



Private Enforcer as a Participant of Legal Relations in the Executive Process

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Abstract

The relevance of the study lies in the fact that in the reforms of the system of compulsory enforcement of decisions stipulated the possibility of performing these functions by private enforcers. The purpose of the article is to consider problematic aspects of the legal status of a private enforcer as a participant of legal relations in the enforcement process. The results of the study contain generalizations on the analysis of the legal status of a private enforcer, proposals for amendments to current legislation on private enforcers and the protection of the rights of the parties of enforcement proceedings. Finally, conclusions were formulated, which may be useful to practitioners of various legal professions such private enforcers, lawyers, judges, as well as citizens and legal persons, including those who are parties to the executive procedure.

Keywords Executive process · Private enforcer · Reforms · Compulsory enforcement · Decision that must be executed

1 Introduction

The separation of the enforcement process as a branch of law that is increasingly supported in legal thought is extremely relevant. The executive process is inextricably linked with the civil process, administrative and criminal law. However, by virtue of a special and single (homogeneous) subject of regulation of relations related to the enforcement of court decisions and a set of interrelated institutions and subsectors, it should be allocated to a separate branch of law [1]. The need to single out the enforcement process into a separate branch as a separate part of the

We confirm that this work is original and has not been published elsewhere, nor is it currently under consideration for publication elsewhere.

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legal system is confirmed by extremely rapid changes in the legislative regulation of enforcement proceedings and the existence of special sectoral laws and a number of bylaws, case law.

The lack of proper consolidation of the place of the executive process in the legal system and proper response of the scientific community to key legislative changes in the implementation of decisions reduce the quality and effectiveness of such changes and complicate the systematic harmonization of relevant regulations with legislative novelties [2]. Thus, in June 2016, the system of enforcement proceedings was radically changed, and a completely new institution—private enforcement agents—was introduced into the enforcement process. Thus, the need for a detailed study of the place and status of private enforcers in the enforcement process is quite relevant. The globalization of markets and all spheres of public life also leads to the need to develop ways to improve the enforcement of decisions and other acts subject to enforcement (complicated by a foreign element present in such relations, in the transnational enforcement process) [3].

The provisions of the Constitution of Ukraine [4] (paragraph 9, part 2 of Article 129) stipulate that the binding nature of a court decision is one of the main principles of justice. The Procedural Codes also contain provisions on the binding nature of court decisions that have entered into force (Article 18 of the Civil Procedure Code of Ukraine [5], Article 18 of the Commercial Procedure Code of Ukraine [6], Article 14 of the Code of Administrative Procedure of Ukraine [7], Article 21 of the Criminal Procedure Code of Ukraine [8]).

Enforcement of court decisions and decisions of other bodies (hereinafter—the decision) is entrusted to the state executive service (hereinafter—the SES) and to private enforcers in cases specified by the Law of Ukraine "On Enforcement Proceedings" [9]. Although the adoption of the Law of Ukraine "On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies" [10] introduced the possibility of enforcement of decisions by private enforcers, in some cases this procedure can be carried out by internal affairs bodies.

In particular, the following decisions are not subject to enforcement by a private enforcer:

- (1) In case of the removal and transfer of the child, the establishment of a meeting with him/her or the removal of obstacles in the meeting with the child;
- (2) When the debtor is the state, state bodies, the National Bank of Ukraine, local governments, their officials, state and municipal enterprises, institutions, organizations, legal entities where the state's share exceeds 25% or that are financed exclusively at the expense of the state or local budget;
- (3) When the debtor is a legal entity, the forced sale of whose property is prohibited in accordance with the law;
- (4) When collectors are the state or state bodies;
- (5) Decisions of administrative courts and decisions of the European Court of Human Rights;
- (6) Decisions that provide for the commission of actions in relation to state or communal property;
- (7) Decisions on eviction and resettlement of individuals;

- (8) Decisions according to which the debtors are children or natural persons who have been declared incapable or whose civil capacity is limited;
- (9) Decision on confiscation of property;
- (10) Decisions, the enforcement of which is referred directly to the authority of bodies that are not enforcement bodies by the Law of Ukraine "On Enforcement Proceedings";
- (11) In other cases provided by the Law of Ukraine "On Bodies and Persons Enforcing Court Decisions and Decisions of Other Bodies" and the Law of Ukraine "On Enforcement Proceedings". For example, a private enforcer may not enforce decisions for which the amount recovery is more than 20 million hryvnias or the equivalent in foreign currency during the first year of employment as a private enforcer. This is directly stated in paragraph 2, part 2 of Article 5 of the Law of Ukraine "On Enforcement Proceedings".

