

## Reform Forum's Note

# ENFORCEMENT OF DECISIONS IN UKRAINE: PROSPECTS FOR THE DEVELOPMENT OF THE LEGAL INSTITUTE\*<sup>1</sup>

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**Keywords:** access to justice, consolidated enforcement proceedings, appealing decisions, actions or inaction of executors, legal certainty, defects in legislation, judiciary reform; Ukraine.

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## ABSTRACT

**Background:** This legal analysis examines the current legislation in the field of legal regulation of some institutes of enforcement of decisions and draft laws. It demonstrates modern trends in the development of legislation in this sphere and addresses problematic aspects related to the legal regulation of consolidated enforcement proceedings and legal regulation of the specifics of appeals against decisions, actions, or inaction of executors. The declared aim is to form a sustainable justice system in Ukraine, which fosters a peaceful and open society, ensures access to justice for all and creates effective, accountable institutions with broad participation on all levels. Scientific approaches to solving these problems are highlighted.

**Methods:** To achieve the research goals, general scientific and unique methods of scientific research were applied, such as comparative-legal and semantic-structural methods, prognostic method and grouping, analysis, synthesis, and generalisation.

**Results and Conclusions:** Two key problematic aspects of the legal regulation of consolidated enforcement proceedings are the lack of a definition of the term 'consolidated enforcement proceedings' in it and the absence of a defined mechanism for the transfer of enforcement proceedings, which complicates their application in practice. It has been concluded that the gaps in the legislation should be addressed at the legislative level and not remain subject to judicial lawmaking, as the judicial practice is unstable. Moreover, it should be in accordance with the requirements of European institutions in the sphere of enforcement proceedings, according to which national legislation should contain a clear definition of the conditions for enforcement and the statutory enforcement provisions should be set out clearly, avoiding the possibility of misinterpretation.

A legal analysis of draft laws in the institute of consolidated enforcement proceedings was carried out. It has been established that the shortcomings of the legal regulation of the institute of consolidated enforcement proceedings, which remain unresolved, are the lack of a legislative definition of the legal category 'consolidated enforcement proceedings', as well as the lack of clear, legal certainty regarding the procedure for the transfer of enforcement proceedings against a single debtor, opened by the state enforcement officer and private executors or only private executors. Considering the performed legal analysis, a definition of 'consolidated enforcement proceeding' is proposed.

A discrepancy has been identified between the Law of Ukraine 'On Enforcement Proceedings' and the procedural codes regarding determining the list of subjects entitled to appeal and the appropriate court for filing such an appeal. It has been proven that such legal uncertainty provokes complications in realising the interested person's right to an effective means of legal protection. A legal analysis of draft laws, regarding the improvement of the institution of appeals against decisions, actions or inaction of executors, was carried out. It was noted that these draft laws intend to eliminate several significant shortcomings of legislation in this area, as well as at the prospective introduction of the institution of pre-trial dispute settlement in this category of cases. However, they also contain some debatable issues, as well as unresolved defects of legislation in the field of enforcement of decisions regarding the legal uncertainty of issues of judicial jurisdiction surrounding appeals against decisions, actions or inaction of executors in consolidated enforcement proceedings. Considering the legal analysis carried out, a specific vision for the elimination of conflicts between special and procedural legislation regarding the regulation of the features of appealing decisions, actions or inaction of executors is proposed.

## 1 INTRODUCTION

The peculiarity of the reform of the institution of enforcement of decisions, which is currently being implemented in the Ukrainian state, is that it aims to break free from the

existing institutional trap in the form of a stable but ineffective institution of enforcement of decisions determined by law. This systemic issue has been recognised by competent European institutions, with the European Court of Human Rights (ECHR) repeatedly highlighting the systematic nature of the problem of non-enforcement of court decisions. One of the underlying causes of this problem is attributed to the inadequacies of national legislation concerning the enforcement of judgments.

Against this background, the priority task of restoring Ukraine in the field of justice at the present stage of development of the national legal system is to build a new effective system of enforcement of court decisions, in particular, through the digitalisation of *enforcement proceedings, ensuring the execution of ECHR judgments by Ukraine, introducing automatic enforcement of court decisions issued against the state*, embodied in the document of the same name<sup>3</sup>.

At the same time, the identified goals and objectives require additional research to develop effective components of the justice system in Ukraine. The research is crucial for preventing and resolving possible controversial measures to restore justice in the justice sector in Ukraine. It is vital to take into account the declared goal of forming a sustainable justice system in Ukraine; one of the goals at the present stage is promoting peaceful and open societies, ensuring access to justice for all, and creating effective, accountable and participatory institutions at all levels<sup>4</sup>.

