



Business
OMBUDSMAN
Council



SYSTEMIC REPORT

February 2021

HOW BUSINESS CAN SEEK EXECUTION OF COURT DECISIONS IN UKRAINE

Table of Contents

LIST OF ABBREVIATIONS 4

INTRODUCTION 6

1 NON-EXECUTION OF COURT DECISIONS
IS A SUBSTANTIAL ISSUE FOR THE BUSINESS
OMBUDSMAN COUNCIL 11

2 PROBLEMS OF COURT DECISIONS ENFORCEMENT... 15

2.1 Issue of the State Enforcement Service and private enforcers 15

2.2 Moratoria impeding court decisions enforcement 24

2.3 Liability of officials for non-execution of court decisions. Judicial control 34

3 SPECIFICS OF COURT DECISIONS EXECUTION IN
VARIOUS AREAS: EXPERIENCE OF THE BUSINESS
OMBUDSMAN COUNCIL 41

3.1 Playing with arguments or typical ways of avoiding execution/taking court
decisions into account by state bodies 41

3.2 Problems of court decisions execution at the pre-trial investigation
stage in criminal proceedings 46

3.3 Systemic defects of reacting to court decisions
in the fiscal sphere (tax and customs aspect)..... 51

3.4 Difficulties of implementing decisions of foreign/international
courts in Ukraine 60

LIST OF ABBREVIATIONS

BOC	Business Ombudsman Council
CAJPU	Code of Administrative Judicial Procedure of Ukraine
CCU	Criminal Code of Ukraine
Civil PCU	Civil Procedural Code of Ukraine
CMU	Cabinet of Ministers of Ukraine
Criminal PCU	Criminal Procedural Code of Ukraine
CUAO	Code of Ukraine on Administrative Offenses
ECHR	European Court of Human Rights
EPAS	Enforcement proceedings automated system
EU	European Union
MOJ	Ministry of Justice of Ukraine
Procedure No. 1165	Resolution of the Cabinet of Ministers of Ukraine dated 11.12.2019 No. 1165 "On Approval of Procedures for Suspension of Registration of Tax Invoice/Adjustment Calculation in the Unified Register of Tax Invoices"
SCS	State Customs Service of Ukraine
SES	State Enforcement Service/Department of the State Enforcement Service
SFS	State Fiscal Service of Ukraine
SSS	State Security Service of Ukraine
STS	State Tax Service of Ukraine
STrS	State Treasury Service of Ukraine
URTI	Unified Register of Tax Invoices
VRU	Verkhovna Rada of Ukraine

* * *

While working on this report, the BOC consulted the Office of the Council of Europe in Ukraine, the Federation of Employers of Ukraine, the American Chamber of Commerce in Ukraine, the European Business Association, the Chamber of Commerce and Industry of Ukraine, and the Ukrainian League of Industrialists and Entrepreneurs.

We are thankful for the important professional input and suggestions of the Ministry of Justice of Ukraine, the State Tax Service of Ukraine, the Independent Association of Banks of Ukraine, the EU-project "Pravo-Justice", and the Association of Private Enforcers.

On a separate note, the BOC would like to thank for the consistent cooperation with Denys Maliuska, Oleksii Liubchenko, Olena Lytvynenko, Marta Basytiuk, Olena Sukmanova, Nazar Chernyavskiy, Oleksii Koltok, Olena Solonska, Dovydas Vitkauskas, Ihor Olekhov, Andriy Bakhmach, Hanna Vasylenko, Inna Pushkar, Iryna Zharonkina, Olha Shenk, Roman Hryshyn-Hryshchuk, and Oleksii Spivak.

However, only the authors of the report are responsible for the views and positions presented in this report.

This report has been prepared by:

Deputy Business Ombudsman

Tetyana Korotka

BOC investigators

Andrii BODNARCHUK

Volodymyr KUTSENKO

Oleh MYKHALIUK

Kirill NOMINAS

Kyryl SLASTUNOV

Vasyl SUKHOVYI

under the supervision of

Business Ombudsman

Marcin ŚWIĘCICKI

INTRODUCTION

Given the relevance of non-execution of court decisions issue and its own long-term practice, the Business Ombudsman Council (BOC) dedicates this systemic report to solving problems related to execution of court decisions that have entered into force.

During 2015-2020, the BOC investigated over 8,000 complaints of businesses against actions of government agencies, of which 632¹ complaints related to voluntary execution or enforcement of court decisions. Compared to national statistics, this number of cases seems insignificant, but the dynamics of growth of appeals to the BOC shows an increasing substantiality of the problem. About half a thousand complaints concerned non-execution of court decisions that entered into force. In 391 cases out of 496 completed investigations, the BOC managed to convince state authorities that the court decision, which had already entered into force, was binding. And in turn, this allowed entrepreneurs to recover and save UAH 2.4 bn.

Although 79% of relevant cases were successfully resolved with the BOC involvement, this result is not always possible within a three-month period provided for by the BOC Rules of Procedure. Quite often it is not possible to have the court decision implemented within the course of normal communication with the respective authority or a subordinate business entity. Hence, in such cases the Business Ombudsman should make a separate decision, recommending the defendant to take appropriate measures. The BOC, in turn, arranges the respective monitoring. Compared to investigation of other categories of cases, this indicates that the final execution of court decisions usually takes more time than the “standard” resolution of cases.

Non-execution of court decisions is one of the **systemic problems in “business – state” relationship**. That is why it seems relevant to expect the Cabinet of Ministers of Ukraine (CMU) to stimulate the voluntary execution of

court decisions, which requires ensuring the principle of irreversibility of enforcement and a negative reputational impact on responsible persons of those bodies that do not comply with court decisions.

The report assesses **regulatory deficiencies in the current enforcement procedure affecting both public and private enforcers**. In particular, according to the BOC, improvement is needed in such areas of enforcement as: proceedings automation, digitalization of documents, tracking debtors' assets, blocking of accounts, prosecution for non-compliance with enforcement requirements, recovery of movable and immovable property. In fact, in accordance with the Loan Agreement between Ukraine and the European Union on receiving EU macro-financial assistance worth up to EUR 1.2 bn, Ukraine has undertaken to expand private enforcers' powers.

In order to increase the effectiveness of court decisions enforcement, as well as to strengthen the institutional capacity of state and private enforcers, the BOC recommends the CMU:

- To develop a legislative package which would be aimed at approximation of mandates of private and state enforcers, including consideration of an option to empower private enforcers to enforce decisions in the public sphere.
- Jointly with other concerned bodies, to develop and to ensure adoption of by-laws that would ensure full implementation of the system of automated seizure of funds on bank accounts and the document flow of enforcers with persons involved in the enforcement process.
- Jointly with other concerned bodies, to develop and to ensure adoption of by-laws that would grant public and private enforcers free access to a number of state registers and databases.

¹ As of 31.12.2020

The Ministry of Internal Affairs of Ukraine – to finalize the Procedure for Cooperation between the Ministry of Internal Affairs of Ukraine, the National Police of Ukraine and bodies and persons enforcing court decisions and decisions of other bodies, approved with the Order of the Ministry of Justice of Ukraine (MOJ) and the Ministry of Internal Affairs of Ukraine No. 64/261/5 dated 30.01.2018, defining forms of interaction and specifying responsibilities of police officers during enforcement actions.

Meanwhile, in this aspect the MOJ should be recommended:

- To initiate creation of a modern information system which would meet substantial needs of the enforcement procedure participants, taking into account the best world practices.
- To ensure publication of decisions of the Disciplinary Commission of Private Enforcers on the MOJ official website (in an impersonal form, if necessary), in particular, by way of initiating respective amendments to the legislation.
- Jointly with the State Judicial Administration of Ukraine, to develop and to approve a legal act that would provide for supplementing the Unified State Register of Court Decisions with information on the status of execution of decisions published in the public domain.

Also, the CMU, jointly with the MOJ, is recommended to develop and to approve by-laws that would provide an opportunity to enter information on non-enforcement of obliging decisions by state bodies in the Register of Debtors.

Currently, there is a **number of moratoria blocking enforcement decisions of certain categories**. At the time of preparation of this systematic report, current laws of Ukraine contain approximately 20 moratoria adopted by the Verkhovna Rada of Ukraine (VRU), which in one way or another may lead to non-enforcement of decisions. There are three groups of moratoria – those related to state-owned enterprises activities, those related to the private sector and the relationship

of banking/financial institutions (creditors) and debtors in particular, and those related to enterprises of fuel and energy sphere. Although some of these moratoria have been introduced temporarily, yet they remain in force for many years. In this report, the BOC considers the relevance and appropriateness of such restrictive measures.

In particular, the MOJ is recommended to create and submit a draft Roadmap for the CMU consideration to abolish moratoria in the sphere of court decisions enforcement. When preparing the draft, one should ensure the following:

- assessment of the reasons that led to introduction of the moratorium and the extent to which goals set by the state were achieved,
- their proportionality and real effectiveness assessment.

In turn, the CMU should ensure the development of the National Strategy regarding gradual elimination of those moratoria on enforcement of court decisions, the relevance of which is retained in accordance with the analysis conducted by the MOJ. Accordingly, in case of confirmation of certain moratoria's relevance, in the context of moratoria on debtors – state-owned enterprises or enterprises with a qualifying share of the state – the CMU should consider and initiate introduction of effective alternative mechanisms to satisfy creditors' claims during respective moratoria being in force. At the same time, it is expected that when raising the issue of extending the moratorium before the VRU, the CMU provides for its extension only to those legal relations that took place before such extension and conditioned actual introduction of the relevant restrictions, refraining from expanding the scope of such restrictions.

A separate issue is the **effectiveness of the current judicial control mechanism and bringing officials to responsibility**, both disciplinary, administrative and criminal, in connection with the delay in execution of a court decision that has become effective, or refusal to comply with it. The lack of such an effective mechanism is apparently giving space

for authorities and subordinate enterprises to abuse it and unreasonably postpone the actual implementation of court prescriptions.

The BOC finds it necessary to advise the CMU to develop and to submit to the VRU the following draft laws:

- On amendments to the Law of Ukraine “On Enforcement Proceedings” to increase the fine amount provided for in Art. 75 of the Law of Ukraine “On Enforcement Proceedings” as of January 2021, and introduction of a mechanism for directing a part of the fine amount paid by the debtor according to the court decision, to compensate for damage caused to the person by delayed non-compliance with the court decision.
- On amendments to Art. 185-6 of the Code of Ukraine on Administrative Offences (CUAO) to increase the penalty amount for leaving a separate court ruling without consideration or failure to take steps to eliminate violations of the law specified therein, as well as to expand the effect of this norm to any effective court decision.
- On amendments to Art. 382 of the Criminal Code of Ukraine (CCU) to introduce criminal liability not only for deliberate non-execution or hindering the execution of a court decision, but also for ignoring a court decision that has entered into force, and/or failure to take measures necessary to implement a court decision that has entered into force.

The BOC also focuses on the specifics of enforcing court decisions in those categories of cases that it directly faces in its work.

When business has proved its case in court (i.e. implemented the most effective guarantee of the violated right restoration), it naturally expects an ending of its problems in relations with the respective state body and the real restoration of violated rights.

Meanwhile, the executive branch resistance may continue harming not only a specific business, but also the judiciary power authority. If one implements a number of

measures proposed by the BOC below, a **monitoring function of court decisions execution by central executive bodies** will be significantly strengthened:

- To review the existing approach to the disciplinary liability of the state servants in the context of delays, neglect, or refusal to actually implement the effective court decision.
- Among the key indicators of results, effectiveness and quality of service of the state servants who hold positions of heads of central executive bodies – to include indicators that reflect the results of court appeals against decisions, actions, inaction of the relevant body against business and actual implementation of the effective court decisions.
- To ensure implementation of control function over execution of court decisions in state bodies, for instance, by creating staffing positions responsible for this area of activity for the state bodies against which over 1,000 court decisions are rendered per year.
- To ensure implementation of procedures for reviewing the law application practice of state bodies based on judicial practice being formed in certain categories of cases or legal norms, which directly indicate systemic violations of the law by the state body.

The vast majority of the BOC cases are **fiscal** ones. Since mid-2018, the BOC has received 270 complaints on tax invoices registration in the Unified Register of Tax Invoices (URTI) based on court decisions that have become effective. This issue stems from introduction and operation of VAT invoices registration suspension system in 2018, when the BOC faced a massive tax invoices suspension wave and significant delays in consideration of appeals by the State Fiscal Service of Ukraine (SFS). Although the procedure was gradually corrected and improved, taxpayers who received negative decisions from the SFS at that time challenged them in court.

Currently, the BOC has to deal mostly with the delay in enforcing current decisions by the State Tax Service of Ukraine (STS), according to which the court obliged the body to register the previously suspended tax invoice. As actual execution of the respective court decisions by the tax authority is often beyond a reasonable term, the BOC considers it important to pay attention to possible ways of addressing this systemic issue. In addition, a large share is complaints on implementation of decisions on VAT electronic administration, VAT refunds, payers' accounting data, as well as administration of customs duties, which also speak for their systemic nature.

The BOC has repeatedly touched upon fiscal issues in its other publications, but in this report the BOC considers it necessary to shape the following set of recommendations for the STS and the State Customs Service of Ukraine (SCS):

- To amend internal regulations and to take appropriate organizational steps to determine a responsible department with functions of: (1) monitoring of court decisions to be enforced, (2) monitoring the process of such decisions execution and (3) preparation of regular public reports on their implementation, as well as on problematic issues creating obstacles to proper court decisions execution.
- To adjust the administrative practice, when applying certain legislation, with regard to the case-law on similar issues. This should provide not only for formal monitoring, but also for a real change in the law application practice of a state body. In particular, to amend the regulations related to the administrative appeal procedure and to oblige the authorities to add a brief overview of the relevant court practice in the text of each decision made as a result of the administrative appeal procedure and/or to make the decision in line with the court practice or to provide relevant reasoning for deviations from it. The criterion for changing law application practice may be a significant change in the results of court proceedings (up to the rate of decision-making to satisfy the claim of business entities to the state body no more than 40% in the respective categories of

cases) or a significant reduction in the total number of lawsuits (*mutatis mutandis*/in other conditions being equal).

The STS is also recommended to amend the Procedure for organizing the work of STS authorities during preparation and support of cases in courts, approved with the STS Order dated 17.10.2019 No. 124, and/or other applicable regulations, according to which:

- to ensure the possibility of making a decision on appealing/not appealing against a court decision within the appeal/cassation appeal terms;
- to set criteria for simplifying a decision on further judicial appeal ineffectiveness, in particular: when (1) the administrative court of first instance ruled in favor of the taxpayer, (2) such a decision was upheld by the court of appeal and (3) the dispute financial result is insignificant for the budget (for example, up to UAH 100,000) – the tax authority will recognize such a decision and will not appeal it in cassation, except when decisions are contrary to the practice of the Supreme Court/Supreme Court of Ukraine in similar cases.

The BOC also has significant experience in cases related to **non-execution or delays in enforcing investigative judges' rulings in criminal proceedings at the pre-trial investigation stage**. The most common cases are ungrounded forfeiture (seizure) of property, including amounts in the VAT electronic administration system. Entities whose interests have been violated have to challenge inaction of law enforcement agencies to investigative judges.

Despite the binding nature of court decisions, current legislation does not provide for any effective mechanism for enforcing investigative judge's decisions adopted at the stage of pre-trial investigation. That is why the BOC often observes a situation where business cannot seek enforcement of the decision in its favor. In particular, this problem is extremely sharp in case when law enforcement agencies do not return property seized from entrepreneurs for a long time, despite the investigator's obligation to return the seized property.

We consider it expedient to develop and to submit to the VRU a draft law on amendments to the Criminal Procedural Code of Ukraine (Criminal PCU) aimed at (1) determining deadlines for implementation of investigative judges' rulings issued in the framework of criminal proceedings pre-trial investigation; (2) introduction of a mechanism for charging a fine for non-compliance with such rulings; (3) directing a part of the fine amount paid by the debtor under the court decision to compensate the damage caused by long non-execution of court decision to the person in whose favor the decision was made.

In addition, in the BOC view, it would be appropriate to develop and to implement a mechanism to monitor the number of investigative judges' rulings issued in the framework of the pre-trial investigation of criminal proceedings and to monitor their implementation status.

It is clear that the **quality of enforcement in commercial and investment disputes** is one of the most obvious indicators of the state attractiveness for business in general. The BOC had the opportunity of conducting a series of investigations into complaints relating to this aspect. As the practice shows, obstacles to actual execution of foreign/international court

decisions may be due to the State Enforcement Service (SES) malpractice and may as well be accompanied by pressure or, conversely, inaction of law enforcement agencies conducting pre-trial investigation in criminal proceedings in one way or another related to the main subject – court decision implementation. This category of cases is also characterized by significant abuse of procedural rights and regulation of national courts to evade or delay actual execution of foreign/international court decisions.

Thus, the BOC recommends the Government to continue working on the draft law on amendments to the administrative and criminal legislation as regards a full-fledged launch of the Bureau for Economic Security of Ukraine with explicit determination of its jurisdiction to investigate economic crimes. Alongside this, the MOJ with the SES are recommended to arrange separate accounting of enforcement proceedings regarding decisions of international courts/arbitrations as such carrying a potential risk of investment disputes a party to which will be the state, as well as to arrange regular reporting on these issues.

The BOC recommendations are supposed to be implemented in the areas set forth in this report.

1 NON-EXECUTION OF COURT DECISIONS IS A SUBSTANTIAL ISSUE FOR THE BUSINESS OMBUDSMAN COUNCIL

In Ukraine, the rule of law principle is recognized and operates as enshrined in Art. 8 of the Constitution of Ukraine. However, non-execution of court decisions declared in the name of Ukraine calls into question the ability of public authorities to adhere to this principle.

The issue of judgments execution in Ukraine has always been one of the most pressing and resonant topics in the private and public sectors. Recently, this topic has acquired international attention. From the position of the Council of Europe, Ukraine belongs to a member states group for which a systemic problem of non-compliance with the decisions of the European Court of Human Rights (ECHR) is in place.

Being an integral parameter in assessing compliance with the rule of law, execution of judgments in the state is subject to continuous improvement through adjusting and maintaining the respective legal framework and procedures. It's no wonder, Ukraine, as a member of the Council of Europe in an effort to fulfill its obligations and thus practically support implementation of the rule of law, has adopted the National Strategy for Solving the Problem of Non-Enforcement of Court Decisions, the Debtors of Which Are a State Body or a State Enterprise, Institution, Organization, for the Period Up to 2022².

The BOC complaint statistics also indicate an exacerbation of this problem. During the period of 2015-2020, 632³ complaints related to voluntary or coercive execution of court decisions were successfully resolved. Compared to national statistics⁴, this number of cases seems insignificant, but the dynamics of appeals growth clearly shows the substantiality of the problem. Over the last five years, this trend has been evident – during 2015-2018 the BOC received twice less complaints in total as compared to 2019-2020 (see Diagram 1).

