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RECOMMENDATIONS OF THE EUROPEAN COMMISSION ON THE EFFICIENCY OF JUSTICE AND THEIR IMPACT ON IMPROVING ENFORCEMENT PROCEEDINGS IN UKRAINE

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Fursa S.Ya., Fursa Ye.I., Rehushevskyi E.Ye. Recommendations of the European Commission on the efficiency of justice and their impact on improving enforcement proceedings in Ukraine.

This article reveals the role of the European Commission for the Efficiency of Justice (CEPEJ) in improving the state of enforcement of court decisions and other bodies in Ukraine. The activities of this Commission are aimed at reducing the burden on the European Court of Human Rights (hereinafter referred to as the ECHR) by improving the efficiency and quality of the judicial system in the member states. Since Ukraine is a member of the Council of Europe, it should take into account the CEPEJ Recommendations on improving the state of enforcement of court decisions, in particular, when improving the legislation on enforcement proceedings in Ukraine.

The Guidelines for the implementation of the relevant Council of Europe recommendations on the enforcement of court decisions, developed by the CEPEJ, are analyzed. The need for such CEPEJ Recommendations is also due to the fact that Ukraine ranks third in the number of applications to the European Court of Human Rights, which indicates problems with the enforcement of decisions of national courts as well as decisions of the ECHR. It is proposed to develop a Program for the Implementation of the CEPEJ Guidelines into the legislation of Ukraine on enforcement proceedings and to take them into account in the draft amendments to the Law of Ukraine "On Enforcement Proceedings". The following CEPEJ Guidelines have been analyzed: the principle of a fair enforcement procedure, the principle of balance between the needs of the plaintiff (claimant) and the rights of the defendant (debtor), the principle of procedural equality of the parties, and the expediency of their implementation into the Ukrainian legislation on enforcement proceedings. Attention is drawn to the debatability of the issue of "flexibility" of enforcement of decisions and the ability of the enforcer to perform the function of a mediator. The author's opinion boils down to the impossibility of combining the professional powers of the enforcer and the mediator, if only because the statuses and functions of these subjects are regulated by different legislation and to some extent conflict with each other in matters of payment. Ideas are expressed for improving the norms that regulate the implementation of the principles of enforcement of court decisions and other bodies in the current Law of Ukraine "On Enforcement Proceedings", based on the CEPEJ Guidelines.

Key words: European Commission for the Efficiency of Justice (CEPEJ), CEPEJ Guidelines, enforcement proceedings, principles of enforcement of court decisions, court, state enforcement officer, private enforcement officer, mediator, collector, debtor.

Фурса С.Я., Фурса Є.І., Регущевський Е.Є. Рекомендації Європейської комісії з ефективності правосуддя та їх вплив на вдосконалення виконавчого провадження в Україні.

У цій статті розкривається роль Європейської комісії з ефективності правосуддя (далі – **CEPEJ)** у покращенні стану примусового виконання рішень судів та інших органів в Україні. **Д**іяльність цієї Комісії спрямована на зменшення навантаження на Європейський суд з прав людини (далі – ЄСПЛ) шляхом підвищення ефективності і якості судової системи в державах-членах. Оскільки Україна є членом Ради Європи, то вона має враховувати Рекомендації **CEPEJ** з покращення стану примусового виконання рішень судів, зокрема, при удосконаленні законодавства про виконавче провадження в Україні.

Проаналізовано Керівні принципи реалізації відповідних рекомендацій Ради Європи з примусового виконання рішень судів, розроблених CEPEJ. Необхідність таких Рекомендацій CEPEJ зумовлена й тим, що Україна займає третє місце за кількістю звернень до Європейського суду з прав людини, що свідчить про проблеми із виконанням рішень національних судів а також рішень ЄСПЛ. Запропоновано розробити Програму впровадження Керівних принципів CEPEJ в законодавство України про виконавче провадження та врахувати їх в проєктах змін до Закону України "Про виконавче провадження" Проаналізовано такі Керівні принципи CEPEJ як принцип справедливої процедури примусового виконання, принцип балансу між потребами позивача (стягувача) та правами відповідача (боржника), принцип процесуальної рівності сторін та доцільність їх запровадження в українське законодавство про виконавче провадження. Звернено увагу на дискусійність питання щодо "гнучкості" примусового виконання рішень та можливості виконавця виконувати функцію медіатора. Авторська думка зводиться щодо неможливості суміщати професійні повноваження виконавця та медіатора, хоча б тому, що статуси і функції цих суб'єктів регламентуються різним законодавством, певною мірою конфліктують між собою в питаннях оплати. Висловлено ідеї із удосконалення норм, які регламентують реалізацію принципів примусового виконання судових рішень та інших органів у чинному Законі України "Про виконавче провадження", виходячи із Керівних принципами CEPEJ.