Several draft laws pending in the legislature of the Ukrainian state are currently aimed at resolving these issues, including the Draft Law on Enforcement of Judgments (hereinafter – Draft Law No. 5660)<sup>5</sup> and the Draft Law on Enforcement Proceedings (hereinafter – Draft Law No. 3726)<sup>6</sup>. The purpose of these draft laws coincides with and is to increase the efficiency of execution of court decisions and decisions of other bodies and comprehensive improvement of the process of enforcement of decisions in the areas specified in these draft laws.

Notably, none of these draft laws defines enforcement proceedings as the final stage of court proceedings. But instead, they are solely described as a set of procedural actions or a procedure for enforcing court decisions and other bodies (officials). Despite the fact that, according to the case law of the ECtHR, the execution of court decisions together with the trial of cases are recognised as elements of the justice system.

So, to ensure real justice, based on the legal positions formed in the case law of the ECtHR, which in this context can hardly be questioned, it can be asserted that true justice can only be achieved when not only a fair final decision in the case has been made, but also when its actual enforcement is guaranteed. It is evident that the party involved in a case is more concerned with the outcome of the proceedings and the actual implementation of the resulting decision rather than the process itself. That is why, taking into account the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, proceedings in court and proceedings for the execution of court decisions are interconnected stages of one process. That is, proceedings for the execution of court decisions cannot be separated from court proceedings, but they are components of a single justice process. This legal position is reflected in numerous ECHR decisions.

3 National Council for the Recovery of Ukraine from the Consequences of the War, 'Draft Ukraine Recovery Plan: Materials of the working group 'Justice' (July 2022) <[https://uploads-ssl.webflow.com/625d81ec8313622a52e2f031/62dea471331181b583d43ec5\\_Юстиція.pdf](https://uploads-ssl.webflow.com/625d81ec8313622a52e2f031/62dea471331181b583d43ec5_Юстиція.pdf)> accessed 25 May 2023.

4 Decree of the President of Ukraine No 722/2019 'On the Sustainable Development Goals of Ukraine for the period until 2030' of 30 September 2019 [2019] Official Gazette of Ukraine 79/2712.

5 Draft Law of Ukraine No 5660 'On Enforcement of Decisions' of 14 June 2021 <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=72223](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72223)> accessed 25 May 2023.

6 Draft Law of Ukraine No 3726 'On Enforcement Proceedings' of 23 June 2020 <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=69256](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69256)> accessed 25 May 2023.

The above-mentioned conceptual understanding of the legal nature of the enforcement of court decisions has found its embodiment in the provisions of the current legislation, particularly regarding the definition of enforcement proceedings, first of all, as the final stage of court proceedings. Considering this, the question arises about the reasons for the potential refusal of the new draft law developments from the above-mentioned conceptual understanding of the legal nature of enforcement proceedings, which, from the point of view of legal hermeneutics, testified to the implementation of the Convention provisions in the national legislation of Ukraine in the field of ensuring the enforcement of jurisdictional decisions.

At the same time, while clarifying the grounds for such a change in the legislative understanding of the legal nature of the institution of enforcement of judgments is rather conceptual, other key aspects of these draft laws require increased attention. These aspects are crucial to pragmatically ensure proper regulatory regulation of legal relations in this area to overcome the systemic problem of ineffective enforcement of court decisions in Ukraine stated in the ECHR Judgments.

One of such critical aspects of the institution of enforcement of judgments that require improvement of legal regulation to overcome the problem outlined above is the issue of *legal nature and regulatory certainty of the institution of consolidated enforcement proceedings, as well as jurisdictional affiliation and legal certainty of the institution of appealing against decisions, actions or omissions of executors.*

## 2 CONSOLIDATED ENFORCEMENT PROCEEDINGS: ASPECTS OF LEGAL CERTAINTY

### 2.1 The current state of legislative regulation of consolidated enforcement proceedings and practice of its application

The provisions of the present Law of Ukraine 'On Enforcement Proceedings' (hereinafter – the Law)<sup>7</sup>, which regulate the issues of enforcement of decisions by different executors (public and private) regarding one debtor, have caused several problems of their practical application. These challenges pertain to the so-called institution of consolidated enforcement proceedings, which seeks to streamline the enforcement proceedings by consolidating several enforcement documents related to one debtor. The institutions' main objectives are to achieve procedural efficiency and ensure fairness in the distribution of amounts recovered from the debtor in compliance with the principles of priority and proportionality<sup>8</sup>. The objective need to consolidate open enforcement proceedings into one consolidated enforcement process, as rightly noted in the scientific legal literature, is caused, in particular, by the need to avoid competition in the procedures for enforcing the debtor's property. This is particularly relevant when the debtor is subject to enforcement documents of a property nature and several decisions have been made which involve multiple claimants. Consolidation serves to eliminate potential difficulties that may arise in such circumstances<sup>9</sup>.

