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FAIR JUSTICE PROJECT

PRELIMINARY STATEMENT OF ISSUES AND RECOMMENDATIONS FOR STRENGTHENING FINANCIAL MANAGEMENT AND BUDGETING PROCESSES IN THE UKRAINIAN COURT SYSTEM

Contract No. AID-121-C-11-00002

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December 20, 2011

The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

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BACKGROUND

The USAID Fair, Accountable, Independent and Responsible (FAIR) Judiciary Program in Ukraine began on October 1, 2011. The Project is designed to support legislative, regulatory, and institutional reform of judicial institutions in order to build a foundation for a more accountable and independent judiciary in Ukraine. Its main objectives are to support USAID/Ukraine's assistance efforts in rule of law and democracy and governance through: 1) development of a legislative and regulatory framework for judicial reform that is compliant with European and international norms and supports judicial accountability and independence; 2) strengthening the accountability and transparency of key judicial institutions and operations; 3) strengthening the professionalism and effectiveness of the Ukrainian judiciary; and 4) strengthening the role of civil society organizations as advocates for and monitors of judicial reform.

Pursuant to Expected Result 3.2, FAIR is working to strengthen the capacity of the State Judicial Administration of Ukraine (SJA) to justify and present budget requests of Ukraine's judiciary. In support of this goal, under Task 3.2.3 and 3.2.5, FAIR assists the SJA in the preparation of recommendations for improving the budgeting process and collecting the data the courts need to formulate and back up budget requests.

INTRODUCTION

The author was asked by the project to assist with the first phase of what is intended to be a longer-term effort to assist Ukraine's State Judicial Administration, now under responsible and competent leadership, and the Council of Judges and specialized Councils of Judges to improve their court budgeting process. The work effort involved five days of work on the ground in the Ukraine and some time preparing the deliverables, one of which is this statement. The small project review team comprised the author as a short-term expert, and resident staff members Sergey Suchenko, Judicial Administration Specialist, and Irina Chernenko, Staff Interpreter/Translator. During the abbreviated research end of the effort, the team met with State Judicial Administration finance/budget officials at the central office and at the regional office responsible for accounting and budgeting services for the ten district courts of Kyiv City. The team also met with and interviewed the chief judges and chiefs of staff of two of the Kyiv general jurisdiction district courts. This statement was compiled at the conclusion of this series of field interviews. The contents of most of the recommendations proposed in this statement were presented to the Chairman of Ukraine's Council of Judges, representatives of the specialized Councils of Judges for Ukraine's general jurisdiction, commercial and administrative courts, and senior staff of the State Judicial Administration at a two-hour session at Supreme Court of Ukraine on 8 December 2011.

The format of the statement is relatively simple. It lists individual issues identified by the team as significant, provides summary background content, and culminates in a recommendation.

ISSUES AND RECOMMENDATIONS

ISSUE: LACK OF CLEARLY SPECIFIED JUDGES’ ROLES IN THE BUDGETING AND FINANCIAL MANAGEMENT PROCESSES: The new *Law on the Judiciary and the Status of Judges* (Law) makes no direct provision for delegating or assigning to the Congress of Judges or the Councils of Judges specific authority for participating in the financial management and budgeting processes.¹ The Law provides that the State Judicial Administration (SJA) of Ukraine shall “represent courts in relations with the Cabinet of Ministers and the Verkhovna Rada of Ukraine during preparation of [annual] draft law on the State Budget of Ukraine for the respective year within its authority specified by this law.” Art. 146.1.1. The Law also provides that the SJA shall report to the Congress of Judges and that the regulations on the SJA shall be approved by the Council of Judges. In the absence of any specific reference in the Law to the role of the Congress or one or more of the councils of judge, effectively, the SJA rather than any judicial governance body has come to function as the primary official liaison with the Parliament’s Committee on the Judiciary on matters relating to judicial system budget and finance. This may be because the multiplicity of councils of judges – the supervisory Ukrainian Council of Judges and three subordinate councils for general jurisdiction, economic, and administrative courts – and the size of the Congress of Judges renders difficult the establishment of a single point of judicial contact on court system budget matters. As of the time of the author’s visit, the judiciary has not yet created a dedicated or permanent judges committee or commission to oversee court system budgeting and financial management.