Thus, a private enforcer in the course of his/her professional activity is the bearer of the function of the state, which he/she is authorized to perform in accordance with current legislation. According to Part 2 of Art. 4 of the Law of Ukraine "On Bodies and Persons Enforcing Court Decisions and Decisions of Other Bodies" he/she must carry out his/her professional activities in good faith, not to disclose in any way a professional secret, to respect the interests of debt collectors, debtors, third parties, not to degrade their dignity. Part 2 of Art. 19 of the Constitution of Ukraine is imperative for a private enforcer to act only on the grounds, within the powers and in the manner provided by the Constitution and laws of Ukraine. It should be noted that in enforcement proceedings there is a competition of two fundamental values—the obligation of the state to take all measures to enforce a lawful court decision and the need to ensure the rights and legitimate interests of all persons involved in this complex multi-stage process. It is the person authorized by the state to enforce a court decision who bears the burden of this balancing act. In accordance with Part 1 of Art. 5 of the Law of Ukraine "On Bodies and Persons Enforcing Court Decisions and Decisions of Other Bodies", in the course of his / her professional activity, a private enforcer is independent, guided by the principle of the rule of law and acts exclusively in accordance with the law.

The institution of private enforcers has been functioning in international practice for quite a long time. Thus, the introduction of this institution in Ukraine is a step not only to European standards of effective and transparent justice system, but also to normal market rules and fair competition, which will stimulate the work of private and state enforcers as best as possible. An effective system of fulfilment of obligations will significantly improve the conditions of doing business in Ukraine, which will certainly have a positive impact on economic indicators and the quality of life of citizens. Consequently, the consideration of problematic aspects of the legal status of a private enforcer as a participant of the legal relations in the executive process in Ukraine will be interesting for international legal scholars and all those interested in the sphere of justice regarding the implementation of the constitutional principles in society. Apart from that, this problem is also important in terms of monitoring the normative and legal transformations of the candidate country to the EU [11].

At the time of writing, no official statistics on enforcement of decisions for 2020 have been found in open sources. However, it is worth noting the following. Since the start of work in 2017, private enforcers have demonstrated significant results. The official statistics show that the performance of private enforcers in terms of the amount of debt collected is 5 times better than the results of the State Enforcement Service. For comparison, in 2019, two hundred and thirty existing private enforcers collected UAH 4.2 billion, while 4472 state performers subordinated to the Ministry of Justice collected UAH 16.5 billion during the same reporting period [12]. The above leads to the need to analyse this situation due to which private enforcers proved to be more effective in enforcing decisions than state enforcers. It seems that the scientific study of the legal status of a private enforcer as a participant in legal relations in the executive process is important in the context of studying the scope of enforcement of decisions, a generalization of issues in this area and prospects for its development.

2 Results and Discussion

According to Art. 16 of the Law of Ukraine "On Bodies and Persons Enforcing Court Decisions and Decisions of Other Bodies", a private enforcer may be a citizen of Ukraine, authorized by the state to carry out enforcement activities in the manner prescribed by law. A private enforcer is a subject of independent professional activity [10]. M. Marchenko [13] notes that the enforcer is a freelance professional who independently organizes his/her activities and bears full material liability for the results of his/her work, receives authority from the state in the person of the judiciary and acts on behalf of the state. The state regulates the competence of a private enforcer, the procedure of activity, the amount of tariffs and other remuneration levied as remuneration for the work of a private enforcer. The state also controls the work of a private enforcer, conducts inspections of professional activities, as well as issues and revokes licenses for the right to operate.

Indeed, when analysing the legal status of a private enforcer, attention is drawn to the fact that, on the one hand, he/she is a private independent entity, and on the other hand, he/she is authorized by the state to enforce decisions. The latter corresponds to the establishment of the requirements by the state to be met by a person wishing to become a private enforcer, the procedure for access to the profession of a private enforcer, organization of his/her work, control over the activities of private enforcers [10].

Control over the activities of private enforcers is carried out by the Ministry of Justice of Ukraine (hereinafter—the Ministry of Justice) by conducting scheduled and unscheduled inspections by the Procedure for inspections of state executive service, private enforcers, the Council of Private enforcers of Ukraine. The subject of inspection of private enforcer's activity by the Ministry of Justice is the observance of the Constitution of Ukraine, requirements of laws of Ukraine, decrees of the President of Ukraine and resolutions of the Verkhovna Rada of Ukraine, acts of the Cabinet of Ministers of Ukraine, and organization of work on

their implementation, compliance with the procedure and deadlines for enforcement actions, compliance with the rules of record keeping [14].

The control of the Ministry of Justice over the activities of a private enforcer is defined as the control of the legality of his/her activities. Thus, private enforcers should act in accordance with the instructions contained in para. 2 of part 3 Art. 34 of the Law of Ukraine "On Bodies and Persons Enforcing Court Decisions and Decisions of Other Bodies", according to which, the Ministry of Justice is authorized to conduct unscheduled inspections of private enforcers based on written appeals of participants in enforcement proceedings on decisions, actions or omissions of private enforcers. However, given the fact that a private enforcer is not an employee of the Ministry of Justice or its bodies, it is appropriate to ask the question: is it legitimate to give the Ministry of Justice the right of procedural control over the activities of private enforcers?