7 Law of Ukraine No 1404-VIII 'On Enforcement Proceeding' of 2 June 2016 (as amended of 22 May 2023) <<https://zakon.rada.gov.ua/laws/show/1404-19#Text>> accessed 25 May 2023.

8 Andriy Avtorgov and Oleksiy Solomko, 'Problematic aspects of summary enforcement proceedings' (*Legal Newspaper online*, 30 January 2018) <<https://yur-gazeta.com/publications/practice/vikonavche-provazhennya/problemni-aspekti-zvedenogo-vikonavchogo-provazhennya.html>> accessed 25 May 2023.

9 Oleksandr Snidevych, 'Legal Regulation of Consolidated Executive Proceedings in the Legislation of Ukraine on Executive Proceedings' (2019) 2 (2) *Jurnalul juridic național: teorie și practică* 72.

Among the shortcomings of the law in this area, the expert community have noted the lack of a clear definition of 'consolidated enforcement proceedings' and the absence of a defined mechanism for the transfer of enforcement proceedings, resulting in complications of their application in practice<sup>10</sup>. These problems are also further confirmed by the application of relevant legislation. Thus, it is evident from the Supreme Court's practice that an assessment of the effectiveness and legal certainty of the current provisions in this field is necessary, which is highly relevant for the practice of its application. At the same time, this practice is not sustainable, and also unambiguous, and even more so, cannot claim to be recognised as the rule of law, but only as a marker of the need for legislative settlement of gaps to ensure compliance with the requirements of relevant standards, in particular paragraphs 23, 24 of the Guidelines on better implementation of the Council of Europe recommendations on enforcement adopted by the European Commission for the Efficiency of Justice of the Council of Europe (CEPEJ). These guidelines emphasise the importance of a clear definition of what constitutes enforcement as well as explicit conditions for such enforcement and unambiguous provisions that leave no room for interpretation<sup>11</sup>.

The Grand Chamber of the Supreme Court (hereinafter – the SC) noted significant gaps in the legislation on enforcement proceedings. At the same time, it should be noted that the current legislation of Ukraine allows for cases to be transferred to the SC on the ground that the case *contains an exceptional legal problem. Such transfer is necessary to ensure the development of law and the formulation of a unified law enforcement practice*. One such exceptional legal problem enforcement proceedings is currently the issue of legislative regulation of relations of consolidated enforcement proceedings, which became more acute after the introduction of the institution of private enforcement officers. The legal uncertainty surrounding the interaction between public and private enforcement officers in this aspect has exacerbated the issue. A legal analysis of the conclusions of the Supreme Court on the application of legislation in consolidated enforcement proceedings indicates that they are legislative defects in this area, particularly the legal uncertainty in regulating important elements of this legal institution. These gaps in legislation should be addressed at the legislative level rather than being left to judicial lawmaking. Since judicial practice is not established, and according to the requirements of European institutions in the field of enforcement of judgments, national legislation should contain a clear definition of the conditions for the enforcement of judgments, with clear enforcement provisions, leaving no room for ambiguous interpretation<sup>12</sup>.

In the context of a conceptual rethinking of the existing system of enforcement of jurisdictional decisions, it seems justified to introduce changes that would ensure equality of creditors in exercising their right to effective enforcement of court decisions, including compliance with priority and proportionality for all claimants, regardless of whether one or more executors conduct their case. In this regard, the possible options proposed in the scientific, legal literature for determining the executor in consolidated enforcement proceedings. These options include allowing the court to appoint an executor at the request of one of the executors carrying out enforcement proceedings against the debtor or at the request of one of the creditors, as well as the possibility of changing the court procedure of this executor. This could be, for example, if they violate the law or the rights of one of the creditors or circumstances have arisen that indicate the need for their replacement. In

10 Avtorgov and Solomko (n 8).

11 CEPEJ, Guidelines for a Better Implementation of the Existing Council of Europe Recommendation on Enforcement (Strasbourg, 17 December 2009) <<https://rm.coe.int/16807473cd>> accessed 25 May 2023.