Although 79% of respective cases were successfully resolved with the BOC involvement, this result is not always achieved within a three-month period provided for in BOC Rules of Procedure. Compared to the investigation of other categories of cases, this, in turn, indicates that the final execution of court decisions usually takes more time. And given the impressive financial effect of the enforced court decisions, it is clear that any delay in restoring the complainants' rights also deeply affects the general state of companies.

In 391 out of 496 completed investigations, the BOC managed to convince authorities that the court decision, which had already entered into force, was binding. This allowed entrepreneurs to recover and save UAH 2.4 bn (see Table 1).

² Approved with the CMU Order dated 30.12.2020 No. 1218-p

³ As of 31.12.2020

⁴ According to the Head of the Supreme Court Valentyna Danishevskaya during the Third Annual Forum "Implementation of Decisions of National Courts in Ukraine "... annually courts of Ukraine consider over 3 million cases, of which 1 million are cases related to economic conflicts, civil and administrative relations, 800k claims are satisfied by courts and, therefore, their decisions must be enforced". See the link: <https://supreme.court.gov.ua/supreme/pres-centr/news/1020282/>

Number of complaints from businesses related to court decisions execution

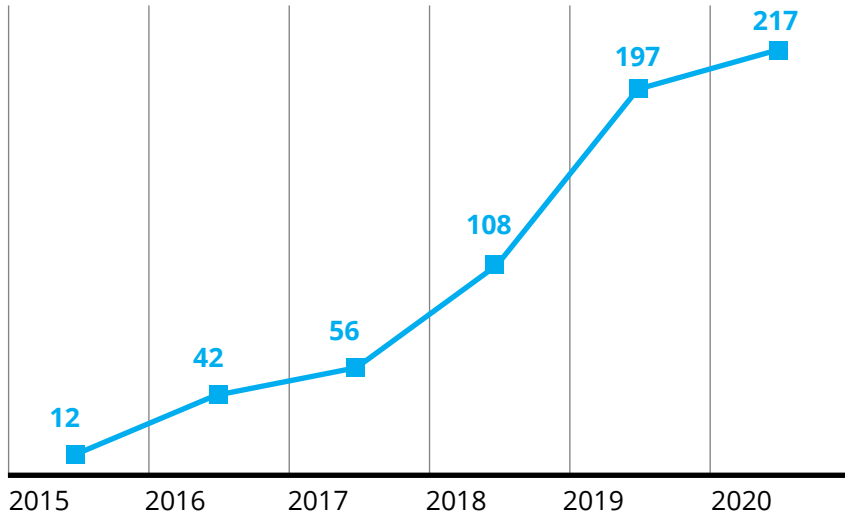


Diagram 1.
Dynamics of business complaints on non-execution of court decisions received by the BOC for the period of 2015-2020

Table 1.

Financial effect for business from court decisions execution in cases that have entered into force

Subject of closed cases	Financial effect, UAH
Tax VAT refund	1,812,883,395
VAT electronic administration	344,390,878
Failure to comply with court decisions on tax invoices registration	93,450,931
Customs duties refund	7,058,934
Other customs actions	4,310,451
Prosecutor's Office – funds refund	1,468,615
Criminal proceedings initiated by the SFS	1,265,600
State Treasury Service – budget compensations	772,049
Violations in customs valuation	409,089
National Police actions (procedural abuse) – funds refund	160,000
Other tax issues	110,403,234
Total	2,376,573,176

Categories of complaints

The BOC, of course, has its own peculiarities of work, which is also well followed by the categories of complaints presented below (see Table 2).

Table 2.

Categories of complaints received from businesses by the BOC related to court decisions execution (May 2015 – December 2020)

Categories of complaints	Number of complaints received
Tax issues	483
Failure to comply with court decisions on of tax invoices registration	270
VAT electronic administration	62
Tax VAT refund	46
Inclusion in the risky taxpayers list	5
Cancellation/renewal/refusal of VAT payers registration	6
Other	94
Actions of the Prosecutor's Office	40
Prosecutor's Office procedural abuse	21
Prosecutor's Office inaction	11
Prosecutor's Office criminal case initiated	7
Other	1
Actions of the National Police	33
National Police procedural abuse	24
National Police inaction	7
National Police criminal case initiated	1
Other	1
Tax Police criminal case initiated	20
Actions of the State Security Service of Ukraine	13
State security Service procedural abused	8
State Security Service criminal case initiated	3
Other	2
Customs issues	23
Customs duties refund	9
Customs valuation	6
Customs clearance (delay/refusal)	3
Other	5
Actions of state regulators	10
Permits and licenses	2
Permits and licenses – construction	1
Permits and licenses – nature management	1
Actions of the SES	2
Actions of local government authorities – Rules and permits	2
Other	3

As can be seen from the array of complaints received by the BOC, the majority of business complaints on non-execution of court decisions, which became effective, related to the tax sphere (483). Almost a half of them (56%) concerned tax invoices registration, 13% – VAT electronic administration, and 10% – VAT refund.

The second large group of issues addressed to the BOC by entrepreneurs were procedural violations and delays by law enforcement agencies – a total of 106 complaints (17% of

all appeals against non-execution of court decisions). Within this block, the breakdown of business complaints was as follows: complaints on the Prosecutor's Office actions (40 complaints), the National Police (33 complaints), the Tax Militia (20 complaints), the State Security Service of Ukraine (13 complaints).

The remaining complaints concerned customs, permits and licenses, state regulators, local government authorities' actions and SES authorities themselves.

The main reasons for non-execution of court decisions

The BOC realizes the problem of proper execution of court decisions is complex and is determined by many factors of both the general level (legislative, economic and political) and individual cases level (subjective).

Thus, while investigating complaints of non-compliance with specific court decisions, the BOC had the opportunity to demonstrate that obstacles are created due to insufficient budgeting of respective programs, presence of moratoria on enforcement, procedural deficiencies/restrictions on the work of private and state enforcers.

At the same time, more often the BOC encounters cases where public authorities, as defendants, do not agree with the decision rendered against them at all, delay execution and refer to the same circumstances which the court has already given an assessment to. In addition, resistance to/delay in execution is often explained by the technical impossibility, irrelevance of the reasoning part of the decision, connection with other lawsuits that allegedly affect the current case, and so on. Given the fact that in certain cases the defendant must create organizational or procedural conditions for actual implementation of the decision, there may be inaction due to unwillingness to create such conditions. Such individual cases can be

explained by another common factor – lack of an effective mechanism for prosecuting for non-compliance with a court decision.

The BOC experience shows that the problem of court decisions execution is not limited to deficiencies in enforcement – this area is much broader.

In addition to those decisions in which the court directly obliged a defendant to take certain actions/decisions, when investigating complaints, the BOC often faces situations in which the court finds actions or inaction of the “authoritative” defendant illegal with the appropriate argumentation, but does not oblige the latter to take any action instead.

There are frequent cases of deliberate disregard for the established practice and conclusions of courts by authorities, although in other disputes, but identical in nature, which is also, in the opinion of the BOC, a systemic problem in the “business – state” relationship.

By and large, the BOC hopes the Government will promote voluntary execution of court decisions ensuring the principle of irreversibility of execution, as well as negative reputational impact on the responsible persons of those bodies that do not comply with court decisions.

2 PROBLEMS OF COURT DECISIONS ENFORCEMENT

2.1 Issue of the State Enforcement Service and private enforcers

Prior to the enforcement system launch in Ukraine after 2014, the civil judgments enforcement level was only about 6%, while the total amount of claims according to not enforced decisions in this field amounted to about UAH 400 bn, which became one of the main barriers on the way to establishing the rule of law in the state and effective work of courts and judges⁵.

In 2016, two laws directly affecting the regulation of court decisions enforcement institute were adopted: "On Bodies and Persons Enforcing Court Decisions and Decisions of Other Bodies" and "On Enforcement Proceedings". This became

the most significant reform in this sphere. Thus, since 2017, Ukraine has switched to the so-called "mixed" model of enforcement proceedings including two components: public and private enforcers.

Despite significant changes in the enforcement proceedings system, there is no single system to account enforcement issues. This does not allow to analyze the distribution of enforcement cases between private and public enforcers and their effectiveness. According to various estimates of private enforcers' involvement – the share does not exceed 10%⁶. However, according to the monetary criterion, for example, the situation looks like this⁷:

Amounts of funds collected by private and public enforcers from the property of debtors in 2019



Meanwhile, it is also difficult to objectively compare the effectiveness of public and private enforcers due to the asymmetry of their rights⁸.

⁵ The Root Causes of Non-Enforcement of Court Decisions of National Courts of Ukraine//Publication of Razumkov Center "National Security and Defense" No. 3-4 (179-180), 2019.

⁶ See the link: <https://newjustice.org.ua/uk/novini/navishho-ukrayini-potribne-nove-zakonodavstvo-shhodo-vikonannya-rishen/>

⁷ According to information of the MOJ: "Evaluation of Work of the State Enforcement Service in 2019"

⁸ On this occasion, the BOC notes that there is a number of initiatives aimed at eliminating such asymmetry. For example, on 23.06.2020, the Draft Law on Enforcement Proceedings No. 3726 was registered. One of the main novelties of this draft is equalization of the procedural statuses of public and private enforcers. According to Art. 3 of this Draft ("Entities that enforce decisions") "public and private enforcers (hereinafter – the enforcers) have the same scope of rights and obligations within the enforcement proceedings". The requirements of the final and transitional provisions of this draft also propose to amend other legislative acts.

Tools available for public and private enforcers

The BOC Rules of Procedure provide for consideration of entrepreneurs' complaints related to actions/inaction of public enforcers and government agencies. For the purposes of this systemic report, we have analyzed a number of cases investigated by the BOC

and simulated potential or even common situations of non-enforcement of court decisions to understand possible ways of solving them using private/public enforcers' tools prior to resolving them.

Enforcement proceedings on funds collection

Traditionally, the main part of court decisions that have to be enforced by public and private enforcers concerns collection of funds. It is a common practice for the debtor, knowing about enforcement proceedings, to try hiding information about his assets and to ignore possible requests and calls from the enforcer. First of all, such behavior of the debtor is a consequence of no real responsibility for obstructing execution of court decisions (*issues of liability will be covered in detail in chapter 2.3 of this report*). Instead, in its essence, enforcement proceedings should focus on protecting interests of the claimant and on enforcing the judgment as quickly and fully as possible.

To ensure a timely search for the debtor's assets, enforcers must have a sufficient range

of means. A possibility of automatic seizure of funds on bank accounts is probably the most crucial thing here. In 2019, Ukraine launched a system of "automatic" seizure of funds on bank accounts^{9 10}.

However, according to the enforcers, the system works automatically only for the alimony collection, and only electronic document flow between banks and enforcers is provided for the rest of court decisions. In addition, only a few banks have joined this system. As for the rest of the banks, enforcers continue paperwork exchange when seizing funds, which takes a lot of material resources and time. Paperwork between enforcers and banks allows dishonest debtors to "win" time and to hide funds from accounts.

Case 1

Nibulon SA addressed the BOC. The complaint concerned non-enforcement of a decision of the Court of Appeal of the Arbitration Court of the Grain and Feed Trade Association (GAFTA) dated 23.05.2014. A permit to execute the court decision was given with a ruling of the Court of Appeal of Kyiv City dated 06.12.2017. The complaint concerned various aspects of non-enforcement of the court decision, one of which was impossibility of furnishing resolution of the public enforcer to the bank in which the debtor had accounts. In particular, the bank did not accept incoming postal correspondence from the SES for a long time and did not even allow the public enforcer to enter the bank's premises to hand the necessary documents over to the bank's representatives.

⁹ Regulations on the procedure for providing information by banks on opening/closing accounts of individuals entered in the Unified Register of Debtors, bodies of the State Enforcement Service or private enforcers (approved with the Resolution of the National Bank of Ukraine dated 18.04.2019 No. 60)

¹⁰ The Procedure for automated seizure of debtors' funds on bank accounts for enforcement proceedings for the alimony collection (approved with the Order of the MOJ dated 16.04.2019 No. 1203/5)

This problem was partially solved due to the fact that the enforcer sent the necessary letters and resolutions to the official e-mail of the bank using e-signature.

Provided functioning of a full-fledged system of automated seizure of funds, the enforcer would be able to perform all the necessary actions without leaving the office and regardless of the behavior of bank employees.

Therefore, in the BOC view, automatic seizure of funds, as well as electronic document flow is an important tool for enforcing court decisions and a creditors' rights protection guarantee. A full implementation of this mechanism is of great importance for improving the effectiveness of court decisions enforcement as well as the attractiveness of Ukraine for domestic and foreign investors.

However, as the practice shows, at the stage of court decision enforcement, the debtor may no longer have the required amount of funds on the account. Therefore, if the debtor does not have sufficient funds on the bank account, the court decision may be enforced at the expense of the debtor's property. As noted above, if the debtor hides information about its assets, it can be difficult and sometimes impossible for the enforcer to find all of the debtor's assets.

For the time being, the enforcer has a real opportunity to freely obtain information only on the debtor's real estate, his bank accounts and vehicles. Enforcers' access to this information is clearly provided by law. Instead, obtaining information from other state registers or databases (such as a hereditary register, register of permits, etc.) is regulated insufficiently, which allows the respective state bodies which administer corresponding registers to refuse providing such information. We heard from enforcers about difficulties in obtaining information from government agencies about the debtor's property, if it is not explicitly provided by law. In our opinion, enforcers should be granted free access to any state registers or databases containing information about the debtor's assets or that can be used to search for them.

Case 2

Nibulon SA addressed the BOC. The complaint concerned non-enforcement of a decision of the Court of Appeal of the Arbitration Court of the Grain and Feed Trade Association (GAFTA) dated 23.05.2014. A permit to execute the court decision was given with a ruling of the Court of Appeal of Kyiv City dated 06.12.2017. The complaint concerned various aspects of non-enforcement of the court decision.

As it turned out, at the time when enforcement proceedings were opened, there were no enough funds on the debtor's accounts to repay the debt, and he did not have any movable or immovable property that could be foreclosed. In such cases, it is expedient to search for information about the debtor's property in alternative sources.

In this particular case, the public enforcer made numerous attempts to obtain the debtor's tax reporting to determine whether it had accounts receivable, at the expense of which the decision could be enforced. The SFS refused to provide the public enforcer with such information, substantiating that the provision thereof was not stipulated by law.

Non-enforcement of obliging decisions by individuals and authorities

No less problematic issue for both public and private enforcers is non-enforcement of obliging decisions by private individuals and especially authorities. To a large extent, this problem is more relevant for execution of decisions made in relation to the public authorities, though there are also cases when individuals (debtors) obstruct execution of this category of court decisions.

It should be emphasized that obliging decision execution, especially when the debtor is a public authority, has primary differences from the execution of a decision on recovery. In particular, in a situation with an obliging decision, a debtor and a public authority that have to ensure the execution are the same person.

We know from the BOC practice that government agencies often object to court decision execution, referring to the same circumstances that were a pretext to filing a lawsuit to the court and thus trying to turn the court decision execution process into a process of circumstances and evidence reassessment. This attitude of authorities towards court decisions is also caused by the fact that currently there is no real and unavoidable liability for non-execution of court decisions.

As it is known, minor fines that can be imposed by public enforcers on the body (as a legal entity) do not cause a positive result. The same applies to criminal liability for non-execution of a court decision, as the mere fact of initiating criminal proceedings does not guarantee the court decision execution.

As noted above, some obliging decisions are not enforced by the SES at all. This, in turn, creates an additional obstacle, namely stakeholders do not have complete statistics on the number of court decisions enforced and their implementation state. Because of this, it is extremely difficult to assess the real scale of court decisions execution problem.

Therefore, we recommend considering the possibility of entering information in the Register of Debtors on debtors-state bodies, local governments, and debtors on non-property decisions, as well as on debtors in respect of whom enforcement proceedings were opened before the Register launch. In our opinion, it might also be appropriate to supplement the Unified State Register of Court Decisions with information on the execution status.

Interaction with law enforcement agencies

As a rule, enforcement of a decision is a conflict situation in which the debtor tries to prevent a public or private enforcer from enforcing it in every possible way. There are cases when debtors resisted enforcers, locking in the office, calling for private security, threatening the enforcer or even setting a private enforcer's office on fire¹¹.

Being in a conflict zone on a daily basis, a public or private enforcer must feel protected and supported by the state. In particular, where possible, law enforcement agencies should assist in enforcing decisions. Current legislation¹² neither precisely and clearly regulates the procedure for enforcers interaction with the law enforcement agencies in such difficult situations, nor provides for other possibilities of getting security services.

¹¹ See the link: <https://www.unn.com.ua/uk/news/1725560-borzhnik-po-alimentakh-pogrozhuav-derzhsluzhbovtsyam-sokiroyu-u-kirovogradskiy-oblasti>

¹² See the link: <https://sud.ua/ru/news/ukraine/178447-u-kiyevi-pidpalili-ofis-privatnogo-vikonavtsya-apvu-vimagaye-povnogo-rozsliduvannya-foto>

Digitalization of operational activities of enforcers

Digitalization of any bureaucratic processes speeds up their implementation and reduces costs, makes it possible to render a respective service more accessible to business. The system of enforcement proceedings is not an exception to this rule. Currently, the electronic platform for the work of enforcers is the Enforcement Proceedings Automated System (EPAS).

According to enforcers and international experts, the current version of the EPAS has a number of technical shortcomings and does not meet all the real needs arising in the day-to-day activities of enforcers. In particular, the current version of the EPAS has a rather small number of enforcement proceedings document templates (resolutions, letters, etc.). As a result, enforcers are forced to manually draw up a large number of standard documents.

The EPAS also does not contain functions for automatic notification of receiving responses to requests from the enforcer. It makes him/her check the status of each individual request manually, which takes a lot of time. Another equally important element is the search for duplicate enforcement proceedings (when several enforcers have opened proceedings on the same decision).

A separate aspect for the system modernization can be the development of a modern automated platform with its integration with the Unified Judiciary Information and Telecommunication System (UJITS). This would allow monitoring the execution status of almost all court decisions in real time and to generate analytics for almost all categories of court decisions as well as to identify the most problematic areas of their enforcement.

Disciplinary liability of private enforcers and challenging their actions

Being a fairly new institution, private enforcers are scrupulously monitored by both the state and civil society members. Particular attention is paid to disciplinary liability issues of private enforcers. Thus, the function of bringing private enforcers to liability is assigned to a specially established body – the Disciplinary Commission.

According to the BOC, a cornerstone principle in the work of any institution should be transparency and openness. An integral

element of transparency is publication of decisions of the corresponding institution (even in an impersonal form) for the general public. Currently, the Disciplinary Commission does not publish decisions made based on complaints consideration outcomes. Therefore, private enforcers and potential complainants are deprived of the opportunity to familiarize themselves with disciplinary practices to take them into account in their work and when lodging a complaint.