Ключові слова: Європейська комісія з ефективності правосуддя **(CEPEJ), Керівні принципи CEPEJ,** виконавче провадження, принципи примусового виконання рішень судів, суд, державний виконавець, приватний виконавець, посередник, медіатор, стягувач, боржник.

Statement of the problem. Ukraine, as a member of the Council of Europe, must adhere to its recommendations on improving the state of enforcement of court decisions and other bodies. When improving the legislation on enforcement proceedings, our state must take as a basis the Guidelines for the implementation of the relevant Council of Europe recommendations on enforcement of court decisions, developed by the European Commission for the Efficiency of Justice (hereinafter – the Guidelines and CEPEJ) [1]. The purpose of this Commission's activities is to reduce the burden on the ECHR by improving the efficiency and quality of the judicial system in the member states. Therefore, the directions for improving enforcement proceedings identified in the Recommendations of the European Commission on the Efficiency of Justice also apply to Ukraine and should be taken into account by specialists when improving the relevant legislation.

This is also due to the fact that Ukraine ranks third in the number of appeals to the European Court of Human Rights [2], so problems with the implementation of court decisions in Ukraine are obvious, therefore, significant work by scientists is required to solve them.

Processing status. Many Ukrainian scientists in their scientific works paid considerable attention to the issues of improving Ukrainian legislation on enforcement proceedings, and also separately analyzed the principles of enforcement proceedings, which are regulated in the Law of Ukraine "On Enforcement Proceedings" [3] and in the Law of Ukraine "On Bodies and Persons Enforcing Decisions of Courts and Other Bodies" [4]and in other areas of jurisdictional activity in a comparative context [5]. However, theoretical concepts still do not coincide with the norms of the legislation in all matters, therefore the question of what principles and how they should be implemented in the legislation on enforcement proceedings and civil proceedings, in particular, remains debatable. There are also scientific works devoted to the execution of decisions of the European Court of Human Rights [6] but these works have not exhausted the problems with the forced execution of decisions and require further research.

The purpose of the article is to bring the content of the Guidelines and the position of scientists regarding their perception and application to the attention of Ukrainian specialists, therefore should be of interest not only to Ukrainian but also to foreign scientists and practitioners.

Presentation of the main material. The **CEPEJ** has carefully studied the situation with the problems of judicial proceedings in Ukraine and the enforcement of court decisions, and even published the results of the work of this commission [7]. The CEPEJ has carefully studied the situation with the

problems of judicial proceedings in Ukraine and the enforcement of court decisions, and even published the results of the work of this commission.

It is important to acknowledge that Ukraine faces a significant challenge in the enforcement of decisions, not only from its domestic courts but also from the European Court of Human Rights. This issue underscores the relevance of a thorough scientific analysis, particularly in examining the "Guidelines on the Enforcement of Court Decisions" and the necessity of their implementation into Ukrainian legislation. Given that the Council of Europe encompasses EU member states, the matter of enforcement gains additional significance within the framework of international law, encompassing both public and partially private dimensions..

Thus, in 2019, Ukraine recognized the irreversible European course, which was enshrined in the preamble to the Constitution of Ukraine. Therefore, upon Ukraine's accession to the European Union, the norms of legislation on enforcement proceedings must be brought into line with the Guidelines, which will ensure compliance with the Council of Europe standards on the enforcement of decisions and, at the same time, will simplify the adaptation of Ukrainian legislation to standards generally recognized in the European Union.

After recognizing the need to implement the Guidelines into Ukrainian legislation on enforcement proceedings, in particular, tasks should be formulated for specific individuals. So, first of all, the question arises as to who should develop a Program for implementing the Guidelines into Ukrainian legislation and whether these principles are taken into account in the draft amendments to the legislation of Ukraine on enforcement proceedings.

We believe that this complex and multifaceted Program should be developed by scientists specializing in the study of the problem of judicial and enforcement proceedings. They should publish the results of their scientific research for specialists to familiarize themselves with. And after a constructive and critical discussion of their ideas, appropriate concepts should be developed. An important aspect may also be the discussion of the concepts of Ukrainian scientists with foreign specialists who have significant experience in enforcing decisions in their own country, valuable information for Ukrainian specialists on the implementation of the Guidelines into legislation.

The CEPEJ formulated the Guiding Principles that should be taken into account in enforcement proceedings in Ukraine as follows:

In order to uphold the rule of law and the confidence of court users in the judicial system, effective but fair enforcement procedures are essential. However, enforcement can only be achieved if the defendant has the means or capacity to comply with the court decision.

