instruct the enforcement agent to eliminate any omissions or mistakes.

4.2. Which activities are controlled and by whom

Gaining and maintaining the public trust is important within the enforcement system. This means that reliability of the monitoring and control is a crucial element of the enforcement agent's trustworthiness. In line with the European standards, this means that a monitoring and control system should be transparent and predictable:

- Clear standards need to be set to check against
- Comprehensive and clear distribution of roles and responsibilities within the monitoring and control system
- Ongoing public awareness efforts to ease understanding and usage of the complaint mechanisms by the general public.

The codes of conduct are used as a reference tool to define misconduct. However, countries might also consider having other statutory and internal rules governing the monitoring and control system to be publicly available. The same is the case with the reports on the findings of the controlling bodies.

	Europe
All his statutory professional activities	23
A part of his statutory professional activities	2
The mistakes or abuses that could be perpetrated during his activities	16
The lack or excessive length in exerting his activities	15
The non-enforcement of decisions against public authorities	8
Excessive costs or fees	18
Unlawful practices	19
Absence or lack of information	9
The accountancy of the judicial officer	14
Other (please specify):	1

* Number of countries; various answers are possible

Table 3: Which activities are subject to control?

How is the control carried out?

	Europe
It can be carried out at anytime	18
Under certain circumstances, it can be carried out unexpectedly	13
Statutory control is carried out as prescribed:	10
The control is carried out on demand	22

* Number of countries; various answers are possible

Table 4: How is control carries out?

In all countries, the control can be carried out at any time (regular control). However, the control may also be carried out at the request of e.g. parties in the enforcement proceedings, a court or the Ministry of Justice:

	Europe
Of a citizen, on a simple request	Scotland, Spain, Estonia, Georgia, Portugal, Romania, Russian Federation, Slovenia, Sweden

Of a citizen, on a detailed and motivated request (i.e. after lodging a complaint)	England and Wales, Belgium, Bulgaria, Spain, Estonia, Finland, Hungary, Latvia, Lithuania, Northern Macedonia, Moldova, Netherlands, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Sweden, Switzerland (Canton de Genève)
Of another judicial officer, on a detailed and motivated request	England and Wales, Belgium, Bulgaria, Estonia, Georgia, Lithuania, Moldova, Netherlands, Portugal, Romania, Slovenia
Of a professional body of judicial officers	England and Wales, Belgium, Bulgaria, Estonia, France, Georgia, Hungary, Latvia, Moldova, Netherlands, Portugal, Slovakia, Slovenia,
Of a professional body other than that of the profession of judicial officer	Belgium, Spain, Estonia, Portugal, Slovenia
Of the Public prosecutor or equivalent	Estonia, France, Georgia, Hungary, Latvia, Lithuania, Portugal, Romania, Russian Federation, Slovenia, Switzerland (Canton de Genève)
Of the competent jurisdiction	Estonia, Hungary, Lithuania, Northern Macedonia, Portugal, Slovenia, Czech Republic
Of the special jurisdiction in charge of the control of the activities of the judicial officer	Estonia, Georgia, Netherlands, Portugal, Slovenia
Of the Ministry of Justice	England and Wales, Bulgaria, Scotland, Estonia, France, Hungary, Latvia, Northern Macedonia, Moldova, Netherlands, Romania, Slovakia, Slovenia, Czech Republic
Of the police authorities	Scotland, Estonia, Georgia, Lithuania, Romania, Slovenia, Czech Republic

Table 5: By whom is the control carried out?

5. Conclusions and recommendations

The role of the court in enforcement proceedings

Most Council of Europe member states with a self-employed enforcement system have, in line with international standards (e.g. CEPEJ Guidelines 78-79), put the supervisory tasks in the hands of a body within the executive branch. In countries with a system similar to Ukraine's (with both State and self-employed enforcement agents), the role of the courts in the enforcement process is rather limited and concentrates mainly on such cases where the integrity or fairness of the enforcement proceedings is at stake.