12 Maryna Stefanchuk, 'The Practice of the Supreme Court as an Indicator of the Defects in Legislation on Enforcement Proceedings' (2019) 1-2 University Scientific Notes 49.

the expert community, the following procedure is recognised as taking into account the objective conditions that will exist and be devoid of signs of artificiality<sup>13</sup>.

## 2.2 Legislative prospects for the development of the institution of consolidated enforcement proceedings

Legal analysis of the current draft laws, which currently demonstrate current trends in the development of legislation in the field of enforcement of judgments, reveals a special focus by the authors on the institution of consolidated enforcement proceedings. An example of this can be seen in Article 69 of Draft No. 5660 which regulates *the peculiarities of executing several decisions in case of receipt of several enforcement documents regarding one debtor*. In such cases, *the execution of several decisions regarding one debtor is carried out in consolidated enforcement proceedings*.

According to the authors of the draft law, these features are, in particular, as follows:

- 1) in consolidated enforcement proceedings, the sale of the debtor's property is carried out by the executor who first carried out the inventory and arrest of such property. However, this excludes cases where enforcement proceedings have been suspended, within the framework of which the inventory and seizure of property was carried out or when the described and seized property has not been transferred for sale within sixty calendar days from the date of inventory and arrest;
- 2) distribution of funds recovered from the debtor (including those received from the sale of the debtor's property) in consolidated enforcement proceedings is carried out by the executor who ensured the recovery of funds;
- 3) if debt collection took place under consolidated enforcement proceedings, which include enforcement proceedings that are enforced by several state and/or private enforcement officers, the enforcement sanction is collected in proportion to the satisfaction of the claims of the creditors by the executor who provided for the recovery, the amount of the enforcement sanction is distributed in proportion *seventy-five percent in favor of the private bailiff/body of the state enforcement service that carried out the recovery and twenty-five percent of the enforcement sanction in favor of the private bailiff/body of the state enforcement service in which the enforcement proceedings were pending, in respect of which the funds were collected*<sup>14</sup>.

It should be noted that one of the shortcomings of the legal regulation of the institution of consolidated enforcement proceedings, which remains unsettled prospectively, is the lack of a legislative definition of the legal category 'consolidated enforcement proceedings', which, according to experts of the Main Scientific and Expert Department of the Verkhovna Rada of Ukraine, complicates the understanding of the content of this article of Draft Law No. 5660, which determines the procedure for the execution of several decisions regarding one debtor<sup>15</sup>.

It should be reminded that the current version of the law lacks a definition for the term 'consolidated enforcement proceedings'. This has led to discussions within the

13 Snidevych (n 9) 75.

14 Draft Law of Ukraine No 5660 (n 5).

15 *ibid*, Conclusion of 30.06.2021.

expert community about the so-called generally accepted understanding of consolidated enforcement proceedings, the essence of which is reduced to the same understanding by all subjects of law enforcement of certain legal categories, which, in such circumstances, may not require a separate definition.<sup>16</sup> In developing this opinion, when it comes to consolidated enforcement proceedings, of course, the generally accepted understanding of this legal category is proposed as *proceedings against one debtor under several enforcement documents*, which may cover both enforcement documents for recovery and non-property enforcement documents. Taking into account the conclusions of some experts that the current version of the law does not answer whether the concept of 'consolidated enforcement proceedings' includes enforcement documents other than enforcement documents for recovery<sup>17</sup> we can only partially agree with this conclusion. Since the current law clearly stipulates that several decisions *on the recovery of funds from one debtor* by both public and private executors are enforced under the procedure of consolidated enforcement proceedings, this is not observed in Article 69 of Draft No. 5660.

In this context, the provisions of Draft Law No. 3726 seem to provide clarity at the legislative level on the legal nature of consolidated enforcement proceedings by highlighting the key aspects of enforcement proceedings that can be consolidated into consolidated proceedings or joined to existing consolidated enforcement proceedings. In particular, it refers to the consolidation in Article 112 of Draft No 3726 *peculiarities of execution of several enforcement documents in respect of one debtor, among which are the following*:

- consolidated enforcement proceedings which encompass the execution procedure of several enforcement documents regarding one debtor, *including the recovery of alimony and other periodic payments, which creates legal certainty in a situation where several enforcement documents regarding one debtor issued for one court decision will be in execution*;
- the automated system of enforcement proceedings checks whether there are other enforcement proceedings or consolidated enforcement proceedings against the debtor when initiating new enforcement proceedings. If such proceedings exists, the system sends a corresponding information message to the executor;
- in case of establishing the existence of open enforcement proceedings for the recovery of funds from one debtor, the executor on the day of opening of enforcement proceedings is obliged to issue a resolution on consolidating the enforcement proceedings into consolidated *enforcement proceedings, and in case of detection of consolidated enforcement proceedings – a resolution on joining enforcement proceedings to consolidated enforcement proceedings*;
- the automated system of enforcement proceeding facilitates communication by *informing the executor responsible for the open enforcement proceedings and the executor (executors) involved in the consolidated enforcement proceedings about their respective roles and responsibilities*
- in cases where debt is collected under consolidated enforcement proceedings, which include enforcement proceedings that are enforced by public and private bailiffs, the *enforcement sanction is collected by the executor who secured the collection*<sup>18</sup>.