¹³ The Procedure for interaction of the Ministry of Internal Affairs of Ukraine, the National Police of Ukraine and bodies and persons enforcing court decisions and decisions of other bodies, approved with the Order of the MOJ and the Ministry of Internal Affairs of Ukraine No. 64/261/5 dated 30.01.2018

¹⁴ See the link: <https://www.pravojustice.eu/storage/app/uploads/public/5f4/d06/8c3/5f4d068c3c203696646679.pdf>

During consultations with the BOC at the time of preparing this systemic report, experts expressed other problems related to the scope of decisions enforcement. Although the BOC had no opportunity to directly confirm the existence of one or another issue given below within the framework of investigating complaints, according to the BOC, the following issues deserve the Government's attention in the context of possible improvements in the procedural regulation of this area:

(1) The issue of debt recovery and monetary funds distribution in case if enforcement proceedings concerning the debtor are conducted by various private enforcers and/or private and public enforcers.

The settlement of this issue may allow elimination of potential imbalance and abuse associated with disproportionate satisfaction of claims of certain creditors compared to other creditors, and ensure consideration of creditors' interests in other enforcement proceedings.

(2) Settlement of the procedure for possible seizure of documents based on court rulings.

This issue can be considered in two aspects. The first one – the procedural law defined the possibility of forced seizure of evidence for their study by the court, the legal mechanism of enforcement of which is not legally regulated and not secured with coercive measures. The second one – when implementing court decisions, the enforcer may request certain information and documents necessary for performing enforcement actions in case, if such information is not provided.

Providing opportunities to forcibly seize these documents based on the court ruling may allow to more effectively identify assets and collect on the account thereof. These documents, for example, may be copies of primary documents, allowing to identify debtors' accounts payable with a view to their further collection, documents confirming the right of ownership to movable property, and so on.

(3) The settlement of arrests cancellation issue in case, if the enforcement document is returned to the collector without enforcement and the creditor does not present it for enforcement again within the provided terms.

At present, the law does not provide for the possibility of lifting the arrest and other restrictions, or the procedure is too complicated. It seems that the logic of the law is not only designed to induce the debtor to execution of the decision, but also does not have to impose an excessive burden on the debtor either, if the creditor does not take actions related to enforcement of the decision .

The set three-year period for initiating the enforcement procedure may be sufficient for the collector. If such actions are not taken by the creditor after the return of the enforcement document without being enforced, it may be appropriate to determine the procedure for lifting restrictive measures automatically or upon the debtor's request.

(4) The possibility for the parties to conclude an amicable agreement at the stage after consideration of the case by the court and until the moment of initiating enforcement proceedings.

Usually, after consideration of the case, the parties have more compelling grounds for settling the dispute. For example, the debt collector and the debtor agreed on partial immediate execution of the decision by forgiving part of the debt. By its legal nature, such an agreement is an amicable agreement between the parties when executing the decision. At the same time, in this period of time court proceedings are over, while there is no enforcement proceeding initiated yet. Initiating the enforcement proceeding for the purpose of obtaining a legal possibility to conclude an amicable agreement will impose an obligation on the debtor to pay the enforcement fee being undesirable for both parties and creating an additional burden on enforcement authorities.

It may be appropriate to determine a norm in the procedural law allowing to settle the dispute after the court decision is made, if enforcement proceedings were not initiated, and the court is empowered to approve this settlement agreement. This, in turn, can have a positive effect on SES authorities' workload.

(5) Data updating (refreshing) in the Unified Register of Debtors.

It should be noted that now there might be a significant time gap from the moment of termination of grounds for the entity to be on the register until the actual exclusion therefrom, and committing mistakes when identifying a debtor. This in turn, causes negative consequences and creates serious obstacles to taking legal actions on disposal of property and doing business in general.

In this context, it may be appropriate to foresee a proper mechanism for correction/removal of irrelevant or erroneous information in the register as well as a mechanism of bringing to liability for the failure to exclude a debtor from the register in due course.

BOC recommendations:

It seems expedient to the BOC that the state considers an issue regarding gradual expanding of powers of private enforcers, which correlates with the Government intentions set forth in the Credit Agreement between Ukraine and the European Union for EU macro-financial assistance of up to EUR 1.2 bn¹⁵.

In our opinion, the step-by-step equalization of public and private enforcers' mandates in the future could facilitate the enforcement process and make it more effective and accessible.

In order to increase the effectiveness of court decisions enforcement, as well as to strengthen the institutional capacity of public and private enforcers, the BOC recommends the following:

1) The CMU:

1.1) To develop a legislative package which would be aimed at approximation of mandates of private and state enforcers, including consideration of an option to empower private enforcers to enforce decisions in the public sphere.

1.2) Jointly with other concerned bodies, to develop and to ensure adoption of by-laws that would ensure full implementation of the system of automated seizure of funds on bank accounts and the document flow of enforcers with persons involved in the court decisions enforcement process.

¹⁵ See the link: <https://www.kmu.gov.ua/news/svitlana-glushchenko-reforma-sistemi-vikonannya-sudovih-rishen-ye-prioritetom-dlya-ministerstva-yusticiyi-uryadu-ta-vsiyeyi-derzhavi>

1.3) Jointly with other concerned bodies, to develop and to ensure adoption of by-laws that would grant public and private enforcers free access, in particular, but not limited, to the following state registers and databases:

- *Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organizations*
- *Hereditary Register*
- *Unified Register of Powers of Attorney*
- *Information Portal of the National Police of Ukraine – “Harpoon” Information subsystem*
- *Register of Administrative Offenses in the Field of Road Safety*
- *System for automatic recording of administrative offenses in the field of road safety*
- *Unified State Register of Vehicles*
- *Unified State Demographic Register*
- *Registers of territorial communities*
- *Unified information and analytical migration processes management system*
- *Database “Information on Foreigners and Stateless Persons Who Have Exceeded Passport Documents Registration Term in Ukraine”*
- *Unified information database on internally displaced persons*
- *Register of warehouse documents for grain*
- *Unified State Register of Animals*
- *State statistical survey “Areas, Gross Harvests and Yields of Crops, Fruits, Berries and Grapes”*
- *Unified Register of Automated Accounting of Tractors, Self-Propelled Chassis, Self-Propelled Agricultural, Road-Building and Reclamation Machines, Agricultural Machinery, Other Mechanisms*
- *Register of Lifting Machinery (cranes and machines, elevators, escalators, cable cars, lifts, funiculars, etc.), Steam and Water Boilers, Pressure Vessels, Steam and Hot Water Pipelines, Attractions, Oil and Gas Complex Facilities, Other Objects of Oil and Gas Complex and Other Facilities.*
- *Unified electronic automated accounting system*
- *“Tax block” information system*
- *“Inspector” customs clearance automated system*
- *Register of Permits*
- *State registers of patents of Ukraine for inventions, utility models and industrial designs · State Register of Certificates of Copyright Registration for a Work*

2) The Ministry of Internal Affairs of Ukraine -

to finalize the Procedure for Cooperation between the Ministry of Internal Affairs of Ukraine, the National Police of Ukraine and bodies and persons enforcing court decisions and decisions of other bodies, approved with the Order of the MOJ and the Ministry of Internal Affairs of Ukraine No. 64/261/5 dated 30.01.2018, defining forms of interaction and specifying responsibilities of police officers during enforcement actions.

3) The CMU jointly with the MOJ -

to develop and to ensure approval of legal regulations, which would provide an opportunity to enter information about non-enforced obliging decisions by state bodies in the Register of Debtors.

4) The MOJ:

4.1) To initiate creation of a modern information system which would meet substantial needs of the enforcement procedure participants, taking into account the best world practices.

4.2) To ensure publication of decisions of the Disciplinary Commission of Private Enforcers on the MOJ official website (in an impersonal form, if necessary), in particular, by way of initiating respective amendments to the legislation.

4.3) Jointly with the State Judicial Administration of Ukraine, to develop and to approve a legal act that would provide for supplementing the Unified State Register of Court Decisions with information on the status of execution of decisions published in the public domain.



2.2 Moratoria impeding court decisions enforcement

The history of moratoria introduction impeding court decisions enforcement is directly related to peculiarities of economic and legal development of Ukraine as an independent state. Transition to a market economy in the aftermath also resulted in errors and low skills in public administration, abuse in privatization of state-owned enterprises, threat of mass layoffs and, as a result, social explosions. A moratorium was used as a tool to temporarily stabilize the situation, which could halt court decisions enforcement. In the future, these tools were used more than once, which allowed to postpone solution of urgent issues and

transfer responsibility for their solution to the leadership of the state and in a more remote period.

At the time of writing this systemic report, current laws of Ukraine contain approximately 20 moratoria, which in one way or another may cause non-enforcement of decisions (see Table 3). Meanwhile, there are three groups of the moratoria – those related to state-owned enterprises activities, those dealing with the private sector and the relationship of banking/ financial institutions (creditors) and debtors in particular, and those related to enterprises in the fuel and energy sphere.

Table 3.
Effective moratoria preventing enforcement of court decisions

Moratoria	Effective since	Legislative basis	Declared goal
Moratorium on use of forced sale of property of state enterprises	05.01.2002	Law of Ukraine No. 2864-III dated 29.11.2001 “On Introduction of Moratorium on Forced Sale of Property”	Ensuring economic security of the state, preventing destruction of integral property complexes of state enterprises, protection of interests of the state during sale of property of companies in the authorized capital of which the share of the state is not less than 25%
Moratorium on proceedings in cases of bankruptcy of debtors- state-owned enterprises. Moratorium on reorganization and liquidation of public enterprises not subject to privatization	01.01.2004	Economic Code of Ukraine No. 436- IV dated 16.01.2003. The provisions should be considered in a systematic combination with: <ul style="list-style-type: none"> Part 2 of Art. 4 of the Law of Ukraine No. 2269- VIII dated 18.01.2018 “On Privatization of State and Municipal Property”, and the List of objects of state property, being of strategic importance to the economy and security of the state approved with the CMU Resolution No. 83 dated 03.04.2015 	Limitations on those objects, which are necessary for the state to perform its main functions, ensure the defense power of the state and property being a material basis of the sovereignty of Ukraine
Moratorium on implementation of measures to enforce decisions, commencing bankruptcy cases and transition to sanation or liquidation procedures, on enterprises of the fuel and energy sector	26.07.2005	Law of Ukraine No. 2711-IV dated 23.06.2005 “On Measures Aimed at Ensuring Sustainable Operation of Fuel and Energy Enterprises”	Improving financial situation of fuel and energy enterprises, preventing their bankruptcy

Moratoria	Effective since	Legislative basis	Declared goal
Moratorium on alienation of agricultural land	13.01.2007	Land Code of Ukraine No. 2768-III dated 25.10.2001	Ensuring land reform before approving conditions of agricultural land circulation
Moratorium on opening a case on bankruptcy on public companies performing transportation activities through main pipelines and storage in underground storage facilities, of Naftogaz Ukraine NJS, its subsidiaries and established companies, as well as enterprises, established as a result of reorganization (merger, joining, division, allocation, transformation) of state enterprises performing transportation activities through main pipelines and storage in underground storage facilities of Naftogaz Ukraine NJS, its subsidiaries and established companies	06.02.2007	Law of Ukraine No. 192/96-VR dated 15.05.1996 "On Pipeline Transport"	Increased energy independence of Ukraine, protection from pressure outside, avoid changing forms of ownership in the assets of the gas transportation system
Moratorium on foreclosure on assets of a joint-stock company of public railway transport, 100% of the shares of which belong to the state	22.03.2012	<p>Law of Ukraine No. 4442-VI dated 23.02.2012 "On Peculiarities of Establishment of Railroad Transport Joint-stock Company of Communal Use"</p> <p>The Law of Ukraine No. 1404-VIII dated 02.06.2016 "On Enforcement Proceedings"</p> <p>The Law of Ukraine No. 1787-VIII dated 20.12.2016 "On Amendments to Certain Laws of Ukraine Concerning Railroad Transport Companies Property Located in Anti-Terrorist Operation Territory"</p> <p>Law of Ukraine 2604-VIII dated 10.18.2018 "On Amendments to Certain Laws of Ukraine Concerning Railroad Transport Companies Property Located in the Area of Repelling and Deterring Armed Aggression of the Russian Federation in Donetska and Luhanska Regions of the Anti-Terrorist Operation"</p>	Ensuring economic security and protection of interests of the state in terms of preservation of key infrastructure facilities. Since 17.02.2017, the need for inventory and assessment of the property of railway transport enterprises located in the territory of anti-terrorist operation, implementation of measures to ensure national security and defense, repel and deter armed aggression of the Russian Federation in Donetska and Luhanska Regions where government agencies temporarily do not exercise their powers, and approval of the act of transfer of this property to the Company as the successor of rights and obligations of these enterprises. Accordingly, the moratorium on foreclosure on assets of the Company under obligations of such enterprises was introduced.

Moratoria	Effective since	Legislative basis	Declared goal
Moratorium on foreclosure of property of citizens as collateral for consumer loans in foreign currency	07.06.2014	Law of Ukraine No. 1304-VII dated 03.06.2014 "On Moratorium on Recovery of Property of Citizens of Ukraine As Collateral for Loans in Foreign Currency"	Minimization of possible losses of citizens in performance of their credit obligations and prevention of a tough financial situation due to sharp exchange rate fluctuations in the foreign exchange market of Ukraine and devaluation of the national currency
Moratorium to meet the mortgagee requirements at the expense of the subject of the mortgage, located in the territory of the anti-terrorist operation	15.10.2014	Law of Ukraine No. 1669-VII dated 02.09.2014 "On Temporary Measures for the Period of the Anti-Terrorist Operation"	Providing support to business entities operating in the territory of the anti-terrorist operation and persons living in the area of the anti-terrorist operation or relocated during it
Moratorium on enforcement actions and commencing bankruptcy cases in case of inclusion of the debtor in the register of enterprises participating in the procedure of settlement of debts of heat supply and heat-generating organizations and enterprises of centralized water supply and sewerage for consumed energy carriers	30.11.2016	Law of Ukraine No. 1730-VIII dated 03.11.2016 "On Measures Aimed at Settling the Debt of Heat Supply and Heat Generating Organizations and Centralized Water Supply and Sewage Enterprises for Energy Consumed"	Ensuring sustainable operation of heat supply and heat generating organizations and centralized water supply and sewerage enterprises
	30.11.2016	Law of Ukraine No. 1404-VIII dated 02.06.2016 "On Enforcement Proceedings"	
	17.10.2020	Law of Ukraine No. 686-IX dated 05.06.2020 "On Amendments to the Code of Ukraine on Bankruptcy Procedures"	
Moratorium on bankruptcy proceedings of debtors-state-owned enterprises and/or companies, more than 50% of shares (stakes) of which are directly or indirectly owned by the state, in respect of which the decision on privatization was made	07.03.2018	Law of Ukraine No. 2269-VIII dated 18.01.2018 "On Privatization of State and Municipal Property"	Attracting foreign and domestic investments, reducing the share of state property in the structure of Ukraine's economy through sale of privatization objects to an effective private owner
Moratorium on application of measures to enforce decisions and commencing bankruptcy cases on state-owned coal mining enterprises	24.05.2017	Law of Ukraine No. 2021-VIII dated 13.04.2017 "On Restoration of State Coal Mining Enterprises Solvency"	Stabilization of state coal enterprises for the transition period, carrying out the necessary technical re-equipment of mines and improving their technical and economic indicators by optimizing coal mining enterprises non-core assets, defining specific measures to reduce the net cost of ready-made coal products. Preparation of certain mines for privatization, modernization of the existing fund for self-sufficiency of state-owned enterprises

Moratoria	Effective since	Legislative basis	Declared goal
<p>Moratorium on foreclosure and seizure of funds on accounts with a special regime of use of economic entities in the spheres of heat, water supply and sewage, received from international financial organizations for the implementation of investment projects (measures) in Ukraine</p>	09.06.2018	<p>Law of Ukraine No. 2417-VIII dated 15.05.2018 "On Amendments to Certain Laws of Ukraine on Prohibition of Foreclosure and Seizure of Business Entities in the Spheres of Heat, Water Supply and Sewage Obtained from International Financial Organizations for the Implementation of Investment Projects (measures) in Ukraine".</p> <p>Amendments to:</p> <ul style="list-style-type: none"> - Law of Ukraine "On Potable Water, Potable Water Supply and Sewage" No. 2918-III dated 10.01.2002 - Law of Ukraine "On Heat Supply" No. 2633-IV dated 02.06.2005 - Law of Ukraine "On Enforcement Proceedings" No. 1404-VIII dated 02.06.2016 	<p>Protection of funds on economic entities' current accounts in the field of heat, water supply and sewage, received from international financial organizations in the form of loans, loans for investment projects (measures) in respective areas</p>
<p>Moratorium on application of enforcement measures to collect debts from the defense industry, included in the list of state property of strategic importance for the economy and security of the state, in favor of the legal entity of the aggressor state and/or the occupying state or a legal entity with foreign investment or a foreign enterprise of the aggressor state and/or the occupying state</p> <p>Moratorium on bankruptcy proceedings in case of defense industrial enterprises included in the list of state-owned objects of strategic importance for the economy and security of the state, according to the statements of a legal entity of the aggressor state and/or the occupying state or a legal entity with foreign investment or a foreign enterprise of the aggressor state and/or the occupying state</p>	22.08.2018	<p>Law of Ukraine No. 2508-VIII dated 12.07.2018 "On Amendments to Laws of Ukraine on Resolving Certain Issues of Debts of Defense Industry Enterprises –Participants of Ukroboronprom State Concern to the Aggressor State and/or the Occupying State and Ensuring Their Sustainable Development"</p> <p>Amendments to:</p> <ul style="list-style-type: none"> - Law of Ukraine "On Pledge" No. 2654-XII dated 02.10.1992 - Law of Ukraine "On Private International Law" No. 2709-IV dated 23.06.2005 - Law of Ukraine No. 5213-VI dated 06.09.2012 "On Some Issues of Debts of Enterprises of the Military-Industrial Complex – Members of Ukroboronprom State Concern and Ensuring Their Sustainable Development" - Law of Ukraine "On Enforcement Proceedings" No. 1404-VIII dated 02.06.2016 	<p>Prevention of interference of legal entities registered on the territory of the aggressor state and/or the occupying state, legal entities with foreign investment of the aggressor state and/or the occupying state with the economic activity of enterprises of the military-industrial complex of Ukraine. Ensuring sustainable operation of enterprises of the military-industrial complex of Ukraine. Prevention of job cuts and growing social and economic tensions in regions. Ensuring fundamental integrity of the military-industrial complex of Ukraine. Ensuring implementation of the strategy for reforming the military-industrial complex of Ukraine in terms of clustering of enterprises-participants of Ukroboronprom state concern.</p>