Best practices among modern court systems provide for the active participation of the judicial leadership in the budget development, approval, submission, and justification processes along with technical and management staff from the judicial system’s primary administrative body. The author has worked with court systems in some 30 countries world-wide, and in most of them, judicial bodies play some officially specified role in the budget development, management, and execution processes.

¹ The Law does provide in Article 122.6.1 that the councils of judges shall “exercise control over organizing the operation of the respective courts and hear reports by chief judges of these courts on the performance of court as well as the report by the Head of State Judicial Administration of Ukraine on issues related to financial and logistical support of respective courts. It also provides in Article 123.2.1 that the Congress of Judges shall “hear a report by the Council of Judges of Ukraine on fulfillment of tasks by bodies of judicial self-government regarding judicial independence and on the state of funding and organizational support of the operation of courts.” It also provides in Article 127.5.8 that the Council of Judges shall, “while considering issues related to funding of courts the Minister of Finance of Ukraine shall be invited to the meeting of the Council of Judges of Ukraine.

RECOMMENDATION: THAT THE FOUR HEADS OF THE COUNCILS OF JUDGES JOINTLY SEEK PASSAGE OF LANGUAGE AMENDING THE LAW TO PROVIDE FOR THEIR ACTIVE PARTICIPATION WITH THE SJA IN THE PROCESS OF PREPARING AND APPROVING THE ANNUAL BUDGET REQUEST FOR THE UKRAINIAN COURTS

ISSUE: THERE IS CONSPICUOUSLY ABSENT IN THE GOVERNANCE FRAMEWORK OF THE UKRAINIAN JUDICIAL SYSTEM OF AN OFFICIAL JUDICIAL ENTITY TO ACTIVELY OVERSEE, MONITOR, AND PROMOTE THE FINANCIAL AND BUDGETARY BUSINESS OF THE JUDICIAL SYSTEM: As a consequence, those functions largely default to the SJA within minimal judicial involvement. With five separate judicial leadership structures already in place, it makes little sense for such functions either to be distributed collectively among all of them or delegated to any one of them. Ideally, their five heads should collectively agree to create a small permanent commission or committee on judicial system financial and budgetary management which might include one representative from each of the five structures. Membership on this commission would be for staggered terms of several years, and the chair would be elected by the members for a term of several years. Ideally, those named to this commission would be judges with experience and/or expertise in financial and budget management.

RECOMMENDATION: THAT THE HEADS OF THE SJA AND THE FOUR COUNCILS OF JUDGES JOINTLY CREATE A SMALL JUDICIAL SYSTEM COMMISSION ON FINANCIAL MANAGEMENT AND BUDGET AFFAIRS TO ACTIVELY OVERSEE, MONITOR, AND PROMOTE THE FINANCIAL AND BUDGETARY AFFAIRS OF THE JUDICIAL SYSTEM. The work of this judicial commission would be supported by SJA Headquarters finance and budget staff.

ISSUE: ROLE OF THE MINISTRY OF FINANCE AND THE COUNCIL OF MINISTERS IN THE JUDICIAL SYSTEM'S BUDGET REVIEW AND DETERMINATION PROCESSES: Although the Judicial System of Ukraine is specified in law independent from the executive power, the Ministry of Finance and the Cabinet of Ministers both play key roles in determining, reviewing, approving and consolidating the Judicial System budget prior to its submission to the Parliament. According to the SJA Head, the budget process commences with receipt by the Central SJA of a letter from the Minister of Finance in the late winter/early spring that specifies a financial ceiling on total court system budget requests for the coming year, implying that it has the authority to do so for the judicial power. Presumably similar letters are sent to all ministries that fall within the general framework of executive power of the government. Any amounts requested above and beyond that ceiling must be thoroughly justified, and there are no guarantees

