



SYSTEMIC REPORT

COMBATTING RAIDERSHIP: CURRENT STATE AND RECOMMENDATIONS



2017

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1 FOREWORD

According to OECD's recent survey the risk of seizure, along with inadequate protection of the right of ownership, belong to top 5 factors that have negative impact on the prospects of business integrity in the countries of Eastern Europe and Central Asia.¹

Meanwhile, one of the core tasks for any state is to ensure adequate protection of the right of ownership through quality legislation, effective functioning of the law enforcement system and access to justice. It is crucial for ensuring competitiveness of the economy, establishing rule of law and, ultimately, strengthening reputation of the country.

Whereas inadequate protection of the right of ownership is one of the factors that negatively affects quality and competitiveness of business environment in Ukraine, this systemic report of the Business Ombudsman Council (the "**Council**") is devoted to the analysis of the problem of raidership in Ukraine (the "**Report**").

Among other things, the significance of this problem is evidenced by the fact that in the Global Competitiveness Index 2016-2017, published by the World Economic Forum, when it comes to "property rights" protection, Ukraine occupies 131st place out of 138 countries.²

To certain extent, the relevance of the problem is also evidenced by the statistics of complaints received by the Council. In particular, from May 2015 until May 2017 the Council received 15 complaints related to raidership attacks on business, where 6 have been received after 02 November 2016, when the so-called "Anti-Raidership Law" entered into force.

The businesses, which sought the Council's assistance, primarily challenged the actions of the state registrars (including notaries);

3 complaints were related to allegedly inadequate consideration of complaints by the permanent commissions tasked to consider complaints in the sphere of state registrations; 3 complaints were lodged to challenge the inactivity of pre-trial investigation authorities due to the inadequate investigation of crimes related to raidership.

The Report commences with the analysis of the term "raidership", lacking legislative definition, thus triggering its ambiguous interpretation. Hence, for the purposes of the Report, the "raidership" is understood as seizure or repossession of assets and/or corporate rights by employing illicit methods or tools.

The Report is continued with the chapter containing **comprehensive analysis of the current state of law and practice in the field of combatting raidership**.

In particular, we *critically analyze the scope and practical impact of the key provisions of the relatively recent Anti-Raidership Law* (No. 1666) when it comes to eradication of the most common raidership schemes.

Thereafter, we analyze *the organizational structure and competency of the permanent commissions tasked to consider complaints in the sphere of state registrations*, set up under the auspices of the Ministry of Justice of Ukraine and its territorial divisions, which were launched as a mechanism of pre-trial ministerial (administrative) appeal of violations in the sphere of state registrations. Here particular attention is paid to the analysis of the most widespread arguments known to be employed by the professional public to criticize activities of these permanent commissions.

¹ See Anti-corruption Reforms in Eastern Europe and Central Asia. Progress and Challenges, 2013-2015, 2016, page 304. Available at <https://www.oecd.org/corruption/acn/Anti-Corruption-Reforms-Eastern-Europe-Central-Asia-2013-2015-ENG.pdf>

² http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf at page 351.

We further highlight the relatively new *control mechanism of state registrars' actions*, comprising monitoring and off sight documentary audit. In particular, we enlist the most common mistakes of the state registrars, as discovered by the Ministry of Justice in the course of practical implementation of this mechanism. As we also attend to the existing criticism of the mechanism, the Report provides the list of proposals to improve thereof.

The chapter completes with the critical *analysis of the current state of law enforcement system* in the context of investigation of "raidership" crimes. Besides, we explore the problems hampering pre-trial investigation bodies to operate efficiently, which is required to ensure that organizers and accomplices in the raidership schemes are actually held liable.

The Report completes with **the chapter containing the aggregated list of systemic recommendations aimed at improving the effectiveness of combatting raidership in Ukraine.**

In particular, we propose improving certain legislation provisions, related to **the registration actions conducted with corporate rights** by (i) introducing a notification system, which would enable owners (members) of a legal entity (or their representatives) to be informed about receipt of the request to conduct a registration action with the respective corporate rights; and by (ii) ensuring adequate informational interaction between the Unified Registry of Legal Entities, Private Entrepreneurs and Civic Formations and the State Registry of Encumbrances Over Movable Property.

As far as **registration actions with immovable property** are concerned, we propose (i) enhancing technical capacity of the state cadastral registrars by ensuring adequate informational interaction between the State Registry of Real Rights Over Immovable Property and the State Land Cadaster, to be conducted in the manner foreseen in the very recent Resolution of the Cabinet of Ministers of Ukraine No. 509, dated 12 July 2017; and (ii) developing single legislative act, setting forth the procedure for assigning the postal addresses to immovable property in Ukraine.

As for **the activities of the permanent commissions tasked to consider complaints**

in the sphere of state registration, the Ministry of Justice is recommended to (i) strengthen its' efforts aimed at properly informing both the professional circles and general public about the status and actual scope of authority vested with these commissions; here emphasis shall be placed on procedural breaches that constituted ground for cancellation of registration actions, – such information should be periodically disclosed at least in the aggregated form; as well as to (ii) initiate certain amendments to the legislation aimed at preventing breaches of the existing territoriality rules while conducting registration actions.

As for the **mechanism of ministerial control over activities of the state registrars**, to ensure the objective exercise of the mechanism of monitoring and off sight documentary audits of the state registrars (including due disclosure of the results thereof), the Ministry of Justice is recommended by the Council to: (i) consider the possibility of introducing public disclosure of the results of the off sight documentary audits; (ii) initiate changes in the Unified Registry of Notaries, which would enable disclosure of information about the notaries, whose access to the state registries was blocked/canceled; (iii) prepare generalized clarifications for state registrars aimed at minimizing typical mistakes committed by them while conducting registration actions; and (iv) consider preparing a clarification or amending the relevant legislative acts aimed at specifying conditions (perhaps, depending upon severity of breach), whose occurrence might trigger cancellation of certificate affirming one's right to conduct notarial activity.

To **expand opportunities of the parties that suffered from raidership attacks when it comes to recordation and collection of evidences**, the Council recommends the Ministry of Justice to (i) issue explanation affirming that the provision of the applicants with scanned copies of the documents, constituting ground for conducting a registration action, should occur in the same manner as the disclosure of other information from the state registries; or (ii) introduce amendments to the Procedure for Carrying Out Notarial Actions by the Notaries of Ukraine, approved by the Order of the Ministry of Justice of Ukraine No. 296/5,

dated 22 February 2012, by supplementing it with a separate section about notarization of images of scanned documents, based on which the registration actions were made, on the computer screen (screenshots).

As far as **improving efficiency in the work of law enforcement bodies** is concerned, the General Prosecutor of Ukraine and the Main Investigatory Department of the National Police of Ukraine are suggested to develop methodological recommendations for prosecutors and investigators focused on investigation of the most common instances of raidership. In the Council's view, such recommendations shall be aimed at developing common approaches to investigation of "raidership" crimes and establishing effective cooperation between prosecution authorities and pre-trial investigation authorities.

When it **comes to ensuring proper access to justice for the parties that suffered**

from raidership attacks, we propose (i) introducing amendments to the Draft Law No. 6232, aimed at fully removing the existing jurisdictional conflicts between civil, commercial and administrative courts that might emerge in the disputes pertaining to the sphere of state registration; (ii) the State Judicial Administration of Ukraine to speed up work aimed at ensuring technical interaction between the State Registry of Real Rights Over Immovable Property and the Unified State Registry of Court Decisions; as well as (iii) the Ministry of Justice of Ukraine to prepare methodological guidelines for the state registrars regarding automatic enforcement of court decisions whose operative parts are ambiguous and/or vague.

Finally, as the Council's recommendation for business, the Report discusses **implementation of business integrity standards as a precondition for decreasing vulnerability to raidership attacks.**

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2 "RAIDERSHIP": DEFINITION OF THE TERM

Raidership is a phenomenon inherent to any country suffering from weak legal institutions and corruption.

In Ukraine, raidership has existed since 90s of the last century. It is thought that this phenomenon comprises three stages. The first one falls on 1991-1999, the period of mass privatization, which took place with systemic breaches of law. The second stage, 2000-2004, is characterized by forced seizures, bribes of judiciary and document forgery. In 2005-2014, raidership has become a systemic criminal business.

The terms "raidership" and "raider" etymologically originate from the English language where the word "**raid**" means seizure, and "**raider**" – a participant of seizure respectively³. Therefore, in practice "raidership" is understood as the seizure of a business or actions aimed at title reallocation by employing various, usually dubious, methods⁴.

The Ukrainian law does not contain a separate term "raidership"⁵. Therefore, in the domestic sources, the term "raidership" may be mistakenly used to refer to quite legitimate transfers of the ownership over corporate rights and assets of a legal entity or a physical person. As a result, in recent years there has been a tendency to substitute the concept of "raidership" with adjacent categories.

Such instances are particularly common among various types of debtors; entities who seized property illegally; as well as in cases where legitimate property owners who are trying to get it back are called "raiders". Hence, it is not unfrequent that such an approach is employed to mislead the public in an attempt to defend illegal property interest, in particular, through the mass media.

Therefore, in the context of this Report, "raidership" means **the seizure or misappropriation of assets and/or corporate rights of a legal entity using unlawful methods and means**⁶.

³ A.M. Orlean. Misappropriation of assets of legal entities in Ukraine (Some results of prosecutors' survey) [Electronic resource] / A. Orlean // Journal of the National Prosecution Academy of Ukraine. – 2008. – No. 4. – P. 41-46. – Available at: http://nbuv.gov.ua/UJRN/Vnapu_2008_4_8

⁴ See above.

⁵ For the first time in the Ukrainian law, "raidership" concept definition appeared in the Declaration of Goals and Objectives of the State Budget for 2008 approved by the Resolution of the Cabinet of Ministers of Ukraine No. 316 of 1 March 2007, according to which the latter should be understood as the alienation of the state property and corporate rights beyond the privatization processes. Besides, this legal term was employed in several draft laws.

⁶ Therefore, the hostile takeover using solely lawful methods does not fall under the concept of "raidership" and does not fall under the scope of this Report.

3 CURRENT STATE OF LAW AND PRACTICE IN THE FIELD OF COMBATTING RAIDERSHIP

3.1 Legal Reform of the Anti-Raidership Legislation

Over the past few years, a set of comprehensive legislative changes, aimed at eliminating shortcomings and gaps enabling implementation of various "raidership" schemes, had been introduced.

In particular, in November 2015 a number of legislative amendments were introduced,⁷ resulting in demonopolization and decentralization of state registration of business and immovable property through liquidation of the former State Registration Service of Ukraine and introduction of the extraterritoriality principle.

Noteworthy, the scope of this reform provided for the following:

- (1) amending data on legal entity requires presentation of the original copies of decisions of the respective governing bodies⁸;
- (2) the notaries were vested with powers of state registrars of rights over immovable property;⁹ whereas state registration of legal entities

and physical persons-entrepreneurs were delegated to bodies of local self-governance, state administrations, notaries and entities, accredited by the Ministry of Justice of Ukraine¹⁰;

- (3) the principle of extraterritoriality of registration actions within Ukraine was introduced¹¹;
- (4) the liability of state registrars was strengthened (including through temporal suspension and/or ban of access to the Unified State Registry)¹²;
- (5) the State Judicial Administration of Ukraine became obliged to hand over the copies of court decisions authorizing arrest of corporate rights and on the prohibition (cancellation of the prohibition) of taking the registration actions, which entered into force¹³; and
- (6) the Permanent Commissions Tasked to Consider Complaints in the Sphere of State Registration had been established under

⁷ 1. The Law of Ukraine "On Amendments in the Law of Ukraine "On State Registration of Legal Entities and Physical Persons-Entrepreneurs" Regarding the Prevention of Making Changes in the Unified State Registry of Legal Entities and Physical Persons-Entrepreneurs Based on the Forged Documents" of 24 November 2015 No. 815-VIII (the "**Law No. 815-VIII**").

2. The Law of Ukraine "On Amendments in the Law of Ukraine "On State Registration of Legal Entities and Physical Persons-Entrepreneurs" and Some Other Legislative Acts of Ukraine Regarding the Decentralization of Powers of State Registration of Legal Entities, Physical Persons-Entrepreneurs and Public Formations" of 26 November 2015 No. 835-VIII (the "**Law No. 835-VIII**").

⁸ The Law No. 815-VIII.

⁹ The Law of Ukraine "On Amendments in the Law of Ukraine "On State Registration of Real Rights Over Immovable Property and Encumbrances Thereto" and Some Other Legislative Acts of Ukraine Regarding the Decentralization of Powers of State Registration of Real Rights Over Immovable Property and Encumbrances Thereto" of 26 November 2015 No. 834-VIII (the "**Law No. 834-VIII**").

¹⁰ The Law No. 835-VIII.

¹¹ See, generally, the "Law No. 834-VIII" and the "Law No. 835-VIII".

¹² The Law No. 835-VIII.

¹³ The Law No. 835-VIII.

auspices of the Ministry of Justice of Ukraine and its' territorial bodies¹⁴.

Besides, to facilitate combatting raidership, on 6 October 2016 the specific Law of Ukraine "On Amendments in Some Legislative Acts of Ukraine Regarding the Improvement of State Registration of Rights to Immovable Property and the Protection of Ownership Rights" No. 1666-VIII (the "**Anti-Raidership Law**") was enacted¹⁵.

In view of the considerable social and political resonance, triggered by the adoption of the Anti-Raidership Law, the following concentrates on the key amendments introduced thereof that directly or indirectly relate to combatting raidership. Moreover, where relevant, the Council's opinion about significance of selected amendments is set forth; the status of practical implementation thereof is critically analyzed; and the appropriate recommendations are given.

3.1.1 Key Amendments Introduced by the Anti-Raidership Law No. 1666-VIII

1. Strengthening criminal liability for obstructing legitimate economic activities, document forgery and abuse of power by persons providing public services¹⁶.