Moratoria	Effective since	Legislative basis	Declared goal
<p>Moratorium on arrests and prohibitions on alienation of property of Chornomornaftogaz State Joint-Stock Company in enforcement proceedings</p>	22.12.2018	<p>Law of Ukraine No. 2618-VIII dated 22.11.2018 "On Amendments to Certain Laws of Ukraine Concerning Resumption of Activities of Chornomornaftogaz State Joint-Stock Company"</p> <p>Law of Ukraine No. 399-IX dated 19.12.2019 "On Amendments to Certain Legislative Acts of Ukraine Concerning Continuation of Measures Related to Resumption of Activities of Chornomornaftogaz State Joint-Stock Company"</p> <p>Amendments, in particular, to the Law of Ukraine No. 1404-VIII dated 02.06.2016 "On Enforcement Proceedings" and the Law of Ukraine No. 192/86-VR dated 15.05.1996 "On Pipeline Transport"</p>	<p>Creating conditions for the resumption of production activities of JSC "Chornomornaftogaz", its optimization and ensuring energy security of Ukraine in the context of occupation of the Autonomous Republic of Crimea</p>
<p>Moratorium on enforcement actions against state property objects, which would be included in the lists approved with the Law of Ukraine "On the List of State Property Objects That Are Not Subject to Privatization"</p> <p>Moratorium on the process of reorganization or liquidation of public enterprises including state-owned enterprises, or joint stock companies in the authorized capital of which the share of state ownership exceeds 50%</p>	20.10.2019	<p>Law of Ukraine No. 145-IX dated 02.10.2019 "On Recognition of the Law of Ukraine" On the List of Objects of State Property Rights Not Subject to Privatization" as Repealed"</p>	<p>Postponing enforcement actions, except for the recovery of funds and goods that have been pledged under loan agreements</p>
<p>Moratorium on enforcement proceedings and measures concerning the wholesale electric energy supplier. Moratorium on foreclosure of funds on current accounts with a special regime of use by the wholesale supplier</p> <p>Moratorium on proceedings in cases of bankruptcy of the wholesale electric energy supplier. Moratorium on transition to the liquidation procedure of participants in settlements under the Law of Ukraine No. 719- IX dated 17.06.2020</p>	<p>16.07.2020</p> <p>16.07.2020</p>	<p>Law of Ukraine No. 719-IX dated 17.06.2020 "On Measures Aimed at Repaying Debt Formed on Electric Energy Wholesale Market"</p> <p>Law of Ukraine No. 1404-VIII dated 02.06.2016 "On Enforcement Proceedings"</p>	<p>Full repayment of debt, formed on the electric energy wholesale market of Ukraine through implementing complex necessary measures</p>

Moratoria	Effective since	Legislative basis	Declared goal
Moratorium on bankruptcy proceedings of debtors-state-owned enterprises and budgetary institutions, as well as rehabilitation of such debtors before initiation of bankruptcy proceedings	17.10.2020	Law of Ukraine No. 686-IX dated 05.06.2020 "On Amendments to the Bankruptcy Procedure Code of Ukraine"	Preventing opening of bankruptcy proceedings against state, local government authorities, budgetary institutions and organizations for compliance with the principles of functioning of the state mechanism established by the Constitution of Ukraine
Moratorium on opening of bankruptcy proceedings against debtors-legal entities at the request of creditors on claims against the debtor from 12.03.2020, during the quarantine established by the CMU to prevent the COVID-19 coronavirus disease spread, and within 90 days from lifting the quarantine	17.10.2020	Law of Ukraine No. 728-IX dated 18.06.2020 "On Amendments to the Bankruptcy Procedure Code of Ukraine on Prevention of Bankruptcy Abuse for the Period of Measures Aimed at Preventing the Occurrence and of COVID-19 Coronavirus Disease Spread"	Prevention of bankruptcy processes that may occur as a result of extended anti-epidemic and quarantine measures and the decline in economic activity of enterprises

At the level of the Council of Europe, the issue of moratoria has been repeatedly identified as a component of formation of a serious structural problem of non-execution/delayed execution of decisions of Ukrainian courts, especially those against the state and the state-owned enterprises.

At the 1,369th meeting¹⁶ held in early March 2020, the Committee of Ministers of the Council of Europe in the context of the ECHR cases *“Yuriy Mykolayovych Ivanov v. Ukraine”*, *“Zhovner v. Ukraine”* and *“Burmych and Others v. Ukraine”* noted once again that the problem of non-execution of decisions in Ukraine remains, among other things, due to impossibility of initiating and terminating bankruptcy proceedings against state-owned or state-owned entities, as well as due to moratoria protecting state-controlled enterprises against liability and enforcement actions in certain economy sectors. In turn, as noted at the 1331st meeting¹⁷ held in early December 2018, given the same moratoria, most of the state debt was formed due to court decisions that came into force.

In June 2020, among the long-term priorities in the Government Action Program¹⁸ in the part of access to justice, cancellation of the unjustified moratoria on enforcement of court decisions was envisaged, which should be one of the steps to increase the level of actual court decisions enforcement.

The existence of moratoria is in fact recognized as the reason for the problem of non-enforcement of court decisions and in the National Strategy for Solving the Problem of Non-Enforcement of Court Decisions, the Debtors of Which Are a State Body or a State Enterprise, Institution, Organization, for the Period Up to 2022¹⁹. In this aspect, the Strategy, in particular, provides for creation of additional mechanisms for implementation

of court decisions regarding enterprises that are subject to moratoria. Alongside this, the Strategy does not cover the question of instant cancellation of moratoria or gradual elimination of reasons why they exist.

The BOC, for its part, realizes that under certain circumstances, moratoria imposed by the authorities and creating conditional immunity for debtors – state-associated enterprises and institutions, may arise from the need for the economic security of the state. Meanwhile, nominally, in implementing such moratoria, the government, which thus creates the significant imbalance between the interests of creditors (debt collectors) and debtors in favor of the latter, should simultaneously take measures to stabilize the situation, eliminate reasons stipulating introduction of the moratorium, and foresee mechanisms for actual execution of court decisions.

One of the most discussed issues in this context is the difficulty of satisfying monetary claims to the state-owned enterprises.

There are more than 17,000 state-owned and municipal enterprises in Ukraine, of which more than 3,000 are government-controlled ones. At the same time, according to the EU-funded Pravo-Justice Project, citing data from the Organization for Economic Cooperation and Development, the number of Ukrainian state-owned enterprises considerably differs from the European practice: 21 state-owned enterprises in Denmark, 29 in the Netherlands, 47 in Finland, 48 in Lithuania, 51 in France, 71 in Germany, and 126 in Poland.

According to the expert community, moratoria imposed to stabilize and guarantee operation of the state-owned enterprises actually result in ongoing abuses of the latter, deterioration of their financial state and recovery prospects,

¹⁶ See the link: <https://www.coe.int/web/cm/-/1369th-human-rights-meeting-of-the-ministers-deputies-3-5-march-2020-?inheritRedirect=true&redirect=%2Fweb%20%2Fcm%20%2Fexecution-judgments>

¹⁷ See the link: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016808f00a7

¹⁸ The CMU Action Program, approved with the Resolution dated 12.06.2020 No. 471. See the link: <https://www.kmu.gov.ua/npas/pro-zatverdzhennya-programi-diyalnosti-kabinetu-ministriv-t120620>

¹⁹ Approved with the CMU Order dated 30.12.2020 No.1218-p. See the link: <https://zakon.rada.gov.ua/laws/show/1218-2020-%D1%80>

distorting competition and often lead to poor management on the whole.

A separate category of moratoria, the relevance of which being the subject of discussion, is legislator's limiting the ability to satisfy the claims to private entities – individuals, individual entrepreneurs, enterprises. Although the government may justify such restrictions by social and business orientation, in practice it might create room for abuse in the same way.

For example, in the summer of 2014, a moratorium on foreclosure on property of citizens transferred as collateral for consumer

loans in foreign currency came into force. The expiration of this moratorium at the time of writing this report is set for 21.04.2021.

Taking into account that the set criteria for the moratorium to work allow the mortgagor to actually evade repayment of mortgage debt, the National Association of Banks of Ukraine, during consultations with the BOC, noted that banks have been significantly negatively affected. At the same time, during the six years' period of the moratorium, the lion share of borrowers has somehow settled the debt issue with banks extrajudicially, yet dishonest borrowers benefit more from the moratorium for a relatively long time.

Case 3

The BOC received a complaint from an industrial and commercial enterprise on the inaction of Selidivskiy City Department of the SES Main Territorial Department of Justice in Donetsk Region (Selidivskiy CDSSES).

Such inaction, according to the Complainant, consisted in non-compliance with the requirements of the Law of Ukraine "On State Guarantees for Enforcement of Court Decisions" No. 4901-VI dated 05.06.2012 (Law No. 4901-VI), in particular:

- According to Part 2 of Art. 4 of the Law No. 4901-VI if the court decision on funds collection from a state enterprise or legal entity is not enforced within six months from the date of the decision to initiate enforcement proceedings, its implementation is carried out at the expense of the budget program to ensure court decisions implementation.
- According to Part 3 of Art. 4 of the Law No. 4901-VI within ten days from the date of the establishment by the public enforcer of the fact of the existence of grounds for returning the enforcement document to the collector according to sub-para. 2-4, 9 of para. of Part 1 of Art. 37 of the Law of Ukraine "On Enforcement Proceedings", except for cases where the claimant obstructs enforcement actions, but not later than the period established by Part 2 of this Article, the head of the relevant body of the SES submits to the central body of executive power, which implements the state policy in the field of treasury servicing of budget funds, documents and information necessary for transfer to the debt collector, according to the list approved by the CMU.

Enforcement documents – a number of orders for 2002, 2006, 2007, 2009-2011, 2013 issued by the Commercial Court of Donetsk Region for a total of about UAH 300k were pending enforcement by the Selidivskiy CDSSES. Subsequently, these enforcement documents were attached to the consolidated enforcement proceedings, in which the debtor is the Korotchenko D.S. Mine State Enterprise, while the Complainant is the debt collector. As of the time of addressing the BOC with a complaint in October 2018, the debt has not been collected.

The Complainant repeatedly appealed to the Selidivskiy CDSSES with a request to provide documents and information on enforcement proceedings necessary for the Complainant to transfer funds to the State Treasury Service of Ukraine (STRS), as required by Law No. 4901-VI, but Selidivskiy CDSSES refused to do it.

After receiving the complaint, the BOC conducted several rounds of correspondence with the MOJ, including its territorial subdivisions, and several times discussed the subject of the complaint at the Expert Group operating under the Memorandum of Partnership and Cooperation between the MOJ and the BOC dated 15.09.2015.

Following the communication, the BOC found out that the position of the MOJ regarding the impossibility of transferring documents and information related to enforcement proceedings to the STrS was based on the fact that the public enforcer had no grounds for transferring the enforcement documents – in all enforcement proceedings related collection from Korotchenko D.S. Mine State Enterprise resolutions on suspension of enforcement actions by virtue of the provisions of the Law of Ukraine “On Restoring Solvency of State Coal Mining Enterprises” were issued. At the same time, the MOJ representatives stressed that sending proceedings materials to the STrS is an enforcement action, whereas the resolution on suspension of enforcement actions prohibits a public enforcer to perform any such actions.

The BOC, for its part, noted that Law No. 4901-VI provides two autonomous grounds for the transfer of documents and information required to transfer funds for the collector to the STrS: 1) a court decision to collect funds from a state enterprise or a legal entity has not been enforced within six months from the date of the decision to initiate enforcement proceedings; 2) the existence of grounds for returning the enforcement document to the collector in accordance with paragraphs 2-4, 9 of Part 1 of Art. 37 of the Law of Ukraine “On Enforcement Proceedings”. The ground provided for in Part 2 of Art. 4 Law No. 4901-VI existed before the adoption of the Law of Ukraine “On Restoring Solvency of State Coal Mining Enterprises” dated 13.04.2017 because the court decision on recovery of funds from Korotchenko D.S. Mine State Enterprise in favor of the Complainant remained inoperative for several years in a row. Therefore, even if to doubt the existence of the second ground, the Selidivskyi CDESES was obliged to submit the respective documents and information to the STrS at least in connection with first ground being in place.

As regards the MOJ arguments on impossibility to send the information on enforcement proceedings due to the resolutions to suspend enforcement actions, the BOC noted that the Law of Ukraine “On Enforcement Proceedings” and by-laws adopted on its basis do not contain a definition of an “enforcement action”. Meanwhile, an exhaustive list of enforcement actions was specified in the Regulations on the enforcement proceedings automated system approved with the MOJ Order dated 05.08.2016 No. 2432/5. “Sending Information on Enforcement Proceedings to the State Treasury Service Address” action was not listed in the said list, which does not allow to consider compliance with the requirements of Art. 4 of the Law No. 4901-VI as an enforcement action and, accordingly, to make such enforcement conditional on the presence or absence of a decision to suspend enforcement actions in the framework of enforcement proceedings.

The practice of other territorial subdivisions of the SES also testified in favor of the BOC position. Thus, in the course of reviewing the complaint, the Complainant also provided a letter from Luhanskyi CDESES with which the latter confirmed the fact of sending enforcement documents to the STrS according to the procedure prescribed by Art. 4 of the Law No. 4901-VI, already after the decisions on suspension of enforcement actions within the framework of enforcement proceedings were made.

The BOC also drew attention to the fact that sending enforcement documents to the STrS would in no way contradict the content of the Law of Ukraine “On Restoration of Solvency of State Coal Mining Enterprises” (Law No. 2658-VIII). The task of Law No. 2658-VIII is to preserve the solvency of the state-owned coal mining enterprises by preventing them from initiating bankruptcy proceedings preceded by enforcement proceedings for the enforcement of the respective decision. Thus, the procedure for court decisions enforcement provided by Law No. 4901-VI is an alternative to the procedure for enforcement of court decisions provided by the Law of Ukraine “On Enforcement Proceedings” and provides for enforcement of court decisions at the expense of the state budget in cases when the court decision failed to be enforced at the expense of the debtor-state enterprise. That is, in case of sending documents and information to the STrS requiring to transfer funds to the Complainant, provisions of the Law No. 2658-VIII would not be violated because the mentioned

Law establishes a ban on taking enforcement actions against the state coal enterprises according to the procedure established by the Law of Ukraine "On Enforcement Proceedings". At the same time, in case of sending the enforcement documents to the STrS further court decision enforcement would be at the expense of the state budget and in the manner prescribed by the Law No. 4901-VI. Hence, the state-owned coal mining company's assets (funds) would not be used to repay the debt, and, therefore, court decision execution would not affect the company's solvency. Moreover, execution of the court decision would thus "write off" liabilities of the state enterprise and improve its financial state.

Later on, another meeting of the Expert Group took place, following which, in June 2019, the BOC confirmed that the SES body had submitted documents to the STrS for the transfer of funds awarded to the Complainant.

In October 2020, the MOJ Directorate of Justice and Criminal Justice began specialized communication with stakeholders regarding moratoria, bans and restrictions that make certain categories of decisions impossible or difficult to implement.

Taking into account the Government's proven intentions, the BOC hopes that guarantees for enforcement introduced by laws of Ukraine will be strictly followed.

Similarly, the BOC expects the state to review and lift moratoria that have exhausted their relevance. In particular, it is expected that the thorough work will be carried out to audit existing obstacles to enforcing court decisions in the form of moratoria in order to objectively ensure proportionality and compliance with the fundamental principles of justice.

BOC recommendations:

1) **The MOJ —**

to create and to submit a draft Roadmap for the CMU consideration to cancel moratoria in the decisions enforcement sphere. When preparing the draft, one should ensure the following:

- assessment of the reasons that led to introduction of moratoria and the extent to which goals set by the state were achieved,
- their proportionality and actual effectiveness assessment.

2) **The CMU, engaging concerned government agencies,**

should ensure the development of the National Strategy regarding gradual elimination of those moratoria on enforcement of court decisions, the relevance of which is retained in accordance with the analysis conducted by the MOJ.

3) **The CMU,** in case of confirmation of certain moratoria's relevance:

- in the context of moratoria on debtors – state-owned enterprises or enterprises with a qualifying share of the state – to consider and to initiate introduction of effective alternative mechanisms to satisfy creditors' claims during the respective moratoria being in force.
- when raising the issue of extending the moratorium before the VRU, to provide for its extension only to those legal relations that took place before such an extension and conditioned actual introduction of the relevant restrictions, refraining from expanding the scope of such restrictions.

2.3 Liability of officials for non-execution of court decisions. Judicial control

The situation with non-execution of court decisions has become threatening. This is confirmed by both international experts' assessments and complaints received by the BOC.

As stated in the expert opinion of the Council of Europe prepared in 2018²⁰, accumulation of non-executed court decisions in our state lasted at least for two decades. This undermined the rule of law and the effectiveness of judicial protection, and ultimately became the main reason for thousands of our citizens to apply to the ECHR.

So, according to the study prepared by the Private Enforcers Association of Ukraine²¹, out of UAH 724.6 bn to be enforced by SES authorities in 2019, only UAH 16.5 bn were actually collected, i.e. the effectiveness rate of court decisions enforcement is about 2.3%.

A case won in court in the absence of the effective enforcement mechanism is not a guarantee of real restoration of a violated right. This problem is most noticeable for businesses in the field of court decisions enforcement against the state, as the legislation provides for very limited instruments for implementation of such decisions. Under such conditions, the institute of legal liability for non-execution of court decisions becomes of crucial importance. In the theory of state and law²², the main tasks of legal liability are considered to be the following: (1) punishment and re-education of the person who committed the offense; (2) preventing commission of another similar

offense in the future; (3) compensation for damages caused by an illegal act.

That is, in conditions when the procedure for enforcement of a court decision, due to its shortcomings, cannot guarantee the final execution of a court decision, the attainment of this goal should be ensured by means of legal responsibility. The threat of sanctions should minimize cases of non-execution of a decision on the grounds of ambiguity or complexity of the enforcement procedure.

It is worth mentioning that in Ukraine there is administrative and criminal liability for non-execution of a court decision. However, results of investigation of complaints related to failure to execute a decision, received by the BOC, indicate that the institute of legal liability for non-compliance with a court decision is also far from being perfect, as relevant sanctions are insignificant and the process of bringing offenders to liability can easily be avoided. As a result, the lack of real liability for non-execution of court decisions only exacerbates the problem of extremely low level of final court decision implementation. By the way, in September 2020, the fact of lacking legal remedies due to non-enforcement of court decisions was finally recognized by the Government of Ukraine as one of the main reasons for court decisions non-enforcement²³.

Before analyzing the specific shortcomings of legal liability for non-compliance with court decisions, it is expedient to briefly describe such liability types. Thus, the existing legal liability measures for non-compliance with

²⁰ Action Plan for Ukraine for 2018-2021, approved by the Committee of Ministers of the Council of Europe on 21.02.2018 (CM/Del/Dec (2018) 1308/2.1bisc)

²¹ See at: <https://drive.google.com/file/d/19qoR0a6qRa2I64twFfdp5hjXsnfxA2yW/view>

²² S.V. Bobrovnyk Legal responsibility//Theory of State and Law. Academic course. Textbook: ed. O.B. Zaychuk and N.M. Onishchenko

²³ The National Strategy for Solving the Problem of Non-Enforcement of Court Decisions, the Debtors of Which Are a State Body or a State Enterprise, Institution, Organization, for the Period Up to 2022, approved with the CMU Order dated 30.09.2019 No. 1218-p

court decisions can be divided into four types: (1) a fine for non-compliance with the requirements of the public enforcer in the enforcement proceedings; (2) an administrative sanction provided by Art.