that they will be approved. The Finance Ministry then follows up with a second more detailed letter which sets ceilings for the individual budget object classes or categories. Following receipt of these letters, the SJA HQ then notifies the territorial SJA offices of the ceilings. In the meantime, all courts commence their budget planning for the coming year. The delegation of budget authority from the governing bodies and the SJA to the individual courts varies by type of court.² All courts except the general jurisdiction trial courts proceed with preparing their budgets and submitting them directly to the SJA HQ office where they are reviewed and consolidated. All of the general jurisdiction trial courts, by contrast, respond by working together with their respective territorial SJA offices to prepare statements of individual court budgetary requirements using outdated formulae and requesting supplemental funding to cover those requirements that the formulae fail to include.³ Once completed, each territorial SJA office consolidates the budget requests for the general jurisdiction district courts in its region and transmits the consolidated budget request to the SJA HQ.

² The Supreme Court, all high courts, all intermediate courts of appeals, and all trial-level commercial and administrative courts are staff with accounting and budgeting personnel as required to manage their own budgets. The general jurisdiction district courts, by contrast, have virtually no authority and are dependent on their respective territorial SJA office for all budgeting, financial management, and procurement functions.

³ Receipt of this letter triggers stage one of the budget preparation process for the general jurisdiction trial courts and the respective territorial SJA offices to which each is assigned. They have approximately two weeks to gather a variety of types of raw statistical data. These data include information on numbers of personnel, buildings,³ equipment on hand, etc. The data also include statistical information relating to the court's caseload. In anticipation of this budget process, courts generally compile these data throughout the year to facilitate the process and transmit it to the territorial SJA office accountant to which they are assigned. Such offices exist for each of the Ukrainian systems oblasts and its special city jurisdictions. For example, the Kyiv City Territorial SJA office handles budgeting and other support functions for the ten general jurisdiction trial courts in Kyiv. The general jurisdiction trial courts also provide lists of any special budgetary requirements for the coming year that fall outside the statistical data such as capital expenditure estimates for courthouse renovation projects. Territorial SJA office accountants then prepare for each court a budget request statement on a standard form that include several columns. One column describes each of the standard budget expense categories. A second column lists the estimated amount required for each category; this amount is calculated using a series of budget formulae which are broadly acknowledged as out of date and inadequate. A third column on the form is designated to provide for each budget category the supplemental amount which, when added to the formula-derived amount in the second column, adequately reflects the court's requirements in that category. The inadequacy of the formula-derived amounts are reflected in a form the review team was allowed to inspect for the Holosiyivskiy District Court. The formula-derived estimate of postal costs for the coming year was 364,110 Hryvna; the supplemental requirement for postal costs was an additional 2,506,250 Hryvna. The formula prescribes the base annual rate for judicial salaries at 332 Hryvna; the current base annual judicial salary for 2012 is 962 Hryvna. The court's total formula-derived estimated budget requirement was 35,669,468 Hryvna; the supplemental was 45,884,801 for a total estimated budget requirement of 81,554,269. Application of the outdated formula yielded less than half of the required amount.

The SJA HQ, in turn, consolidates all territorial SJA budget requests from the general jurisdiction trial courts as well as the budget requests of all the commercial and administrative trial courts and all the appellate courts, including the Supreme Court, into a single budget request for the entire judicial system. This budget request is then transmitted to the Ministry of Finance which reviews and processes it, imposing reductions where it deems appropriate. It then transmits its revised version of the Judicial System's budget request to the Cabinet of Ministers where, again, it is subject to review and revision. The Cabinet of Ministers then sends a consolidated budget request for all executive power ministries and other bureaus and including the Judicial System budget request to the Ukrainian Parliament where a final government-wide budget is prepared in the form of an annual Law on the State Budget.

A truly independent judicial system should not have its budget subject to review and modification by an executive-branch ministry or by a council of ministers. Under the Ukrainian Constitution as in most democratic systems based on separation of powers principles, the power to allocate funding for the salaries and expenses of the various institutions of the government and judiciary rests with the legislative power or Parliament. It is entirely appropriate for the Ministry of Finance to consolidate the judicial system's budget request into its general budget submission to the Parliament. It is however inappropriate, given the separation of powers and the independence of the judicial system, for the Finance Ministry to reduce or otherwise modify the judicial system's budget request. That function should rest exclusively with the Parliament.