The bodies of some "raider" crimes were further specified, and the legislative gaps that enabled the impunity of state registrars were eliminated, namely:

- 1)** The disposition of Article 206 of the Criminal Code of Ukraine ("Obstruction of Legitimate Economic Activities") was expanded by introducing thereunder such separate body of crime as seizure of property of an enterprise¹⁷.
- 2)** It became possible to bring public notaries, state registrars, subjects of state registration, public and private executors to liability for document forgery and abuse of powers¹⁸.

- 3)** The upper limit of the alternative sanction for document forgery, foreseen by paragraph one Article 358 of the Criminal Code of Ukraine in the form of a fine, was increased to UAH 17,000.

However, it is worth noting that obvious positive effect of the foregoing amendments was, to certain extent, frustrated by both the collisional nature of certain bodies of "raider" crimes envisaged, in particular, by Articles 205-2, 206-2 and 365-2 of the Criminal Code of Ukraine; as well as by the lack of a comprehensive approach to the investigation of such crimes by the law enforcement authorities.

A more detailed analysis of the problems related to the investigation of "raider" crimes, along with the Council's respective recommendations, are set forth in the Section 3.4 of this Report "State of the Law Enforcement System".

¹⁴ Paragraph 2 of the Procedure for consideration of complaints in the sphere of state registration, as approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1128, dated 25 December 2015 (the "Procedure for complaints consideration").

¹⁵ The Anti-Raidership Law came into legal effect on 02 November 2016.

¹⁶ See amendments made in Articles 206, 358, 365-2 of the Criminal Code of Ukraine

¹⁷ Part 1 of the Article 206 of the Criminal Code of Ukraine was supplemented with the following sentence: "the seizure of an integral property complex, its part, buildings, structures, land plot, construction projects, other facilities and unlawful termination or restriction of activities at these facilities and limitation of an access thereto".

¹⁸ See amendments introduced to Articles 358 and 365-2 of the Criminal Code of Ukraine.

2. Strengthening administrative liability for violation of the law on state registration of legal entities, physical persons-entrepreneurs and public formations¹⁹, as well as for violation of the procedure for state registration of real rights over immovable property and encumbrances thereto²⁰.

The liability for violation of the statutory time limits for state registration of a legal entity and physical person-entrepreneur; for requiring documents not foreseen by the law to proceed with state registration; as well as for other violations of the procedure for state registration, established by the law, was increased **10 times²¹**.

Similarly, the amount of fines was increased in the sanction, envisaged by Article 166-23 of the Code of Ukraine on Administrative Offences ("Violation of the Procedure for State Registration of Real Rights Over Immovable Property and Encumbrances Thereto").

3. The principle of extraterritoriality (originally introduced on 01 January 2016) was narrowed as follows:

- **registration actions with regard to immovable property may be taken within the region (except when such action is taken immediately upon notarization)²²;**

- **registration actions with regard to legal entities may be taken solely within the region (except for state registration on the basis of documents lodged in electronic form, to be carried out anywhere within Ukraine irrespective of a legal entity's actual domicile)²³;**

It is worth noting that narrowing the principle of extraterritoriality became one of the basic preconditions for reducing the number of mass raidership. Hence, it is certainly one of the most positive effects of the adoption of the Anti-Raidership Law.

- **4. When registering business (not in electronic format) and real estate, the owner is entitled to receive a paper confirmation of the ownership with a signature and seal of the state registrar²⁴**

- **5. When a state registrar receives a set of documents to proceed with a registration action, he/she is obliged to notify the owner of immovable property regarding which such registration action is contemplated. If the owner considers this registration action as "raider" seizure, he/she may file an application seeking prohibition of such action. Simultaneously, the owner may apply to the court to seek imposition of a judicial ban²⁶.**

¹⁹ See Article 166-11 of the Code of Ukraine on Administrative Offences (the "CUAO").

²⁰ See Article 166-23 of the CUAO.

²¹ At present, such administrative offence prescribes imposition of a fine in the amount ranging from two hundred up to four hundred tax-free minimum incomes of citizens (hereinafter referred to as the "tax-free minimum income") (i.e. from UAH 3,400 up to UAH 6,800), and for repeated offence committed within a year – up to five hundred tax-free minimum incomes (UAH 8,500).

²² See part five of Article 3 of the Law of Ukraine "On State Registration of Real Rights Over Immovable Property and Encumbrances Thereto" No. 1952-IV, dated 01 July 2014 (the "**Law on Registration of Real Rights**").

²³ See part 2 of Article 4 of the Law on Registration of Real Rights.

²⁴ See Article 12 of the Law of Ukraine "On State Registration of Legal Entities, Physical Persons-Entrepreneurs and Public Formations" No. 755-IV, dated 15 May 2003 (the "**Law on Registration of Legal Entities**").

²⁵ See paragraph 11-1 of the Procedure for State Registration of Real Rights Over Immovable Property and Encumbrances Thereto, as approved by the Resolution of the Cabinet of Ministers of Ukraine of 25 December 2015 No. 1127 (the "Procedure for Registration of Real Rights").

²⁶ See part one of Article 25 of the Law on Registration of Real Rights.

Now, according to the general rule, the state registrar shall immediately notify the owner of immovable property regarding whom an application was filed/received for a registration action.²⁷

Such notification shall be made using the software of the State Registry of Rights²⁸, if the latter contains owner's e-mail address, specified accordingly.²⁹

To raise the efficiency of combatting raidership attacks, the foregoing mechanism was improved by adding a separate service of sending SMS to immovable property owners (**SMS-Maiak service**).^{30 31}

Considering that all requests for data from the State Registry of Real Rights Over Immovable Property (forwarded directly through a personal cabinet of electronic services or at the request of a lawyer, notary, registrar or investigator) are registered by the technical administrator of the registry, in the Council's opinion, the advantage of SMS-Maiak service in the investigation of cases of fraudulent misappropriation of property is undisputable, since **it allows to obtain information bearing significant evidentiary value.**

6. If a judicial ban is imposed – a state registrar is obliged to suspend registration actions³².

7. The registration action shall be resumed if a judicial ban is lifted or an application for the prohibition, previously imposed by the property owner, is withdrawn. In the former case, the registrar shall notify the owner accordingly³³.

8. Registration actions based on court decisions shall be taken solely on the basis of the decisions received as a result of information interaction between the State Registry of Real Rights Over Immovable Property and the Unified State Registry of Court Decisions without submission of the relevant application. This rule will become effective once technical interaction between these registries is established³⁴.

Hence, from now on, the registration actions conducted on the basis of court decisions should be carried out by state registrars automatically solely on the basis of legally valid copies of court decisions received in paper form – i.e., without submission of relevant applications and payment of an administrative fee.

²⁷ According to paragraph 4 of part one of Article 20 of the Law on Registration of Real Rights.

²⁸ See paragraph 11-1 of the Procedure for Registration of Real Rights.

²⁹ Such notification shall be made by sending at such e-mail address the information in electronic form about the type of application, its registration number, date and time of submission, surname, name and (if any) patronymic of the applicant with putting the own electronic digital signature.

³⁰ Thus, on 26 October 2016, Limited Liability Company "Liga Zakon" and State Enterprise "National Information Systems" of the Ministry of Justice of Ukraine, which is the technical administrator of the State Registry of Real Rights Over Immovable Property, entered into the Memorandum of Cooperation which implemented the service (online service) of notification of: (1) physical persons and legal entities about the registration actions in respect of any separately determined immovable property in the State Registry of Rights without specifying data on real rights over immovable property and encumbrances thereto, subjects of such rights; and (2) owners of separately determined immovable property – on submitted/received applications in the sphere of state registration of real rights over immovable property and encumbrances thereto with regard to property owned by such owners, namely: registration number, date and time of registration of such applications.

³¹ <https://smsmayak.ligazakon.net/>

³² See Article 31-1 of the Law on Registration of Real Rights.

³³ See part three of Article 25 of the Law on Registration of Real Rights.

³⁴ See Article 31-1 of the Law on Registration of Real Rights.

In general, the Council views the idea of a system of automatic enforcement of court decisions as definitely positive one. Yet, from the practical standpoint, one of the problems is the absence of actual technical interaction between the State Registry of Rights and the Unified State Registry of Court Decisions (the "**USRCD**"). According to the information received by the Council while working on the Report, whereas entire scope of works required from the Ministry of Justice has already been fulfilled, it appears that existence of such technical interaction now depends upon the State Judicial Administration of Ukraine.

Another problem is the existence of different approaches to specifying the conclusions in the operative part of the court decisions. Thus, in particular, if the operative part of the decision is set forth by a judge ambiguously and/or

vaguely ("shall enter data", "shall recognize the contract as invalid", "shall recognize the ownership right", "shall repossess", etc.), the likelihood of automated enforcement of such a decision becomes doubtful.

Moreover, given that some courts adopt the decisions solely within the boundaries of claims formally submitted for consideration; and that in civil and commercial proceedings there is a position that claims related to making changes with the state registries do not fall within their competence and should be considered under the rules of the administrative process, – the decisions containing ambiguous and/or vague operative parts carry the risk of being not enforced by the state registrars automatically.

The Council's Recommendations:

1. The State Judicial Administration of Ukraine to speed up work aimed at ensuring technical interaction between the State Registry of Real Rights Over Immovable Property and the Unified State Registry of Court Decisions;
2. The Ministry of Justice of Ukraine shall consider preparing the methodological guidelines for the state registrars regarding automated enforcement of court decisions with ambiguous and/or vague operative parts (e.g., "shall recognize the contract as invalid", "shall recognize the ownership right", "shall repossess", etc.).

9. Until the integration between the foregoing registries is not ensured, the registrar shall verify the court decisions in the Unified State Registry of Court Decisions. If no such decision is found, the registrar shall file a request to the respective court³⁵.

10. While conducting registration action vis-à-vis immovable property, the registrar is obliged to use data from the State Land Cadastre and the Unified Registry of Authorization Documents, enabling to perform pre-construction and construction works and certifying the commissioning of the completed projects; data evidencing return for revision, refusal to issue, cancellation and revocation of such documents³⁶.

11. The procedure for opening a new chapter in the State Registry of Real Rights Over Immovable Property became more complicated so that the parallel existence of two legitimate registry chapters became impossible³⁷.

Although this change is generally positive, in practice the issue of unrestricted registration of property rights over immovable property located at formally different addresses (when buildings have been assigned different letters, the numbering of premises has been changed)

remains largely unresolved. As a result, the parallel existence of two chapters in the Registry remains possible, provided that they have some differences in the addresses, and this is abused by the raiders.

Moreover, the additional risk for legitimate property owners is the lack of the efficient control over the private technical inventory bureaus, which are not required to have any licenses to be entitled to make changes in/prepare new technical documentation for immovable property (technical certificate, etc.) in which the address of immovable property will be formally changed. In addition, according to the applicable procedure, in the event of split-up, split-off or merger of immovable property, the registrar shall be provided with a certificate evidencing assignment of a postal address to a new immovable property. Nonetheless, in practice this requirement is consistently neglected.³⁸

Thus, according to one standard scheme the stolen premises are divided into several other objects bearing different addresses (their registration numbers are changed, and the prior registration history of the facility disappears, accordingly) and are subsequently registered in the name of different owners.

Moreover, according to the applicable law, the postal address shall be assigned to immovable property in accordance with the procedure established by the decision of local self-governance bodies. That, in its turn, also provides raiders with a space for maneuvers.

³⁵ See Section II of Final and Transitional Provisions of the Anti-Raidership Law.

³⁶ See paragraph 4 of the part three of Article 10 of the Law on Registration of Real Rights.

³⁷ See part two of Article 17 of the Law on Registration of Real Rights.

³⁸ Instruction regarding split-up, split-off and calculation of the shares of immovable property, as approved by the Order of the Ministry of Housing and Communal Services of Ukraine No. 55, dated 18 June 2007.

The Council's Recommendations:

The Ministry of Regional Development, Construction and Housing and Communal Services of Ukraine shall consider developing a single regulations, which would set forth the procedure for assigning postal addresses to immovable property in the territory of Ukraine and harmonization of the latter with the existing legislative provisions³⁹

12. An electronic digital signature is provided solely subject to personal presence of signatories, in particular, officials of the enterprises⁴⁰

13. The signatures of chairman, secretary or members of the meetings in the minutes and the constituent documents – providing for introduction of amendments thereto – are subject to compulsory notarization⁴¹

Even though in some cases such novelty may slow down economic turnover, the Council believes it is definitely appropriate for the time being.

Indeed, it is much more difficult to forge a notarized document as compared with a document executed in simple writing form. It is also much easier to prove the fact that the document is forged, since expert examination of signatures takes time and sometimes can not be conducted without the original copy of a forged document, while the fact of forgery of a notarized document can sometimes be established just by filing a request.

Therefore, as only highly qualified criminal groups can implement the fraudulent scheme in such conditions, this novelty objectively reduces mass raidership.

14. When a physical person seeks exit from the composition of founders of a legal entity, the respective statement is subject to compulsory notarization⁴².

15. The time limits for filing a complaint with the permanent commissions tasked to consider complaints in the sphere of state registration were expanded from 30 to 60 days⁴³.

16. The complainant, when applying to the permanent commissions tasked to consider complaints in the sphere of state registrations, shall specify the existence of a court dispute on the subject matter of the complaint due to be lodged⁴⁴.

³⁹ This means, in particular, the Law of Ukraine "On Local Self-Governance in Ukraine" No. 280/97-VR, dated 21 May 1997; the Law of Ukraine "On the Fundamentals of Zoning" No. 2780-XII, dated 16 November 1992; the Resolution of the Cabinet of Ministers of Ukraine "On Zoning Cadastre" No. 559, dated 25 May 2011; and SCS (ДБН) В.1-1-93. "The Procedure for Formation and Keeping of City Development Cadastres of Populated Areas".