Another problem is the submission to the Ministry of Justice of Ukraine of complaints about the actions of private enforcers because such complaints are filed in significant number (Fig. 1) [15]. Therefore, it would be appropriate to determine the criteria for assessing these complaints in terms of their acceptability, determine the criteria for their inadmissibility. This would make it possible for the Disciplinary Commission of Private enforcers to reject openly unfounded complaints and not to consider them.

At the same time, the Ministry of Justice accepts complaints from persons who are not the participants in the enforcement proceedings and on the basis of their complaints initiates disciplinary proceedings against private enforcers, which even end with the imposition of disciplinary sanctions.

It should be noted that independence is one of the principles of activity of both internal affairs bodies and private enforcers (item 3 of part 1 of Article 4 of the Law of Ukraine "On Bodies and Persons Enforcing Court Decisions and Decisions of Other Bodies"), respectively, in case of enforcement of decisions the private enforcer is an independent subject. Prescriptions of Part 2 of Art. 74 of the Law of Ukraine "On Enforcement Proceedings" provide for a court body to which the relevant decisions, actions, inaction of the enforcer may be appealed; prescriptions

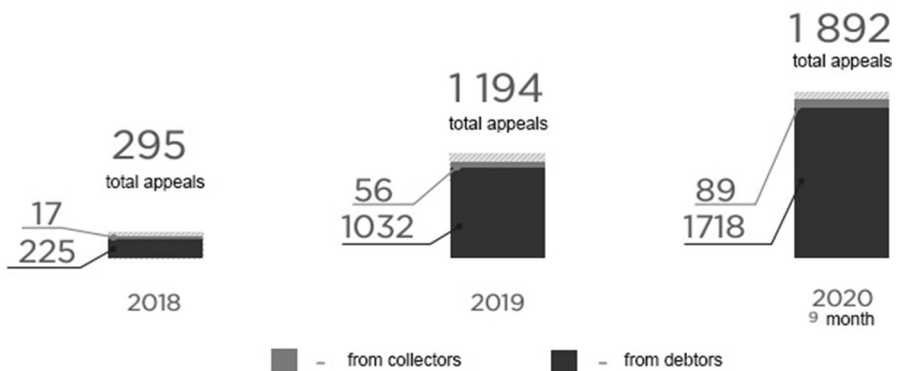


Fig. 1 Complaints received by the Ministry of Justice regarding the activities of private enforcers

of Art. 447 of the Code of Civil Procedure of Ukraine, 339 of the Code of Civil Procedure of Ukraine provide for the court of the subject to which a complaint may be filed in against decisions, actions, the inaction of the enforcer.

Given the above, the procedural control over the activities of a private enforcer (assessment for compliance with the law of its decisions, actions, omissions committed during the enforcement of the decision) should be carried out by the court. In this context, A. Avtorgov [16] rightly points out that the current legislation does not give the Ministry of Justice or the Disciplinary Commission of Private Enforcement Agents formed by it any authority to exercise procedural control over the procedural actions of a private enforcement agent in the process of enforcing court decisions. Instead, the Ministry of Justice of Ukraine and the Disciplinary Commission of Private Enforcement Agents are endowed with the function of departmental control, which is designed to ensure proper ethical behaviour of private enforcers, proper implementation of organizational measures (including compliance with instructions, reception of citizens, office by certain requirements), insurance of their professional activity, etc.

I. Kuzmina [1] determines that the private enforcer enjoys the same rights and obligations to perform procedural actions as state enforcers. This conclusion can hardly be accepted, given the following. The law establishes restrictions on the conduct of certain types of enforcement proceedings by private enforcement agents (Part 2 of Article 5 of the Law of Ukraine “On Enforcement Proceedings” [9]). Accordingly, exclusively state enforcement agents may perform all enforcement actions in such enforcement proceedings. However, in some enforcement proceedings, which can be carried out by both state and private enforcers, the law establishes the specifics of the powers of state enforcers.

For example, both public enforcers and private enforcers can carry out enforcement proceedings for the recovery of alimony arrears. However, if the total amount of alimony arrears exceeds the sum of payments for four months, only the state enforcer can conduct enforcement proceedings in accordance with paragraph 2 of part 9 of Article 71 of the Law of Ukraine “On Enforcement Proceedings”. According to this Law, the state enforcer can impose the following restrictions on the debtor:

- (1) On the establishment of a temporary restriction of the debtor’s right to leave Ukraine;
- (2) On the establishment of a temporary restriction of the debtor’s right to drive vehicles;
- (3) On the establishment of a temporary restriction of the debtor’s right to use hunting, pneumatic and melee weapons, devices of domestic production for firing cartridges equipped with rubber or similar in their properties non-lethal metal shells, until the repayment of arrears of alimony;
- (4) The establishment of a temporary restriction of the debtor’s right to hunt.