16 Avtorgov and Solomko (n 8).

17 *ibid.*

18 Draft Law of Ukraine No 3726 (n 6).

At the same time, the scientific legal literature notes that the legislative approach to understanding consolidated enforcement proceedings solely as proceedings for the execution of decisions (enforcement documents) for the recovery of funds needs to be revised. This interpretation fails to take into account the functional characteristics of the implementation in enforcement proceedings of such an institution as consolidated enforcement proceedings, which encompass more than just the procedural economy and compliance with the principle of priority and proportionality of distribution of recovered funds debtor amounts. Consolidated enforcement proceedings also aim to prevent the likelihood of legal conflicts during the foreclosure of the same property simultaneously by several executors.

In view of this, it is rightly proposed that all enforcement proceedings that may give rise to such conflicts or contradictions, or those requiring the distribution of recovered funds among creditors, be consolidated within the framework of consolidated enforcement proceedings. This would encompass all property proceedings, particularly enforcement proceedings under enforcement documents on the transfer of items to the collector, whether individually determined and determined by generic characteristics), as specified in the enforcement document, and not only proceedings for recovery of funds<sup>19</sup>.

Attention is drawn to one of the peculiarities of consolidated enforcement proceedings envisaged by Draft Law No. 5660, which boils down to the fact that enforcement proceedings against one debtor initiated by state executors are transferred for execution to the state executor or to the state enforcement service body in accordance with the procedure established by the Ministry of Justice. In such circumstances, the issue of the procedure for transferring enforcement proceedings against one debtor opened by public and private requires legal certainty executors or only private performers. Given the peculiarities of consolidated enforcement proceedings enshrined in the draft law, it seems that prospectively these issues should find their embodiment in the order of forming information on the implementation of consolidated enforcement proceedings by an automated system of enforcement proceedings, which, according to the authors of the draft law, should also be established by the Ministry of Justice.

In this regard, it should be noted that similar attempts to regulate these issues through legislative means have already taken place in the draft law and received an appropriate expert assessment. Thus, the Verkhovna Rada of Ukraine registered the Draft Law on Amendments to Certain Laws of Ukraine on the Enforcement of Court Decisions and Decisions of Other Bodies No. 8198 dated March 26, 2018<sup>20</sup>, According to which Part 2 of Article 30 of the Law was proposed to state that the specifics of executing several enforcement documents regarding one debtor in case of execution by a state executor and a private executor would be determined by the Ministry of Justice. However, upon analysing the version of the amendments proposed in the draft law, it can be concluded that they are unlikely to fundamentally affect the legal certainty of the provisions of Article 30 of the Law. Moreover, it is doubtful that these amendments would be favourable to private executors, given that the bodies of the state executive service are formed by the Ministry of Justice in the manner prescribed by law.

Moreover, it seems that these amendments create a legal situation where there is a risk of defining new rights and obligations for executors through a subordinate legal act, which is not consistent with the provisions of Article 5 of the Law of Ukraine 'On Bodies and Persons Engaged in the Enforcement of Court Decisions and Decisions of Other

19 Snidevych (n 9) 73-4.

20 Draft Law of Ukraine No 8198 'On Amendments to Certain Laws of Ukraine on Enforcement of Court Decisions and Decisions of Other Bodies' of 26 March 2018 <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=63741](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=63741)> accessed 25 May 2023.



Bodies'<sup>21</sup>. Thus, in accordance with the provisions of this article, state executors and private executors are independent and are guided by the principle of the rule of law, *acting exclusively in accordance with the law*. A similar norm is contained in Article 7 of Draft No. 5660, which regulates legal protection and guarantees the activities of executors. According to Part 1, *the contractor is independent while carrying out professional activities, guided by the principles of enforcement of decisions and acts exclusively in accordance with the law*.

