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## ADMINISTRATIVE AND LEGAL STATUS OF PRIVATE EXECUTORS AUTHORISED TO ENFORCE JUDGEMENTS

**Abstract. Purpose.** The aim of the article is to make important practical and theoretical conclusions on the introduction of the institution of private executors regarding the enforcement of judgements. **Research methods.** The article studies requirements for private executors as one of the elements of determining their administrative and legal status. The focus is on the absence of legal requirements to high personal and professional qualities of private executors, which is a significant gap in modern legislation. The author argues that the introduction of the institution of private executors in Ukraine has come a long way, and arguments justifying the competence of public executors in comparison with private executors are established in accordance with statutory requirements, but the issues are open and need to be improved. The current discussions at various hearings and conferences on the reform of the system of enforcement of judgements, where participants are representatives of the Ministry of Justice, scientists in the field of enforcement of judgements, representatives of the Legal Policy Committees, and judges, who note that newly established institutions of enforcement of judgements work imperfectly and there are many problems. Some of the stakeholders have taken a position on the advisability of returning the institution of bailiffs, but the author disagrees with the position of the latter, so the analysis of the administrative and legal status of private executors through the prism of legislative requirements is covered. One of the main means of ensuring legality in the activities of private executors should be to control the lawfulness of the executive action taken by the private executor, which can violate the rights and interests of participants in the enforcement or other interested persons, and therefore, such cases require the prompt restoration of their rights and the elimination of violations. **Conclusions.** The control mechanism of the Private Executors Council is quite promising: first, in terms of self-monitoring and optimising the use of budget funds; second, a distinction should be drawn between the subjective abuse by individual unscrupulous private executors and the purification of the private executor system by the Private Executors Council, for survival in the fierce competition for the “customer” in so far as the business component, i.e., maximum profit, which is impossible without growth of the quality of services of private executors and growth of their professional competence.

**Key words:** persons of private executors, requirements, administrative and legal status, enforcement of judgements, executors of decisions.

### 1. Introduction

Dealing with the administrative status, we underline requirements as part of the administrative status of private executors, as our research focuses on the administrative and legal framework for the enforcement of judgements, where the private executor is the main enforcer of judgements.

With regard to legislative regulation, the following legal regulations standardise this issue: Law of Ukraine “On bodies and persons who enforce judgements and decisions of other bodies”, Law of Ukraine “On enforcement pro-

ceedings”, Law of Ukraine “On execution of judgements and application of the case-law of the European Court of Human Rights”, Law of Ukraine “On guarantees of the State on execution of judgements”, Instruction on the organization of enforcement of judgments, approved by Order 512/5 of the Ministry of Justice of Ukraine of 02 April 2012, Order 2432/5 of the Ministry of Justice of Ukraine of 05 August 2016 on approval of Regulations on automated system of enforcement procedure, Order 2831/5 of the Ministry of Justice of Ukraine of 29 September 2016 on approval of the Procedure for seized property.

However, in our opinion, before outlining the scope of requirements imposed by the legislator on the private executor, the administrative and legal status should be defined generally, as the requirements under study are a key element in its definition.

For example, V.B. Averianov disclosed the legal status in a broad and narrow sense, noting that competence, such as rights and obligations, is the main component of the content of the status of each body, which is complemented by elements such as tasks, function, nature of relationships with other bodies (Averianov, 2002).

According to S.V. Kivalov, the administrative and legal status of an executive body, which includes a private executor, includes the following elements: functions, tasks, competence (Kivalov, 2003).

We partially agree with the position of the above scientists, since the administrative and legal status should include rights, duties, powers through which they exercise the provisions of law, as well as legal liability, as a means of terminating and educating in compliance with the law in the relations it covers.

## 2. Specificities of the legal status of private executors

According to A.M. Avtorhov, the administrative and legal status of a private executor is an independent type of the legal status of a person, predetermining the specificities of his/her individual constitutional rights and freedoms, based on the legal status of a person (Avtorhov, 2008, p. 11).

D.V. Severin argues that the administrative and legal status of private executors is a legal category, characterising the place of this service in the system of public administration and defines limits of activity of its employees in relation to other actors of executive legal relations (Siverin, 2014, p. 10).