If the debtor’s actions show signs of an administrative offence under Article 183–1 of the Code of Ukraine on Administrative Offenses [17] “Non-payment of

child support, one of the spouses, parents or other family members, which resulted in debt, the total amount of which exceeds the sum of the payments for six months from the date of presentation of the executive document to enforcement”, it is the state enforcer that draws up a protocol on administrative offence and sends it for consideration to the court at the location of the internal affairs body.

Suppose that the existence of such differentiation in the authority of public and private enforcers is associated with the status of the state enforcer as a civil servant, the presence of power granted to him by the state, including the power to restrict individual's rights. Then the question arises why a private enforcer does not have the same authority. Although he/she is not a civil servant, but he/she is also authorized by the state to enforce decisions and performs faces the same tasks as the state enforcer.

Ghusarjev and Tykhomyrov [18] note that a characteristic feature of the activities of state enforcers is the use of coercive measures, which is due to the reluctance of debtors to perform their duties. The state authorizes the use of coercion by the state enforcer in advance, assuming that all other means of resolving the situation have been used and have not succeeded. In this regard, in contemporary research, there is even an opinion that the main method of legal regulation of the executive service is sanctioned coercion. Perepelytsia [19] generally notes that legal relations in enforcement proceedings arise as a result of non-performance by the debtor of his/her obligations specified in the decision of the court or non-judicial body, voluntarily. Therefore, it allows to apply coercive measures in the enforcement of court decisions and non-judicial bodies, which are provided by the legislation on enforcement proceedings. It seems that the application of coercive measures is primarily related to the essence of enforcement proceedings. Within this type of jurisdictional activity, the enforcement of decisions is enforced, i.e. through the application of coercive measures (see Articles 1, 10 of the Law of Ukraine "On Enforcement Proceedings").

The analysis of the provisions of the Law of Ukraine "On Enforcement Proceedings" allows us to conclude that it does not provide for the beginning of enforcement of decisions with the unwillingness of the debtor to voluntarily fulfil its obligation specified in the relevant decision, which must be enforced. The following justification can be given in favour of the given conclusion. If the enforcement document is presented for enforcement in compliance with the law (Articles 4, 5, 24, 26 of the Law of Ukraine "On Enforcement Proceedings"), the enforcement agent must initiate enforcement proceedings. The law does not provide for such a basis for the return of the writ of enforcement to the claimant without acceptance for enforcement as "voluntary enforcement of the debtor's decision before presenting the writ of enforcement for enforcement."

Therefore, even if the debtor voluntarily executed the decision before the claimant presented the enforcement document for such a decision, there is nothing to prevent the debt collector from presenting such an enforcement document. In this case, we can talk about the abuse of the claimant's procedural rights. It should also be emphasized that such a ground for the termination of enforcement proceedings as the actual enforcement of the full decision by the executive document (paragraph 9 of Part 1 of Article 39 of the Law of Ukraine "On Enforcement Proceedings")

concerns the enforcement of the decision in enforcement proceedings after its opening and not the voluntary enforcement of the decision by the debtor before the initiating of enforcement proceedings. The mechanism of protection of the rights of the debtor who voluntarily executed the decision before presenting the executive document for enforcement should determine the recognition of the executive document as unenforceable (Article 432 of the CPC of Ukraine, 328 of the Code of Civil Procedure of Ukraine, 374 CAS of Ukraine, 2004).

Moreover, it is worth mentioning that the current procedural law provides for a period of 10 days for considering the application for the recognition of the executive document as unenforceable. However, it is not always possible to issue the decision on the application within the determined period due to the workload of courts [20]. It is possible to carry out coercive measures because the submission and consideration by the court of the relevant application are not defined by law as a ground for suspending the commission of enforcement actions. Suspension of enforcement actions is possible if the court (this is the right of the court) suspended enforcement under the enforcement document (see Part 3 of Article 432 of the CPC of Ukraine, Part 3 of Article 328 of the CPC of Ukraine, Part 3 of Article 374 of the Criminal Procedure Code of Ukraine, p. 2 part 1 of Article 34 of the Law of Ukraine "On Enforcement Proceedings" [9]).

Meanwhile, the provisions of the above procedural laws give the court the right to prohibit to accept the executive document for enforcement until the consideration of the application for recognition of the executive document as unenforceable. The existence of such authorities of the court seems justified in terms of the mechanism of protection of the debtor's rights to prevent the potential risk of negative consequences for him/her in the future (seizure of property, recovery of funds if the writ of enforcement is presented for enforcement). As mentioned above, if the enforcement document is presented for enforcement in compliance with the law (Articles 4, 5, 24, 26 of the Law of Ukraine "On Enforcement Proceedings" [9]), the enforcement agent must initiate enforcement proceedings.