In order to decide on the integrity or fairness of the enforcement proceedings, States introduced *a posteriori* systems of legal remedies, namely decisions in case of infringements during the enforcement process, opposition to the enforcement or attachment, decisions on the challenges to the enforcement agent or on other issues raised by the enforcement agent, by the parties, or by third parties.

The main provisions regarding legal remedies in Ukraine can be found in Section 10 of the Law of Ukraine on Enforcement Proceedings and Article 36 of the Law of Ukraine On the Bodies and Persons Authorised to Enforce Court Decisions and Decisions of Other Bodies. Indeed, parties in the enforcement procedure should, through the use of legal remedies, be enabled to challenge non-enforcement or enforcement measures. However, such challenges should not halt or delay the enforcement proceedings: misuse of legal remedies is a major cause of backlog in enforcement and one of the main problems identified in European Court of Human Rights case law. Legal remedies as well as the role of the courts must be clear. A delay in the execution of a judgment may be justified in particular circumstances, but this delay may not be such that it impairs the essence of the right protected under Article 6, paragraph 1 of the ECHR.[37] In this respect, the role of the courts is important and a clear legal framework is a must.

The Ukrainian legislator might consider a review of the provisions regarding the use of legal remedies. In this respect, the experiences coming from the review of legal remedies in Serbia might be useful:

- According to Ukraine's LEP (Article, 72 paragraph 1), the court who issued the enforcement document is also competent for the appeal in the enforcement procedure. This may question the impartiality of the decision on appeal, since it is to be rendered by the colleagues of the judge who rendered the disputed ruling. The same judges that made mistakes when deciding in the first instance are expected to repeat those mistakes when deciding in second-instance proceedings. Furthermore, there is a very important issue of conflicting decisions coming from the same court, since there is no way of creating uniform practices;
- A well-organised system of judicial control should avoid unjustifiable halts or delays. But such deadlines should be reasonable: in Serbia, the deadline of 5 working days appeared to be restrictive. Within such a period, it often appeared impossible to collect and provide evidence. One may draw the same conclusion with the Ukraine's deadline of 10 days;
- The Serbian system relied on a well-functioning system of service of documents. In practice, however, there are numerous problems with the correct service of documents.

[37] See *Fuklev* v. *Ukraine*, European Court of Human Rights 7 June 2005, no. 71186/01 and *Jankulovski* v. *FYROM*, European Court of Human Rights 3 July 2008, no. 6906/03. Another example is the case *Pakom Slobodan Dooel* v. *FYROM*, European Court of Human Rights 21 July 2010, no. 33262/03. Also: Rec 17/2003 under III.1.F: "There should be no postponement of the enforcement process unless there are reasons prescribed by law. The postponement may be subject to review by the court."[37]

The same also applies in Ukraine. In accordance with Article 28 of the Law of Ukraine on Enforcement Proceedings, copies of resolutions and other documents of enforcement proceedings which the enforcement officer are notified to the parties and other participants in the enforcement proceedings by regular post or delivered by courier. There is an exception for documents regarding the initiation of the enforcement proceedings, decisions on return of the writ of enforcement to the creditor, notification of the creditor about the return of the writ of enforcement without accepting it for execution: these documents are sent by registered mail with a return receipt. The debtor is "considered notified" with regard to the initiation of enforcement proceedings in cases where "a message was sent to the address specified in the enforcement document". There is no guarantee that the parties actually received the documents, which is not in line with international standards.

Court intervention in the enforcement process should concentrate on such cases where the integrity or fairness of the enforcement proceedings is at stake.[38] While providing for legal remedies, the main focus should be put on the preventive side of the control system – professional standards, effective supervision, code of ethics, and disciplinary proceedings.

A careful balance between preventive (professional standards, etc.) and reactive (remedies) tools as a means to control the (self-regulatory) system is likely to have a more positive systemic outcome on both enforcement and court systems than the introduction of legal remedies against basically any decision taken in the enforcement process.

Finally, a remark regarding the discretionary powers of the State Bailiff Service of Ukraine. These powers are not in line with other countries. Errors or a lack of information in the documents submitted to the Bailiff Service or "unclear" formulation in the court decisions (as mentioned in the Draft Strategy) should be addressed to the court. It should not be a reason to immediately refuse the enforcement of judgments.