185-6 of the CUAO; (3) a fine for failure to submit a report on the status of court decision execution; (4) criminal liability under Art. 382 of the CCU.

A fine for non-compliance with the demands of the public enforcer under the enforcement proceedings procedure

According to the Law of Ukraine "On Enforcement Proceedings", after launching the procedure for enforcement of a court decision, a public enforcer has the right to send demands for execution of decisions that are binding throughout Ukraine²⁴. Failure to comply with the legal demands of the enforcer entails liability in the form of a fine levied on the debtor as official in the amount

of 200 non-taxable income minimums (about UAH 3,400), while if the debtor is a legal entity (a government agency) the amount is 300 non-taxable income minimums (about UAH 5,100)²⁵. For repeated non-compliance with the public enforcer demands, a double fine is imposed on the debtor. Such a fine is levied on the debtor in favor of the state.

Case 4

In October 2019, a trading company from Zaporizhzhia turned to the BOC with a complaint on the inaction of the STS, which consisted in non-execution of a decision of the Dnipropetrovskiy District Administrative Court in case No. 160/8898/18 dated 08.02.2019 (Decision) by which the STS Commission deciding on registration of the tax invoice/adjustment calculation in the URTI or refusal of such registration was obliged to consider the Complainant's documents on his suspended tax invoices and make a reasoned decision based on the consideration results.

According to the information from the Unified State Register of Court Decisions, the date of the Decision's entry into force is 11.07.2019. At the same time, according to the Complainant, as of the date of its complaint (04.10.2019), the Decision remained not executed.

Responding to the Complainant's request regarding the Decision enforcement status, the STS, with a letter sent in September 2019, informed that measures on execution of the Decision were being taken.

In response to the request of the BOC, as part of the investigation of the company's complaint, the STS informed of impossibility to implement the Decision. The state body's arguments regarding the impossibility of execution of the Decision could be summarized as follows: (1) Decision was challenged to the court of cassation; (2) execution of the Decision is impossible given the provisions of the Procedure for suspension of tax invoice/adjustment calculation registration in the URTI approved with the CMU Resolution dated 11.12.2019 No. 1165 (Procedure No.1165).

With a judgment of the Supreme Court dated 30.03.2020, the STS's cassation appeal was returned to the applicant.

The second argument of the tax authority was repeatedly discussed at the meetings of the Expert Group established according to the Memorandum of Partnership and Cooperation between the STS and the BOC dated 06.11.2019. However, the STS continued claiming that the Procedure No. 1165 allows the STS to consider appeals against tax invoices registration suspension only once,

²⁴ Part 4 of Art. 18 of the Law of Ukraine "On Enforcement Proceedings"

²⁵ Art. 63, 75 of the Law of Ukraine "On Enforcement Proceedings"

while the Decision obliged the STS to reconsider the appeal. Therefore, the STS insisted on the need to amend the Procedure No. 1165. At the same time, the STS did not initiate the process of amendments.

Apart from addressing the BOC, the Complainant also launched the enforcement proceedings to have the Decision executed. However, the enforcer's demands also did not contribute to the execution. In this regard, the public enforcer issued a decision to impose a fine on the STS under Art. 75 of the Law of Ukraine "On Enforcement Proceedings". After that, the enforcer, in fact, stopped trying to oblige the STS to comply with the Decision, as the latter continued claiming that it was impossible.

In September 2020, the Complainant applied to the court for judicial control of the Decision execution. On 01.10.2020, the Dnipropetrovskiy District Administrative Court satisfied the Complainant's application and ordered the STS to submit a report on the execution of the Decision by 02.11.2020. At the end of October 2020, the STS finally complied with the Decision, then the BOC completed the investigation of the complaint.

As can be seen from the above-mentioned complaint, it is clear that the court decision made in the name of the State of Ukraine, can easily be neglected by the state (represented by its competent bodies). Thus, such kind of legal responsibility as the penalty provided by Art. 75 of the Law of Ukraine "On Enforcement Proceedings", is unable to stop the offense or prevent commission of other similar offenses in the future. There are several reasons for this inefficiency of this type of liability: (a) a small fine amount in pecuniary equivalent; (b) a fine does not serve as a personal punishment of perpetrators as it is collected from the state budget of the respondent state body and transferred to the state budget of the SES; (c) the person in whose favor the judgment is given does not receive any compensation for damages caused to him by non-compliance with the judgment.

The BOC is convinced that the most crucial thing to ensure the effectiveness of such a

mechanism of legal protection as a fine under Art. 75 of the Law of Ukraine "On Enforcement Proceedings" is to eliminate the reasons "b" and "c". After all, under the current regulation, on the one hand, the state (represented by its competent authority) as an offender does not de facto suffer any negative consequences of its illegal behavior, and on the other hand, a person who has suffered from illegal behavior does not receive compensation for damages. That is, we see that such a fine does not contribute to achieving basic legal liability functioning objectives.

It is important to remember that the ECHR has repeatedly stressed the need for introducing effective remedies in Ukraine that can provide adequate redress for non-compliance with court decisions²⁶. As a result, the above considerations suggest the need to improve the mechanism of application of the fine provided for in Art. 75 of the Law of Ukraine "On Enforcement Proceedings".

²⁶ In its Judgment in "Burmych and Others v. Ukraine", the ECHR ruled that 12,143 applications set out in annexes to this Judgment should be dealt with in accordance with obligations arising from the pilot Judgment in "Yurii Mykolayovych Ivanov v. Ukraine" (Application No. 40450/04, Judgment dated 15.10.2009), which established the existence of a structural problem that leads to violation of para. 1 of Art. 6 and Art. 13 of the Convention and Art. 1 of the First Protocol to the Convention. As a result, the ECHR ruled (para. 4 of the Judgment "Burmych and Others v. Ukraine") to remove these applications from the Court's register of cases in accordance with sub-clause "c" of clause 1 of Art. 37 of the Convention and refer them to the Committee of Ministers of the Council of Europe, for consideration in the context of **taking general measures to implement the pilot decision in Ivanov case**, including compensation for non-enforcement or delayed enforcement of national court decisions, as provided for in para. 5 of the resolution part of that decision, and payment of the debt according to a national court decision. In turn, in para. 5 of the pilot Judgment in the case "Yurii Mykhailovych Ivanov v. Ukraine", the ECHR ruled as follows: *"the respondent State must introduce an effective remedy or a set of such remedies capable of providing adequate and sufficient redress for non-compliance or delays in enforcement of judgments of national courts in accordance with the principles established by the case-law of the Court"*.

Administrative sanction provided by Art. 185-6 of CUAO

Art. 185-6 of the CUAO provides for liability for failure to take measures for a separate court ruling. Punishment for this offence is a fine ranging from UAH 340 to 850. However, the scope of this liability type is extremely limited. After all, the commented norm of the law provides for liability for non-compliance with a separate court ruling²⁷, not any court decision.

There are two obvious shortcomings of legal liability under Art. 185-6 of the CUAO: (1) a small amount of the fine, which is neither able to perform the punishing function of the offender, nor becomes a deterrent to prevent similar offenses in the future; (2) the scope

of the sanction is limited and, as a result, a large number of offenses remain without an adequate response from the state.

Hence, to prevent situations, where a person may be potentially brought both to the administrative and criminal responsibility under Art. 382 of the CCU for one type of violation (non-execution of court decision), the BOC finds it necessary to set a property criterion for the amount of loss caused by non-execution of court decision exceeding of which for such non-execution entails criminal responsibility under Art. 382 of the CCU.

Penalty for failure to submit a report on the status of a court decision execution

Provisions of Part 1 of Art. 382 of the Code of Administrative Judicial Procedure of Ukraine (CAJPU) stipulates that the court that rendered a court decision in an administrative case may oblige a public authority, in whose favor the court decision was made, to submit a report on execution within the period set by the court decision.

Failure to submit such a report by the head of the relevant public authority may be the ground for imposing a fine amounting from twenty to forty subsistence minimums for employable persons equivalent in pecuniary form from UAH 38,420 up to 76,840. According to the BOC, this fine amount is significantly bigger as compared to fines imposed in accordance with the CUAO.

As part of one of complaints that came for the BOC consideration, a decision that had not been implemented by the STS Main Department in Kharkivska Region for almost half a year, was executed as soon as the court established time limits to submit the report and started reviewing the complainant's application on imposition of fines on the head of the respective controlling body.

We see an increase in the number of decisions on imposing fines on the heads of government agencies, which certainly testifies to the practical usefulness of judicial control instruments.

The BOC sees considerable potential in the judicial review institute as a form of liability for non-execution of court decisions and hopes that judges actively use this instrument.

Given that implementation of decisions taken against a public authority is often sabotaged by the central executive bodies, the BOC considers it appropriate to supplement the CAJPU with the provision that in cases where the defendant is a central executive body – provision of the report on the court decision execution is mandatory. There are currently conflicting (controversial) views on the feasibility of introducing this institute, including concerns that the said initiative could result in overloading judicial authorities even more, as well as bear additional budget expenses. There is no doubt these arguments should be critically assessed to adopt consistent governmental decisions and to prevent inexpedient court overload.

²⁷ A separate ruling is issued by court when, during proceedings, it establishes a violation of the law or deficiencies in the activities of a legal entity, state or other bodies, or as a court reaction to abuse of procedural rights by a party to the trial.

Criminal liability under Art. 382 of the CCU

The Art. 382 of the CCU qualifies intentional non-execution of a court decision as a crime for which, depending on its severity, liability in the form of a fine of UAH 12,500 and even imprisonment for up to eight years is provided.

It might seem that such a severe sanction should play a preventive role in punishing and encouraging both private and public authorities to properly comply with decisions to avoid criminal prosecution. However, the real situation with investigation of crimes and prosecution for non-compliance with a court decision is completely the opposite.

According to the Prosecutor General's Office official report²⁸, for the period January-December 2019, law enforcement authorities carried out pre-trial investigation in 3183 criminal proceedings under Art. 382 of the CCU. At the same time, during the same period, only 86 criminal proceedings were referred to court with an indictment.

It is clear that convictions will not be passed in all proceedings that were referred to court. Meanwhile, even a superficial analysis of convictions under Art. 382 of the CCU contained in the Unified State Register of Court Decisions, allows us to see that the vast majority of convicts under this article are private entities, not state servants. By the way, the largest share of convictions concerns non-execution of decisions on collection of debts on bank loans, arrears on alimony, non-payment of fines for administrative offenses imposed by courts, non-execution of decisions on collection of debts on wages, etc.

The BOC experience in considering complaints on improper investigation of crimes under Art. 382 of the CCU also allows us to conclude that the mechanism of criminal prosecution for non-compliance with court decisions of such categories of persons as state servants is extremely ineffective. This can be illustrated with an example of the following complaints the BOC had to work on.

Case 5

In July 2019, the Complainant appealed to the BOC with a complaint about inaction of an investigator of Shevchenkivskiy District Police Department of the Main Department of the National Police in Kyiv City within a criminal investigation No. 12019100100004608 dated 18.05.2019.

The criminal proceedings No. 12019100100004608 dated 18.05.2019 were initiated on the fact officials of the SFS Main Department in Kyiv City were not complying with a decision of the District Administrative Court of Kyiv City in case No. 826/17365/17. The SFS Main Department in Kyiv City was, in particular, obliged to make certain changes to the Complainant's integrated card (remove tax debt record from the card).

The Complainant stated that the police investigator was not conducting an investigation and was unreasonably refusing to recognize him as a victim. As a result, the Complainant was deprived of the opportunity to initiate investigative actions on his own.

As part of the complaint consideration, the BOC sent a written request to the Shevchenkivskiy District Police Department of the National Police in Kyiv City, emphasizing that according to the current provisions of the Criminal Procedural Code of Ukraine (Criminal PCU), the Complainant is considered a victim of crime and, accordingly, has a right to acquiring such a status in the criminal proceedings. In addition, the BOC investigator participated in the Complainant's meeting with the police investigator, during which he also supported the Complainant's position.

²⁸ See the link: https://www.gp.gov.ua/ua/stat_n_st?dir id=113895&libid=No.

Finally, in August 2019, the investigator handed the Complainant a memo on the victim's procedural rights and responsibilities. The BOC completed the investigation of the complaint.

However, even after the Complainant was granted a victim status, the investigation in the case did not progress significantly, as the tax authority argued that it was technically impossible to implement the decision and make the necessary changes to the Complainant's integrated card. According to the latest information received from the Complainant, in June 2020 the investigation continued, no charges were brought against anyone in the case.

Case 6

In October 2019, the Complainant appealed to the BOC with a complaint about inaction of an investigator of the Shevchenkivskiy District Police Department of the National Police in Kyiv City within a criminal investigation No. 12019100100008517 dated 06.09.2019.

The criminal proceedings No. 12019100100008517 dated 06.09.2019 were initiated on the fact of the failure of officials of the STS Main Department in Kyiv City to implement a decision of the District Administrative Court of Kyiv City dated 06.09.2016 in case No. 826/1268/16. The tax authority was, in particular, obliged to make certain adjustments in the Complainant's integrated card (remove a record of the existence of a tax debt on income tax from the card).

The Complainant reported that the STS Main Department in Kyiv City was ignoring the court decision for three years in a row. Meanwhile, even after the Supreme Court confirmed the legality of the court decision, tax authorities did not stop trying to prevent its execution by submitting applications for clarification of the decision, initiating a change in the manner of execution of the decision, and so on. Despite the obvious illegal inaction of the STS Main Department in Kyiv City, the police investigator did not perform any investigative actions to identify perpetrators. The only investigative action in the criminal proceedings was interrogation of the Complainant's representative.

The investigator, for his part, informed the Complainant several times that he did not see any signs of a crime in the actions of the officials of the STS Main Department in Kyiv City.

Following the discussion of the complaint at the Expert Group established under the Memorandum of Partnership and Cooperation between the BOC and the Prosecutor General's Office of Ukraine dated 12.11.2019, materials of the criminal proceedings No. 12019100100008517 dated 06.09.2019 were sent for further investigation to the Territorial Department of the State Bureau of Investigation in Kyiv City.

As of January 2021, the pre-trial investigation of the criminal proceedings No. 12019100100008517 dated 06.09.2019 was ongoing. The BOC also continues investigating the complaint.

As can be seen from the example of the above cases, it is much more difficult for law enforcement agencies to investigate crimes related to non-execution of court decisions by state servants than similar investigations against individuals. When working on this

category of complaints, the BOC has often heard law enforcement agencies stating impossibility or difficulty of proving the intent of officials (as a mandatory condition of criminal liability) for non-compliance with a court decision. It should be noted that

this “complexity” of proving the intent to commit a crime is to some extent due to the existing disposition²⁹ of Art. 382 of the CCU, which de facto allows bringing a person to responsibility only for non-compliance with a court decision, which directly obliged this person to take certain actions, such as paying money. This is exactly the approach taken by the Supreme Court to determine the intent to commit a crime³⁰. At the same time, according to the established case-law in disputes on debt collection, the court does not oblige the debtor to pay the creditor, but rather decides to collect the debt amount from the debtor by the SES authority. In such circumstances, the disposition of Art. 382 of the CCU practically makes it impossible to bring a dishonest debtor to justice.

The intent not to comply with a court decision in the category of cases where a state body must take a number of additional actions that the court did not oblige it to take is

even more difficult to prove. Meanwhile, the responsibility for not taking measures aimed at enforcing a court decision is extremely necessary to overcome the systemic problem with court decisions execution in Ukraine. The BOC experience shows that public authorities quite often do not take necessary actions to eliminate the reasons preventing execution of a court decision. The example of Case 4 given above shows that the STS did not comply with the court decision for almost a year and a half in view of the need to amend the procedural legislation, however, it did not take any actions to initiate such amendments. At the same time, such behavior of a state body is obviously malpractice and leads to blocking of a court decision implementation and should be recognized by the state as an offense, with the respective applying of legal responsibility measures. This indicates that the existing wording of Art. 382 of the CCU needs significant revision.

BOC recommendations:

The CMU:

- 1) To develop and to submit to the VRU a draft law on amendments to the Law of Ukraine “On Enforcement Proceedings” to increase the fine amount provided for in Art. 75 of the Law of Ukraine “On Enforcement Proceedings”, as of January 2021, and introduction of a mechanism for directing a part of the fine amount paid by the debtor according to the court decision, to compensate for damage caused to the person by delayed non-compliance with the court decision.
- 2) To develop and to submit to the VRU a draft law amending Art. 185-6 of the CUAO to increase the penalty amount for leaving a separate court ruling without consideration or failure to take steps to eliminate violations of the law specified therein, as well as to expand the effect of this norm to any effective court decision.
- 3) To develop and to submit to the VRU a draft law amending Art. 382 of the CCU to introduce criminal liability not only for deliberate non-execution or hindering the execution of a court decision, but also for ignoring a court decision that has entered into force, and/or failure to take measures necessary to implement a court decision that has entered into force.

²⁹ Disposition is that part of the norm (article) of the CCU naming a specific criminal act or describing signs in respect of committing which liability arises

³⁰ See a judgment of the Supreme Court dated 12.02.2020 in case No. 659/1012/18. <https://reyestr.court.gov.ua/Review/87640607>

3 SPECIFICS OF COURT DECISIONS EXECUTION IN VARIOUS AREAS: EXPERIENCE OF THE BUSINESS OMBUDSMAN COUNCIL

3.1 Playing with arguments or typical ways of avoiding execution/taking court decisions into account by state bodies

When the business proved its case in court (that is, exercised the most effective guarantee of the violated right restoration³¹), it naturally expects the end of its problems in relations with the respective state body and the real restoration of violated rights.

However, as we described earlier, the resistance of the executive body might continue, damaging not only a specific business but also the judicial authority.

According to the BOC observations, such resistance may be manifested as:

- actual non-execution of a court decision (when the state body does not comply with a mandatory injunction/obliging court decision); and
- neglect of judicial protection and/or non-recognition of the court decision results (when the state body actually ignores a declaratory/non-obliging court decision and refuses to take actions necessary for the actual restoration of violated rights; or after execution of a mandatory injunction continues similar violations in the future ignoring the reasoning part of the decision).

In case of non-execution of a mandatory injunction, business has a certain set of

instruments to “influence” the state body (enforcement proceedings, various types of liability for non-compliance, etc.). Although such instruments require significant improvements, which is this report is largely intended for, their availability allows them to have quite serious leverage to influence the illegal behavior of a public body.

At the same time, in the second case the situation is more complicated, as it actually requires a good will of the state body (usually except the situations when legal acts clearly stipulate a rule of conduct in case the court declares illegality of the previous act, action, omission of a public authority).