The grounds for returning the executive document to the claimant without acceptance for enforcement are exhaustively defined by law (Part 4 of Article 4, Part 3 of Article 5 of the Law of Ukraine "On Enforcement Proceedings"), among which there is no prohibition to accept the executive document for enforcement. As issued by the provisions of Part 3 of Art. 432 Code of Civil Procedure of Ukraine, Part 3 of Art. 328 Code of Civil Procedure of Ukraine, Part 3 of Art. 374 CAS of Ukraine and Part 4 of Art. 4 of the Law of Ukraine "On Enforcement Proceedings" should be correlated. In this regard, it is proposed to supplement Part 4 of Art. 4 of the Law of Ukraine "On Enforcement Proceedings" subparagraph ten of this content "the court is prohibited to accept the enforcement document for enforcement."

The analysis of Art. Art. 432 Code of Civil Procedure of Ukraine, 328 Code of Civil Procedure of Ukraine, 374 CAS of Ukraine states that such a mechanism to protect the rights of the debtor to recognize the executive document as non-enforceable is possible only for executive documents issued by courts. Meanwhile, in enforcement proceedings, enforcement documents issued by other bodies (officials) may also be enforced (see Article 3 of the Law of Ukraine "On Enforcement

Proceedings”). Concerning notaries’ writs of enforcement, a mechanism for protecting rights is possible by filing a lawsuit to recognize a notary’s writ of enforcement as unenforceable. However, given the workload of the courts, to protect the right promptly is quite difficult. Thus, there is an urgency of independent research on the effective mechanism of protection of the rights of persons identified as debtors in non-judicial enforcement documents from abuse by debt collectors to present such enforcement documents for enforcement, provided that the debtor has already enforced the decision.

Hence, it can be concluded that the beginning of legal relations in enforcement proceedings is caused by the appeal of the authorized entity to the internal affairs body, that is, by a private enforcer. Therefore, the will of the relevant subject to enforce such a decision (for example, the implementation of the constitutional principle of binding court decisions or the implementation of the subjective right to legal protection of the violated right) is paramount.

Shcherbak [21] argues that the method of legal regulation of executive relations is sanctioned coercion, which is the obligation of the state enforcer to perform only state-sanctioned executive actions in the manner prescribed by law. The same conclusions are supported by Perepelytsia [19]. The above statement about the obligation of the state enforcer to act within the powers granted to him/her and in the manner prescribed by law corresponds to his/her status as a civil servant and the constitutional provisions on the activities of public authorities and their officials. They are obliged to act only based on within the powers and in the manner prescribed by the Constitution and laws of Ukraine (Part 2 of Article 19 of the Constitution of Ukraine). Meanwhile, in order to perform his/her functions, the private enforcer must follow the enforcement procedure. The state-sanctioned enforcement procedure is mandatory for both public and private enforcement agents when enforcing decisions.

Makushev [22], arguing about the theoretical justification of the content and meaning of authorized coercion with Fursa and Shcherbak [23] note that authorized coercion is carried out only by state bodies, is authorized by the judiciary on behalf of the state, and coercion is carried out by the state enforcer. The debt collector cannot authorize coercion against the debtor to the state enforcer, as only the state can do it. S. Fursa and S. Shcherbak claim that the method of regulating executive legal relations is based on the sanctioning of coercion by the state and the debt collector to the obligated person. The authors explain this by the fact that, on the one hand, the state has clearly defined the procedure, means of enforcement of decisions, regulated the procedure and grounds for state coercion and thus authorized the potential for coercion to the obligor within clear limits.

On the other hand, the debt collector, submitting the documents established by law to the state executive service, authorizes the forced recovery of a particular debtor as a result of the debtor’s failure to perform their duties voluntarily. In this context, it should be noted that the state authorizes the possibility of coercion, that is, enforcement of the decision, establishing the appropriate procedure (executive procedural procedure) and giving appropriate powers to certain subjects of the executive process—the state enforcer, private enforcer, who is authorized to carry out such measures, setting them an appropriate task [24]. This is based on the provisions

of the Laws of Ukraine "On Enforcement Proceedings" [9] and "On Bodies and Persons Enforcing Court Decisions and Decisions of Other Bodies" [10]. However, without initiating the enforcement of the decision by the debt collector or a person who by law has the authority to send/submit an enforcement document to the internal affairs body / private enforcement agent, the beginning of enforcement is impossible.

Thus, Fursa and Shcherbak [23] aptly noted that the sanctioned coercion has two structural aspects: normative (determination by the state of the executive procedural procedure in the relevant NPA) and voluntary (the beginning of the enforcement of decisions directly related to enforcement of the decision). It should be noted that without the latter—the volitional aspect of sanctioned coercion—legal relations in enforcement proceedings cannot begin at all. That is, on the one hand, the state clearly defined the procedure of enforcement of decisions and thus sanctioned the potential possibility of force to be applied to a liable person within a clear framework of the executive proceeding. On the other hand, the collector only initiates the procedure of the enforcement of debt from a particular debtor, having been sanctioned by the state as a result of the failure of the debtor to fulfil his/her obligations voluntarily. It is noteworthy that the state authorizes coercion not through the activities of the court that makes the decision for which the executive document is issued, but through the regulation of enforcement and empowering enforcers to use coercion on behalf of the state in enforcing decisions, i.e., enforcement [25].