⁴⁰ See Article 5 of the Law of Ukraine "On Electronic Digital Signature" No. 852-IV, dated 22 May 2003.

⁴¹ See Article 15 of the Law on Registration of Legal Entities.

⁴² See Article 17 of the Law on Registration of Legal Entities.

⁴³ See part three of Article 37 of the Law on Registration of Real Rights; part three of Article 34 of the Law on Registration of Legal Entities.

⁴⁴ See part five of Article 37 of the Law on Registration of Real Rights; part five of Article 34 of the Law on Registration of Legal Entities.

17. The control functions of the Ministry of Justice of Ukraine, consisting of monitoring and conducting off sight documentary audits of notaries and other state registrars, have been expanded⁴⁵

It is worth noting that although the mechanisms of monitoring and off sight documentary audits was legally implemented back in December 2016, it actually became effective only in March 2017.

Appreciating the introduction of this mechanism, the Council believes that it would be worthwhile to ensure greater awareness of business and the public about the results of its practical implementation.

A more detailed analysis of the mechanisms of monitoring and off sight documentary audits (including respective recommendations) is provided below in the Section 3.3 thereto.

18. The competency to exercise control over the activities of notaries in the sphere of registration has been expanded, – the Ministry of Justice of Ukraine and its territorial bodies are now entitled to apply to the High Qualification Commission of the Notary Office at the Ministry of Justice of Ukraine to seek cancellation of the certificates affirming one’s right to carry out notarial activity⁴⁶

While this amendment is certainly positive, the criterion for cancelling professional certificates of notaries, which have committed violations, remains legislatively undetermined.

The Council’s Recommendations:

The Ministry of Justice of Ukraine shall consider preparing an explanation (or introducing amendments to the relevant legislation) to properly specify the conditions (perhaps, depending upon severity of violation) Consider preparing a clarification or amending the relevant legislative acts aimed at specifying conditions (perhaps, depending upon severity of breach), whose occurrence might trigger cancellation of certificate affirming one’s right to conduct notarial activity.

⁴⁵ See Article 37-1 of the Law on Registration of Real Rights; Article 34-1 of the Law on Registration of Legal Entities.

⁴⁶ See paragraph 2 of the part six of Article 37, paragraph 4 of the part two of Article 37-1 of the Law on Registration of Real Rights; paragraph 2 of the part six of Article 34, paragraph 4 of the part two of Article 34-1 of the Law on Registration of Legal Entities.

19. Registrars and notaries are obliged to use a secured personal key carrier only – a mean of electronic digital signature intended to keep personal key and containing the embedded hardware and software protecting data recorded thereon from an unauthorized access⁴⁷.

20. The State Registries (including data contained therein) are protected at the technological level, aimed at preventing unauthorized intrusion.⁴⁸

21. The notaries received access to the State Registry of Citizen's Civil Status in the "read only" mode⁴⁹.

Notarial certification of contracts requires ascertaining scope of civil capacity of physical persons, being the parties thereto. Hence, when proceeding with notarial certification of a contract, the notary shall verify the individual's marital status, – i.e., if a person is married, the prior spousal consent to purchase or sale the property is required. Now, the notary will take an appropriate decision based on the information retrieved from the State Registry of Citizen's Civil Status.

Among other things, the use by a notary of the State Registry of Citizen's Civil Status, makes it impossible for a person to act pursuant to a power of attorney issued by a deceased person. This prevents possible raidership-related manipulations too.

⁴⁷ See footnote No. 25.

⁴⁸ See amendments introduced to the Law of Ukraine "On Data Protection in the Information and Telecommunication Systems" No. 80/94-VR, dated 05 July 1994.

⁴⁹ See Article 46-1 of the Law of Ukraine "On Notary Public" No. 3425-XII, dated 02 September 1993.

3.1.2 Significance of the Anti-Raidership Law while combatting most known raidership schemes

(a) **Scheme No. 1. Using forged documents evidencing transfer of ownership over corporate rights or immovable property**

The analysis of complaints received both by the Commissions Tasked to Consider Complaints in the Sphere of State Registration and by the Council illustrates that one of the most widespread "raidership" schemes involves misappropriation of property by recording changes with the state registries based on fraudulent decisions of the management bodies of a legal entity, sale-purchase agreements, court decisions, etc., submitted to the state registrar⁵⁰.

Under this scheme, raiders submit to the registrar the minutes of the meeting of the owners of the company (or other documents according to which the rights are transferred to a third party), and the registrar shall, in his/her turn, take the respective registration action comprising transfer of corporate rights to such person. As a consequence the entity is stripped of its' tax credit, "reimburses" VAT to other entities, transfers funds onto accounts of third parties, etc.

The significance of the Anti-Raidership Law

To solve the foregoing problem, the Anti-Raidership Law:

(1) Provided for compulsory notarization of signatures on the main documents (in particular, minutes and constituent documents) which are submitted to proceed with registration actions with corporate rights.

(2) Restricted the application of the extraterritoriality principle when taking registration actions vis-à-vis immovable property and corporate rights from the national down to regional (oblast) level⁵¹

⁵⁰ In this Report the scheme of "raider" seizure using fraudulent court decisions, in view of its span and peculiarities, was identified as a separate one and analyzed accordingly below (see Scheme No. 2).

⁵¹ For the first time, the principle of extraterritoriality was introduced on 01 January 2016.

(b) Scheme No. 2. Carrying out registration action based on forged or non-existing court decision.

Another common "raidership" scheme is the use of forged court decisions on whose basis the unlawful registration actions with real rights over immovable property and encumbrances thereto are taken.

Thus, before the Anti-Raidership Law came into force, the law envisaged that any registration actions based on the court decisions should have been taken solely upon the request of the applicant by using data from the USRCD retrieved from its' official web-portal.

The significance of the Anti-Raidership Law

To minimize the instances of unlawful registration actions with immovable property and encumbrances thereto based on the fraudulent court decisions, the Anti-Raidership Law:

- (1) Established that the State Judicial Administration of Ukraine (the "SJAU") on the day when the court decision (which envisages the acquisition, change or termination of real rights over immovable property, encumbrances thereto; introduction of changes in the entries of the State Registry of Rights; termination of registration actions; making an entry about cancellation of the state registration of the rights; or cancellation of the decision of the state registrar), enters into legal force, – shall ensure the transfer to the State Registry of Rights of the copy of such court decision⁵²

Therefore, according to the foregoing provision of the Anti-Raidership Law, the obligation to notify the state registrars about entering into legal force by the court decisions authorizing acquisition, change or termination of real rights over the immovable property and encumbrances thereto, was delegated from the applicants to

a separate body – the SJAU. In the Council's view, it actually minimized the risk of taking the registration actions based on the fraudulent decisions.

- (2) Obligated the state registrar, – when conducting the state registration of the ownership right and other real rights, based on the court decision, – to verify availability, validity and contents of such decision with the Unified State Registry of Court Decisions. If the document is not found, the registrar shall apply to the respective court with the request for the authenticity and availability of the court decision filed by the applicant. Notably, the existence of a request lodged with the court to retrieve a copy of the court decision constitutes a separate ground for suspension of consideration of the application for state registration of real rights over immovable property and encumbrances thereto.
- (3) Envisaged the integrity of the registries of immovable property, business and court decisions aimed at avoiding unnecessary inspections and requests, and to ensure that registration actions are taken solely on the basis of legitimate court decisions.

⁵² See Article 31-1 of the Law on Registration of Real Rights.

At the same time, until **information interaction** between the State Registry of Real Rights Over Immovable Property and the Unified State Registry of Court Decisions is achieved, as well as in the case of registration actions based on the court decisions which entered into force, **registration actions on the basis of court decisions shall be conducted at the applicant's request**⁵³.

As for registration actions with corporate rights, the procedure for enforcement of court decisions in the sphere of state registration of corporate rights is essentially identical to the procedure for registration of real rights over immovable property and encumbrances thereto.

(c) **Scheme No. 3. "Bribing" the registrar or a notary.**

The lack of an efficient mechanism for bringing the state registrars to liability enabled the latter to collude with raiders and make unreasonable changes in the state registries.

The significance of the Anti-Raidership Law

To combat registrars acting in the bad faith, the Anti-Raidership Law:

(1) Strengthened the administrative and criminal liability of the subjects of registration actions, that is supposed to become a deterrent for the participants of illegal conspiracies and should allow bringing to liability both state registrars and the applicants.

(2) In particular, in case of violations of the procedure for state registration of rights by state registrars (or by authorized persons of the subjects of state registration of rights), the respective permanent commission tasked to consider complaints in the sphere of state registration should prepare a submission to the High Qualification Commission of the Notary Office at the Ministry of Justice of Ukraine seeking cancellation of the certificate affirming one's right to conduct notarial activity.

⁵³ See part two of Section II of Final and Transitional Provisions of the Law on Registration of Real Rights.

(d) Scheme No. 4. Stealing registrar's electronic key.

The raiders "hack" the computer of the registrar or a notary and remotely "read" the key under which the latter enters the registries for taking the registration actions. On behalf of the registrar or a notary, the criminals commit unlawful transactions with property in order to register the alienation thereof in favor of third parties.

Often, such scheme is combined with the Scheme No. 3, when the registrar or a notary "forgets" to install the required software, or deliberately leaves the flash memory card with an electronic key on the computer, and then "mistakenly" formats the hard disk.

The significance of the Anti-Raidership Law

(1) registrars and notaries are legally obliged to use a secure carrier of personal keys – a reliable mean of electronic digital signature. It is designed to keep a private key and has the embedded hardware and software protecting data stored thereon.

(2) all state registrars of immovable property and business are required to transfer to secure carriers of personal keys⁵⁴.

(e) Scheme No. 5. Transfer to the template statutory document.

Prior to 2 November 2016, the legislation governing state registration of legal entities did not require notarization of signatures placed on the decision of competent governing body of a legal entity, constituent documents of a legal entity and on other documents submitted for state registration of amendments in data about such entity⁵⁵.

Moreover, documents, constituting grounds for state registrations, could have been submitted to the subject of state registration, regardless of the location of the legal entity that also led to certain manipulations by the offenders⁵⁶.

Thus, in order to seize a business on the basis of forged documents (constituent documents and minutes of the governing bodies), raiders made amendments in data about legal entity evidencing its' transfer to a so-called "model charter" (i.e., template statutory document). The latter would stipulate that existence of a notarially uncertified original minutes of the superior managerial body of a legal entity constitutes sufficient ground to proceed with any registration actions.

⁵⁴ See amendments introduced to Article 5 of the Law of Ukraine "On Electronic Digital Signature" No. 852-IV, dated 22 May 2003.

⁵⁵ See Article 15 of the Law on Registration of Legal Entities.

⁵⁶ See Article 4 of the Law on Registration of Legal Entities.

The significance of the Anti-Raidership Law

The described scheme was "disarmed" by providing that signatures on the documents constituting main ground for conducting registration action with corporate rights

are subject to compulsory notarization. In addition, the legislative mechanism, preventing the application of the Scheme No. 1, is also applicable here.

(f) Scheme No. 6. Unlawful contribution of immovable property to the charter capital.

This scheme foresees unlawful transfer of property without the knowledge of its owner (or co-owner) to the charter capital of a (newly established or already existing) legal entity. Hence, such owners/co-owners, simultaneously with the transfer of property to the charter capital, were losing property rights over such assets in exchange for becoming owners of corporate rights proportionally to the value of thus contributed property. Then, in order to further alienate the rights over object contributed to the charter capital, the raiders

would sell it or use as pledge or mortgage against the loan.

Until recently such a scheme was possible due to the lack of legislative provision requiring notarization of the authenticity of signatures made on the transfer-acceptance act or other document confirming the fact of transfer of such property (or any other document evidencing the fact of transfer of such property into the ownership of a legal entity as a contribution).

The significance of the Resolution of the Cabinet of Ministers of Ukraine No. 806, dated 09 November 2016

For state registration of ownership rights due to the transfer of property to legal entity (for example, as a contribution to the charter capital), the relevant state registrar must be provided with, inter alia, **the act of acceptance-transfer of property or other document confirming the fact of transfer of such property**.⁵⁷

Moreover, in accordance with the new wording of the Resolution of the Cabinet of Ministers

of Ukraine No. 1127, the application of the described scheme is virtually impossible. In particular, starting from 16 November 2016, the state registrars became obliged to **certify authenticity of signatures placed on acts of acceptance-transfer of property (or other document evidencing the fact of such property's transfer)** to be conducted in accordance with the requirements set forth in the Law of Ukraine "On Notary Public" No. 3425-XII, dated September 02 1993.⁵⁸

⁵⁷ See paragraphs 48, 50 of the Procedure for Registration of Real Rights.

⁵⁸ See amendments introduced by the Resolution of the Cabinet of Ministers of Ukraine "On Introducing Amendments to Certain Resolutions of the Cabinet of Ministers of Ukraine on the Matters of State Registration" No. 806, dated 09 November 2016 to the Procedure for Registration of Real Rights.

3.2 Permanent Commissions Tasked to Consider Complaints in the Sphere of State Registrations

3.2.1 Organizational structure and competence

Since 01 January 2016, the reformed system of administrative services in the sphere of state registration of business and immovable property⁵⁹ has become operational in Ukraine. The main features of this reform included demonopolization and decentralization of relevant services through liquidation of the State Registration Service of Ukraine and introduction of the principle of extraterritoriality. One of the components of this reform was also the introduction of a two-level system of ministerial (administrative) appeal of the decisions, actions or inactions of the state registrars and subjects of state registration⁶⁰.

Thus, every person, who thinks that his/her rights in the sphere of state registration have been violated, prior to applying to the court may file a complaint with the Ministry of Justice of Ukraine or its territorial bodies, in which relevant permanent commissions tasked to consider complaints in the sphere of state registration are established (collectively, the "**Commissions**", and individually, the "**Commission**").