Among explanations regarding non-execution of court decisions, state bodies give the BOC the following arguments, in particular³²:

- technical impossibility to implement a court decision;
- inconsistency of the obligation determined by the court for the state body with legal acts and/or real circumstances of databases, registers functioning, etc;
- lack of financing;
- references to initiated court proceedings that might (!) result in the impossibility of

³¹ The second sentence of the second paragraph of sub-clause 2.3 of clause 2 of the reasoning part of the judgment of the Constitutional Court of Ukraine (Grand Chamber) in the case of constitutional complaint of Glushchenko Viktor Mykolayovych regarding compliance (constitutionality) of provisions of Part 2 of Art. 392 of the Criminal PCU with the Constitution of Ukraine dated 13.06.2019 No. 4-p/ 2019.

³² The BOC would like to draw attention to the fact that it is the arguments used by government officials to explain non-compliance, not the classification of reasons for that. According to the CMU Order dated 30.09.2020 No. 1218-p “On Approval of the National Strategy for Solving the Problem of Non-Enforcement of Court Decisions, the Debtors of Which Are a State Body or a State Enterprise, Institution, Organization, for the Period Up to 2022”, the following main reasons for emergence of court decision non-enforcement problem were identified: legislative; reasons related to collection of information; financial reasons; reasons caused by the lack of legal remedies.

executing the court decision in the future (such as continuing appeal proceedings (even upon the court decision entry into force) or re-appealing to the investigative judge in criminal proceedings attempting to impose arrest on confiscated property);

- the need for long-term internal coordination (!) of court decision execution by various departments and/or officials;
- counter-claims of the state body to the enterprise;
- obvious illegality of a court decision, in the opinion of state officials (!);
- lack of a normatively regulated procedure (method) for implementing a specific requirement of the court (referring to Art. 19 of the Constitution of Ukraine);
- the need for clarifying the court decision and/or establishing the procedure and method of its enforcement;
- the need for conducting examinations in the case, etc.

Such arguments are to some extent bordering with an outright evasion of the execution of a court decision and should be eradicated in the practice of public authorities.

In a situation with the actual neglect of judicial protection and/or non-recognition of the court decision results, apart from the above-mentioned arguments, we often hear from government officials that:

"... since the court did not oblige them to do anything, no action can be required from them at all";

"...Ukraine is not a Common law legal system country (no binding precedent rule in place), and taking a specific court decision into account in the future is not necessary at all"

The blame for this situation is shifted either to the court, which failed to protect the rights effectively, or to the business, which allegedly could have previously simply included more claims in its statement of claim.

However, the desire of the state body to continue consequences of actions, decisions, omissions recognized illegal by courts is often lying behind this "position". Thus, businesses have to go to court again to finally achieve the desired result in the form of a specific action.

At the same time, according to the BOC standpoint, such an approach is unacceptable in a state governed by the rule of law, which focuses on improving the business climate and fighting corruption. Every court decision confirming a violation of business rights by a state body and/or declaring illegality of decisions/actions/omission of a public authority should be an impetus for the state body to analyze the situation and changes, and not for the company – to re-apply to court.

Moreover, sometimes re-appealing to the court is no longer possible.

Case 7

On 24.01.2018, Fozzy-Food, a leading Ukrainian retailer, approached the BOC regarding overpaid customs duties refund.

In 2013, disagreeing with the customs value of the imported goods determined by the Complainant, the Kyivska Customs adjusted it upward. Accordingly, the Complainant paid more taxes to the budget. In order to prove the correctness of the declared customs value and refund the overpayment, the retailer challenged the respective decisions of the Kyivska Customs in court.

But despite the fact that in 2013-2014, the courts made a number of decisions in favor of the Complainant, he received a refusal from the Kyivska Customs to refund many of them. In 2016, the court even ordered the Kyivska Customs to take action to refund funds in connection with the cancellation of the adjustment decisions, but it did not result in full refund either. The reasons for the refusal were quite formal.

At the same time, one of the grounds for refusal to return funds for some deliveries was that the court did not revoke adjustment decisions, but "only" declared them illegal. All that was offered to the Complainant was to re-apply to the court or obtain an explanation of the court decision. Meanwhile, the time passed since violation of the Complainant's rights did not facilitate confidence of judicial protection, and the court refused to provide clarifications.

The BOC fully supported the Complainant's position and requested the SFS and the Kyivska Customs to comply with the court decisions. The BOC was proving inadmissibility of the attempt of the state body to evade execution of the court decisions in the state governed by the rule of law. In particular, regarding "interpretation" of the resolution part of the court decision by Kyiv City Customs officers, according to which (interpretation) the absence of a clear instruction to cancel the decision on customs value adjustment by "simply" declaring it illegal does not result in cancellation of such an adjustment decision.

As a result of a long dialogue with the public authority, the BOC was able to convince it of the sufficiency of declaring illegality of the decision on customs value adjustment to refund respective funds to the company.

Thus, the BOC believes that actual continuation of the consequences of decisions/actions/ omissions declared illegal in court is inadmissible, and it is the state (represented by the state bodies) that should take a proactive position to correct the unfair situation and restore the violated rights.

Particular attention should be paid to the expediency of taking into account the reasoning part of court decisions by the state

bodies as regards, in particular, interpretation of certain provisions of the law. After all, a constant disregard for the logic of the court by applying the law in a way other than the court considers to be correct, cannot meet legal expectations of business and harms the judicial authority³³.

For example, litigation statistics in certain categories of cases clearly indicate the need for changes, in particular, in such areas as tax

³³ Judgment of the ECHR dated 24.11.2016 in the case of "Polimerkonteyner, TOV v. Ukraine" (Application no. 23620/05), para. 9: "The domestic courts stated on many occasions that the issue in question had already been examined many times and that the continued practice of the customs office of wrongly assigning the 'more expensive' code to the applicant company's imported goods undermined both the finality of those judgments and the courts' authority."

invoices registration suspension³⁴ and customs value adjustment³⁵.

Judicial decisions should be an important indicator of the state body's activity, which should be taken into account both in terms of assessing its functioning performance (including measuring individual officials' performance) and in terms of amending law application and legal regulation in the future.

It should also be noted that the direct dependence of execution on numerous internal approvals or the workload connected to a large number of relevant decisions to be executed does not seem admissible. Similarly, collegiality of the internal decision-making process should not contribute to avoiding responsibility for delaying thereof.

It seems obvious that a function of internal monitoring regarding court decisions should be ensured at a proper level, especially for the state bodies in respect of which more than 1,000 decisions are made per year. In such state bodies, it is considered expedient

to create separate staffing positions (at least temporarily) to be tasked with the function of ensuring court decision execution with the provision of appropriate powers to control the adequate level of other employees' performance if they are required to perform certain actions/decisions, etc.

In this aspect, it also seems appropriate to set separate requirements for key performance indicators (KPI) both at the level of government agencies and for individual positions. This will help to ensure systematic monitoring and respective process management. It can be noted that the development of a system for monitoring the implementation of tasks and KPI, effectiveness and quality of professional activities has already been set in the framework of the tasks of reforming the STS³⁶ and the SCS³⁷. Accordingly, setting the necessary requirements for court decisions execution may not require adoption of new regulations and implementation of complex procedures for approving changes thereto.

³⁴ According to the Report of courts of first instance on consideration of cases in administrative proceedings No. 1-a (See the link: https://court.gov.ua/inshe/sudova_statystyka/rik_2019) on tax invoices suspension 2143 cases were considered with a decision, of which 1978 satisfied the claim (!), i.e. it is 92%.

³⁵ According to the Report of courts of first instance on consideration of cases in administrative proceedings No. 1-a (See the link: https://court.gov.ua/inshe/sudova_statystyka/rik_2019) on "customs valuation of goods" 2105 cases were considered with the decision, of which 1738 satisfied the claim, i.e. more than 80%.

³⁶ The CMU Order dated 05.08.2019 No. 542-p "Some Issues of Implementation of Conceptual Areas of Reforming the System of Bodies Implementing State Tax and Customs Policy"//Action Plan for implementing conceptual areas of reforming the system of bodies implementing state tax policy (para. 18). See the link: <https://zakon.rada.gov.ua/laws/show/542-2019-%D1%80No.Text>

³⁷ The CMU Order dated 13.05.2010 No. 569-p "Some Issues of Implementation of Conceptual Areas of Reforming the System of Bodies Implementing State Tax and Customs Policy"//Action Plan for reforming and developing the system of bodies implementing state tax policy (para. 17). See the link: <https://zakon.rada.gov.ua/laws/show/569-2020-%D1%80No.Text>

BOC recommendations:

The CMU:

- 1) To review the existing approach to the disciplinary liability of the state servants in the context of delays, neglect, or refusal to actually implement the effective court decision³⁸.
- 2) Among the key indicators of results, effectiveness and quality of service of the state servants who hold positions of heads of central executive bodies – to include indicators that reflect the results of court appeals against decisions, actions, inaction of the relevant body against business and actual implementation of the effective court decisions.
- 3) To ensure implementation of control function over execution of court decisions in state bodies, for instance, by creating staffing positions responsible for this area of activity for the state bodies against which over 1,000 court decisions are rendered per year.
- 4) To ensure implementation of procedures for reviewing the law application practice of state bodies based on judicial practice being formed in certain categories of cases or legal norms, which directly indicate systemic violations of the law by the state body.

³⁸ The current legislation, particularly Chapter 2 of the Law of Ukraine “On State Service” provides for the principles of disciplinary liability of state servants. The reason for bringing to this type of liability is committing a disciplinary offense. A disciplinary offenses list given in Part 2 of Art. 65 does not directly imply that impeding actual implementation of court decisions (where it directly depends on a certain state servant) may be considered a disciplinary offense. In view of the above, the BOC believes that there may be a problem in the respective law application and, consequently, the possibility of bringing the state servants to liability.

3.2 Problems of court decisions execution at the pre-trial investigation stage in criminal proceedings

Non-execution of court decisions is also problematic in the area of court decisions in the framework of pre-trial investigation of criminal proceedings. Despite the fact that the procedure for court decisions execution in Ukraine has its shortcomings (which have already been discussed in previous chapters of this report), the very fact of the existence of such a procedure and the possibility of using coercive measures by the state gives the person in whose favor a court decision was rendered, a minimum toolkit to ensure implementation of the final court decision.

At the same time, there is a category of court decisions for which the enforcement mechanism is not stipulated by law as such. Consequently, we cannot even imagine the scale of the problem associated with non-execution of this category of court decisions. Such court decisions are rulings of investigative judges, and this primarily applies to **rulings on the return of property seized during investigative actions**.

The BOC is well aware that criminal proceedings, and especially pre-trial investigations, are the areas where the rights of entrepreneurs are most vulnerable to arbitrariness on the part of the state represented by its law enforcement agencies. As of 31.12.2020, the BOC received 1,323 complaints on law enforcement officers' actions and inaction, of which 106 complaints (8%) relate to the very failure to comply with the investigative judges' rulings on return

of property seized as a result of searches. It should be noted that such a typology of complaints as non-compliance with court decisions within investigation of criminal proceedings, the BOC began to monitor only in early 2019 (after it became clear that this problem is systemic for the Ukrainian business). Therefore, in fact, the BOC has received many more than 106 complaints about inaction of law enforcement officers related to non-compliance with court decisions since the launch of its operations.

While considering such complaints, the BOC repeatedly had to observe cases when during the search of the enterprise documents and property, which do not directly relate to criminal proceedings, were seized, but there were serious difficulties with the subsequent return of such property. Of course, the person whose property was seized during the investigation has the right to demand its return in court. In case the court agrees with the fact there were no sufficient grounds for seizing property, it would oblige the respective investigation authority to return it.

However, complaints received by the BOC indicate that sometimes investigative bodies refuse to comply with the rulings on the return of property under various reasons (such as handing over criminal proceedings to another body, appointment of an expert, the need to clarify a court decision, failure to obtain copies of a ruling certified by the court, investigator's being on sick-leave or on vacation, etc.).

Case 8

In July 2017, an agropesticide manufacturer from Odeska Region filed a complaint with the BOC alleging non-compliance of an investigator of the Investigation Department of the SSS Department in Odeska Region with a ruling of Odeska Region Court of Appeal dated 26.04.2017 in case No. 522/5170/17 on return of seized property (documents and agropesticides).

As it turned out during the consideration of the complaint, the investigator justified the impossibility of returning the property by saying that agropesticides seized from the Complainant were recognized as material evidence in the criminal proceedings and were sent to an expert institution for examination.

However, Art. 16 of the Criminal PCU clearly stipulates that deprivation or restriction of property rights in criminal proceedings shall be made only upon a motivated court's decision (seizure of property). Recognition of seized property as material evidence or scheduling an examination in accordance with the provisions of the current Criminal PCU is neither a ground for restricting a person's property rights, nor, moreover, a ground for non-execution of a court decision to return such property.

In the course of considering the complaint, the BOC repeatedly sent written requests to the Prosecutor General's Office and the State Security Service of Ukraine (SSS) requesting to execute the court decision and to return the seized property to the Complainant. In addition, the complaint subject was discussed several times during working meetings of the BOC representatives with the management of the Prosecutor General's Office. However, the seized property was not being returned to the Complainant for a long time. At first, both the Prosecutor's Office and the SSS claimed that the property could not be returned until the examination was completed. Later, the reason for non-return was handing over the criminal proceedings to another law enforcement agency (the case with the SSS was passed to the National Police), which could not execute the decision to return the property for a long time, because the Prosecutor's Office did not transfer the criminal proceedings file to a new investigator.

Finally, only in April 2018, the decision of the Odeska Region Court of Appeal dated 26.04.2017 in case No. 522/5170/17 on the return of the seized property was finally executed. However, at the time of the return some agropesticides were spoiled due to storage expiration of such specific property. Therefore, as a result of the police's long evasion of property restitution, the Complainant suffered material damage.

There is no doubt that the binding nature of court decisions is the cornerstone of the rule of law. Judicial protection will not make any sense without the state's ability to ensure effective enforcement of court decisions. **"That right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative"** – this is the first time the ECHR has stated in one of its judgments on the problem of court decisions execution. However, from the example of Case 8, we can see that the law enforcement agencies, which the state has given the right to use coercion to

protect legitimacy and the rule of law, violate the rule of law themselves, allowing to not execute final decisions on contrived grounds.

Meanwhile, the person in whose favor the court decision was rendered can only hope for a conscientious approach of a law enforcement body to the issue of such decision execution. If the law enforcement body leaves the court decision not executed and does not return the property seized from the entrepreneur (or does not perform other actions specified in the court ruling), then the legislator did not provide any mechanism

³⁹ Hornsby v. Greece, Judgment dated 19.03.1997 (Application no. 18357/91), para. 40

for enforcement of court decisions rendered in the criminal proceedings at the pre-trial investigation stage.

The origins of this issue relate to shortcomings of the Criminal PCU itself.

Firstly, in 2012, at the Criminal PCU drafting stage, this problem was extremely difficult to predict.

Secondly, the development of any enforcement mechanism and its harmonization with the existing system are baffling tasks. We do not rule out the Criminal PCU developers were driven by a high level of legal culture of pre-trial investigation bodies, which, being part of the state, a priori should be interested in court decisions execution delivered on behalf of the state.

However, the reality and existing practice show the opposite. The pre-trial investigation bodies, realizing the absence of a coercive

mechanism for enforcing the decisions of investigative judges, are frankly slow on returning property to the owner. Can this situation continue? Of course not, because the practical assertion of the rule of law is incompatible with a situation where the final judgment cannot be effectively implemented. The ancient Roman maxim *ubi ius, ibi remedium* suggests that any right must be accompanied with a remedy. There is no doubt that a fundamental human right – the right to property⁴⁰ must be effectively protected from state arbitrariness in criminal proceedings.

It is paradoxical that the BOC is aware of cases when the lack of a legally regulated mechanism for enforcing the rulings of investigative judges complicates execution of decisions on return of property, even when the law enforcement agency is ready to execute such a court decision.

Case 9

In April 2020, an enterprise specializing in granulated sugar wholesale trade applied to the BOC with a complaint on failure to execute a ruling of the investigative judge of Pecherskyi District Court of Kyiv City dated 08.11.2017 in case No. 757/49662/17-k on return of seized property.

The Complainant reported in particular that in December 2016 within the investigation of criminal proceedings No. 4201600000003528 dated 16.11.2016, the enterprise was searched, which resulted in seizure of granulated sugar in an amount of 1,645.064 tons. Later on, the investigative judge made a decision to cancel the arrest of the seized property and ordered the investigator to return the property to the Complainant. However, as of April 2020, i.e. more than two and a half years after the seizure date, the arrested property was not returned to the Complainant.

When investigating the complaint, the BOC found out that the sugar seized from the Complainant had been placed in the custody of a sugar factory in one of the villages in Vinnytska Region. The police several times tried to take out the property from the territory of the sugar factory, but each time they faced resistance from local residents – employees of the sugar factory, in the territory of which granulated sugar was stored. The fact is that the employees of the plant believed that the granulated sugar belonged to them, and the transportation of sugar was an attempt of authorities to lead the factory into bankruptcy. Therefore, the employees guarded its territory around the clock and did not allow police investigators to enter its territory.

In connection with the obstruction of the sugar transportation from the territory of the factory, the respective criminal proceedings were launched on the facts of obstruction in the execution of the court decision.

⁴⁰ Speaking in the ECHR language: the right to peaceful possession of property

In addition, the complaint subject was discussed several times during working meetings of the BOC representatives with the management of the Prosecutor General's Office and the Main Investigation Department of the National Police. However, the law enforcement officials explained that the law did not provide for a procedure to enforce the investigative judge's ruling, so the investigators could not involve a law enforcement agency to forcibly take sugar away from the factory, as he could be accused of abuse of power. At the same time, after such working meetings, materials of the criminal proceedings No. 4201600000003528 were requested to be given to the Prosecutor General's Office for examination and giving instructions.

At the end of October 2020, the National Police investigator finally managed to arrange for the sugar to be taken away from the factory and returned it to the Complainant.

The BOC completed the investigation of the complaint.

This raises a logical question of how exactly investigative judges' decisions can be effectively enforced? In answering this question, it is necessary to focus on finding a kind of a system of deterrence and incentives that would facilitate effective implementation of the decisions of investigative judges on return of property without creating additional burdensome bureaucratic procedures. Such a system should not provide for severe and disproportionate sanctions for the investigating authority that does not return the property.

First of all, the Criminal PCU should set a deadline for voluntary execution of the decision on return of property by the investigative body. Currently, the Criminal PCU does not provide for any deadlines for enforcement of decisions of investigative judges. Usually, in practice, an analogy is made with the procedural actions timing. In particular, execution of a decision on return of property can be considered a procedural action that must be carried out within a reasonable time-frame (being objectively necessary for performance of procedural actions and procedural decisions)⁴¹.