The activity of the court is related to the consideration and resolution of cases to protect the rights, freedoms, interests of individuals (see Article 2 of the CPC of Ukraine, 2 of the CPC of Ukraine, 2 CAS of Ukraine) [6]. Not only court decisions but also decisions of other bodies (officials) are subject to enforcement, which has been repeatedly emphasized. Court decisions may not provide for their enforcement (for example, a court decision on the recognition of property rights, etc.). Instead, certain enforcement actions (for example, entering a dwelling belonging to a debtor-individual) may be subject to judicial sanction, as referred to in the regulations governing the procedure of enforcement of decisions.

Emphasizing the exclusivity of executive powers, the legislator establishes the feature of mandatory requirements of the state enforcer, which generally characterizes the system of power relations. Decisions of the authorities are, as a rule, imperative, and their non-compliance is protected by the possibility of using authoritarian (within the law) coercion [18]. At the same time, the lack of a private enforcer's status, as a civil servant did not prevent the legislator from empowering him to impose fines as a measure of liability for non-compliance with the decision obliging the debtor to take certain actions and resumption of work. That is, in essence, the legislator authorized both the state enforcer and the Private enforcer to bring to justice individuals for non-compliance with the decision obliging the debtor to take certain actions and the decision to resume work.

It is also worth paying attention to the requirements of Art. 188–13 of the Code of Ukraine on Administrative Offenses "Failure to comply with the legal requirements of the state enforcer, private enforcer". The analysis of the objective side of the administrative offence, the responsibility for which is provided by Art. 188–13 of the Code of Administrative Offenses, makes it possible to summarize that the

legislator has equally determined the mandatory requirements of both public and private enforcers, in terms of the possibility of using coercion for failure to comply with such requirements. Thus, sanctioned coercion is also characteristic of the activities of private enforcers, as is the binding nature of their claims. Item 7 of part 1 of Art. 4 of the Code of Administrative Procedure of Ukraine defines the concept of "the subject of power", that is, a public authority, local government, their official or official, another entity in the exercise of public authority management functions based on legislation, including the performance of delegated powers, or provision of administrative services.

Para.3 item 3 of the Resolution of the Plenum of the Supreme Administrative Court of Ukraine "On certain issues of jurisdiction of administrative courts" [26] states that for the purposes and objectives of administrative proceedings, the governing function should be understood as the activities of all tasks assigned to them by the Constitution or laws of Ukraine. In this context, it should be recalled that the tasks of private enforcers are defined in Art. 3 of the Law of Ukraine "On bodies and persons carrying out enforcement of court decisions and decisions of other bodies", as timely, complete and impartial enforcement of decisions, enforcement of which is provided by law, and it is identical to the task of the state enforcer (according to this article—bodies ICE).

A distinctive feature of the actions of the subject of power is the presence in them of the content of the management of a person, the exercise of power over him/her, by influencing his rights and responsibilities [27]. It seems that the key here is to influence the rights and responsibilities of the individual, but this is inherent not only in actions but also in inaction, in the decisions of the subjects of power. The meaning of the concept of "public authority management function" in the legislation is not disclosed [28]. Among legal scholars, various definitions of the concept of public authority management function are proposed.

According to Averyanov [29], there are the following management functions of public authority: setting goals, resource-supporting, organizational-regulating, and transformational. Meanwhile, Agapov [30] puts forward that management functions of public authority can be exclusive and unified (or general). Exclusive ones are functions which executive bodies of a certain kind are authorized to perform. Unified functions belong to the competencies of ministries, special/state services, agencies, and inspections. Accordingly, the first level of functionality is exclusive functions, and the second level is unified ones. In general, agreeing with the division of functions by levels, exclusive management functions of the public authority can include functions: public administration, administrative services, and law enforcement function (bringing to administrative responsibility and administrative justice).

For example, N. Hliborob [31] notes that it is more appropriate to talk about the legal formula "public authority", which follows from the understanding of the essence of public authority and its special role in regulating public relations, proposing public authority to understand the powers of legal regulation, provision of administrative services, supervision and control, management of facilities, as well as other powers to address issues of rights, freedoms, interests of individuals, legal entities, except for legislative powers, as well as powers to administer justice. Public authorities cannot realize their social purpose unless they are in mutual relations

with other actors. Otherwise they will not be able to cause certain changes in the external world. In this context, it should be noted that several decisions, actions, omissions of the private enforcer, made in the enforcement of decisions, affect the rights and obligations of the debtor.