The first level of administrative appeal is formed by the Main Territorial Departments of Justice in the Autonomous Republic of Crimea, regions (oblasts), cities of Kyiv and Sevastopol, which deal with the complaints against the decisions, actions or inactions of the state registrars and subjects of state registration operating within the territories falling under competence of relevant territorial bodies⁶¹.

The second level is the Commission in the sphere of state registration operating as a permanent collegial advisory body under auspices of the Ministry of Justice of Ukraine. The competence of this Commission includes consideration of the following types of complaints:

- (1) against registration actions taken by the state registrar of a business (except when such registration actions are taken pursuant to the court decision);
- (2) against the decision of the state registrar of immovable property with respect to the state registration of rights (except when such right is acquired pursuant to the court decision, as well when there is a litigation concerning immovable property);
- (3) against the decisions, actions or inactions of territorial bodies of the Ministry of Justice of Ukraine.

In other words, **as a mechanism of pre-trial (ministerial) administrative appeal, the Commissions have competence only when it comes to challenging decisions, actions or inactivity of the state registrars or subjects of state registration. Therefore, no documents (decisions) on whose basis a problematic registration action was taken can be challenged with the Commission. Consequently, the competence of the Commission does not extend to the resolution of corporate conflicts on their merits.**

⁵⁹ On 13 December 2015, the Law No. 834-VIII and the Law No. 835-VIII entered into force.

⁶⁰ According to paragraph 2 of the Procedure for complaints consideration, to ensure examination of complaints the Ministry of Justice of Ukraine and its territorial bodies established permanent commissions tasked to consider complaints in the sphere of state registration.

⁶¹ Their competence, in particular, includes consideration of complaints against (i) the decision (other than the decision on which basis a registration action had been taken), actions or inactivity of the state registrar of a business; (ii) the decision (other than the decision on state registration of the rights), actions or inactivity of the state registrar of immovable property; and (iii) actions or inactivity of subjects of state registration. See Article 34 of the Law on Registration of Legal Entities and Article 37 of the Law on Registration of Real Rights.

3.2.2 Eligibility criteria of complaints

Prior to the commencement of consideration of complaints on their merits, the Commissions should ascertain whether they are compliant with the following eligibility criteria:

- 1) whether the complaint falls under the competence of the subject of complaint's consideration (appropriate subject of complaint's consideration);
- 2) whether the requirements of the legislation with respect to the time limits governing filing a complaint and the requirements to execution thereof have been met;
- 3) whether there are (no) other complaints being resolved by the subject of complaint's consideration⁶².

Noteworthy, the Commissions should refuse the subject of complaint's consideration (the Ministry of Justice or its territorial bodies) to satisfy the complaint if:

- 1) the complaint is prepared without adhering to existing legislative requirements;
- 2) at the time when the decision is made on the merits of the complaint, subsequent registration action has been taken with regard to a legal entity (or a physical person-entrepreneur) / the state registration of the same right has taken place for a person other than that indicated in the challenged decision;
- 3) there is information about court decision or ruling on refusal to proceed with the claim on the same subject-matter; on recognition of claim by the defendant; or settlement agreement reached between the parties;
- 4) there is information about ongoing judicial proceeding in connection with a dispute between the same parties, on the same subject matter and on the same grounds;
- 5) there is decision of the same body on the same matter;
- 6) the competent authority continues to consider the complaint on the same subject matter from the same complainant;
- 7) the complaint was filed by a person lacking respective authority;
- 8) the deadline, set by the law for filing a complaint, has expired;
- 9) consideration of the matters raised in the complaint is beyond the respective authorities' scope of powers.

⁶² Paragraph 5 of the Procedure for complaints consideration.

3.2.3 Types of decisions

Following consideration of complaints, the Commissions shall render a well-grounded decision on:

- (1) the refusal in satisfaction of the complaint;
- (2) the satisfaction (full or partial) of the complaint by rendering a decision on:
 - a) cancellation of registration action; revocation of the decision of territorial body of the Ministry of Justice of Ukraine taken on the basis of the results of the complaint's consideration;
 - b) cancellation of the decision on the refusal to proceed with state registration followed by such state registration;
 - c) introducing amendments in the entries of the State Registry of Rights and/or correction of a technical mistake made by the state registrar;
 - d) imposing temporal ban on the state registrar's access to the State Registry of Rights or the Unified State Registry of Legal Entities, Physical Persons-Entrepreneurs and Public Formations;
 - e) barring access of the state registrar to the State Registry of Rights or the Unified State Registry;
 - f) cancellation of the accreditation of a subject of state registration;

g) bringing an official of the territorial body of the Ministry of Justice of Ukraine to disciplinary liability;

h) forwarding to the High Qualification Commission of the Notary Office at the Ministry of Justice of Ukraine a submission seeking cancellation of the certificate affirming one's right to conduct notarial activity.

The foregoing decisions of the Commissions shall be executed in the form of **the conclusions** to be signed by the Chairman of the Commission, the secretary and members of the Commission who participated in the meeting of the Commission⁶³. According to the results of complaint's consideration, the subject of complaint's consideration (the Ministry of Justice of Ukraine or its' territorial bodies), based on the Commission's conclusions, takes a reasonable decision in the form of **the order** on satisfaction or refusal to satisfy the complaint on the grounds envisaged in the legislation⁶⁴. Noteworthy, it is only **the orders** of the subjects of complaint's consideration (the Ministry of Justice of Ukraine or its' territorial bodies) that have binding effect, and not **the conclusions** of the Commissions which bear purely advisory nature and thus cannot force issuance of the respective order⁶⁵.

⁶³ See Article 8 of Section III of the Regulation on the Commission Tasked to Consider Complaints in the Sphere of State Registration, as approved by the Order of the Ministry of Justice of Ukraine No. 37/5, dated 12 January 2016.

⁶⁴ See Paragraph 12 of the Procedure for complaints consideration.

⁶⁵ Similar legal position is outlined, in particular, in the resolution of the Higher Administrative Court of Ukraine issued on 7 June 2017 in case No. K/800/35906/16 (<http://www.reyestr.court.gov.ua/Review/67196825#>)

3.2.4 The analysis of criticism on the activities of permanent commissions

In the Council's view, the introduction of a mechanism of pre-trial challenge of registration actions by referring to permanent commissions tasked to consider complaints in the sphere of state registration is undoubtedly a positive phenomenon.

Notably, according to statistics provided to the Council by the Ministry of Justice of Ukraine, as at 1 July 2017 the Ministry considered **1,389 complaints**, of which **830** were satisfied. The majority of complaints, which were not accepted into consideration on the merits, did not fall within the competence of the Ministry of Justice of Ukraine; were compiled with violations; were redirected to relevant territorial bodies of the Ministry of Justice of Ukraine; or in their legal nature belonged to the category of citizens' appeals. The Ministry of Justice thus considered the latter accordingly without Commission's involvement. It is also worth noting that as compared to 2016, in 2017, the number of complaints related to corporate matters that were accepted into consideration on their merits, decreased considerably: from **369** in 2016 to **63** in the first half of 2017.

At the same time, the Council is well aware that certain elements of the status and practical activities of the Commission are subject to criticism amongst the professional public. The following represents critical analysis of key arguments accumulated by the Council during its work on the Report.

(a) Lack of sufficient transparency and publicity

Since conclusions issued by the Commissions and/or respective orders of the subjects of consideration of complaints are not subject to public disclosure, such non-transparency might be interpreted as a manifestation of existence of certain element of corruption.

The Council notes, however, that upon the request of the parties, the Ministry of Justice of Ukraine shall provide them with the complaint, documents submitted during consideration

thereof, as well as the decision taken. Moreover, actually any person actually obtain the conclusion of the Commission by lodging request for access to public information.

(b) The existence of quasi-judicial authority

The argument is used that the availability of an opportunity for the subjects of complaint's consideration (the Ministry of Justice or its territorial bodies) to independently and at their own discretion cancel registration entries in state registries actually vests them with a quasi-judicial authority to decide on the merits of disputes related to the ownership right; that itself might constitute a separate ground for launching judicial action in the future.

Yet, it is worth noting that the Commission's decisions do not have a prejudicial effect. In other words, the view regarding the legality of a certain registration action, set forth in the conclusion of the Commissions and/or respective orders of the subjects of complaint's consideration, shall not be regarded as already proved fact for the court considering the complaint on the same subject matter.

Besides, according to the statistics of the Ministry of Justice of Ukraine disclosed to the Council, only 0.3% of the decisions of the subjects of complaint's consideration, which were challenged with the court, were eventually cancelled.

(c) Cancellation of the "chain" of registration actions violates the law

One of the most common raidership schemes is when the first registration action is taken with violations (for example, on the basis of forged documents or in violation of the procedure), and in the future the property is being re-registered by using the "chain" of bona fide purchasers documented without any violations at the part of the state registrars or the parties to the respective contract.

Some of the experts interviewed by the Council stated that, in their opinion, the positive effect of the Commission's work up to now was that by establishing that the applicant's right had been violated when the first registration action occurred, it would cancel not only the first action but all subsequent registrations "in the chain" of "raider" actions. At the same time, according to experts, this practice appears to be in breach with the requirements of the law, since, as a general rule, the cancellation of the registration action should be refused if "... at the time of taking the decision based on the results of consideration of the complaint there was the state registration ... of the right for another person than the one referred to in the challenged decision".⁶⁶

Yet, while working on the Report the Council ascertained that, in the opinion of the Ministry of Justice of Ukraine, the foregoing rule did not deprive the applicant, who believes that his/her rights were violated by the subsequent registration actions, of the right to file an annex to the complaint to specify the details of other decisions of state registrars which he/she wants to challenge. Among other things, this should be facilitated by the fact that the information, contained in the state registries, is public and new entries become available as soon as they are made.

Moreover, the Ministry of Justice of Ukraine assured the Council that the practice of filing annexes to the complaint is rather widespread.

(d) Inefficiency in case of unauthorized intrusion with the registries

It is argued that the Commission is inefficient when challenged registration action took place as a result of allegedly unauthorized intrusion with the operation of the electronic databases of state registries.

Nonetheless, it should be recognized that in this case the Commission is not vested with

the necessary competence, since the competent authorities can only establish the fact of unauthorized access to the registry, for example, based on the court decision and/or actions of the competent unit of the National Police of Ukraine.

It is also worth noting that the Commissions do not consider complaints against actions or inactivity of state registrars if there is an ongoing litigation between the parties on the same matter.

(e) Inefficiency in case of violation of territoriality rules

In this case, the object of criticism is the situation when the Commissions refuse to cancel registration actions taken in violation of the existing territoriality rules.

It is worth noting that, although the Anti-Raidership Law restricted the principle of extraterritoriality, the Ministry of Justice of Ukraine acknowledged that, in practice, there are rare cases of registrations outside the territory within which the registration action may be carried out pursuant to the law.

Moreover, the Council found that when the state registrar formally complied with all the requirements of the law, however failed to comply with the territoriality rules, the Commission usually decides to bring such a registrar to administrative liability and/or block/cancel an access to the Registries; yet without cancelling relevant registration action.

Nevertheless, the Council's position is that violation of the territoriality rules is, above all, a quite serious procedural violation. Moreover, the perspective of being brought to personal disciplinary liability is not perceived by the Council as a sufficient condition that would, in principle, rule out a deliberate violation of territoriality rules as an element of a "raidership" scheme.

⁶⁶ According to paragraph 2 of the part 8 of Article 37 of the Law on Registration of Real Rights (similarly, in part 8 of Article 34 of the Law on Registration of Legal Entities).

The Council's Recommendations:

To prevent taking registration actions in violation of existing territoriality rules by:

(1) Providing that violation of territoriality is a compulsory basis for the Commission to cancel the registration action; to this end, the Ministry of Justice should initiate introduction of relevant amendments to Article 3, para. 5 of the Law of Ukraine "On State Registration of Real Rights Over Immovable Property and Encumbrances Thereto" No. 1952-IV, dated 01 July 2014 and Article 4, para. 2 of the Law

of Ukraine "On State Registration of Legal Entities, Physical Persons-Entrepreneurs and Public Formations" No. 755-IV, dated 15 May 2003;

and/or

(2) Excluding the possibility of violating the territoriality rules at the technical level; to this end, the Ministry of Justice of Ukraine, in cooperation with SE "National Information Systems", shall make appropriate changes in the software of relevant state registries

(f) Inefficiency when there are discrepancies with previously registered real rights

The situations are also being criticized when the Commissions allegedly refuse to cancel the registration actions taken by the state registrar in the event of a conflict with previously registered real rights over immovable property and encumbrances thereto; or contrary to

the application of the owner seeking prohibition of registration actions.

The law, however, expressly provides that one of the grounds for a decision to refuse to conduct state registration of rights is "*the existence of discrepancies between the claimed and already registered real rights over immovable property and encumbrances thereto*".⁶⁷

⁶⁷ See part one of Article 24 of the Law on Registration of Real Rights.

Thus, the Ministry of Justice assured the Council that if the Commission establishes the existence of such a discrepancy, the relevant subject of consideration of complaints (the Ministry of Justice of Ukraine or its territorial body) should take a decision in the form of an order cancelling the decision of the state registrar of the rights to immovable property.⁶⁸

(g) Inefficiency when registration action was taken on the basis of forged documents

Some experts criticize the Commission for refusing to cancel registration actions when the evidence available in the materials of the complaint appears to be undeniably confirming that the decision on the registration was taken by the state registrar on the basis of forged documents.

As in the case of allegedly unauthorized access to the registries, it should be admitted that the Commissions do not have proper competence, since only the court can establish whether the documents submitted for state registration are forged or not. Since the members of the Commission are not experts in the respective fields and the Commission is not a judicial authority, it is not possible, from a legal point of view, to establish that the document is forged when considering the complaint.