Enforcement should strike a balance between the needs of the claimant and the rights of the defendant. Member States are encouraged to monitor enforcement procedures, monitor the administration of courts and take appropriate measures to ensure procedural equality of arms.

The enforcement process should be flexible enough to allow the enforcer a reasonable degree of freedom to enter into agreements with the defendant, provided that there is a consensus between the claimant and the defendant. Such agreements should be carefully monitored to ensure the impartiality of the enforcer and to protect the interests of the claimant and third parties. The role of the enforcer should be clearly defined in national law (e.g. the degree of its autonomy). It may (for example) play the role of a "post-judicial mediator" during the enforcement phase [8].

This is the quintessence of the Council of Europe's position, which is difficult to discuss in general terms, since it has a fundamental and even philosophical context. Therefore, let us analyze individual fragments of the principles proposed by the CEPEJ. In particular, that «*enforcement can be achieved only if the defendant has the means or the opportunity to execute the court decision*.» Thus, in the above quote, the use of the conjunction «or» seems inappropriate, since a decision to collect a certain amount of money can be executed not only by levying a fine on the debtor's property, but also by partially repaying the debt amount at the expense of the debtor's property and collecting the remaining debt through periodic payments, etc. That is, the enforcement of decisions should provide for the transformation of the types of enforcement proceedings to achieve full execution of the decision. Therefore, the conjunction «or» separates the means from the opportunities to execute the decision in another way.

Therefore, let us pay attention to the conceptual provisions of the principles. Yes, it is quite possible to agree with the fact that the CEPEJ position is derived by a comparative method, in particular, the Recommendations speak of "*effective but fair enforcement procedures*".

If we are talking about the enforcement of decisions, then effective procedures will be reduced to the effectiveness of coercion. The latter factor should be measured again in comparison – "the more severe the punishment, the more effective the corresponding warning about the negative consequences for the debtor in case of non-compliance with the decision will be", and this will accordingly contribute

to the conscientious enforcement of the decision by the majority of debtors. However, the more democratic the state system in the state, the more unacceptable the use of harsh methods of coercion is, otherwise, society may return to serfdom and slavery due to the presence of debts, the obligation to forcibly work them out. Therefore, the issue of fair satisfaction in enforcement proceedings will remain debatable until we analyze the second principle, the existence of which in enforcement proceedings as a jurisdictional activity separate from the court in Ukraine is difficult to agree with. In particular, this is the provision that enforcement must ensure a balance between the needs of the plaintiff and the rights of the defendant. Thus, in the enforcement of a court decision, the issue is no longer about the needs of the plaintiff, but about the mandatory fulfillment of the requirements established in the decision. Each legal system must ensure compliance with the principle of legality and, in exceptional cases, the rule of law. The authors of the principle of the rule of law have devoted several works [9], where attention is focused on the fact that this principle should be applied in relations between persons who are not equal in status, in particular, in relations with government bodies.

Thus, in enforcement proceedings, each party has a corresponding legal status. The collector has the right to claim, and the debtor has an obligation established by a court decision, which he must fulfill. The executor must accept this status quo and cannot influence it in any way. Otherwise, the legal value of the court decision as a generally binding legal act will be devalued.

Therefore, the general needs of the "plaintiff-collector" in enforcement proceedings should not interest anyone because his right to claim is specified in a court decision that has already entered into legal force and cannot be increased or decreased at the stage of enforcement, except in the case when the parties reach an amicable agreement. Indeed, during the enforcement of a decision, a situation may arise where the debtor's property is not enough to fulfill his obligation, but the collector's right to claim does not cease in such a case according to Ukrainian legislation on enforcement proceedings. As a rule, an unexecuted writ of execution is returned to the collector if the debtor's property has not been found (clause 2, part 1, article 37 of the Law of Ukraine "On Enforcement Proceedings"), and he has the right to present it for repeated enforcement (part 5 of the Law of Ukraine "On Enforcement Proceedings"). At the same time, the maximum period for debt collection is not provided for in the legislation, the main thing is to periodically present it for execution on time (Part 5, Article 12 of the Law of Ukraine "On Enforcement Proceedings"). Therefore, the content of the second principle regarding the rights of the defendant is somewhat distorted, since the debtor has a certain obligation.