RECOMMENDATION: THAT THE COUNCIL OF JUDGES PETITION THE UKRAINIAN PARLIAMENT FOR AUTHORIZATION UNDER LAW TO EITHER:

- **PREPARE AND SUBMIT ITS ANNUAL BUDGET REQUEST DIRECTLY TO THE PARLIAMENT, OR**
- **PREPARE AND SUBMIT ITS ANNUAL BUDGET REQUEST TO THE MINISTRY OF FINANCE ON THE CONDITION THAT THE MINISTRY AND THE CABINET OF MINISTERS INCORPORATE IT INTO THE CONSOLIDATED GOVERNMENT BUDGET REQUEST *WITHOUT MODIFICATIONS***

RECOMMENDATION: THAT THE COUNCIL OF JUDGES PETITION THE UKRAINIAN PARLIAMENT TO PROVIDE UNDER LAW THAT THE MINISTRY OF FINANCE'S AUTHORITY TO TRANSMIT ANNUAL LETTERS SPECIFYING GENERAL AND SPECIFIC FUNDING LEVELS FOR THE JUDICIAL SYSTEM BUDGET BE WITHDRAWN

This will enable the Judicial System to develop and prioritize its budget request following zero-based budgeting principles based on actual needs and requirements, as is provided for in the new Law.

ISSUE: COLLECTION AND RECEIPTING OF COURT FEES: Courts in Ukraine do not have the authority to collect fees payable for various court services. Litigants who file cases or otherwise obtain court services, once they have submitted their documents, are obliged to leave the courthouse and pay the prescribed fees at a local bank, post office, or other government-authorized location. This was once a common practice in civil law court systems in Central and Eastern Europe but is increasingly being abandoned for the following reasons:

- Inconvenience to the bar and the public: Members of the bar and the public should be accorded the best practices approach which provides for one-stop shopping in the court environment. This means eliminating the requirement that litigants are burdened with having to transact court-related business in three locations: First, the court; second, a bank or post office; and third back to the court.
- Errors in the computation of fees: Fees payable to the court are computed by litigants using official fee schedules posted in public areas. For inexperienced litigants, this can be a confusing process; because they do not understand the complexities of fee calculations, they make occasional mistakes and at the bank, they pay either too much or too little. When the litigants return to the court with a receipt from the bank, they are advised that the amount paid was incorrect, and they are compelled to return to the bank to correct the error. Such errors would not occur and litigants would not be inconvenienced if the fees were collected and receipted at the court.⁴
- Presentation of fraudulent receipts: The advent of electronic publishing makes it relatively easy for unscrupulous litigants to forge counterfeit receipts that appear to be official and are submitted to court staff as proof of having paid the required fees. The incidence of forged receipts is likely to mushroom once the dramatic increases in the court fee schedule go into effect in 2012 and result in direct losses in sources of revenue to the courts from the collection of fees.

⁴ This points to an issue in service to the public. Ideally, court staff at the register desk should make themselves available to assist litigants with the fee-computation process to ensure against errors. This should be considered a basic public service that all courts should provide to all litigants who require it.

- Independence and efficiency of the judiciary: As an independent branch of the government, the courts should have the authority to collect their own fees. It is indeed ironic that the Government entrusts the courts with the administration of justice in all matters under law, including the most complex financial cases involving millions of Hryvna, yet appears unwilling to let it collect its own fees. Moreover, now that the court system is authorized to retain fees collected for various services it provides to fund court operations, the most efficient means for accounting for and processing those fees would be for the courts to collect them and deposit them in a special government account under its control. This is more efficient than having all fees travel the cumbersome journey of being collected at a bank, transferred to a central Finance Ministry account, then transferred to an SJA-controlled account.