At the same time, if the subject of complaint's consideration (the Ministry of Justice of Ukraine or its territorial body) were to develop doubts about the authenticity of submitted documents while considering the complaint against the decision, actions or inactivity of the state registrar, – they should notify relevant law enforcement authorities accordingly.⁶⁹

3.3 The mechanism of ministerial control of state registrars

In March 2017, the mechanism of the ministerial control over activities of nearly 10,000 state registrars (including notaries) was launched in Ukraine. The mechanism was designed to

address procedural abuses committed by state registrars while carrying out registration actions through continuous monitoring and selective off sight documentary audits⁷⁰.

⁶⁸ See part one of Article 18 of the Law on Registration of Real Rights.

⁶⁹ See part one of Article 36 of the Law on Registration of Real Rights.

⁷⁰ Functioning of such mechanism is envisaged by: (1) the Law on Registration of Real Rights; (2) the Law on Registration of Legal Entities; and (3) the Procedure for exercising control in the sphere of state registration, as approved by the Resolution of the Cabinet of Ministers of Ukraine No. 990, dated 21 December 2016 (the "**Procedure for exercising control**").

3.3.1 Monitoring and off sight documentary audits

Monitoring comprises array of organizational and technical measures ensuring systematic selective verification of compliance by the subjects of state registration⁷¹ with the law while carrying out registration actions based on the following exhaustive criteria:

- violation of time limits envisaged for registration;
- taking the registration actions beyond working hours;
- absence in the registries of scanned electronic copies of the documents submitted for state registration;
- registration on the basis of court decisions;
- cancelation (deletion) of entries from the registries;
- state registrar and/or subject of state registration is otherwise specifically selected for monitoring by the Ministry of Justice of Ukraine⁷².

If in the process of monitoring occurrence of one or several foregoing criteria is established, – it shall constitute the ground for conducting so-called **"off sight documentary audit"** – desktop audit of the registrar's actions, which is

conducted within 14 working days on the basis of the order of the Ministry of Justice of Ukraine, establishing the commission consisting of at least three persons⁷³.

The off sight documentary audit may result in:

- temporary restriction or cancelation of an access to the registry;
- handing over the materials to the law enforcement authorities;
- bringing the registrar, an authorized person of the subject of registration to administrative liability;
- filing a submission with the High Qualification Commission of the Notary seeking cancelation of the certificate affirming one's right to conduct notarial activity;
- cancelation of accreditation of the subject of state registration⁷⁴.

As such, according to the Ministry of Justice of Ukraine, **as at 1 July 2017, 174** off sight documentary audits resulted in the temporary suspension of access to the state registries for **120** state registrars, and for **13** registrars – forever.

⁷¹ This means the state registrars of the rights over immovable property, the state registrars of legal entities, physical persons-entrepreneurs and public formations, authorized persons of the subjects of state registration.

⁷² Paragraph 4 of the Procedure for exercising control.

⁷³ Paragraph 6 of the Procedure for exercising control.

⁷⁴ This is prescribed by paragraph 11 of the Procedure No. 990, Articles 37-1 of the Law on Registration of Real Rights, and the Article 34-1 of the Law on Registration of Legal Entities.

3.3.2 Typical mistakes committed by state registrars

According to data provided by the Ministry of Justice of Ukraine, in the course of the registration actions the state registrars make the following typical mistakes.

- (1) Electronic copies of the documents submitted by the applicants for registration actions are not prepared.⁷⁵
- (2) The statutory sequence of the registration actions is violated.⁷⁶
- (3) The statutory time limits for state registration of rights and encumbrances thereto are violated.⁷⁷
- (4) The territoriality rules are violated.⁷⁸
- (5) Printed image of the decision on state registration is not prepared, thus violating the requirements of the law with respect to execution of the decision on state registration of rights and encumbrances thereto.⁷⁹
- (6) No information is searched in the State Registry of Real Rights Over Immovable Property, or search is made not on the basis of all identifiers (might constitute violation only if registration action was carried out despite existence of grounds for refusal).⁸⁰
- (7) The sequence of consideration of applications for state registration of real rights and encumbrances thereto is not observed (might constitute violation only if registration action was carried out despite existence of previously registered application).⁸¹
- (8) The requirements of the Law On the State Registration of Real Rights and Encumbrances Thereto regarding the amount of administrative fee to be paid for the state registration of rights and encumbrances thereto are violated.⁸²
- (9) State registration of rights is conducted on the basis of the documents which do not establish the ownership right or other real rights over immovable property.⁸³
- (10) State registration of rights is conducted without the certificate issued by public authorities, enterprises, institutions and organizations, which according to the law conducted registration of rights in the absence of information on registration of the ownership right over immovable property in the State Registry of Rights and the Registry of Ownership Rights Over Immovable Property (constituting integral part of the State Registry of Real Rights Over Immovable Property).⁸⁴
- (11) During the state registration of rights and encumbrances thereto no data of the unified registries is used.⁸⁵

⁷⁵ See Article 16 of the Law on Registration of Real Rights, clauses 9, 10 of the Procedure for Registration of Real Rights and paragraph 56 of the Procedure for keeping the State Registry of Real Rights Over Immovable Property, as approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1141, dated 26 October 2011 (the "**Procedure for keeping the State Registry of Rights**")

⁷⁶ Part one of Article 18 of the Law on Registration of Real Rights.

⁷⁷ Article 19 of Law on Registration of Real Rights.

⁷⁸ Part five of Article 3 of the Law on Registration of Real Rights.

⁷⁹ Paragraph 15 of the Procedure for keeping the State Registry of Rights and the Requirements to execution of applications and decisions in the sphere of state registration of rights to immovable property, as approved by the Order of the Ministry of Justice of Ukraine No. 3276/5, dated 21 November 2016.

⁸⁰ Clauses 10, 11 of the Procedure for keeping the State Registry of Rights.

⁸¹ Part 8 of Article 18 of the Law on Registration of Real Rights and paragraph 13 of the Procedure for keeping the State Registry of Rights.

⁸² Parts four, seven of Article 34 of the Law on Registration of Real Rights.

⁸³ Paragraph 4 of part one of Article 3 of The Law on Registration of Real Rights, Article 27 of The Law on Registration of Real Rights.

⁸⁴ See Article 10 of The Law on Registration of Real Rights.

⁸⁵ See Article 10 of The Law on Registration of Real Rights.

3.3.3 Criticism of the mechanism and the proposals for improving thereof

In general, the Council appreciates both the introduction of the ministerial control mechanism to monitor the activities of the state registrars as well as the first operational results. At the same time, some of the experts interviewed by the Council referred to insufficient proportionality of the imposed sanctions⁸⁶ and the lack of proper public disclosure of the results of the off sight documentary audits.

The Council agrees that the mechanism of monitoring and off sight documentary audits of state registrars should be applied objectively, and the results shall be disclosed to the proper extent.

From that perspective, since the Order of the Ministry of Justice of Ukraine authorizing off sight documentary audit must be disclosed on

the official web-site, then, in the Council's view, the subsequent disclosure of the results of such audit appears to be rather logical. Therefore, since sanctions are not always imposed against the state registrars following the off sight documentary audit, the disclosure of the results of the off sight documentary audits should prevent the possible negative impact on the reputation and image of state registrars acting in good faith.

Moreover, the Council supports the position of the Ministry of Justice of Ukraine expressed during the work on the Report, which proposed to inform the public about the notaries whose access to state registries was blocked/canceled through the disclosure of such information with the Unified Registry of Notaries.

The Council's Recommendations:

In order to ensure the objective application of the mechanism of monitoring and off sight documentary audits of state registrars and appropriate publication of relevant results, the Ministry of Justice of Ukraine is recommended:

(1) to consider introducing public disclosure of the results of the off sight documentary audits;

- (2) initiate changes in the Unified Registry of Notaries, which would allow for disclosure of information about the notaries whose access to state registries was blocked/canceled.
- (3) elaborate the generalized clarifications for state registrars to minimize occurrence of typical mistakes committed by them while conducting registration actions.

⁸⁶ Thus, it was argued that some notaries and state registrars were denied access to registries for insignificant procedural violations (for example, improperly executed receipt); while other registrars systematically violating the existing procedural requirements were allegedly not brought to adequate level of liability.

3.4 State of the law enforcement system

The analysis of the substance of complaints received by the Council shows that phenomenon of raidership could be less widespread if the law enforcement authorities were to be more efficient while investigating relevant bodies of crime and bringing guilty persons to liability.

The Council, in particular, ascertained that lengthy and, sometimes, ineffective pre-trial investigation of "raidership" crimes was caused, first of all, by the lack of a single approach to the investigation of relevant bodies of crime by the law enforcement authorities.

At the same time, the law enforcement officers themselves complain about sharp increase in the number of registered criminal proceedings per one investigator resulting from the abolition of the inquiry institute following adoption of the current version of the Criminal Procedural Code of Ukraine.

In view of the projected increase in the burden on the investigators of law enforcement authorities, in 2012 their staff was increased by 1.2 thousand units (+16.7%). However, these measures were not able to significantly improve the situation. In particular, according to the information provided by the Department of Methodological, Organizational and Analytical Work of the Main Investigation Department of the National Police of Ukraine, as at 2017, the burden on one investigator, as compared to 2011, has increased almost three times (170 proceedings in 2017 versus 60 proceedings in 2011).

The first attempt to unify the approach to investigation of the facts of raidership was made at the end of 2013, when the Criminal Code of Ukraine was supplemented with Article 206-2 "Unlawful Misappropriation of Property of an Enterprise, Institution, Organization"⁸⁷. Moreover, it became possible to bring to liability the persons involved in "raidership"

schemes holding senior positions based on the body of crime provided for in Article 206-2 of the Criminal Code of Ukraine "Unlawful Misappropriation of Property of an Enterprise", which was attributed to the investigatory competence of detectives by the National Anti-Corruption Bureau of Ukraine (the "NABU"). Relevant amendments were made in Article 216 of the Criminal Procedure Code of Ukraine in summer 2015⁸⁸.

With the adoption of the Anti-Raidership Law, another attempt was done to bring certainty in the criminal qualification of "raidership" crimes. In particular, Article 206 of the Criminal Code of Ukraine "Counteraction to Lawful Economic Activities" is now complemented with such independent body of crime as "the seizure of integral property complex, its part, buildings ..., illegal restriction or termination of activity at these facilities, limitation of an access thereto". Besides, certain amendments were introduced to Articles 358, 365-2 of the Criminal Code of Ukraine, as described in more detail in the Section 3.1.1. of the Report "Key Amendments Introduced by the Anti-Raidership Law".

However, as far as ensuring effectiveness of the pre-trial investigation of "raidership crimes" is concerned, such amendments, for objective reasons, have not proved to be as effective as the current realities require. The reason is that in most cases the foregoing provisions of the Criminal Code of Ukraine refer to the relevant provisions of commercial and civil law, which in their turn, are also confusing and/or uncertain.

Thus, Article 206-2 of the Criminal Code of Ukraine "Unlawful Misappropriation of Property of an Enterprise" contemplates liability for the unlawful misappropriation of property of an enterprise based on forged or stolen documents. At the same time, the question of legal qualification of "raider" crimes according

⁸⁷ See Law of Ukraine "On Amending Certain Legislative Acts of Ukraine on Improving the Legal Regulation of the Activity of Legal Entities and Individuals – Entrepreneurs" No. 642-VII, dated 10 October 2013.

⁸⁸ See Law of Ukraine "On Amending the Article 216 of the Criminal Procedure Code of Ukraine regarding the clarification of the jurisdiction of the National Anti-Corruption Bureau of Ukraine" No. 628-VIII, dated 16 July 2015.

to Articles 206, 206-2 of the Criminal Code of Ukraine is a rather difficult task, since the objective side of this crime includes signs of document forgery (Article 358 of the Criminal Code of Ukraine), or abuse of powers by a person providing public services (Article 365-2 of the Criminal Code of Ukraine). In practice it means that the investigation of crimes under Articles 206, 206-2 of the Criminal Code of Ukraine requires a significant amount of work related to verification. Thus, for the investigator, in its turn, it is much easier to prove the fact of document forgery than that of obstructing legitimate economic activity.

Therefore, in its work, the Council observes that the pre-trial investigation of "raidership" crimes is often conducted on the basis of fraud (Article 190 of the Criminal Code of Ukraine); the abuse of powers by a person providing public services (Article 365-2 of the Criminal Code of Ukraine); theft of documents (Article 357 of the Criminal Code of Ukraine); document forgery (Article 358 of the Criminal Code of Ukraine) rather than on the basis of unlawful repossession (Article 206-2 of the Criminal Code of Ukraine) or obstruction of commercial activity (Article 206 of the Criminal Code of Ukraine).

For a business that has suffered from raidership attack, this situation is alarming, since bringing a person who forged a document or committed official negligence to liability does not mean bringing the organizer of a raidership attack to liability.

Having analyzed the statistics of the results of the pre-trial investigation on such profile "anti-raidership" bodies of crime as "Counteraction to Legitimate Economic Activities" (Article 206 of the Criminal Code of Ukraine) and "Unlawful Misappropriation of Property of an Enterprise" (Article 206-2 of the Criminal Code of Ukraine), the Council found that the number of convictions under these Articles is extremely low.

According to the official statistics on the registered criminal proceedings and the results of their pre-trial investigation, which are published on the web-site of the

General Prosecutor's Office of Ukraine⁸⁹, in 2016, on the grounds of a crime stipulated in Article 206-2 of the Criminal Code of Ukraine ("Unlawful Misappropriation of Property of an Enterprise") the law enforcement bodies registered 78 criminal proceedings, with only two proceedings being forwarded to the court with the indictment. For 5 months of 2017, on the basis of Article 206-2 of the Criminal Code of Ukraine, 42 proceedings have been registered, and as at 31 May 2017 no pre-trial investigation has been completed on any of them.