Monitoring and control mechanisms

In most countries, private enforcement agents are obliged, periodically, to submit a report on their activities. Such a report might refer to the total number of cases handled; the total number of disposed cases or the total number of unprocessed cases at year end. In addition, most countries oblige the enforcement agent to submit (financial) reports of incomes realised through enforcement and the total number of claims. A preventive periodical review of the case flow will be much more efficient in preventing lengthy proceedings than judicial control through an extensive system of legal remedies.

Contrary to other Council of Europe member states, there is no obligation on the part of Ukrainian private enforcement agents to deliver periodic reports. Article 27, paragraph 7 of the Law of Ukraine On the Bodies and Persons Authorised to Enforce Court Decisions and Decisions of Other Bodies, in its general wording, refers to the obligation of the private enforcement agent to submit information to the Ministry of Justice. Here, we also need to mention the importance of controlling the monetary flow / financial position of the office in order to ensure

- that money entrusted to the private enforcement agent in connection with enforcement is transferred to the creditors;
- that no deficit in the balance of the special account exists (presently not in Ukrainian law);
- that the private enforcement agent is not taking any financial risks.

[38] A good example of the needless interference of courts in the enforcement process in Ukraine is Article 19, paragraph 2, LEP: "A peace agreement between parties needs to be approved by the court."

If a private enforcement agent does not meet these obligations, this should be considered a disciplinary offence (in most countries this results in the immediate suspension of the private enforcement agent). In this respect, we recommend adding this as a disciplinary violation in the Law of Ukraine On the Bodies and Persons Authorised to Enforce Court Decisions and Decisions of Other Bodies.

The introduction of professional standards

The legislative framework (the Law of Ukraine On the Bodies and Persons Authorised to Enforce Court Decisions and Decisions of Other Bodies and the Law of Ukraine on Enforcement Proceedings) as well as the regulatory framework, for example, the Code of Ethics and the Instruction on Compulsory Enforcement of Decisions[39] should serve as a reference tool for defining desired conduct and misconduct. In addition, it is important to mention that a number of European countries have since introduced (or will introduce) professional standards, a set of quality norms to be implemented in each individual enforcement agent's office, and a basis for the audit of such offices. Through the express introduction of "standards of professional conduct", the Ukrainian legislator could introduce a system that guarantees a minimum level of quality in each office.

The determination of quality standards for the enforcement profession is a powerful tool for control, if implemented accordingly. It provides for a pillar of control outside of legal remedies and therefore takes on a preventive function. Implemented and supervised efficiently and effectively, the quality system should have a positive effect on the use of legal remedies in the enforcement system.

That is why the balance between the monitoring and control of a self-regulatory system through preventive measures (introduction of professional standards, effective disciplinary measures, monitoring and control, and ethics) in conjunction with effective protection via judicial control through legal remedies (appeal and objection, counter-enforcement, etc.) is of great importance to a functioning, efficient enforcement system.

Cooperation and coordination of supervisory activities

The status of the enforcement agents in the Council of Europe member states influences the way the supervision and control system are organised. Supervision in Council of Europe member states with a similar system to Ukraine's (with both State and self-employed enforcement agents) is carried out both externally (normally by the Ministry of Justice) and internally (normally by the Chamber of Private Enforcement Agents).

Indeed, adequate supervision of the enforcement process implies the responsibility and commitment of all authorities involved: the national organisation (like the Association of Private Enforcement Officers), the Ministry of Justice, and courts. Each body has its role and responsibility in the monitoring and control system. Ideally, the co-ordination of the monitoring activities is done through information sharing, joint planning, and joint policy-making between representatives of these controlling bodies. the President of a respective court for the territory covering the activity of the private enforcement agent may request extra-ordinary control, based on the signals that have been received. Normally, a court will address such requests for control to the external or internal controlling bodies.

A well-developed IT system may facilitate accountability through the use of indicators and management reports.

[39] Instruction on Compulsory Enforcement of Decisions as adopted by the Decree of the Ministry of Justice of Ukraine of 2 April 2012 No. 512/5; here after: Instruction