If we detail the procedure of enforcement proceedings provided for in the norms of the legislation that regulates it, then the defendant-debtor is endowed with a whole range of rights, but this does not give grounds to conclude that the rights of the parties to enforcement proceedings, that is, the debtor and the collector, are equal. Such a balancing of rights contradicts the essence of enforcement proceedings, when the collector for a considerable time and in different courts achieved the desired court decision, and the defendant-debtor tried in every possible way to avoid liability. In connection with the above, the parties should resolve mutual claims and reduce the amount of recoveries in court, and not in enforcement proceedings. Therefore, the authors categorically objected to the appearance in Art. 2 of the Law of Ukraine "On Enforcement Proceedings" of the principle of fairness, impartiality and objectivity, since the executor should not be guided by the principle of fairness, but should act in strict accordance with the requirements of the law [10]. Therefore, it is difficult to adhere to the principle of equality of parties in enforcement proceedings.

Ukrainian legislators also failed to adhere to *the principle of granting the executor a reasonable degree of freedom to conclude agreements with the defendant, if there is a consensus between the plaintiff and the defendant*. The issue of approving the terms of the settlement agreement under Article 434 of the Code of Civil Procedure of Ukraine does not belong to the executor, but to the court. But it would be worth drawing the legislators' attention to the aspect that with the emergence of private executors, the latter have their own material interest in the results of enforcement proceedings, since they have the right to receive basic and additional remuneration (Part 8, Article 31 of the Law of Ukraine "On Bodies and Persons Carrying Out Compulsory Enforcement of Court Decisions and Decisions of Other Bodies"). Therefore, before submitting the parties' settlement agreement for court approval, the private executor must resolve with the parties the issues of compensation for basic and additional remuneration, return of the advance payment, etc. and only after that it can be submitted for court approval. Otherwise, the private executor has the right to ask the court to refuse to approve the settlement agreement.

Regarding the role of the executor as a *"post-judicial mediator" at the stage of enforcement*, this position raises several questions regarding the function of the executor in relation to the enforcement of a court decision. It seems to us that the "flexibility" of enforcement and the executor's attempts to achieve the desired result for him is a path to corruption, since the greater the powers an official

is granted by law, the more options he has to influence the parties to the enforcement proceedings. For example, if an arrest is imposed on the accounts of an enterprise, then for a certain period such a legal entity will not be able to function, that is, it will not be able to maintain employees, pay off counterparties, etc., and this is the path to bankruptcy. Therefore, we consider it inappropriate to entrust the executor with the possibility of reconciling the parties, i.e., performing the function of a mediator.

Due to the possibility of reaching an agreement on the conclusion of a settlement agreement by the parties through such manipulative methods, it does not seem entirely rational to perceive the executor as a person who is able to reconcile the parties, that is, to perform the function of a mediator.

For comparison, in civil proceedings the court is allowed to conduct reconciliation of the parties, but in the event of such a procedure, the judge can no longer consider the case on the merits, therefore, according to Part 4 of Article 204 of the Civil Procedure Code of Ukraine [11], it is transferred for consideration to another judge. The authors believe that this provision is correct because in the process of reconciliation of the parties, the judge will already have a certain opinion about each of them and the dispute between them, which may affect the correctness of the final resolution of the dispute on the merits.

Therefore, it is incorrect for an enforcer to forcibly execute a court decision and, at the same time, try to reach an agreement between the parties who have directly opposing interests in the results of the enforcement proceedings. A person vested with the power to enforce a court decision should have one goal - to execute the court decision in a timely, impartial and full manner, and all his actions should be directed towards this.

Conclusions.

Summing up the analysis, it can be stated that the CEPEJ Guidelines, despite the date of their adoption – December 9-10, 2009, are still relevant for Ukraine and a significant part of them should be publicly discussed and then implemented in the legislation on enforcement proceedings of Ukraine, adapting it to the legal system of our state.

At the same time, the analyzed principles cannot be taken as an axiom, since when introducing them into Ukrainian legislation, the system of enforcement bodies of Ukraine should be taken into account. The State Enforcement Service is separated from the court and belongs to the executive branch of government, and private enforcement officers are self-employed persons. As for the "flexibility" of the process of enforcement of a decision, it is not consistent with a clear definition of the role of the enforcer, as well as with the role of the "post-judicial mediator", that is, the mediator. The Guidelines do not focus on the role of the enforcer as a mediator, but on the proposal for the parties to conclude amicable agreements between themselves, where the enforcer performs his own role, explaining to the parties their rights and obligations, the consequences of concluding an amicable agreement. It is not advisable to combine the professional powers of the enforcer and the mediator in the same enforcement proceedings, if only because the statuses and functions of these subjects are regulated by different legislation, and to some extent conflict with each other in matters of payment. The enforcer cannot simultaneously receive funds for the performance of his powers and for the performance of the functions of a mediator.

It can also be recognized that some of the principles have already been partially implemented in the system of forced execution of decisions in Ukraine without a broad constructive and critical analysis.

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