In its turn, according to Article 206 of the Criminal Code of Ukraine ("Counteraction to Legitimate Economic Activities"), for 5 months of 2017 the law enforcement bodies have registered 120 respective proceedings, and only 2 of them have been referred to the court with indictment.

As for the "raidership" crimes attributed to the investigatory competence of the NABU, according to the information provided by the NABU and statistical data disclosed by the General Prosecutor's Office of Ukraine⁹⁰, in 2016 the NABU detectives launched just 2 criminal proceedings under Article 206-2 of the Criminal Code of Ukraine ("Unlawful Misappropriation of Property of an Enterprise"). During January-May 2017 the NABU detectives did not register any criminal proceedings under Article 206-2 of the Criminal Code of Ukraine ("Unlawful Misappropriation of Property of an Enterprise").

The NABU itself has acknowledged that problems with investigation of raidership crimes are caused, inter alia, by the lack of sound investigatory and judicial expertise with investigation of crime foreseen in Article 206-2 of the Criminal Code of Ukraine ("Unlawful Misappropriation of Property of an Enterprise")

The Council notes that even those cases in the investigation of "raidership" crimes, in which the law enforcement authorities immediately initiate a pre-trial investigation, are often investigated ineffectively and do not provide the victims with an opportunity

⁸⁹ <http://www.gp.gov.ua/ua/statinfo.html>

⁹⁰ See the footnote No. 89.

to suspend unlawful behaviour vis-à-vis their property. For example, the one suffered from raidership attack may not always get the status of a victim in the criminal proceeding on the pre-trial stage. Those applicants who have been granted the status of a victim, for a long time can not achieve the application of such measures aimed at ensuring due course of the criminal proceedings⁹¹ as temporary access

to documents, or the arrest of property. In cases where the object of the "raidership" attack was property of an enterprise, the significance of such step as prompt imposition of an arrest on the object of the attack by the investigator is extremely important, as this may prevent further alienation of such property in favour of third parties and ensure the possibility of returning property to its lawful owner.

The foregoing difficulties with the investigation of "raidership" crimes can be illustrated by the following cases drawn from the Council's practice:

CASE NO. 1. **Complaint against inactivity of the investigator of the National Police**

The Complainant approached the Council with a complaint challenging inefficiency of the pre-trial investigation of the criminal proceeding under Article 190 of the Criminal Code of Ukraine "Fraud", Article 206-2 of the Criminal Code of Ukraine "Unlawful Misappropriation of Property of an Enterprise", and Article 358 of the Criminal Code of Ukraine "Forgery of Documents, Seals, Stamps and Letterheads, Sale or Use of Forged Documents, Seals, Stamps", which was launched on 5 July 2016. The ground for initiating the criminal proceeding was an attempt of "raidership" attack on the business of the Complainant.

In particular, in early July 2016, the state registrar of one of the village councils in Kyiv region, on the basis of forged documents, made changes to the composition of owners of the company and substituted the director. It resulted in a complete loss of control over activities of the company and its property. Subsequently, according to the results of consideration of relevant complaint of a business entity and with the assistance of the Council, the state registrar corrected data in the Unified State Registry of Legal Entities and Physical Persons-

Entrepreneurs and reinstated legitimate owner's of the company. Later, to bring the organizers of the "raidership" attack to liability, the Complainant applied to the law enforcement authorities with relevant application.

In May 2017, the Complainant applied to the Council about the fact that during 9 months of the investigation the guilty persons were neither identified nor punished, the investigation is being conducted inactive, and the Complainant was not granted the status of a victim in the criminal proceeding.

In the course of consideration of the complaint, the Council established that, in accordance with the provisions of the Criminal Procedural Code of Ukraine⁹², the status of a victim should be given to the Complainant automatically. At the same time, the lack of the status of a victim deprived the Complainant of the opportunity to actively influence the course of the pre-trial investigation, collect evidence independently and request that certain investigative and search actions be taken within the framework of the criminal proceeding.

⁹¹ See Section II of the Criminal Procedure Code of Ukraine

⁹² See parts 1-3 of the Article 55 of the Criminal Procedure Code of Ukraine: "a victim in the criminal proceeding may be a physical person who has suffered moral, physical or property damage as a result of the criminal offence, as well as a legal entity who has suffered property damage as a result of the criminal offence. The rights and obligations of the victim arise in the person upon filing an application for committing a criminal offence against him/her or an application for involving him/her in the proceeding as a victim. The victim shall be given a note of procedural rights and obligations of the person who accepted the application for committing a criminal offence".

Having talked to the investigator in the criminal proceeding, the Council found that, in his view, the fact that according to the results of the appeal against actions of the state registrar the property was returned to the Complainant, effectively precludes the existence of damage caused to the latter and, consequently, granting him the status of a victim. The investigator explained the delay in the pre-trial investigation by regular requests of materials of the case by the procedural supervisor (prosecutor), resolution of the matter related to changes in crime qualification, replacement of the investigator in a case etc.

The Council has filed a complaint for consideration with the Permanent Specialized Expert Group, established under auspices of the Memorandum of Partnership and

Cooperation between the National Police of Ukraine and the Council. In the course of the Expert Group meeting, the representatives of the Main Investigation Department of the National Police agreed with the necessity to grant a victim status to the Complainant. According to the results of the discussion, the management of the Main Investigation Department of the National Police decided to provide the investigator with the instructions to activate the pre-trial investigation and forwarded to the head of investigative unit the relevant letter stressing the need for further study of the materials of the criminal proceeding and resolution of the matter of recognition of the Complainant as a victim.

The Council continues to investigate the complaint.

CASE NO. 2.

Complaint against inactivity of the investigator of the National Police

The Complainant approached the Council with complaint challenging ineffective pre-trial investigation carried out within the framework of the criminal proceeding under Article 388 of the Criminal Code of Ukraine "Unlawful Acts Against Property Arrested, Pledged Property or Property Distrainted or Subject to Confiscation".

The ground for the initiation of a criminal proceeding was the unlawful alienation of immovable property pledged by "A" LLC (the "Pledgor") to the Complainant (the "**Pledgee**"). Since "A" LLC did not repay the loan in due time, the Complainant applied to the court with the claim to commence enforcement procedure against mortgage. However, during the trial, in the period from

10 November 2016 to 17 November 2016, "A" LLC, having taken the benefit from the forged court decision, lifted a ban on the alienation of immovable property. Then, the disputed immovable property was several times alienated, and as a result became property of company "B", which calls itself a bona fide purchaser.

Hence, the Complainant filed an application for committing a crime to the competent unit of the National Police in Kyiv region.

The Complainant applied to the Council, taking into account that for 7 months of the investigation no investigative and search actions were taken in the case to identify those involved in the crime. The investigation failed even to interrogate the state registrar who had

taken an unlawful registration action. Moreover, the Complainant expressed his/her concern about the transfer of the criminal proceeding to one of the district police departments in Kherson region, after which the Complainant lost any opportunity to control and influence the course of the pre-trial investigation.

During the consideration of the complaint by the Council, it was established that the state registrar violated the procedure for lifting restrictions on the disposal of immovable property, because it ignored the requirements of the law, according to which the state registrar should verify the authenticity of

the court decision with the data of the Unified State Registry of Court Decisions⁹³. These circumstances indicated that the state registrar could have had the intention to commit a crime, or allowed an official negligence. That is, the prompt interrogation of the state registrar could have provided the investigation with important information to identify those involved in the crime without a delay; yet it was not done.

The Council suspended the consideration of the complaint at the request of the Complainant in connection with the transfer of the case to the competent court.

The Council's Recommendations:

Hence, to enhance efficiency of the law enforcement bodies in combatting raidership, the Council recommends as follows:

1. The General Prosecutor of Ukraine, in accordance with clause 9 of part 1 of Article 9 of the Law of Ukraine "On Prosecution", shall develop and approve the Methodological Guidelines for Prosecutors in order to ensure more uniform application of legislative acts of Ukraine when conducting the prosecutorial activities in the procedural management over the investigation of "raidership" crimes.

Given that, in accordance with the applicable Criminal Procedural Code of Ukraine⁹⁴, the prosecutors, in the exercise of the procedural management, are

empowered with procedural management over the progress of the pre-trial investigation, the Council believes that such Methodological Guidelines should help the prosecutors effectively coordinate the work of investigators in the investigation of intricate "raidership" schemes.

2. The Main Investigation Department of the National Police of Ukraine, in accordance with the Instruction on the organization of the activities of the pre-trial investigation bodies of the Ministry of Internal Affairs of Ukraine⁹⁵, jointly with the Ministry of Justice of Ukraine, the National Police of Ukraine, the representatives of the judicial authorities and law enforcement self-governance bodies,

⁹³ Див. пункт 2 Прикінцевих та перехідних положень Антирейдерського Закону.

⁹⁴ Див. статтю 36 КПК України.

⁹⁵ Затверджена Наказом Міністерства внутрішніх справ України «Про організацію діяльності органів досудового розслідування Міністерства внутрішніх справ України» № 686 від 09 серпня 2012 року (далі – «Наказ № 686»).

specialized non-governmental organizations, as well as with participation of the Council, shall ensure generalization of the existing practice of the investigation of "raidership" crimes, on which basis develop and approve the Methodological Guidelines on the investigation of the most typical cases of raidership.

Such Methodological Guidelines could become a kind of the road map for law enforcement officers in the investigation of "raider" crimes. Such a document, in the opinion of the Council, could, in particular, set out: (1) unified approaches to legal qualification of raidership facts; (2) the procedure and terms for taking measures to ensure criminal proceeding; (3) a list of investigative and search acts

that the investigator should take to gather evidence of committing a crime and identify guilty persons; (4) information on the possibility for the investigators to use electronic services (registries) of the Ministry of Justice of Ukraine in the mode of full access and on a free-of-charge basis⁹⁶; (5) the procedure for determining the amount of damage caused by a crime; as well as (6) the procedure for interaction between the parties and other participants of the criminal proceedings.

The Council believes that in terms of their aggregated effect, such Methodological Guidelines should improve the work organization of prosecutors and investigators and ensure prompt and effective pre-trial investigation of "raidership" crimes.

⁹⁶ As specifically provided for in the Article 32 of the Law on Registration of Real Rights; paragraph 6 of the Procedure for the operation of the portal of electronic services of legal entities, physical persons-entrepreneurs and public formations that do not have the status of a legal entity, as approved by the Order of the Ministry of Justice of Ukraine No. 784/5, dated 23 March 2016.

4 COUNCIL'S RECOMENDATIONS AIMED AT IMPROVING STATE OF COMBATTING RAIDERSHIP

4.1 Improving selected legislative provisions

4.1.1 Regarding registration actions with corporate rights

(a) Notification of the intention to take registration action

Late notification of lawful owners about registration actions taken with their property resulting in the transfer of such property into the raider's ownership, – is one of known problems of legal framework governing state registration of corporate rights.

In particular, under one common raidership scheme, offenders, on the basis of forged or stolen documents, introduce changes to the data contained in the Unified State Registry of Legal Entities, Physical Persons-Entrepreneurs and Public Formations (the "**USR**") by filing applications with authorized state registrars seeking illicit registration actions⁹⁷. The final stage of such "raider" seizures is the alienation of property to a new purchaser, who subsequently alienates property to a number of bona fide purchasers.

In such cases, the lawful owners of corporate rights usually may not always be able to timely respond to raidership attack, since while seizing control over a legal entity and/or its assets

the raiders attempt, in all possible ways, not to attract the attention of the legal owner, and, therefore, the latter can learn about the fact of seizure only in a few days or even months thereafter.

Certainly, according to the general rule set forth in Article 387 of the Civil Code of Ukraine (the "**CCU**"), the owner is vested with an absolute right to repossess property⁹⁸ by filing a vindicatory action to the ultimate owner of the disputed property or corporate rights.⁹⁹

However, due to the fact that raiders have a sufficient range of procedural tools for delaying the consideration of cases, it may be quite difficult for lawful owners of property (victims of raidership attacks) to repossess it through a judicial procedure.

At the same time, if the lawful owner could receive information about registration actions with his/her corporate rights until completion thereof, this would have prevented the majority of cases of illegal ("raider") seizure of business, and, in the long run, would have saved the resources of public authorities related to the

⁹⁷ The state registrar of legal entities, physical persons-entrepreneurs and public formations (hereinafter referred to as the "state registrar") is a person having labor relations with the subject of state registration, a notary (see paragraph 5 of part one of the Article 1 of the Law on Registration of Legal Entities).

⁹⁸ According to paragraph 3 of part one of the Article 388 of the CCU, if the property acquired under pecuniary contract from a person who was not entitled to alienate it, – about what the acquirer was not and could not have been aware about (the bona fide acquirer), – the owner is entitled to repossess this property from the acquirer provided that the owner of the property or a person to whom the owner transferred the property in possession were dispossessed of the property not in accordance of their will and in another manner.

⁹⁹ It is recommended that the vindicatory action be filed together with lodging the application for a committed criminal offence to the law enforcement authorities and a complaint against actions of the registrar to be lodged with the Commission Tasked to Consider Complaints in the Sphere of State Registration (if the subject matter of the complaint and the action coincide, then the complaint should be filed before appeal to the court).

renewal of reliable data in the state registries, identification of guilty persons and bringing them to liability, etc.

In the Council's opinion, similarly to already existing procedure for notification of the owners of immovable property about registration

actions that are being contemplated,¹⁰⁰ such mechanism of combatting raidership attacks may be implemented through, inter alia, the establishment at the legislative level of the procedure for notification of the owners of corporate rights of the registration actions that are being taken in respect of their property.

The Council's Recommendation:

The Ministry of Justice of Ukraine shall elaborate the draft amendments to the Law of Ukraine "On State Registration of Legal Entities, Physical Persons-Entrepreneurs and Public Formations" No. 755-IV, dated 15 May 2003, which, similarly to the mechanism of notification used for registration actions with immovable property, would:

- 1) introduce the system of notification of owners of a legal entity or their representatives (by forwarding messages to e-mail and, as an additional administrative service, SMS-messages) of the receipt by the state registrars of the applications for registration actions in respect of such legal entity and/or its separate subdivision.