Following L.V. Krupnova's studies on the administrative and legal status of an employee of the State Executive Service, this status is a manifestation of the personal status, describing the position of an employee of the State Executive Service in the system of public division of labour as a subject of legal relations regulated by administrative and legal provisions (Krupnova, 2008, p. 9). It should be noted that in her scientific work, L.V. Krupnova reveals the shortcomings of the modern reform of the enforcement proceedings system (the lack of effective control mechanisms for the actors of delegated authority) (private executors); defines the development trends of the system of enforcement proceedings, which include: further institutional implementation of the combined system of enforcement of judgments,

improvement of certain aspects of the executive procedure, improvement of administrative procedures for executive proceedings, introduction of mediation in executive proceedings; systematises and characterises factors, influencing the development of the enforcement proceeding system in Ukraine; develops a system of criteria for the effectiveness of administrative procedures for enforcement proceedings, reflecting the proportionality of resources and human potential; substantiates the concepts of a two-level system of enforcement proceedings.

Attention should be drawn to the fact that the administrative and legal status of a private executor, who enforces judgements and those of other bodies, has a complex legal and regulatory framework that includes a number of elements: its purpose and missions; principles and jurisdiction of activities; tasks and functions performed by the private executor; the scope and nature of State powers; forms and means of activities; legal rights and obligations; responsibility of an authorised actor in connection with the performance of duties.

The review of the scientific perspectives on the concept and content of the administrative and legal status enables to reveal the content, to analyse thoroughly the issue of the administrative and legal status of the private executor, authorised to enforce judgements.

Therefore, taking into account the above and the fact that the definition of any administrative and legal status begins with the definition of the range of requirements, we consider it appropriate to analyse the main legislative requirements for the private executors.

According to art. 18, only a citizen of Ukraine may be a private executor. Thus, the general requirement to a private executor is the acquisition of Ukrainian citizenship. Citizenship is the basis of the legal status and determines the permanent political and legal relationship between the individual and the State, whereby the individual is subject to the sovereign rights of the State and its rights and legitimate interests are protected (Kolb, Khodyriev, & Bondar, 2000, p. 26). It should be noted that private executors, as well as public ones, represent the State in the enforcement of judgements and decisions of other bodies, they should be nationals of the State they represent, and therefore, such a requirement is legitimate.

The next requirement for private executors is the requirement to have a legal education of not less than 2nd level (arts. 10, 18 of the Law of Ukraine "On bodies and persons enforcing judgements and decisions of other bodies") (Law of Ukraine "On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies", 2016).

Under the Law of Ukraine 1556-VII “*On Higher Education*” as of July 01, 2014, the second level of higher education is the master’s level, which corresponds to the eighth level of the National Qualifications Framework and provides for that the person has in-depth theoretical and/or practical knowledge, skills in a chosen specialty (or specialisation), the general basis of the methodology of scientific and/or professional activity, other competencies sufficient for the effective performance of innovation tasks of the corresponding level of professional activities (Law of Ukraine on Higher Education, 2014).

Therefore, persons with a master’s degree in law can be private executors. At the same time, the question arises as to “law degree” to determine the requirements for private executors, since there is no clear opinion on this issue in the regulatory and doctrinal field of Ukraine.

In addition, in the context of the above, it should be noted that, unlike public executors, the legislature does not set requirements for individuals to be of high personal and business qualities, which is a significant gap in modern legislation. The introduction of the institution of private executors in Ukraine has come a long way, and arguments justifying the competence of public executors in comparison with private executors are established in accordance with the requirements of the legislation, but the issues are open and need to be improved.

The current discussions at various hearings, conferences on the reform of the system of enforcement of judgements, where participants are representatives of the Ministry of Justice, scientists in the field of enforcement of judgements, as well as representatives of the Legal Policy Committees, judges, who note that newly established institutions of enforcement of judgements work imperfectly, there are many problems. And some of the stakeholders have a position on the advisability of restoring the institution of bailiffs, but we disagree with the position of the latter.

It should be noted that the institution of private executors was introduced in Ukraine in accordance with adopted on June 2, 2016 by the Verkhovna Rada of Ukraine the Law of Ukraine *On bodies and persons enforcing judgements and decisions of other bodies*, which came into force on 5 October 2016. Since then, the enforcement of judgements and decisions of other bodies (officials) has been entrusted both to then existing bodies of the State Executive Service and to new actors – private executors. The provisions of the Law reveal that the legal status of public and private executors differ clearly from each other. And while the work of public