However, as the practice shows, any evaluative considerations turn into objects of abuse and manipulation in the daily work

of investigative bodies. In view of this, the legislator should set a minimum period for voluntary implementation of the decision. This should first of all introduce time certainty in the "property owner – investigation body" relationship – 10 working days, for example. From the practical point of view, this is a sufficient period of time for the pre-trial investigation body to be able to perform all the paperwork and to return the property.

After its expiration, a fine must be charged for each day of delay in returning the property. The amount of such a fine should be determined by the court when making a decision based on the market value of the seized property, which was not voluntarily returned by the investigator. In general, the model proposed by the BOC is similar to the institute of judicial control, which has already demonstrated its effectiveness in executing decisions in the sphere of administrative proceedings⁴².

In fact, after a decision to return property has been made, the pre-trial investigation body storing it acts as the debtor against the owner (from the point of view of the civil law) and therefore has to de facto fulfill an obligation to return the property. The application of such a model will ensure compliance with the balance of interests of the state represented

⁴¹ See Art. 28 of the Criminal PCU

⁴² See chapter 2.3 of this report

by prosecution and a private entity whose property was seized. Thus, in case of non-return of the seized property to the owner, the latter must be guaranteed the right to receive monetary compensation. The proposed mechanism, at the same time, will

allow the State of Ukraine to demonstrate the adoption of general measures to implement the ECHR Judgment in “Burmych and Others v. Ukraine” case, particularly to provide adequate compensation for non-execution or delayed execution of court decisions.

BOC recommendations:

The CMU:

- 1) To develop and to submit to the VRU a draft law on amendments to the Criminal PCU to: (1) set a deadline for implementation of investigative judges' rulings issued in the pre-trial investigation of criminal proceedings; (2) introduce a mechanism for charging a fine for non-execution of such rulings; (3) direct a part of the fine amount paid by the debtor under the court decision to compensate the damages caused by delayed non-execution of the court decision to the person in whose favor the decision was rendered.
- 2) To develop and to implement a mechanism to monitor the number of investigative judges' rulings issued in the pre-trial investigation of criminal proceedings and to monitor their implementation status.

3.3 Systemic defects of reacting to court decisions in the fiscal sphere (tax and customs aspect)

According to the statistics of the Supreme Court in the first half of 2020, 44% of cases submitted to the court of cassation concerned taxes and fees, which is the largest category of cases.

The STS litigation statistics as of 01.10.2020 are as follows:

- 88.6k cases with the participation of tax authorities were pending in courts, and this figure is growing annually (79.7k as of 01.10.2018 and 86.5k as of 01.10.2019).
- for nine months of 2020, courts made final decisions on 7.4k cases, of which 3.3 k in favor of taxpayers.
- the most numerous are cases of tax notifications-decisions cancellation (46.3k) and tax debt collection (11.6k).

- in disputes on the cancellation of tax notifications-decisions drawn up as a result of inspections, only 35.7% of court cases are ruled in favor of tax authorities.

These data indicate, inter alia, the need to increase the effectiveness of the procedure for tax notifications-decisions administrative appeal. The STS may more critically evaluate the challenged decisions made by regional authorities during inspections and cancel those ones that are insufficiently substantiated and have little prospect of “surviving” the judicial appeal. Such an approach would significantly reduce the burden on administrative courts and prevent inefficient spending of budget taxpayers’ resources to support tax disputes.

Tax section

In this section, we will consider different types of malpractice of the STS after receiving a court decision in favor of taxpayers. It is important to note that the word “malpractice” in most cases does not mean dishonesty of a particular official, but rather indicates a wrong reaction of the state represented by the respective authority acting according to certain rules, algorithms and practices. Such algorithms and practices may in some circumstances be inadequate and cause undue harm to taxpayers’ interests.

We will consider the following categories of malpractice that the BOC has encountered in its practice (from more to less obvious and illegal):

1. A court decision remains not executed for years or is executed with a significant delay.
2. A court decision is formally executed, but the dispute between the taxpayer and the controlling authority is not actually resolved.
3. The tax authority abuses the right to appeal against a court decision.

Improper execution of the resolution part of a court decision

The types of decisions that can be rendered by the administrative court in case of satisfaction of a claim are listed in Part 2 of Art. 245 of the CAJPU. The overwhelming majority of court decisions against tax authorities fall into two categories:

- 1) “declaring an act or its individual provisions illegal and cancellation thereof”. A common example is a decision on cancellation of tax notifications-decisions issued after tax inspections;
- 2) “declaring inaction of the public authority illegal and obliging to take certain actions”. A common example is a decision on obliging to register a tax invoice in the URTI.

Decisions of the first category are executed “automatically” at the moment of the court decision entry into force (usually after appeal is complete) – the respective individual act becomes invalid and does not cause any legal consequences for a taxpayer. From the practical point of view, the tax authority must formally reflect the fact of cancellation of an individual act in its internal document management systems, but this process usually does not affect the interests of taxpayers.

As for decisions of the second category, restoration of taxpayer’s legitimate interests occurs only after the tax authority has taken certain active actions. This does not always

happen within a reasonable term, and sometimes court decisions are not executed for years. It is the case when business representatives turn to the BOC.

In August 2020, the BOC published a Systemic Report “Administering Taxes Paid by Business”, in which considerable attention is paid to common situations related to non-execution/delayed execution of court decisions in the tax sphere. In particular, the report considers the problems of improper execution of court decisions on:

- 1) Obligation to register a tax invoice (the registration of which was suspended by the tax authority),
and
- 2) Amendments to the SEA VAT related to the increase in the amount which the taxpayer can register tax invoices for.

Complaints about non-execution of the above decisions were the most common complaints in the practice of the BOC in 2020, which related to failure to take specific actions according to the resolution part of court decisions.

In this report, we will demonstrate only one case, which the BOC received in July 2020, as an example illustrating these problems.

Case 10

In November 2017, a company drew up and submitted a tax invoice for registration. The invoice registration was suspended, and the company appealed to court. In October 2019, a decision of the administrative court obliged the SFS to register the tax invoice. At the same time, the SFS bodies, and later the STS (after the reorganization), delayed tax invoice registration even after receiving requests from the BOC. Finally, the invoice was registered in early November 2020, i.e. almost three years after the tax invoice was drawn up.

In accordance with Clause 198.6 of Art. 198 of the Tax Code of Ukraine, the VAT amount paid by the buyer of goods or services is included in the tax credit for the period in which the tax invoice was registered, but not later than 1095 calendar days from the date of such an invoice.

In fact, in the described situation, if the tax authority delayed the tax invoice registration for another three weeks, such registration would not restore the violated rights of business entities. First of all, the Complainant’s counterparty would suffer by way losing the opportunity to include the paid amounts in the tax credit.

The above case on the tax invoice registration based on the court decision two or three weeks before the expiration of a three-year term for assignment of relevant amounts to the tax credit is quite rare, but not the only one in the BOC practice.

The position of the BOC is that the decision of a court, formulated in the resolution part, must be unconditionally and immediately executed. Any situation when a public authority allows an unjustified delay in the execution of a court decision or even states that the decision cannot be executed is unacceptable at all from the point of view of the state's attitude to business representatives.

The situation when a private entity has to apply to the SES due to the fact that the executive body does not comply with a court decision voluntarily is also abnormal in the state declaring compliance with the rule of law.

The BOC has already issued recommendations⁴³ concerning unconditional and immediate performance of actions specified in the resolution part of decisions of the administrative courts, in particular:

- Recommendation to the Ministry of Finance of Ukraine and the STS: to undertake all required measures (including organizational and technical), which will ensure implementing court decisions obliging STS/SFS (their regional bodies) to adjust the registration limit and/or other indicators of VAT payers in the SEA. The STS should be able to promptly correct indicators in the SEA manually, based on an internal document (order, the working group conclusion, etc.) issued by the respective officials. The implementation of

court decisions should be ensured within a reasonable time-limit upon their entry into force (within the period not exceeding 1 month), provided that the court decision was sent by the court to the STS/SFS (its regional authority) or handed over to their representative.⁴⁴

- The STS and the Ministry of Finance of Ukraine – to develop and to submit for approval to the CMU and the latter – to approve draft amendments to the Procedure No. 1165 and/or the Procedure No. 1246⁴⁵, which would introduce a deadline within which suspended tax invoice/adjustment calculation must be registered in the URTI in accordance with the court decision. Such a term should be reasonable (to allow the STS to ensure its strict following) and should not exceed 15 calendar days from the date when the court decision enters into force. After such amendments entered into force, all episodes of missing the specified deadline shall be the basis for carrying out official internal investigations by the STS and bringing guilty persons to liability⁴⁶.

In addition to the above, it is in this report that the BOC considers it necessary to formulate another recommendation for the STS, particularly:

- To amend internal regulations and to take appropriate organizational steps to determine a particular division, responsible for: (1) monitoring of court decisions to be executed by the STS, (2) monitoring the process of executing such decisions; and (3) preparing regular public reports on the implementation, as well as on problematic issues creating obstacles to proper execution of court decisions.

⁴³ Formulated in the Systemic Report “Administering Taxes Paid by Business”

⁴⁴ Page 39 of the Systemic Report “Administering Taxes Paid by Business”

⁴⁵ The Procedure for maintaining the Unified Register of Tax Invoices, approved with the CMU Resolution dated 29.12.2010 No. 1246

⁴⁶ Page 60 of the Systemic Report “Administering Taxes Paid by Business”

Formal execution of a court decision

Another dimension of the problem of tax authorities improper response to decisions of the administrative courts is the situation when the tax authority formally acts in accordance with the resolution part of the court decision, but deliberately ignores the context and position of the court formulated in a more voluminous reasoning part of the decision.

This problem can be illustrated by the following case:

Case 11

In January 2018, the Complainant asked the SFS for a tax consultation to clarify the issue related to tax invoices adjustment under specific circumstances.

In March 2018, the SFS provided the tax consultation, the content of which shows that the taxpayer has no right to adjust tax invoices under those circumstances.

The Complainant disagreed with the tax authority's position and turned to court. In December 2018, the consultation provided to the payer was canceled with the court decision.

In February 2019, the SFS issued a new consultation, which in content and essence was similar to the canceled one.

The Complainant filed a lawsuit again. In May 2019, the administrative court upheld the lawsuit. In the reasoning part of the decision, the court analyzed the tax authority's arguments, disagreed with them and noted that in the Complainant's situation the tax invoices adjustment was legal. In the resolution part of the decision, the court ordered the SFS to provide a new individual tax consultation. In October 2019, the court of appeal upheld the decision.

In December 2019, referring to the above-mentioned court decision, the STS provided the Complainant with a new individual tax consultation, containing a conclusion similar to that set out in the previous consultations cancelled by the court.

The Complainant returned to the STS requesting clarification on the content of the consultation provided, which contradicted the court's position. The STS responded formally, which showed that it considered the decision of the administrative court, adopted in May 2019, as the executed one.

To the BOC and the Complainant's belief, the individual tax consultation provided by the STS in December 2019 did not take into account the court's findings on the merits of the dispute and, therefore, cannot be considered as the proper execution of the decision.

An even brighter illustration of the formal attitude to a court decision is the following (unfortunately, more common) case given below.

Case 12

In October 2020, the BOC received the following complaint. On 01.08.2012, the Pension Fund of Ukraine sent a claim to the company to pay the debt of the single social contribution. The company appealed this claim to the Pension Fund and at the end of August 2012 the claim was canceled.

Administration of the single social contribution was transferred from the Pension Fund to the SFS. In October 2015, the SFS sent the company a claim for payment of the same debt contained in the claim of the Pension Fund in 2012. The Complainant appealed to the administrative court, which found that the SFS had issued the claim based on information about the existence of the debt that arose before July 2012. In 2012, the Pension Fund canceled the claim, but did not remove the debt record from databases that had been transferred to the SFS. In December 2016, the administrative court revoked the tax claim issued in October 2015 and noted in the reasoning part of the decision that the claims for payment of arrears (debt), which arose before August 2012, were considered repaid.

After the end of the dispute (during 2016-2020), the company received another seven (!) claims for payment of debt of the single social contribution, similar to the decision on the debt payment overturned by the court, which was accounted by the Pension Fund in 2012. Some of these claims have been revoked by the court, some were pending consideration. The last chronological claim (issued in October 2020) became the reason for applying to the BOC.

The company understands that such claims will continue being sent, despite cancellation of each of them until the tax authorities admit that the court had already investigated the circumstances of the case, acknowledged the lack of grounds for sending these claims and, although it did not oblige the STS to literally “refrain from issuing similar claims for the future”, further attempting to collect the debt are futile, harms interests of the taxpayer and leads to inefficient use of budget resources for repeated administrative and judicial proceedings.

The complaint is currently under the BOC consideration.

In fact, it is a question of evasion from recognition the taxpayer’s being right and a situation in which tax authorities take a position of formal and forced submission to the court decision and, as a matter of fact, “resist” the real settlement of the disputable situation. Such actions of the controlling body, in the BOC opinion, significantly reduce the effectiveness of judicial protection of violated rights.

The BOC position is that there’s no precedent system of law actually working in Ukraine, but when the court analyzed specific relationship between the taxpayer and the supervisory authority and formulated a position in the reasoning part of the decision, other public authorities should consider this court position in further interaction with this taxpayer and not make decisions contrary to the formulated position of the court, since the court is highly unlikely to change its position.

Abuse of the right to challenge a court decision

The problem of the judicial appeal process duration against decisions of tax authorities is generally recognized. Even if the taxpayer receives a decision of the court of first instance in his favor (which may take from one month to a year), the tax authority in almost 100% of cases challenges such a decision to the court of appeal, and later to the Supreme Court as cassation. As a result of such appealing, years pass from the moment the dispute arises to the moment of the final settlement.

This problem is also complicated with the fact that tax authorities are quite often unable to pay the court fee when filing an appeal or a cassation appeal, as a result of which such an appeal is lodged with a significant delay and a request to the court to renew the missed deadlines. It further delays the achievement of the judicial final outcome.

Case 13

In August 2019, a district administrative court issued a decision ordering the STS to increase the amount the VAT SEA for which the Complainant has the right to register tax invoices and/or adjustment calculations in the URTI, by a negative value for June 2015 in the amount of approximately UAH 50 mn. Immediately after the decision, the STS filed an appeal, which was returned in connection with failure to pay the court fee.

The decision was not executed, and the Complainant approached the BOC. On 12.08.2020, the BOC sent a letter to the STS requesting to take prompt action to execute the court decision.

On 27.08.2020, the BOC received a letter from the STS stating measures to implement the court decision were being taken.

In September 2020, the issue constituting the complaint subject was brought up for consideration of the Expert Group with the STS. Within the Expert Group, it was reported that in August 2020 (one year after the decision), the STS lodged a second appeal against the court decision, and the court renewed the terms, commenced the appeal proceedings and suspended the court decision.

The BOC had to terminate its investigation as the subject matter was pending before the court.

The problem also lies in the fact of expediency of challenging court decisions (especially in cassation). The budgetary resources spent on such an appeal may outweigh the benefits of winning the case, especially in cases where reversal of the decision is highly unlikely. It also increases the burden on the judiciary, which in turn negatively affects the quality of judicial procedures for businesses' rights protection.

The BOC understands that in order to avoid accusations of insufficiently consistent

defense of interests of the state (including law enforcement agencies), all the situations in which tax officials refuse to further appeal court decisions in favor of taxpayers must be regulated by internal regulations setting forth clear criteria for making appropriate decisions.

According to the BOC, it is impractical for tax authorities to file a cassation appeal to the Supreme Court if both the courts of first and appellate instances have ruled in favor of the taxpayer, and the amount in dispute is not significant for the budget. In such a case, an

appeal makes sense only when court decisions of first and appellate instances contradict the established case-law of the Supreme Court or the issue may become typical and it is necessary to form the court practice for the

future. In other cases, it is more effective for business, the judiciary and the tax authority to recognize the dispute as complete at the appeal stage and to focus resources on more important and promising tasks.

Customs section

As we have already noted⁴⁷, to a large extent public authorities oppose court decisions execution due to internal disagreement with the relevant review outcome. In the customs sphere, the issue of non-execution of court decisions was largely resolved in 2016. At that time, the procedure for excessively paid customs duties based on challenged decisions on adjustment of customs value was significantly simplified.

However, the issue of court decisions execution has not been fully resolved, and even in matters of overpaid customs duties based on challenged decisions on adjustment of customs value the BOC had to consider complaints after these amendments to the legislation and to facilitate further clarification therein.

In general, given a large number of procedures in place in the customs sphere and, consequently, a large number of related court proceedings, the relevance of changes to the relevant administrative practices is obvious.

Although, as compared to the STS, the problem of non-execution of court decisions is not so glaring, in matters of disregarding the court viewpoint on correct application of the law, significant changes are needed.

The issue of adjusting the customs value significantly loads the judicial system from year to year. Despite a large number of judicial positions, the customs authorities continue defending its understanding of customs legislation and generating identical disputes, the outcome of which is easy to predict.

It is the same problem with the classification of goods, which, in particular, was pointed out even by the ECHR in the decision mentioned earlier in this report⁴⁸, and with cases on customs rules violation.

The BOC also had experience in reviewing a complaint in which a public authority did not want to take the Supreme Court's position on the classification of goods into account.

⁴⁷ See chapter 3.1 of this systemic report

⁴⁸ Judgment of the ECHR dated 24.11.2016 in the case of "Polimerkonteyner, TOV v. Ukraine" (Application no. 23620/05).
"18. The Court notes that, as established by the domestic courts, during the period between 2001 and 2006 the customs authorities kept assigning the wrong classification code to the same commodity imported by the applicant company, which had led to a considerable increase in the customs duty payable by the latter. This caused the applicant company to apply to the courts on a regular basis with identical claims. Although in every single case the courts found in the applicant company's favour and set aside the impugned decisions, this did not prevent the customs authorities from continuing to assign the same, wrong code to the same commodity when subsequently imported by the applicant company. In other words, the judicial action pursued was devoid of any remedial effect and was confined to post factum redress only.
19. The Court attaches weight to the statements of the domestic courts that such a practice undermined both the finality of their judgments and the courts' authority in general. There are no reasons to question that conclusion. The Court interprets it as an indication that, firstly, the customs authorities acted in an arbitrary manner and, secondly, there were no mechanisms for putting an end to that practice."

Case 14

On 23.02.2018, TROUW NUTRITION Ukraine LLC turned to the BOC in connection with incorrect declaration of the UCGFEA code and subsequent defining its monetary obligations based on the results of a documentary onsite audit on classification correctness. The tax authority determined the need to apply to the imported goods (soy protein concentrate) a commodity subcategory 2309 90 96 90 instead of 2304 00 00 00 defined by the importer.

During the complaint investigation, the BOC came to the conclusion that many of the company's arguments were relevant. The BOC paid a special attention of the SFS to the fact that the Supreme Court confirmed the correctness of classification of this particular product under code 2304 00 00 00 in the case of another company that also imported this product.

The relevant conclusions of the Supreme Court, in the BOC view, should be considered binding on all public authorities applying a legal act containing the relevant rule of law in their activities⁴⁹.