(b) Ensuring information interaction between the Unified State Registry and the Unified Registry of Encumbrances Over Movable Property

When creating the USR, the ideology of its functioning was based on the assumption that responsibility for the accuracy and reliability of the documents was borne by a person filing an application for making changes in the registry; so that the state registrar verifies only the accuracy of execution of the set of documents, but does not examine their contents and does not check the documents for their compliance with the applicable law.

At present, the situation has somewhat changed, since the applicable law obliges the state registrar to check the substance of submitted documents.¹⁰¹

Nonetheless, certain systemic gaps still remain. Thus, since the USR data primarily contains information about legal status of a legal entity rather than that of its owners,¹⁰² the law, in particular, does not envisage entering in the USR the information about the transfer by the owner of his/her share (equity stake) into the ownership of third parties (sale) or fiduciary ownership; the same applies to entering the information about means of communication

¹⁰⁰ The procedure is set forth in paragraph 4 of part one of the Article 20 of the Law on Registration of Real Rights and the paragraph 11-1 of the Procedure for state registration of real rights over immovable property and encumbrances thereto, as approved by the Procedure for Registration of Real Rights.

¹⁰¹ See Articles 27, 28 of the Law on Registration of Legal Entities.

¹⁰² See Article 9 of the Law on Registration of Legal Entities.

with the owners, the presence or absence of encumbrances with respect to the owners of a legal entity, etc.

Presumably, it stems from the fact that corporate rights, as far as their legal nature is concerned, falls under the category of movable property, whereby transfer of ownership does not require state registration of the respective contract.

At the same time, encumbrances of corporate rights (as movable property) are registered in separate registry – the State Registry of Encumbrances Over Movable Property (the "SREMP"). Therefore, when making changes in the USR evidencing transfer of ownership over corporate rights, the state registrars are not required to verify availability of encumbrances in the SREMP and, as a rule, do not do this (in most cases they do not even have the technical ability to do so).

Besides, according to clause 2 of part one of Article 25 of the Law No. 755-IV, the court decisions on the arrest of corporate rights (which belong to the category of public encumbrances) constitute the ground for making changes with the USR; nonetheless, Article 9 of this Law does not prescribe for entering such information in the registry. Moreover, there is no such information in the standard extracts from the USR.

Moreover, in addition to court decisions authorizing arrest of corporate rights, there are other types of encumbrances – for example, a secured encumbrance in the form of a pledge or a contractual ban on alienation; or public encumbrance in the form of a tax pledge or a ban on alienation of property of a person imposed by the enforcement service authorities.

Consequently, the issue of proper information interaction between the USR and the SREMP remain unresolved.

The Council's Recommendations:

The Ministry of Justice of Ukraine shall introduce amendments to the Procedure for state registration of legal entities, physical persons-entrepreneurs and public formations without legal entity status, as approved by the Order of the Ministry of Justice of Ukraine No. 359/5, dated 9 February 2016, according to which:

(1) the state registrars shall be obliged, when making changes in the USR in respect of ownership of corporate rights, to verify

data of the SREMP to ascertain existence of registered encumbrances of such corporate rights;

(2) in the presence of any encumbrances prohibiting the transfer of ownership of corporate rights – the respective registration actions shall be rejected on the basis of clause 5 of part one of Article 28 of Law No. 755-IV¹⁰³.

¹⁰³ The basis for the refusal to proceed with state registration is the submission of documents contradicting the requirements of the Constitution and laws of Ukraine (paragraph 5 of part one of Article 28 of the Law on Registration of Legal Entities).

4.1.2 Regarding registration actions with immovable property

(a) Information interaction between the State Registry of Rights and the SLC

One of the problems in the sphere of legislative regulation of state registration of real rights over the land plots, which was discovered by the Council in the course of consideration of raidership-related complaints, is the lack of proper information interaction between data of the State Registry of Rights and the State Land Cadastre (the "SLC").

Thus, according to the law¹⁰⁴, the information entered in the State Registry of Rights should be automatically synchronized in the SLC, which, inter alia, also contains data about registered owner of the land plot. However, in practice, such synchronization does not always occur.

In particular, in the event of registration of the transfer of ownership right to a land plot, the issue of the selectivity of the automatic transfer of information about the new owner of the land plot to the SLC remains unsolved. Thus, if the change of information about the land plot owner in the State Registry of Rights occurs as a result of correction by the state registrar of prior erroneous registration action, such information is not transferred to the SLC.

The foregoing problem drew the Council's attention because raiders might attempt seizing property of business entities exactly by making changes in data about property owner in the State Registry of Rights on the basis of forged or invalid documents. However, if a victim of "raider" attack manages to restore his/her violated right in the "error correction" mode by the same state registrar who has taken the disputed registration action, then correction of information about the owner in the State Registry of Rights does not trigger automatic synchronization of the relevant information with the SLC.

Furthermore, in the event of correcting erroneous registration entry in the State Registry of Rights, the applicant can not independently approach the state cadastral registrar with an application for making such changes in the information about the land plot owner in the SLC¹⁰⁵. At the same time, relevant data of the State Registry of Rights are not synchronized automatically with the information in the SLC. As a result, a business entity – the lawful owner of the land plot who successfully "withstand" "raidership" attack – is not able to fully use and dispose of his/her property due to the presence in the SLC of the information about other owner of the same land plot.

¹⁰⁴ See the Procedure for providing information on the registered land plots to the state registration authority and on the registered rights over land plots to the authority maintaining the State Land Cadastre, as approved by the Resolution of the Cabinet of Ministers of Ukraine No. 118, dated 22 February 2012, and the Regulation on the provision of information about land plots upon request of the state registrar of rights over immovable property, as approved by the Order of the Ministry of Justice of Ukraine, the Ministry of Agrarian Policy and Food of Ukraine No. 1779/5/748, dated 3 December 2012;

¹⁰⁵ See Item 4, para. 3 of the Final and Transition Provisions of the Law of Ukraine "On State Land Cadastre" No. 3613-VI, dated 07 July 2011.

The foregoing difficulties with the lack of proper synchronization between the data of the State Registry of Rights and the SLC can be illustrated by the following case from the Council's practice:

CASE NO. 3.**Complaint against inactivity of the Ministry of Justice of Ukraine and the State Service of Ukraine for Geodesy, Cartography and Cadastre (the "StateGeoCadastre")**

The Complainants approached the Council with a complaint challenging inactivity of the Ministry of Justice of Ukraine and the StateGeoCadastre.

The complaint was lodged with the Council following attempted raidership attack on the property of the Complainants aimed at seizing their land plots. In particular, the Complainants reported that they were the owners of adjacent land plots in Boryspil district of Kyiv region. In early February 2017, the Complainants learned that one of private notaries of the Obukhiv District Notary Office had unlawfully made changes to the State Registry of Real Rights, as a result of which the owner of the land plots of the Complainants became a third party – LLC "A".

The Complainants immediately filed a complaint with the Ministry of Justice of Ukraine demanding cancellation of the decision on the state registration, as a result of which the land plots were transferred to LLC "A". The same day, the notary corrected data about lawful owners of land plots in the State Registry of Real Rights on his/her own by correcting the mistake made when taking the registration action. However, afterwards the Complainants discovered that the State Land Cadastre still records LLC "A" as the owner of the land plots.

Given the fact that these land plots were mortgaged to secure fulfillment of loan commitments of the Complainants and that the discrepancy in the data of the State Registry

of Real Rights and the State Land Cadastre could have become the basis for changing the terms of these loans, the Complaints filed a complaint against inactivity of the Ministry of Justice and the StateGeoCadastre demanding to ensure that the State Land Cadastre contains relevant information about the lawful owners of the land plots. However, the Ministry of Justice of Ukraine, in its reply to the application of the Complainant, reported that, in accordance with the law¹⁰⁶, the entries about real rights bearing the status of "erroneus" are subject to transfer through information interaction; yet, the appropriate software is in the stage of finalization and its completion is impossible without making any changes in the legislative acts.

In the process of consideration of the complaint, the Deputy Business Ombudsman held several meetings with the executives of the Ministry of Justice of Ukraine in order to elaborate a comprehensive solution for the problem faced by the Complainants. In the course of such meetings, the Council ascertained that for proper synchronization between data of the State Registry of Real Rights and that of the State Land Cadastre the Procedure for Maintaining (Administering) the State Land Cadastre¹⁰⁷ and the Procedure for Granting Access to the State Registry of Real Rights Over Immovable Property¹⁰⁸ should be changed accordingly.

The Council continues to investigate the complaint.

¹⁰⁶ See the Regulation on the provision of information about land plots upon request of the state registrar of rights over immovable property, as approved by the Order of the Ministry of Justice of Ukraine, the Ministry of Agrarian Policy and Food of Ukraine No. 1779/5/748, dated 03 December 2012 No. 1779/5/748.

¹⁰⁷ See the Resolution of the Cabinet of Ministers of Ukraine "On Approval of the Procedure for Keeping the State Land Cadastre" No. 1051, dated 17 October 2012.

¹⁰⁸ See the Resolution of the Procedure for Registration of Real Rights.

The foregoing problem is supposed to be resolved at the systemic level by the very recent Resolution of the Cabinet of Ministers of Ukraine "On Approval of the Procedure for Granting Access for the State Registrars of Rights Over Immovable Property and Use of Data from the State Land Cadastre" No. 509, dated 12 July 2017 (the "**Resolution No. 509**"). However,

the application of the Resolution No. 509 should be launched on 01 October 2017, and by that time the Ministry of Justice of Ukraine and the State Service of Ukraine for Geodesy, Cartography and Cadastre shall agree upon the structure and format of the information files transferred through information interaction between the registries.

The Council's Recommendations:

The Ministry of Justice of Ukraine and the StateGeoCadastre shall, according to Clause 10 of the Resolution of the Cabinet of Ministers of Ukraine No. 509, dated 12 July 2017, prepare and approve the protocol determining the structure and format of the information files to be transferred and accepted through information interaction of information systems of the State Registry of Real Rights Over Immovable Property and the State Land

Cadastre. The respective technical protocol, inter alia, shall aim at creating technical opportunities for providing the state cadastral registrars with the information about the registered real rights over immovable property by granting direct access to the State Registry of Real Rights Over Immovable Property and entering data about owners and/or users of the land plot in the data recorded with the State Land Cadastre.

(b) Regarding the procedure governing assignment of the postal addresses

The Ministry of Regional Development, Construction and Housing and Communal Services of Ukraine shall consider developing

a single regulation setting forth the procedure for assigning postal addresses to immovable property in the territory of Ukraine and harmonization of the latter with the provisions of the existing legislation.

4.1.3 Regarding activity of permanent commissions tasked to consider complaints in the sphere of state registration

Taking into account the position set out in this Report, the Council recommends:

- (1) In lieu of the Council's position outlined hereunder, the Ministry of Justice is recommended to strengthen its' efforts aimed at properly informing both the professional circles and general public about the status and actual scope of authority vested with the permanent commissions tasked to consider complaints in the sphere of state registration. Here emphasis shall be placed on procedural breaches that constituted ground for cancellation of registration actions, – such information should be periodically disclosed at least in the aggregated form.
- (2) To prevent occurrence of registration actions in violation of the existing territoriality rules:
 - 1) Provide that violation of territoriality constitutes a compulsory ground for

the permanent commissions tasked to consider complaints in the sphere of state registration to cancel the registration action; to this end, the Ministry of Justice should initiate introduction of the relevant amendments in Article 3, para. 5 of the Law of Ukraine "On State Registration of Real Rights Over Immovable Property and Encumbrances Thereto" No. 1952-IV, dated 01 July 2014 and Article 4, para 2 of the Law of Ukraine "On State Registration of Legal Entities, Physical Persons-Entrepreneurs and Public Formations" No. 755-IV, dated 15 May 2003;

and/or

- 2) Exclude the possibility of violating the territoriality rules at the technical level; to this end, the Ministry of Justice of Ukraine, in cooperation with SE "National Information Systems", shall make appropriate changes in the software of relevant state registries.

4.1.4 Regarding mechanism of ministerial control over activities of state registrars

In order to ensure the objective application of the mechanism of monitoring and off sight documentary audits of state registrars and appropriate publication of relevant results the Council recommends the Ministry of Justice of Ukraine to:

- (1) Consider introducing public disclosure of the results of the off sight documentary audits;
- (2) Initiate changes in the Unified Registry of Notaries, which would allow for disclosure of information about the notaries whose access to state registries was blocked/canceled;

- (3) Elaborate the generalized clarifications for state registrars to minimize occurrence of typical mistakes committed by them while conducting registration actions.
- (4) Consider preparing a clarification or amending the relevant legislative acts aimed at specifying conditions (perhaps, depending upon severity of breach), whose occurrence might trigger cancellation of certificate affirming one's right to conduct notarial activity.

4.1.5 Regarding recordation and collection of evidence by a victim

An important procedural component of the system of combatting raidership is the victim's ability to collect and record evidence of the unlawful actions committed against him/her by accessing the electronic data of the state registries of corporate rights and immovable property, containing information about the full history of registration actions, including scan copies of the documents on whose basis relevant registration actions have been taken.

At present, the system works in such a way that a victim (personally or through a legal representative) has to contact a public notary (or other registrar) who unofficially prints for him/her a scan copy of the documents on whose basis the registration actions have been taken.

In the Council's opinion, this restricts the array of procedural tools that could protect owners of corporate rights and immovable property.