When initiating enforcement proceedings, the enforcer, including private, indicates the obligation of the debtor to submit a declaration of income and property of the debtor (Part 5 of Article 26 of the Law of Ukraine "On Enforcement Proceedings", which essentially provides for the debtor to take appropriate action, and non-compliance with which is ensured by a measure of coercion—the imposition of a penalty, by the provisions of Art. 76 of the Law of Ukraine "On Enforcement Proceedings", 188–13 of the Code of Administrative Offenses. The enforcer, seizes the debtor's property (funds), may restrict the right to use the property, seal or seize it from the debtor and transfer for storage to other persons, about which he makes a decision or notes restrictions in the decision on arrest (Article 56 of the Law of Ukraine "On Enforcement Proceedings") by a resolution on the seizure of the debtor's property (funds) or the description and seizure of the debtor's property (funds), which results in the debtor's ownership of the property and its implementation. The enforcer has the right to summon individuals, officials concerning the executive documents which are in executive proceedings, and the debtor is obliged to execute the requirement of the enforcer about appearance before the enforcer (item 14 of h. 3 Art. 18, item 5 part 5 of Article 19 of the Law of Ukraine "On Enforcement Proceedings"), which affects the right to freedom of movement of the debtor.

The enforcer has the right to freely enter the land, premises, storage facilities, other property of the debtor to inspect them, open and seal them forcibly (paragraph 5, part 3 of Article 18 of the Law of Ukraine "On enforcement proceedings"), which results in the debtor's ownership of the property and its implementation. The same can be said about the enforcement by the enforcer, including the private enforcer of the registration of encumbrances on the property in the process and connection with enforcement proceedings (paragraph 8 of Part 3 of Article 18 of the Law of Ukraine "On Enforcement Proceedings").

The use of photography and filming by the enforcer during the enforcement of decisions affects the right of an individual to be filmed on photo, film, television, videotape only with his/her consent (Part 1 of Article 307 of the Civil Code of Ukraine). It is possible to speak about the inaction of the enforcer when he/she was obliged to perform certain actions but did not perform them. For example, the enforcer is obliged to consider the applications of the parties, other participants in the enforcement proceedings and their petitions (paragraph 3 of Part 2 of Article 18 of the Law of Ukraine "On Enforcement Proceedings"), the decision to initiate enforcement proceedings must be made no later than the next working day from the date of receipt of the executive document [9].

Therefore, failure to issue a decision to initiate enforcement proceedings within the specified period affects the rights of the claimant to enforce the decision. Prescriptions of Part 5 of Art. 13 of the Law of Ukraine "On Enforcement Proceedings" oblige the enforcer to decide to lift the arrest no later than the next working day after receipt of documents confirming the existence of the grounds provided for in Part 4

of Art. 59 of this Law, and send on the same day to the body (institution) to which the decision on seizure of the debtor's property was sent for enforcement.

The inaction of the enforcer follows on the debtor's ownership of the property and its implementation because the property remains under arrest, although the grounds for arrest are no longer available. Based on the above, it can be generalized that in the enforcement of decisions, the private enforcer can be considered "another entity in the exercise of public authority management functions under the law", therefore, covered by the concept of the subject of power in the context of item 7 part 1 of Art. 4 CAS of Ukraine. This also correlates with the provisions of Art. 287 CAS of Ukraine (appeal in the order of CAS of Ukraine by filing an administrative lawsuit against decisions, actions, the inaction of a private enforcer).

Because the private enforcer is given the same task as the state enforcer (enforcement of the decision), the private enforcer may be considered "another entity in the lawful exercise of public authority". Therefore, it should be enshrined in the legislation that enforcement proceedings can be conducted by both the state enforcer and the private enforcer, their competence being the same.

In connection with the above, in the provisions of Part 9 of Art. 71 of the Law of Ukraine "On Enforcement Proceedings", paragraph 6 of Section XVI of the Instructions on the organization of enforcement of decisions, the wording "state enforcer" should be replaced by the wording "enforcer". Special attention should be paid to foreign experience in the organization of enforcement of decisions, in particular in the context of private enforcement agents [32]. It is worth noting O. Tkachuk's [33] opinion that global trends in the field of enforcement of court decisions suggest that the introduction of a mixed system of enforcement of court decisions in Ukraine is undoubtedly a progressive step, but this should not be seen as a final solution to the problem of enforcement proceedings, and should be perceived only as a transitional stage to the full "privatization" of the sphere of enforcement proceedings to increase the effectiveness of protection of human rights, freedoms and interests.

In France, Belgium, Luxembourg and several other continental European countries, enforcers are privately licensed individuals. They are managed by regional and national chambers as self-governing bodies [34]. The oldest and probably the most developed system and professional organization of private performance exists in France. So, the French system is often taken as a model. Since the time of the French kings, the enforcers have been private. Now in France, there are whole generations, dynasties of enforcers. Enforcers (French—"huissier") are self-employed professionals who are government officials and legal professionals at the same time. They are appointed by the Ministry of Justice and run their own business in the same way that a director runs a company by hiring skilled workers. There is a tradition in France when one of the enforcer retires, he/she sells his/her office. New owners simply buy licenses and work for an average of 50 years. The process of concluding the Ministry of Justice controls a purchase agreement and the price of the office. The seller represents the buyer to the Minister of Justice for approval. Therefore, in France, the sphere of activity of the enforcer is given.