The BOC issued recommendations to the SFS to conduct the proper consideration of the appeal against the decision on determining the product code, taking into account the position of the BOC, as well as the case-law of the Supreme Court. At the same time, on 14.05.2018, the SFS dismissed the Complainant's appeal. Therefore, the BOC in its decision drew attention to the absence of reasons in the SFS decisions for turning down claims and objections of the Complainant as well as the BOC proposals.

In April 2019, following the rejection of the Complainant's claim by the court of first instance, the court of appeal declared respective tax notifications-decisions illegal and cancelled them. The court of appeal pointed out the need to apply the relevant practice of the Supreme Court in identical legal relations.

Accordingly, the issue of finding a mechanism to stop the arbitrary practice of ignoring court decisions must be addressed.

Changing law application and taking the case-law into account will obviously help to relieve both administrative and judicial procedures and to facilitate the use of public authority

resources more wisely. Only on the example of decreasing decisions on adjustment of customs value (potentially by more than twice, if to be guided by results of consideration of court cases), it is possible to understand what resources could be released from both public authorities and businesses.

⁴⁹ In accordance with Part 4 of Art. 13 of the Law of Ukraine "On Judiciary and Status of Judges" conclusions on application of law, set out in the Supreme Court, are binding on public authorities applying a legal act containing the relevant rule of law in their activities.

BOC recommendations:

- 1) **The STS and the SCS** – to amend internal regulations and to take appropriate organizational steps in order to indicate a responsible department with functions of: (1) monitoring court decisions to be executed, (2) monitoring the process of such decisions execution and (3) preparation of regular public reports on the implementation, as well as on problematic issues creating obstacles to proper court decisions execution.
- 2) **The STS and the SCS** – to adjust the administrative practice, when applying certain legislation, with regard to the case-law on similar issues. This should provide not only for formal monitoring, but also for a real change in the law application practice of a state body. In particular, to amend the regulations related to the administrative appeal procedure and to oblige the authorities to add a brief overview of the relevant court practice in the text of each decision made as a result of the administrative appeal procedure and/or to make the decision in line with the court practice or to provide relevant reasoning for deviations from it. The criterion for changing law application practice may be a significant change in the results of court proceedings (up to the rate of decision-making to satisfy the claim of business entities to the state body no more than 40% in the respective categories of cases) or a significant reduction in the total number of lawsuits (*mutatis mutandis*/in other conditions being equal).
- 3) **The STS** – to amend the Procedure for organizing the work of STS authorities during preparation and support of cases in courts, approved with the STS Order dated 17.10.2019 No. 124, and/or other applicable regulations⁵⁰, according to which:
 - to ensure the possibility of making a decision on appealing/not appealing against a court decision within the appeal/cassation appeal terms;
 - to set criteria for simplifying a decision on further judicial appeal ineffectiveness, in particular: when (1) the administrative court of first instance ruled in favor of the taxpayer, (2) such a decision was upheld by the court of appeal and (3) the dispute financial result is insignificant for the budget (for example, up to UAH 100,000) – the tax authority will recognize such a decision and will not appeal it in cassation, except when decisions are contrary to the practice of the Supreme Court/Supreme Court of Ukraine in similar cases.

⁵⁰ It is expected that in accordance with the efforts to reform the administration of taxes and commitments made by Ukraine in accordance with a Letter of intent with the IMF dated 02.06.2020 No. 18124/0/2-20, in particular in accordance with the Memorandum of Economic and Financial Policy, the STS will take measures to significantly improve the quality of inspections, the impartiality of administrative appeal, which will reduce the number of appealed decisions in court and will not require additional efforts.

3.4 Difficulties of implementing decisions of foreign/ international courts in Ukraine

International courts/arbitration is one of the most effective and convenient ways to resolve a dispute. In Ukraine, decisions of foreign courts and international commercial arbitrations can be recognized and enforced on two grounds:

- such recognition and enforcement is provided for in an international agreement, the binding nature of which has been approved by the VRU,

- on the principle of reciprocity.

The fact that international commercial arbitration decisions can be enforced in over 100 countries makes this institution extremely attractive for business. In this chapter we will consider issues related to certain practical aspects of foreign/international court decisions implementation in Ukraine on the example of the relevant BOC complaints.

Granting permission to implement decisions of international courts/arbitration

Even if the debtor agrees with the arbitration decision, the claimant has to obtain the appropriate permission of the court for its voluntary execution. The Art. 480 of the Civil Procedural Code of Ukraine (Civil PCU) defines a simplified procedure for consideration of applications for permission to voluntarily comply with the decision of international commercial arbitration. Such application shall be considered by a sole judge within 10 days from the date of receipt at the court hearing without notifying parties to arbitration proceedings.

In case of enforcement, the issue of recognition and granting permission to execute a decision of international commercial arbitration is considered by the court at the request of the claimant.

The claimant is obliged to provide the court with the original of a duly certified arbitral award or a notarized copy of such award, as well as the original of the arbitration agreement or a notarized copy of such agreement.

The claimant's application is considered by a sole judge within two months from the date of its receipt in court at a court hearing with notification of the parties. During the consideration of the application, the court does not consider the case on the merits, but only checks the absence of grounds for refusal to recognize and grant permission to enforce the decision of international commercial arbitration, provided for in Art. 478 of the Civil PCU and Art. 36 of the Law of Ukraine "On International Commercial Arbitration".

FOR REFERENCE

During consultations with the expert community during preparation of this systemic report, the BOC drew attention to the following issues.

The current procedural law does not separately regulate the issue of acknowledging and granting a permit for execution of decisions rendered based on an international agreement (when it comes not to international commercial arbitration but, for example, to investment arbitration in place under agreements on mutual protection and promotion of investments concluded between states or other international agreements (for example, the Energy Charter).

Despite this fact, the case-law shows that acknowledging and granting permission for execution of such arbitration decisions is in place as of today. However, it is based on rules governing acknowledgement and execution of decisions of international commercial arbitration or a decision of a foreign court⁵¹. It testifies to lacking clear legal regulation in the given issue and may carry potential legal risks associated with admission to enforcement of the respective arbitration decisions.

Another issue which could require legislative regulation is acknowledgement and granting permission for execution of decisions of arbitration on taking interim measures (a decision of Emergency Arbitrator), as well as decisions of foreign courts regarding application of measures to secure a claim.

The legislation does not contain specific rules that would regulate these issues and allow to unequivocally confirm the existence of such a legislative possibility (taking into account discussions, in particular, whether decisions of the Emergency Arbitrator are covered by the New York Convention). However, in particular, in several cases, courts though refused to acknowledge and grant permission for enforcing the Emergency Arbitrator decisions, yet they referred to the New York Convention provisions ipso facto confirming the possibility of such acknowledgement and implementation in Ukraine⁵².

Besides, it seems important to introduce a procedural mechanism for changing, suspension or cancellation of a Ukrainian court decision on acknowledging and granting permission for execution of an arbitration or a foreign court decision on taking interim measures in cases when an international arbitration or a foreign court:

- refused to consider the case;
- the case consideration was terminated;
- refused to satisfy the claim;
- the action of security measures suspended;
- interim measures were canceled or changed.

For the time being, such a mechanism is not envisaged, which could result in the existence of parallel mutually excluding decisions of Ukrainian courts on the matters of interim measures. It might be also expedient to supplement Part 4 of Art. 444 of the Civil PCU with provisions on reversing decision execution in case when the international arbitration decision was canceled.

⁵¹ See, for example, a judgment of the Supreme Court dated 25.01.2019 in case No. 796/165/2018, a ruling of Kyiv City Court of Appeal dated 17.07.2019 in case No. 824/66/19.

⁵² See, for example, a judgment of the Supreme Court dated 19.09.2018 in case No. 757/5777/15-ts, a judgment of the Supreme Court dated 14.01.2021 in case No. 824/178/19

Enforcement proceedings

Complaints investigated by the BOC regarding implementation of decisions of international courts/arbitrations concerned the following issues:

- unreasonable return of enforcement documents to the claimant without acceptance for enforcement;
- lack of promptness/inaction of public enforcers in enforcement proceedings, which allows the debtor to get rid of property that could be foreclosed.

As regards the first category of questions the procedure for administrative appeal of decisions of the public enforcer to the head of department to which the public enforcer directly reports proved to be effective (and decisions of such head to the head of the highest level SES body)⁵³.

Effectively addressing the second category of issues requires a more comprehensive approach, described in chapter 2.1 of this report.

Criminal proceedings

Unfortunately, pre-trial investigation of criminal proceedings alongside implementation of international court/arbitration decisions remains fairly common practice.

Thus, in some cases, the claimant has to apply to law enforcement agencies regarding non-execution of the court decision. In other cases, the debtor initiates pre-trial investigation to oppose enforcement of the international arbitration judgment in Ukraine.

Case 15

The BOC is considering a complaint of a foreign company regarding non-execution of a decision of an international arbitration court by a Ukrainian state-owned enterprise in Ukraine. According to the court decision, the company, which implemented a large infrastructure project in Ukraine, must receive more than USD 20 mn.

Thus, in 15 days upon the Complainant receipt of the ruling from the Ukrainian court to grant permission to enforce the decision of the international arbitration in Ukraine, pre-trial investigation was initiated in criminal proceedings. Subsequently, the Complainant's representatives were searched and interrogated.

Approximately 12 days after the Complainant received the enforcement document of the Ukrainian court, the pre-trial investigation was intensified, in particular, the Complainant's representatives were interrogated and a large number of their documents was seized, some of which had previously been seized during the Complainant's office search.

At the same time, for more than 9 months after carrying out the priority investigative actions (searches, interrogations) investigators did not carry out any further actions within the pre-trial investigation of the criminal proceedings. The relevant investigative actions were resumed immediately upon the receipt of the above-mentioned enforcement letter by the Complainant.

Following numerous discussions of this complaint at the Expert Groups between the BOC and the respective law enforcement agencies, the criminal proceedings were closed due to absence of a crime.

⁵³ Part 3 of Art. 74 of the Law of Ukraine "On Enforcement Proceedings"

Investment arbitration

It should be noted that non-execution of an international arbitration decision, a party to which is a state company, might entail a risk of the investment dispute. Currently, the procedure for amicable settlement of investment disputes in Ukraine is regulated by the Decree of the President of Ukraine dated 25.06.2002 No. 581/2002 “On Procedure for Protecting Rights and Interests of Ukraine in Settlement of Disputes, Consideration of Cases with Foreign Jurisdiction and Ukraine”.

In its work, the BOC has often participated in pre-trial dispute settlement of foreign investors.

Foreign investors have an opportunity to send a formal investment claim to the Government. This approach, according to the BOC, reflects the investor's distrust of the national courts. In this case, the claim is used as a tool to start direct negotiations with the Government with a view to the pre-arbitration dispute settlement.

It should be noted that in case of applying to the investment arbitration, the Government will already be a party to the dispute, with all the negative consequences (including reputational ones).

BOC recommendations:

In order to increase the effectiveness of international court/arbitration decisions implementation, as well as to prevent administrative pressure on business from the part of law enforcement agencies during execution of such decisions in Ukraine, the BOC recommends the following:

1) The CMU:

1.1) to continue working on the draft law on amendments to the administrative and criminal legislation as regards the full-fledged launch of the Bureau of Economic Security of Ukraine with explicit determination of its jurisdiction to investigate economic crimes⁵⁴;

1.2) to communicate the need for responsible and balanced carrying out of their functions among the central executive bodies, given the potential disputes that may be referred to international courts/arbitration.

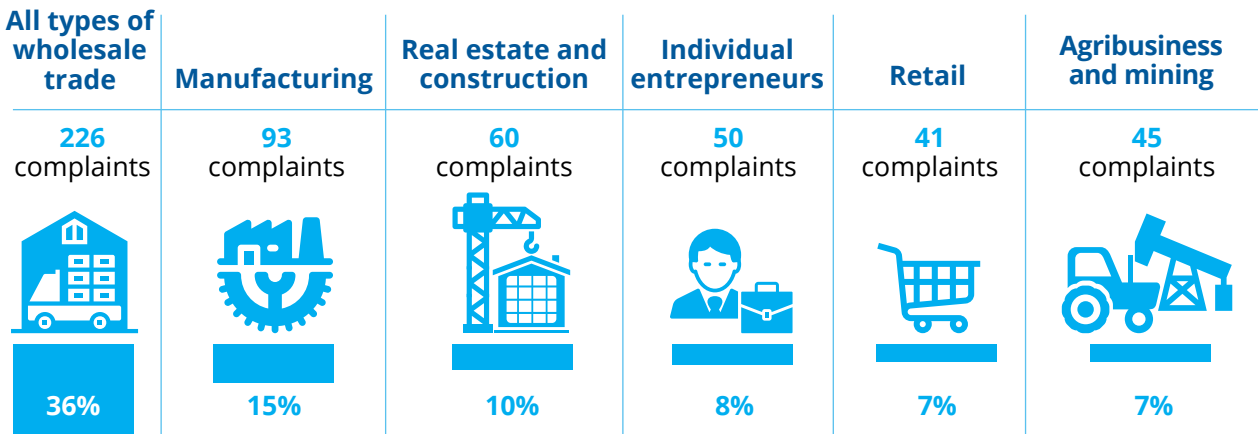
2) The MOJ and/or the SES – to arrange separate accounting of enforcement proceedings regarding decisions of international courts/arbitrations as such carrying a potential risk of investment disputes a party to which will be the state, as well as to arrange regular reporting on these issues.

⁵⁴ At the time of completing work on this report, the Parliament adopted the Draft Law on the Bureau of Economic Security of Ukraine” No. 3087 dated 02.07.2020. In this document, the BOC recommendations provided in the past were largely taken into account. Meanwhile, a clear definition of jurisdiction for the Bureau of Economic Security of Ukraine is also critical. Namely in the context of this systemic report, from the BOC practice, investigation of the same crimes under the CCU by various law enforcement agencies may create room for potential abuse and does not contribute to actual implementation of court decisions, including foreign ones. To solve the jurisdiction problem, among other things, a Draft Law on amendments to the administrative and criminal law on the introduction of the activities of the Bureau of Economic Security Ukraine No. 3959-1 dated 25.08.2020 was developed. The latter was adopted in the first reading 03.02.2021.

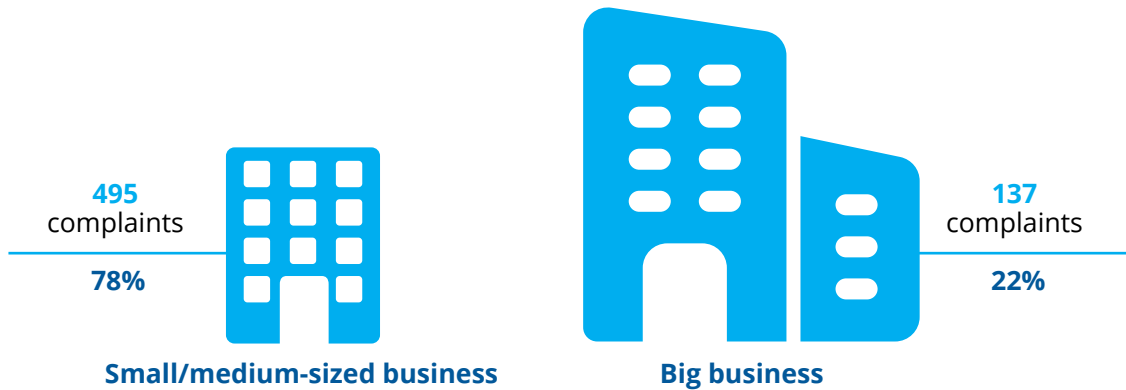
4 ANNEXES

Non-execution of court decisions: Portrait of the BOC complainants

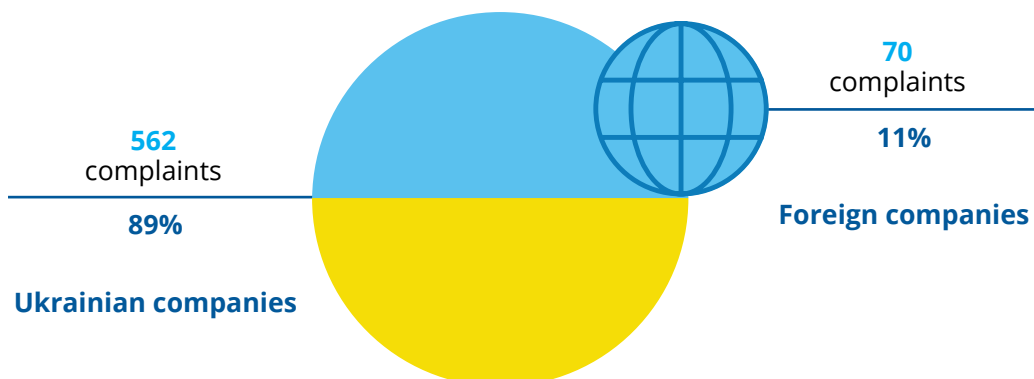
TOP-6 industries-complainants (May 2015 - December 2020)



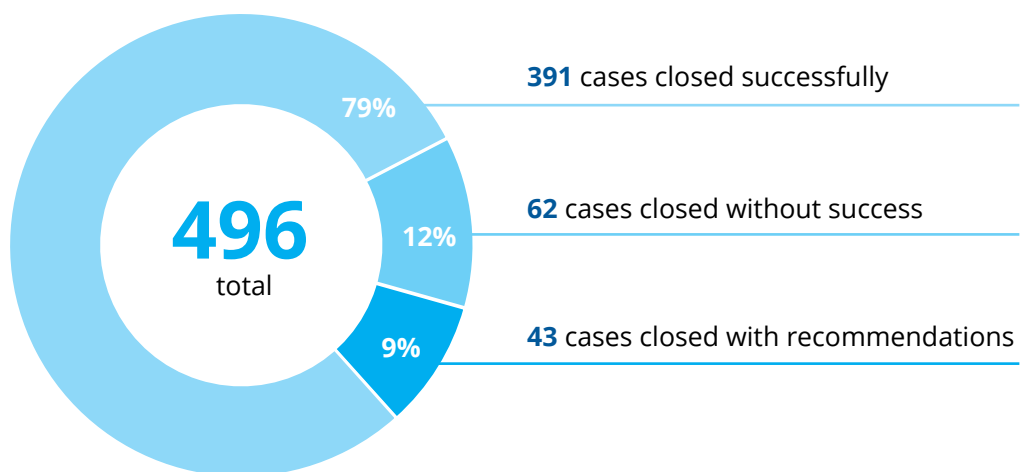
Distribution of complainants by size of business:



Distribution of complainants by origin of capital:



Statuses of closed cases (investigations) related to non-execution of court decisions:





Podil Plaza Business Centre,
30A Spaska St.,
04070 Kyiv, Ukraine
(entrance from 19, Skovorody St.)

Phone: +380 (44) 237-74-01
Fax: +380 (44) 237-74-25
E-mail: info@boi.org.ua

www.boi.org.ua

www.facebook.com/BusinessOmbudsmanUkraine