In this context, the provisions of Part 4 of Article 17 of Draft No. 3726, according to which the activities of a private executor are regulated by law, with the provision that by-laws may regulate the procedure for committing certain procedural actions by a private executor – an exhaustive list of which is set out in Article 8 of this bill.

Thus, the practice of application of legislation in the field of enforcement proceedings shows that the legal regulation of relations regarding the peculiarities of enforcement of several decisions involving several enforcement documents against one debtor does not comply with the principle of legal certainty and requires improvements in the enforcement procedures carried out by state enforcement bodies and private executors.

At the same time, achieving this goal should be carried out by means that would contribute to the certainty, clarity and unambiguity of the legal norm, as well as taking into account the existing guarantees of the activities of executors and other participants in enforcement proceedings regarding the certainty of their legal status exclusively by law. We believe that these issues should be addressed through legislative means rather than subordinate regulations to establish a balanced framework for the activities of public and private executors and to justify a legislative definition of the status of private executors as independent professionals authorized by the state to engage in enforcement activities in the manner prescribed by law. In addition, it is assumed that the legislative consolidation of these issues will align with European standards for enforcement, particularly in terms of requirements for the clear development of enforcement provisions, thereby leaving no room for ambiguous interpretation.

*In view of the foregoing, we propose the following definition of the legal category 'consolidated enforcement proceedings' – this is enforcement proceedings regarding the execution of property-related decisions against a single debtor based on several enforcement documents. It aims to ensure procedural savings, in particular, through foreclosure on the debtor's property to the extent necessary for the execution of all enforcement documents, the order and proportionality of the distribution recovered from the debtor amounts, elimination of the likelihood of legal conflicts during the foreclosure of the same property simultaneously by several executors, and implemented by appropriate executors in the manner prescribed by the Law.*

### 3 APPEAL AGAINST DECISIONS, ACTIONS OR OMISSIONS OF EXECUTORS: JURISDICTIONAL AFFILIATION AND LEGAL CERTAINTY

In accordance with the already mentioned Enforcement Guidelines laid down in the Recommendations of the Committee of Ministers of the Council of Europe to member states on enforcement, *the enforcement procedure should be regulated in detail by law, i.e.*

21 Law of Ukraine No 1403-VIII 'On Bodies and Persons Ensuring Enforcement of Court Decisions and Decisions of Other Bodies' of 2 June 2016 (as amended of 6 May 2023) <<https://zakon.rada.gov.ua/laws/show/1403-19#Text>> accessed 25 May 2023.

defined by clear legal rules in order to be reliable and transparent and, as far as possible, predictable and effective.<sup>22</sup>

One of the topical issues of the institution of enforcement proceedings, which is currently characterized by legal uncertainty and creates problems in its application, is the legal regulation of the peculiarities of appealing against decisions, actions or inaction of executors regarding the execution of court decisions. The state of such legal uncertainty provokes complications in the exercise by the interested person of the right to an effective remedy since the provisions of Part 1 of Article 74 of the Law, which gives participants in enforcement proceedings and other persons the right to appeal against decisions, actions or omissions of the executor and officials of the state executive service regarding the execution of a court decision to the court that issued the enforcement document. However, this provision needs to be harmonised with the jurisdictional competence of the courts, to establish a systemic connection. One of the possible variants of such a version is the construction of the disposition of the article by referencing corresponding provisions in the procedural law. Such wording would resolve conflicts between procedural rules, as well as bring the legal regulation of relations in the field of appeal against decisions, actions or omissions of the executor and officials of the state executive service in the execution of a court decision, thereby aligning it closer to the principle of legal certainty as a crucial element of the rule of law.

However, in the current draft laws aimed at improving the institution of enforcement of decisions, the option of determining in special legislation the procedure for appealing against decisions, actions or inaction of executors and officials of the state executive service is chosen. Thus, in accordance with Article 155, 156 of Draft Law No. 5660 provides two avenues for appeal are proposed: judicial and administrative.

According to the provisions of these articles of Draft No. 5660, decisions, actions or omissions made by both public and private executors, as well as officials of the state executive service *regarding the execution of a court decision may be appealed by the parties, other participants and individuals to the court that initially handled the case as the court of first instance*, in the manner prescribed by law. At the same time, decisions, actions or omissions of the executor and officials of the state executive service regarding the execution of decisions of other *bodies or officials, including resolutions of the executor on the recovery of enforcement sanctions, costs of enforcement proceedings and fines, may be appealed by the parties, other participants and persons to the relevant administrative court in the manner prescribed by law*<sup>23</sup>.