The Council's Recommendations:

- (1) The Ministry of Justice of Ukraine shall provide clarification that the provision of the applicants with scan copies of the documents on whose basis the registration actions have been taken should take place in the same manner as the provision of other information from the state registries, to be conducted in accordance with the Procedure for the provision of information from the USR, as approved by the Order of the Ministry of Justice of Ukraine No. 1657/5, dated 10 June 2016, and the Procedure for the provision of information from the State Registry of Real Rights Over Immovable Property, as approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1127, dated 25 December 2015.
- (2) The Ministry of Justice of Ukraine to introduce amendments to the Procedure for Carrying Out Notarial Actions by the Notaries of Ukraine, approved by the Order of the Ministry of Justice of Ukraine No. 296/5, dated 22 February 2012, by supplementing it with a separate section about notarization of images of scanned documents, based on which the registration actions were made, on the computer screen (screenshots).

4.2 Improving activity of law enforcement bodies

In order to enhance efficiency of the law enforcement bodies in combatting raidership, **the Council recommends** as follows:

- (1) The General Prosecutor of Ukraine, in accordance with clause 9 of part 1 of Article 9 of the Law of Ukraine "On Prosecution", shall develop and approve the Methodological Guidelines for Prosecutors in order to ensure more uniform application of legislative acts of Ukraine when conducting the prosecutorial activities in the procedural supervision over the investigation of "raider" crimes.
- (2) The Main Investigation Department of the National Police of Ukraine, in accordance with the Instruction on the organization of the activities of the pre-trial investigation bodies of the Ministry of Internal Affairs of Ukraine¹⁰⁹, jointly with the Ministry of Justice of Ukraine, the National Police of Ukraine, the representatives of the judicial authorities and law enforcement self-governance bodies, specialized non-governmental organizations, as well as with participation of the Council, shall ensure generalization of the existing practice of the investigation of "raider" crimes, on which basis develop and approve the Methodological Guidelines on the investigation of the most typical cases of raidership.

¹⁰⁹ Approved by the Order No. 686.

4.3 Providing a party that suffered from raidership with access to justice

4.3.1 Splitting jurisdiction over disputes in the sphere of state registration

The phenomenon common to most raidership schemes is the continuous re-registration of property rights between physical persons and legal entities. In such cases, bona fide property owners have to file concurrent claims against different defendants (physical persons and legal entities) and, simultaneously, deal with the related disputes under the rules of different types of litigation.

To prevent manipulations in determining the jurisdiction, the Verkhovna Rada of Ukraine adopted in the first reading the Draft law No. 6232¹¹⁰ designed, in particular, to overcome the inconsistent enforcement practices, create the efficient procedural tools for protection of rights and interests of individuals, and to properly address the absolute priority given to the principle whereby jurisdiction of courts extends to any legal relations.

According to the new rules for determining jurisdiction of courts, the disputes will be referred to civil, commercial and administrative courts **depending primarily on the subject matter of the dispute rather than on the subjective composition of the parties.**

Thus, amendments in the Commercial and Civil Procedure Codes of Ukraine, contemplated by the Draft Law No. 6232, actually authorize the courts to consider disputes whereby certain registration actions are challenged, if the subject matter of the latter is directly related to a dispute regarding the right falling under jurisdiction of a respective court.

Yet, the Council noted that in the wording that existed as at the date of the Report, the foregoing Draft Law does not completely eliminate the existing conflicts of jurisdictions arising between civil, commercial and administrative courts.

¹¹⁰ See the Draft Law "On Introducing Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Administrative Procedure Code of Ukraine and other legislative acts" No. 6232, dated 23 March 2017.

The Council's Recommendations:

(1) To include in the Draft Law No. 6232 provisions which would:

1) introduce amendments to the Administrative Procedural Code of Ukraine providing that the subject matter of the claims in the administrative proceedings can not be demand to cancel or revoke the registration entries in the state registries, if enforcement of decision taken in such a case would directly result in the emergence, modification or termination of real rights or encumbrances.

2) Introduce amendments to the Civil Procedure Code of Ukraine and the Commercial Procedure Code of Ukraine, which would foresee that property owner, when applying to the court for the protection of his/her property right, can unite in a single claim several related claims due to be considered under the rules of different types of litigation, provided that a separate consideration of such claims by the courts of different jurisdictions would deprive him/her of efficient legal protection envisaged in Article 13 of the European Convention on Human Rights and Fundamental Freedoms.

4.3.2 Ensuring technical interaction between the Registry of Real Rights and the Unified State Registry of Court Decisions

The State Judicial Administration of Ukraine to speed up work aimed at ensuring technical interaction between the State Registry of

Real Rights Over Immovable Property and the Unified State Registry of Court Decisions.

4.3.3 Improving system of automatic enforcement of court decisions

The Ministry of Justice of Ukraine shall consider preparing the methodological guidelines for the state registrars regarding automatic enforcement of court decisions whose operative parts are specified in

ambiguous and/or vogue manner (e.g., "shall recognize the contract as invalid", "shall recognize the ownership right", "shall repossess", etc.).

4.4 Implanting business integrity standards as a precondition for decreasing likelihood of raidership attacks against business

According to the recent survey prepared by Transparency International Ukraine, the situation with transparency¹¹¹ of local entities is extremely unsatisfactory. In particular, only 38% of private and public Ukrainian companies adhere to principles of transparency and accountability. Almost 62% are far from transparency standards. On average, the companies received 3 of 10 possible points for transparency.

At the same time, the insufficient transparency of business processes, the lack of clear internal organizational subordination as well as ambiguous corporate governance

standards trigger the so-called "dirty hands dilemma"¹¹². The latter, in its turn, could create favorable conditions for raidership.

Even though certain companies that have been negatively affected by raidership could have minimum mechanisms for preventing hostile attacks (for example, the code of conduct and internal procedures), the practical mechanisms for implementation thereof that would be built on a transparent corporate culture and management structure did not always implement in real life.

Yet, the very presence of safeguard measures in the risk management system, such as

¹¹¹ As a general rule, when investigating the issue of "corporate transparency", three thematic blocks were studied: disclosure of the anti-corruption program; organizational transparency; disclosure of information about the company's activities and transactions in other countries. The move towards corporate transparency is a global trend that has been gaining momentum in recent years. So, in a number of developed countries, the transparency standards of financial information in the form of the procedure "Know Your Client (Customer)" (KYC) already exist. See, in particular, https://ti-ukraine.org/wp-content/uploads/2017/02/TRAC_ti_rating_eng_web-1.pdf

¹¹² The Balanced Company: A Theory of Corporate Integrity by Muel Kaptein, Johan Ferdinand Dietrich Bernardus Wempe, p. 188. Available at <https://books.google.com.ua/books?id=BEXhuz-vtM8C&pg=PA302&lpg=PA302&dq=hostile+takeovers+compliance+integrity&source=bl&ots=FLtsOA4Ym1&sig=i5yOFJUOAQoj2NJIYNzBXS9fVnQ&hl=en&sa=X&ved=0ahUKEwjVI6XRt7XUAhVBWhQKHTO6C6g4ChDoAQg1MAQ#v=onepage&q=dirty%20hands&f=false>

third parties due diligence, early screening of doubtful transactions, and professional development of employees may allow early detection and prevention of various forms of raidership.¹¹³

In this Report, the Council did not aim to provide an exhaustive list of the compliance system elements to prevent raidership risks.

The companies themselves acknowledge that there is no universal approach and each risk management system should be tailored to the scope and peculiarities of any given company's activity. Therefore, the recommendations set forth below are, in the Council's view, comprising minimum set required to attain such a goal.

The Council's Recommendations:

In view of the need to strengthen the role of risk analysis, ensure legal certainty in business operations, acknowledging the importance of creating transparent system and implanting a business integrity culture, the following comprises Council's recommendations aimed

at mitigating raidership risks by (1) introducing the compliance system; (2) applying the international risk management standards; and (3) joining the collective actions on implanting business integrity standards.

¹¹³ According to a survey of the initiative group of the Ukrainian Network of Integrity and Compliance, 66.7% of respondents believe that the introduction of integrity standards is a prerequisite for reducing the vulnerability of businesses to "raider" attacks, while 33.3% of respondents tend to consider that implementation of integrity standards can probably become a prerequisite for reducing the vulnerability of businesses to "raider" attacks. The study was conducted for the initiative group of the Ukrainian Network of Integrity and Compliance within the period from June 25 to July 16, 2017. 46 respondents were interviewed, representing Ukrainian and international businesses engaged in the economic activities in various regions of Ukraine.

4.4.1 Introduction of the compliance system

Some local entities (mostly large groups or subsidiaries of international companies) have already introduced the compliance programs¹¹⁴ aimed at their protection

(protection of their shareholders). At the same time, today there is no promising approach on maintaining or encouraging businesses to introduce the compliance systems.¹¹⁵

The Council's recommendations:

(1) the National Corruption Prevention Agency shall develop unified practical guidelines and methodologies to help the companies build and improve the reliable compliance systems. The Council emphasizes that such guidelines could be useful for businesses, if they cover the issues of best practices in the area of corporate governance; ensure a balanced allocation of authorities among managerial bodies of the company; propose optimal approaches to the development of internal policies/regulations (document signing/initialization procedures, reporting policies, risk management, key performance indicators, etc.); disclose the essence of the procedures that determine the nature of violation associated with conflicts of interest as well as the mechanisms of ongoing control to detect violations, etc. Appropriate attention to those issues will help mitigate raidership risks.

(2) the National Corruption Prevention Agency (jointly with partners) shall properly and in due time complete the implementation of the measures envisaged in the State Program for Implementation of the National Anti-Corruption Policy for 2015-2017 in terms of addressing corruption in private sector. To ensure a sustainable effect, particular measures should also be reflected when developing the National Anti-Corruption Policy for subsequent years by the National Corruption Prevention Agency.

In the future, this should ensure the sustainability of compliance culture in Ukraine through, inter alia, the mechanisms for certification, provided that there are more elaborated and established compliance programs.

¹¹⁴ As a general rule, the concept of "compliance" includes the compliance by a business entity with legislative acts, market standards, as well as the standards and internal documents of the entity. In its turn, the compliance risk is the risk of legal sanctions, financial losses or loss of reputation as a result of non-compliance with legislative acts, market standards, as well as standards and internal documents. See, in particular, the Resolution of the NBU Board dated 29.12.2014 No. 867 "On Approval of the Regulation on the Organization of Internal Control in the Banks of Ukraine".

¹¹⁵ In the Council's opinion, the state should recognize and encourage the efforts of the companies aimed at the implementation of efficient compliance and conformity systems. So, for example, the G20 companies were obliged to support active participation of the company by ensuring positive recognition of efficient anti-corruption systems and compliance systems through regulatory empowerment and strengthening the mechanisms for reducing fines and institutionalizing the mitigation programs in the event of voluntary self-disclosure. In this way, the companies will be more motivated to resolve the "dirty hands dilemma", and thus reduce vulnerability to raidership.

4.4.2 Introduction of international compliance standards

Given the increasing integration of domestic business into the world economy, there is certainly the need for the implementation of key international compliance practices as well. For example, in December 2014, ISO 19600:2014 "Compliance management systems" was released, and at the end of the previous year – ISO 37001:2016 "Anti-bribery management systems" designed to facilitate the implementation of anti-corruption management system.

Adequate implementation of best practices will help mitigate legal, economic and

reputational business risks, establish transparent business relationships and structures, and make positive effect on business integrity of the company, and thus serve as a prerequisite for reducing vulnerability of businesses.

Therefore, **the Council recommends** strengthening the training capacity of the National Corruption Prevention Agency and the Ministry of Justice of Ukraine to raise awareness of companies about the international standards and their implementation by the private sector.

4.4.3 Joining the collective actions on implanting business integrity standards

Today, the importance of collective actions to overcome the risks faced by businesses and to form business integrity culture is emphasized at the international level¹¹⁶. Thus, the resources and responsibilities required to ensure ethical behavior/business integrity/joint counteraction to raidership and other risks faced by businesses can be concentrated using the collective actions.

Moreover, the current Anti-Corruption Strategy declares, inter alia, the necessity of ensuring active participation of Ukraine in international transparency initiatives and achieving high level of compliance with the standards of international initiatives by introducing the standards of transparency initiatives of extractive industries, the construction sector and the Open Budget Index.¹¹⁷ At the same

¹¹⁶ Promoting Integrity by Creating Opportunities for Responsible Businesses. B20 CROSS-THEMATIC GROUP RESPONSIBLE BUSINESS CONDUCT & ANTI-CORRUPTION. POLICY PAPER 2017. Див. за посиланням: <http://www.ethic-intelligence.com/wp-content/uploads/2017-B20-Policy-Paper-1.pdf>

¹¹⁷ The Law of Ukraine "On the Principles of the State Anti-Corruption Policy in Ukraine (Anticorruption Strategy) for 2014-2017" No. 1699-VII, dated 14 October 2014.

time, in the course of preparing this Report, the public sources did not contain information about measures, which were actually taken by the competent authorities to increase transparency and foster integrity.

Since the collective actions in private sector are now in the embryonic stage, **the Council recommends** that:

- (1) the National Corruption Prevention Agency and the Ministry of Justice of Ukraine shall encourage the development of the network of partnership relations with business circles and non-for-profit organizations for collective counteraction of raidership risks. For example, in May 2017 the Council, with the support of the European Bank for Reconstruction and Development (EBRD) and the OECD, presented the Ukrainian Network of Integrity and Compliance¹¹⁸.

¹¹⁸ The purpose of creating the network is the promotion of the idea of ethical and responsible business. The network members have agreed to maintain good business reputation and continuously improve their own integrity standards in line with the best international practices. Network members will work together to assess the anti-corruption risks to implement the compliance programs in their organizations, involve business representatives in the discussion of the integrity principles, and raise the interest in transparent business among market participants. The network members will regularly confirm their integrity level through self-assessment and assessment verification. See <https://boi.org.ua/publications/news/92-rada-bznes-ombudsmena-zapochatkovu-vseukranksu-mer>



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