RECOMMENDATION: THAT THE SJA AND THE COUNCIL OF JUDGES PURSUE THE LONG-TERM GOAL OF SEEKING A DELEGATION OF AUTHORITY AND RESPONSIBILITY FROM THE VERKHOVNA RADA TO THE JUDICIAL SYSTEM FOR THE COLLECTION AND RECEIPTING OF ALL COURT FEES.

Under this new model, staff in all but the smallest and most rural courts would assume responsibility for collecting and receipting all court fees at the courthouse.

- If this transition needs to be accomplished in a sequence of steps, possible steps include the following:
 - ❖ Work with the Finance Ministry to establish a protocol whereby select and properly trained court staff are trained and certified in how to collect, receipt, secure, and deposit fees for court services. This could be tested utilizing a pilot court approach in which a small number of courts are authorized to proceed.
 - ❖ Work with local banks to develop a process whereby select and properly trained court staff are effectively deputized by the banks to act as their in-court agents to collect, receipt, secure, and deposit fees collected for court services.
 - ❖ Create space in registration offices in larger courts to accommodate a small and secure bank office wherein bank employees would be assigned during business hours to collect fees at the time new cases are being filed or other court services are being requested.
 - ❖ Work with local banks to install automated electronic payment kiosks in public areas in the courts. Such kiosks are fairly ubiquitous for other types of

payments elsewhere. The kiosks would permit litigants to pay court fees electronically using debit or credit cards and issue paper receipts that are then submitted to staff at the register as verification of payment.

- However it is initiated, it should be done on a pilot basis, beginning with a small number of the larger general jurisdiction district courts. The effort also should be closely coordinated with representatives from the Ministry of Finance.

ISSUE: FINANCIAL REPORTING AND ANALYSIS FUNCTION IN THE SJA: Financial and budget management and planning functions in the SJA fall under the responsibility of the Department of Planning and Finance. Currently there is no separate organizational entity within the SJA for Financial Reporting and Analysis. Pursuant to passage of the new *Law on Court Fees*, the SJA will assume significantly expanded responsibilities relating to financial reporting and analysis as it develops tools and reporting formats for tracking, ensuring the security of, and disbursing court fee receipts among the courts. Moreover, because court fee receipts will become a part of the revenue stream for the judicial system, the SJA will need to establish a mechanism whereby payment of courts fees in individual courts are tracked through the receipts litigants submit and reported to the SJA. These reports will be consolidated and serve as a cross-reference to deposits made by the Ministry of Finance into the SJA court fee receipts account.

RECOMMENDATION: THAT THE COUNCILS OF JUDGES JOINTLY SEEK AUTHORIZATION AND FUNDING SUFFICIENT TO ESTABLISH WITHIN THE SJA A NEW DEPARTMENT FOR FINANCIAL REPORTING AND ANALYSIS

ISSUE: DECENTRALIZING BUDGET ADMINISTRATION AND FINANCIAL MANAGEMENT TO THE LOCAL COURT LEVEL: Under current practice, all commercial and administrative courts at the trial and appellate levels are authorized and staffed to manage their own budgets and to exercise procurement authority. This same authority extends to the Supreme Court, all high courts, and all intermediate appeals courts. The only segment of the court system to which this budget and financial management authority is not extended are the general jurisdiction district courts. Their budgets are managed for them by the territorial SJA offices.

If, for example, the chief of staff in one of Kyiv's large metropolitan district courts experiences an unrecoverable error on the hard drive of his Dell computer, causing it to crash, he has no authority to dispatch a staff member to the nearest Dell component outlet to pick up a new hard drive. Instead, staff are required to prepare and submit to their court's assigned territorial SJA office a written request with justification for a new hard drive. The territorial SJA office will respond by preparing the purchase order for

acquisition of the hard drive and transmitting it to the computer parts and services vendor previously selected through the tendering process to provide all computer related parts, service, and maintenance for all of the general jurisdiction district courts that are assigned to that SJA office. The time it takes the SJA and the vendor to respond to the court's request depends on the workload traffic from the other courts both serve. It may take a day; it may take a week.⁵ The courts have no control over the response time, although the SJA office tries to respond promptly to emergency requests.