Similar changes are proposed in the Draft Law on Amendments to Certain Legislative Acts of Ukraine on the Enforcement of Court Decisions and Decisions of Other Bodies No. 3609 dated 5 June 2020 (hereinafter – Draft Law No. 3609)<sup>24</sup> with the justification for the prospective elimination of conflicts of provisions of the Law and procedural codes under such wording, as well as the establishment of a unified procedure for appealing against the actions of executors.

The administrative procedure consists of the possibility of the collector and other participants in enforcement proceedings (except for the debtor) to appeal against decisions, actions or omissions of the state bailiffs to the head of the department to which the state bailiff

22 Recommendation Rec(2003)17 of the Committee of Ministers to Member States on Enforcement (adopted 9 September 2003) <[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805df135](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805df135)> accessed 25 May 2023.

23 Draft Law of Ukraine No 5660 (n 5).

24 Draft Law of Ukraine No 3609 'On Amendments to Certain Legislative Acts of Ukraine on Enforcement of Court Decisions and Decisions of Other Bodies' of 5 June 2020 <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=69057](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69057)> accessed 25 May 2023.

is directly subordinate. So, according to Part 3 of Article 156 of Draft Law No. 5660, the complaint filed in enforcement proceedings to the head of the department to which the bailiff is directly subordinate is considered *within 10 working days from the date of its receipt*. Then, the head of the department makes a *decision to satisfy or refuse the complaint*. At the same time, decisions, actions and omissions of the head of the department to which the state executor is directly subordinate may be appealed to the head of the state executive service of a higher level based on the results of consideration of the relevant complaint by the head of the higher level; a resolution is made.

This draft also provides for the possibility of a private executor, at the request of a party and subject to objective grounds, to cancel the resolution or other procedural document (or part thereof) made in enforcement proceedings. This decision is accompanied by a reasoned resolution, which can be appealed in the manner prescribed by law.

Therefore, attention is drawn to the *fact that, as under the provisions of the current law, judicial protection is the only way for the debtor to protect violated rights in enforcement proceedings. However, the creditor and other participants in enforcement proceedings can also use the administrative method to protect their rights. At the same time, Draft No. 5660, in the field of legal regulation of the administrative procedure for appealing decisions, actions or omissions of the bailiffs, are proposed to eliminate several significant shortcomings of the current law, one of which, as rightly noted in the scientific legal literature, is the lack of legislative fixation of the term for consideration of such a complaint and the procedural document that formalises the resolution of this issue and the method of its appeal*<sup>25</sup>.

In contrast to the perspective mentioned above, Draft Law No. 3726 sets out the legal regulation of the issues under study in a separate section dedicated to appealing against decisions, actions and omissions of executors, which, with some probability, can be argued, *introduces a mandatory pre-trial dispute settlement procedure*. Thus, according to Articles 127-128 of this draft law, decisions, actions or omissions of a private executor may be appealed by the parties and other participants in enforcement proceedings against such executor within ten days from the day the person learned or should have known about the violation of his rights, freedoms or legitimate interests. In case of disagreement with the decision, based on the results of consideration of the complaint, such a decision may be appealed to the court within ten days from the date of its receipt as prescribed by law. Decisions, actions or omissions of the bailiffs may be appealed by the parties and other participants in enforcement proceedings to the head of the state enforcement service within ten days from the day when the person learned or should have known about the violation of his rights, freedoms or legitimate interests. In case of disagreement with the decision based on the results of consideration of the complaint, such a decision may be appealed to the court within ten days from the date of its receipt in the manner prescribed by law<sup>26</sup>.

The chosen approach in the draft law to refer to corresponding provisions of procedural law in the article's disposition appears to be a justified means of eliminating the conflict of procedural norms in the field of legal regulation of relations regarding the judicial procedure for appealing against decisions, actions or omissions of executors.

*At the same time, it seems debatable to file a complaint with a private executor regarding their own decisions, actions or omissions since such legislative regulation may raise objectively*

25 Lyubov Malyarchuk, 'New Rules for Appealing Decisions, Actions or Inaction of Executors During Foreclosure of the Debtor's Property: Advantages and Disadvantages' (2018) 2 Law Review of Kyiv University of Law 160.

