

Ukraine- Draft # 2 of the Law on Improvement of the System of Enforcement of Decisions of Courts and Other Agencies (Officers)

General comments-

Overall, the second draft is more comprehensive and clearly introduces a dual system providing court users the choice and option to select who will enforce court decisions provided the selected entity has jurisdiction under the law. The draft also addresses a great number of issues raised during the review of the first draft such as conflict of interest, fees, operation and regulation of the private system, a detailed qualification scheme, confidentiality and access to data, fees and remuneration (although allowing parties to contract with private bailiffs for supplementary fees(Art.36 (9)) can provide the wrong incentives and result in an advantage for wealthy parties), the establishment of a professional association (the National Council) as well as referencing a Code of Ethics(more information should be provided however on how the Code will be developed and by whom and who will be responsible for enforcing it).

The new draft also establishes a good balance of authorities and powers between the MOJ and the National Council, e.g. inspections can be carried out by both entities; the National Council is provided seats on the MOJ Disciplinary Commission and the Qualifications Commission; disciplinary actions can be taken by the MOJ on the basis of a proposal from the Council; and qualification procedures for private officers are approved by the MOJ with advise from the Council. The establishment of the National Council and its self-governing structure is also well outlined and thought out and provides for a participatory and inclusive process that include regional councils etc.

As previously recommended, the new draft includes in greater specificity the laws that must be amended in order to make the dual system operational. This is a very useful step taken by the drafters and one that will save them time when actually amending these other laws. However, for inclusion in this law simply mentioning or listing of all these laws will suffice. Unless these details will automatically trigger other legislative changes, the great details provided in Section IX about the specific language that must be added or amended in each law would be better presented in a separate MOJ decree.

With regards to the overall organization and layout of the new draft, an additional round of review should be undertaken to ensure clarity and eliminate the need to read several articles to determine how a particular issue is addressed, e.g. jurisdiction. Some of the clarifications and reorganization needed is addressed below in the following section.

More efforts should be also dedicated to studying the impact the new dual system may have on the public enforcement system and on driving competition and improving effectiveness and efficiency of services. Best practices in creating a dual systems aim at: 1) improving the efficiency and effectiveness and provide better services to court users; 2) protecting against possible corruption; and 3) driving competitions. Although more comprehensive in many ways than the prior draft, the proposed law does not sufficiently address all three elements and may in fact have an opposite effect. The impact of the current law on all court users, especially those who may not afford private services, should also be taken into consideration when undertaking the next round of review.

Specific Comments-

The draft law does not sufficiently address some of the problems of the currently inefficient system: the inefficiencies in the current state system; and the low rate of successful enforcement which are some of the primary drivers for introducing the new dual system. Instead, the draft introduces a new private system and places a greater emphasis on its establishment while neglecting improving the enforcement services provided by the state. This unbalanced approach may in effect reduce competition between the 2 systems altogether; significantly reduce the number of public officers by making it more attractive to become private officer; and make public services available mainly to those unable to afford private services.

This uneven balance in which each system (public and private) is treated is evident throughout the draft. For instance, the new draft goes into great details about the training and professional development of private officers (Art.22) while neglecting this issue for public officers. What is provided to public officers are incentives such as housing and telephone allowances (Art.14) as well as other unspecified “encouragements” for successful work (Art.11 (1)). However, incentives and allowances alone will not necessarily translate into improved performance which should be the overarching goal of the new system. What is needed is addressing the capacity issues of state officers, through training and professional development; reengineering and automating processes and making them more effective and efficient; providing automated solutions to courts users; and developing a solid performance management system so that they are able to provide better services or at least similar services to those that will be provided by private officers. The greater focus on private officers is also evident in Art. 32 (5) allowing private officers to provide legal advice, compile legal documents and also mediate civil cases- rights that are not provided to state officers. This additional incentive in combination with other benefits such as negotiating supplemental fees with court users will collectively drive state officers from public employment, eliminate or significantly reduce competition and undermine the envisioned dual system by creating what will essentially be a private enforcement system that may not be affordable by the poor.