executors has recently become undisputed, the activities of private executors are increasingly under focus of both scientists and practising lawyers in terms of the legality of their individual executive actions and the integrity of their legal status. Possible abuses of powers by private executors have already been mentioned in the pages of the legal periodical. One of the remedies of the rule of law regarding their activities is monitoring. Without resorting to an analysis of the procedure and effectiveness of the so-called ‘departmental’ control over the activities of private executors, which, under this Law, is carried out by the Ministry of Justice of Ukraine through planned and unscheduled inspections, as well as the control by the Council of Private Executors of Ukraine, we believe that the focus should precisely be on the control of legality in the activities of private executors should be to control the lawfulness of the executive action taken by the private executor, which can violate the rights and interests of participants in the enforcement (and persons who are involved in the enforcement actions) or other interested persons, and therefore such cases require the prompt restoration of their rights and the elimination of violations. Such control is exercised through appeals against decisions, actions and omissions of the private executor. It should be noted that the control mechanism of the Private Executors Council is quite promising: first, in terms of self-monitoring and optimising the use of budget funds; second, a distinction should be drawn between the subjective abuse by individual unscrupulous private executors and the purification of the private executor system by the Private Executors Council, for survival in the fierce competition for the “customer” in so far as the business component, i.e. maximum profit, which is impossible without growth of the quality of services of private executors and growth of their professional competence.

### 3. Financial security for private executors

The activities of private executors are financially motivated and differ significantly from those of public servants. However, while the decisions, actions or omissions of the public executor can be appealed to the Head of Department, to whom the public executor is directly responsible (decisions, actions and omissions of this head may be appealed to the head of the higher body of the State Executive Service), decisions, actions and omissions of the private executor can be appealed only to the court. Here, problems arise at the stage of determining the court of appropriate jurisdiction to appeal the decisions, acts or omissions of the private executor in a particular enforcement proceeding. This is what determines the relevance of the problem

of judicial control over private executors' performance (Koroied & Loshytskyi, 2018).

The institution of private executors should also enable persons, who will do so within their individual professional activity not related to public service, to enforce judgments. Consequently, the burden on public executors should be substantially reduced, and private executors themselves would have an interest in the timely and full enforcement of judgements (Malyshev, 2017).

The introduction of private executors is an innovation in the practice of enforcing jurisdictional decisions, which cannot help provoking controversy among scholars. The scientific literature review shows that today the debate on this issue is simultaneously taking place in several ways. In particular, a number of scientists focus on the study of positive and negative factors in the functioning of private executors, while others study the legal nature and essence of a definition of "private executor". For example, L. Saiko and V. Liashenko argue that the advantages of the introduction in Ukraine of the institution of private executors are: the improved quality of the provision of enforcement services to the population, a new higher quality level of the enforcement procedure, budget expenditures significantly reduced, the increased revenue to the budget due to the payment of taxes by private executors, reduction in the corruption component in the enforcement system (Meshcheriakov, 2011, p. 77).

According to A. Solonar and V. Vasilieva, the introduction of private executors is a significant step ahead in the system of public administration reform, because it is represented by a number of advantages. The law vests a wide range of powers and the status of self-employed to private executors, delimits the competence of public and private executors in certain cases and establishes a reasonable and balanced mechanism of accountability for violations and abuse of their rights for the latter (Meshcheriakov, 2011, p. 63).

Therefore, the idea of institution of private executors has no alternative and initiates an irrevocable mechanism to reduce the corruption component in the system of the State Executive Service of Ukraine in general.

It should be noted that the legislator has provided fairly high requirements to the professional level of candidates for a private executor, so the risks of entering the field of incompetent lawyers or persons with fraudulent intentions are minimised.

Pursuant to the Law of Ukraine *On Enforcement Proceedings*, a private executor has the right to enforce all decisions, except:

1) Decisions to remove and transfer the child, to establish a visit with him or her or to remove obstacles to visiting the child;

2) Decisions, according to which the debtor is the State, State bodies, the National Bank of Ukraine, local self-government bodies, their officials, State and communal enterprises, institutions, organisations, legal entities with a share of the authorised capital exceeding 25 per cent and/or financed exclusively from the State or local budget;

3) Decisions in which the debtor is a legal person whose forced sale of property is prohibited by law;

4) Decisions for which the State or public authorities are collectors;

5) Judgements of administrative courts and decisions of the European Court of Human Rights;

6) Decisions providing for the enforcement of actions on the property of State or municipal property;

7) Decisions on the eviction and settlement of natural persons;

8) Decisions in which the debtors are children or natural persons who have been declared legally incapable or whose civil capacity is limited;

9) Decisions on seizure of property;

10) Decisions, enforcement thereof is directly attributed by the Law to the powers of other bodies that are not enforcement bodies;

11) Other cases provided for by this Law and the Law of Ukraine *On bodies and persons enforcing judgements and decisions of other bodies* (Law of Ukraine on Enforcement Proceedings, 2016).