26 Draft Law of Ukraine No 3726 (n 6).

*reasonable doubts about the compliance of such national practice with the legal axiom according to which no one should be a judge in their own case (nemo iudex in re sua), and therefore – in the impartiality of consideration of such a complaint.*

It is also necessary to pay attention to another gap in the current legislative regulation of the institution of enforcement proceedings, stated in the Resolution of the Supreme Court of October 17, 2018 in case No. 5028/16/2/2012,<sup>27</sup>. This gap pertains to the lack of clarity regarding judicial jurisdiction when appealing against decisions, actions or inaction of executors in consolidated enforcement proceedings. Thus, in the said resolution, the Supreme Court concluded that complaints against the executor regarding the enforcement of enforcement documents issued by courts of different jurisdictions in consolidated enforcement proceedings should be considered in administrative proceedings. Complaints against the executor regarding the enforcement of enforcement documents issued by courts of a single jurisdiction in consolidated enforcement proceedings should be considered by the relevant court that issued the enforcement document in the appropriate type of proceedings.

In essence, the determining criterion for assigning a dispute to administrative jurisdiction is the presence of court decisions adopted under the rules of different jurisdictions or decisions of other non-judicial bodies within consolidated enforcement proceedings, if these decisions are subject to enforcement. The SC justified its position by pointing out that neither the Law of Ukraine 'On Enforcement Proceedings' nor the relevant procedural codes regulate the issue of appealing against the actions of executors in consolidated enforcement proceedings, thereby indicating the existence of a defect in legislation in the field of enforcement of decisions, which, unfortunately, remains unresolved in the analysed draft law initiatives.

## 4 CONCLUSIONS

The ongoing reform of the enforcement of decisions, which is currently being implemented in the Ukrainian state, is aimed at breaking free from the existing established yet inefficient institutional enforcement trap, which has been characterised as a systemic problem by competent European institutions. One of the key aspects that require improvement in order to overcome the systemic problem of ineffective enforcement of court decisions in Ukraine is the issue of legal nature and regulatory certainty of consolidated enforcement proceedings, as well as the issue of jurisdictional affiliation and legal certainty of the institution of appealing against decisions, actions or omissions of executors.

The practical application of the current legislation in the field of enforcement proceedings reveals that the legal regulation of relations regarding the enforcement of several decisions involving several enforcement documents regarding a single debtor does not comply with the principle of legal certainty. Consequently, in this regard, there is a need to enhance the procedure for the enforcement of decisions by both state enforcement bodies and private executors. At the same time, the aim is to achieve this by means that would contribute to the certainty, clarity and unambiguity of the legal norm while also taking into account the existing guarantees of the activities of executors and other participants in enforcement proceedings, ensuring their legal status is determined by law. It is assumed that the legislative consolidation of these issues will align with European standards on enforcement, particularly in terms of requiring

<sup>27</sup> Case No 5028/16/2/2012 (Grand Chamber of the Supreme Court of Ukraine, 17 October 2018) <<http://www.reyestr.court.gov.ua/Review/77607634>> accessed 25 May 2023.

clear and unambiguous development of enforcement provisions, leaving no room for ambiguous interpretation.

The conducted legal analysis of draft laws in the field of legal regulation of consolidated enforcement proceedings revealed that some shortcomings in the legal regulation of relations in this area remain unresolved. This includes an absence of a legislative definition for the legal category of 'consolidated enforcement proceedings' and the lack of clear legal certainty regarding the procedure for transferring enforcement proceedings against a single debtor initiated by either a state executor, a private executor, or exclusively by a private executor.

To address this, it is proposed to *understand 'consolidated enforcement proceedings'* as enforcement proceedings that involve the execution of property decisions against a single debtor based on several enforcement documents. This objective aims to ensure procedural savings by facilitating the foreclosure of the debtor's property to the extent necessary for the execution of all enforcement documents, ensuring a systematic and proportional distribution of the recovered amounts from the debtor, and eliminating the likelihood of legal conflicts among multiple executors during the foreclosure of the same property simultaneously. These consolidated enforcement proceedings are to be implemented by appropriate executors in the manner prescribed by the Law.

The Law of Ukraine 'On Enforcement Proceedings' establishes the criteria of the subjects entitled to the right to appeal and specifies the court to which such an appeal should be addressed, in line with the procedural codes established. However, the existing legal uncertainty in this regard provokes complications in exercising the right to an effective remedy for interested individuals. In order to address this issue, a legal analysis of draft laws on improving the institution of appealing against decisions, actions or omissions of executors has been carried out. The results which have been established are aimed at eliminating several significant shortcomings of legislation in this area and also propose the potential introduction of the institution of pre-trial consideration of disputes. However, these draft laws still contain controversial issues, as well as unresolved shortcomings of legislation in the field of enforcement of decisions regarding the legal uncertainty of judicial jurisdiction issues regarding appeals against decisions, actions or inaction of executors in consolidated enforcement proceedings. Further research in this field should be directed towards addressing these issues.

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