As such, the draft should be reviewed to ensure either that the new system establishes greater balance and more healthy competition between public and private officers and provide for a smooth transition into this new system where both types of officers are provided with a leveled playing field, or that protections for poor people are created to allow them to access both services equally.

Additional comments- Section III- Private Officers

- 1) Jurisdiction –the various articles dealing with jurisdiction should be consolidated in one article to avoid confusion. Art 30 (6) also dealing with jurisdiction should be combined with Art. 20(2) and Art. 32 (5); and Article 20 (2) 1 and 4 needs further review- it is confusing which may be due to a translation issue. An article should also be dedicated to outlining in specific jurisdiction of state officers- currently the reader has to delve into Section III (Private Officers) in order to learn of the state officers’ jurisdiction. Organizationally, jurisdiction should be clearly stated upfront in each Section. The whole draft could benefit from further re-organization to avoid having to jump from one article to another to fully understand what is required.

- 2) A section outlining legislative intent is needed and would provide the opportunity to outline a justification for the new system and its intended purpose.
- 3) A comprehensive definitions section should be inserted in the beginning of the law so that the reader is clear about the various entities and laws mentioned etc.
- 4) Dual system(Article 21 (2)) - provides parties with the right to select among private and public officers- organizationally this should have been stated earlier in the draft. The dual system in general should be better and more clearly defined upfront as well.
- 5) Conflict of interest- although mentioned in Art.21 (4) that an officer must avoid it, it remains unclear what may create a conflict. More clarity is needed by way of specific examples.
- 6) Eligibility to serve (Art. 23)- Although outlining the qualifications in details (an improvement from the previous draft law) the new draft does not address if a state employee is prohibited from working as a private bailiff even for a period of time after leaving state employment. A “non-compete language” where state officers are prohibited from qualifying as private officers for a specific period of time after leaving state employment may be beneficial in providing a transitional process without destroying the state system. Unaddressed, this issue will result in state employees leaving the state and becoming private enforcement officers making the state system even more ineffective.
- 7) Keeping of funds (Art.37)- while it is a good step to include a section on financial matters, it is unclear who will oversee financial reporting of private officers- what happens in the event of a violation, the consequences of co-mingling funds and who will be responsible for investigating violations etc. Article 59 establishes an Audit Commission, but this entity appears to only exercise control over financial and business activities of the National Council. Ideally, the Commission should also be in charge of ensuring proper financial reporting by private officers, which should be done on a yearly basis; investigating violations; and putting in place a clear system that must be followed by all private officers. This function could also be provided to an entity in the MOJ which is already in charge of regulating many aspects of the profession.
- 8) Fees (Art. 36)-in addition to addressing the potential for benefiting the wealthy by allowing for contracting for supplementary fees, a scheme for providing for fee waivers for those unable to afford enforcement cost should be addressed. Currently, those who are not wealthy will most likely not be able to access private services and will be forced to use state enforcement officers giving the wealthy access to better and more efficient and effective services.
- 9) The creation of the position of Assistant to Private Enforcement Officers is a good addition, but it is unclear what the intent in having this position is and why it was developed. Ideally, such a position could be used as a stepping stone for those who do not fully qualify as bailiffs and as a way to transition into the position by acquiring practical experience. A further review of this position should be undertaken.
- 10) As mentioned in the previous set of comments, a detailed performance management system is essential to improving performance of the state officers while driving performance of the private ones. This system should be developed and equally applied in both systems and should also be tied to the incentives (e.g. housing allowance for public officers) provided as well. (See comments on 1st Draft law on required elements)
- 11) Transitional Provisions (Section IX)- It may be more realistic to require the MOJ to undertake all the tasks outlined in this section within a period that is longer than one month of the effective date of policies “governing the obtainment of the right to exercise private enforcement officer

activity” . Realistically, it may take longer to develop and approve “automated anonymous qualification questions” (1(4), hold qualification exams and set up a provisional qualifications commission for example. Unless a great part of tasks will have already been undertaken in preparation for the enactment of the new law, more time should be dedicated to them.

- 12) Training for private officers- while it is good to include a detailed scheme for training, it may be beneficial to require annual training as opposed to once every 3 years. This will allow officers to be up on any changes in the laws and newly developed procedures by the MOJ etc.