It should be noted that, despite the fact that the public executor, unlike the private executor, is a representative of the authorities, during the enforcement of judgments private and public executors, according to Art. 18 of the Law of Ukraine *On Enforcement Proceedings*, have equal opportunities to cooperate with the State authorities (Law of Ukraine on Enforcement Proceedings, 2016).

#### 4. Conclusions

Research conducted and the analysis of certain aspects of the administrative and legal status of bodies and persons authorised for the enforcement of judgements allow concluding that the idea of the institution of private executors laid a non-refundable mechanism to reduce the corruption component in the system of the State Executive Service of Ukraine in general. Domestic legislation sets high standards for the professional level of candidates for private executors, so the risks of incompetent lawyers or persons with fraudulent intentions entering this area are minimised. However, the current legislation does not provide for a separate article with a list of the rights and obligations of private executors, these provisions are not specific and dispersed by law, allowing for various manipulations and clarifications,

complaints both ungrounded and vice versa, on the abuse of powers by a private executor.

One of the main means of ensuring legality in the activities of private executors should be to control the lawfulness of the executive action taken by the private executor, which can violate the rights and interests of participants in the enforcement (and persons who are involved in enforcement) or other interested persons, and therefore, such cases require the prompt restoration of their rights and the elimination of violations. Such control is exercised through appeals against decisions, actions and omissions of the private executor.

The control mechanism of the Private Executors Council is quite promising: first, in terms of self-monitoring and optimising the use of budget funds; second, a distinction should be drawn between the subjective abuse by individual unscrupulous private executors and the purification of the private executor system by the Private Executors Council, for survival in the fierce competition for the “customer” in so far as the business component, i.e. maximum profit, which is impossible without growth of the quality of services of private executors and growth of their professional competence.

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## АДМІНІСТРАТИВНО-ПРАВОВИЙ СТАТУС ПРИВАТНИХ ВИКОНАВЦІВ, УПОВНОВАЖЕНИХ НА ПРИМУСОВЕ ВИКОНАННЯ СУДОВИХ РІШЕНЬ

**Анотація. Мета.** Метою статті є сформулювати важливі в практичному та теоретичному аспектах висновки стосовно запровадження інституту осіб приватних виконавців щодо примусового виконання судових рішень. **Методи дослідження.** Стаття присвячена дослідженню вимог до приватного виконавця як одного з елементів визначення їх адміністративно-правового статусу. Акцентовується увага на відсутності законодавчо-закріплених вимог до високих особистих і ділових якостей до осіб приватних виконавців, що є суттєвою прогалиною сучасного законодавства. Автором зазначається, що запровадження інституту приватного виконавця в Україні пройшло тривалий шлях, аргументи, що обґрунтовують компетентність державних виконавців у порівнянні з приватними виконавцями, є встановленими відповідно до вимог законодавства, однак проблемні аспекти є відкритими та потребують удосконалення. Дискусії, які ведуться на сьогодні на різних слуханнях, конференціях, що присвячені реформуванню системи примусового виконання судових рішень, де учасниками є як представники Міністерства юстиції, науковці у сфері дослідження виконання судових рішень, так і представники Комітетів з питань правової політики, судді, які в тому числі зазначають, що новостворені інститути примусового виконання судових рішень працюють недовільно, є багато проблем. А деякі із стейкхолдерів висловлюють позицію щодо доцільності повернення інституту судових виконавців, однак з позицією останніх автор не погоджується, у зв'язку із чим для дослідження обрано аналіз адміністративно-правового статусу осіб приватних виконавців крізь призму законодавчих вимог. Одним із основних засобів забезпечення законності в діяльності приватних виконавців повинен стати контроль за законністю вчинених приватним виконавцем виконавчих дій, якими можуть порушуватись права та інтереси учасників виконавчого провадження чи інших зацікавлених осіб, а отже, такі випадки вимагають швидкого поновлення їхніх прав і усунення порушень. **Висновки.** Механізм контролю з боку Ради приватних виконавців є досить перспективним: по-перше, в плані самоконтролю та оптимізації використання бюджетних коштів; по-друге, слід розмежувати суб'єктивні зловживання з боку окремих недобросовісних приватних виконавців і складову частину самоочищення системи приватних виконавців з боку Ради приватних виконавців для виживання в жорсткій конкурентній боротьбі за «замовника» в частині бізнесової складової частини, тобто максимального отримання прибутку, що неможливо без зростання якості послуг приватних виконавців та росту їхньої професійної компетенції.

**Ключові слова:** особи приватних виконавців, вимоги, адміністративно-правовий статус, виконання судових рішень, суб'єкти виконання рішень.

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