In Germany, court registrars, who have a special certificate that gives them the right to enforce court decisions [34], carry out enforcement proceedings. By the way, the German Code of Civil Procedure regulates the enforcement of a court decision.

In this regard, N. Schelever [35] notes that court registrars in Germany resemble enforcers of the former Soviet Union. The activities of these persons were effective, court decisions were enforced almost one hundred percent, because, in addition to the influence of the enforcer on the debtor, there was a corresponding influence of the court. The enforcer was "under the protection" of the court.

There are certain features of enforcement proceedings in Italy. Enforcers enforce judgments. However, the executive judge, who has the right to resolve disputes that arise during enforcement or obstruction of enforcement, considers motions for postponement or instalment and decides several other issues [35], plays a significant role in the enforcement stage. It seems that the issues of enforcement itself (this is the competence of the enforcer) and the issues related to enforcement (this is the competence of the executive judge) should be clearly articulated here. Conclusion No 13 of the Advisory Council of European Judges "On the role of judges in the enforcement of judgments" of 19 November 2010 [36] sets out the following rules-guarantees of the professional activity of a Private enforcer:

- Enforcement of the decision should not be undermined by external interference by the executive or the legislature through the adoption of retroactive legislation (paragraph 11);
- Enforcement bodies should not have the power to appeal or change the terms of decisions (paragraph 14);
- If it is necessary for the party in the case for the decision to be enforced, it should be easy to initiate the enforcement procedure. Any obstacles to this should be avoided, such as excessive costs (paragraph 15);
- Enforcement must be fast and efficient. Therefore, the necessary funds must be provided for this. Clear legal norms should determine the available resources, responsible bodies and the appropriate procedure for their allocation (paragraph 16).
- There are also a number of legal positions of the European Court of Human Rights that argue in favour of the need to ensure a certain level of guarantee of the proper performance of a private enforcer. So, the Court considers that:
- The very nature of the enforcement proceedings requires promptness [3];
- Article 6 § 1 of the Convention protects, *inter alia*, the enforcement of final judgments which, in States which have recognized the rule of law, cannot be enforced to the detriment of one of the parties. According to the judgment, it cannot be obstructed, refused or excessively delayed [38];
- The state is obliged to organize a system of enforcement of court decisions, which will be effective both in law and in practice [39].

As it can be observed, various system of enforcement of decisions exist in different countries, regulating the activities of private enforcement agents. Ukraine has already embarked on reforming enforcement proceedings, and the work of private enforcement agents has shown its effectiveness [40]. Therefore, further reform of this area seems promising in the context of the existence of a mixed model of enforcement system, with a possible further transition to a private model of the enforcement system. The effectiveness of the protection of violated rights, freedoms,

interests of persons mediated by the decision of the relevant jurisdiction is directly related to its implementation [41]. We hope that the reform of executive process will lead to real and common protection of violated rights, freedoms and interests through effective remedies of executive process.

3 Conclusion

To conclude, authorized coercion is characteristic of the activities of private enforcers, as well as the binding nature of their claims. When enforcing decisions, a private enforcer can be considered "another entity in the exercise of public authority management functions based on law", therefore, covered by the concept of the subject of authority in the context of paragraph 7 of Part 1 of Art. 4 CAS of Ukraine. This also correlates with the provisions of Art. 287 CAS of Ukraine (appeal in the order of CAS of Ukraine by filing an administrative lawsuit against decisions, actions, the inaction of a Private enforcer).

It is necessary to stipulate at the legislative level that in the performance of enforcement proceedings, which may be conducted by both public and private enforcement agents, their competence in such enforcement proceedings is the same. In connection with the above, in the provisions of Part 9 of Art. 71 of the Law of Ukraine "On Enforcement Proceedings", paragraph 6 of Section XVI of the Instructions on the organization of enforcement of decisions, the wording "state enforcer" should be replaced by the wording "enforcer".

Various debatable issues in the field of enforcement of decisions are considered in the scientific works of S. Fursa, S. Shcherbak, P. Makusheva, A. Perepelytsia and other legal scholars. In the scientific works of A. Avtorgov, the author raises topical issues regarding the functioning of various subjects of legal relations that take place in the enforcement of decisions and private enforcers. The topic of the place of private enforcers in the system of subjects of executive proceedings in Ukraine was also considered by I. Kuzmina.

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Availability of Data and Materials Data will be available on request.

Declarations

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Ethical approval All procedures performed in studies involving human participants were in accordance with the ethical standards of the institutional and national research committee and with the 1964 Helsinki declaration and its later amendments or comparable ethical standards.

Consent for publication All individual participants agreed to be included in the study.

Consent to participate Informed consent was obtained from all individual participants included in the study.

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