This same sequence must be followed by all general jurisdiction district courts for the acquisition of virtually all goods and services. These courts have no discretionary funds or budgets of their own even for the acquisition of consumable supplies such as pencils, paper clips, toner cartridges, and bathroom supplies. Everything, from the acquisition of blank CDs to the contracting of repair services for plumbing must be routed through the assigned regional SJA office, regardless of cost. In their business planning as well as in their responses to urgent and emergency matters, chief judges, judges, chiefs of staff and all other court staff must include as a factor the inevitable delay entailed by being required to procure products and services through and with the approval of their regional SJA office.

The SJA HQ does not appear to have conducted any studies to determine whether it makes sense to transfer the financial management and budgeting functions from the territorial SJA offices to the general jurisdiction district courts. It would appear, however, that effecting such transfers in the largest urban district courts would result in increased efficiency and improved self-management. Chief judges and chiefs of staff interviewed in two of Kyiv's ten city district courts all agreed that having independent financial management and budgeting authority and responsibility were highly desirable options that would increase their operating and planning efficiency, assuming they were given staff with accounting expertise and experience. There may be small and remote courts in Ukraine's system whose budget and financial management workload do not suffice to justify the allocation of additional staff for whom the territorial SJA offices could continue to provide such services. However, for the majority of general jurisdiction district courts, one or more additional finance/budgeting staff may be required. The expense of such positions could be largely mitigated by transferring most of the persons currently employed in accounting

⁵ The head of the Budget Department of the Kyiv City SJA office noted that the computer parts and services vendor that handles the needs of all ten general jurisdiction district courts in Kyiv City has only two full-time employees. The vendor was selected through a competitive bidding process as the low bidder. With only two employees to handle the needs of ten busy urban trial courts, it is no surprise that this particular vendor was awarded the contract. Whether award of the contract entailed any conditions such as delivery of services or products within specified time frames is unclear.

positions at the territorial SJA offices to the affected district courts. Those who remain would continue to service the small and remote courts.

RECOMMENDATION: THAT THE SJA HQ INITIATE A PILOT PROGRAM TO DELEGATE FINANCIAL MANAGEMENT AND BUDGETING AUTHORITY FROM THE TERRITORIAL SJA OFFICES TO THE LARGER DISTRICT COURTS. KYIV CITY MAY BE AN IDEAL LOCATION FOR EMBARKING UPON SUCH A PILOT PROGRAM.

ISSUE: ACCORDING TO KYIV CITY TERRITORIAL SJA OFFICIALS, APPROXIMATELY 12% OF THE OPERATING BUDGETS OF THE DISTRICT COURTS ARE EXPENDED ON POSTAGE COSTS:

District courts on average expend approximately 80% of their allocated budget on salary costs. This proportion may increase in 2012. With another 12% required for postage costs, this leaves 8% of courts' annual budgets to cover the costs for all other goods, services, and capital expenditures incurred during the year.

Collectively, the courts that comprise the Ukrainian judicial system generate substantial business for the Ukrainian postal service. They are among the postal services' most reliable and consistent customers with the enormous amount of mail they generate throughout the calendar year. That business notwithstanding, courts are charged the same amount per item mailed as occasional individual users of postal services.

It is not clear whether the court system is required to utilize the national postal service for the distribution of notices, summons, and other official mail. If it is not required to do so under law, then the SJA should explore whether the cost of services offered by competing private sector companies that specialize in the distribution of commercial sector communication is competitive with or lower than the costs charged by the postal service. In the Republic of Georgia, the court system is implementing criminal jury trials which entails mailing large numbers of summons forms to prospective jurors throughout the country. Because the government postal service in Georgia is costly but inefficient and not always reliable, the Georgian courts explored the option of using a private-sector courier service. The court system eventually contracted with the private sector company to distribute juror communications. Even though the per item cost was slightly higher than that charged by the government's postal service, the company guaranteed delivery to a high percentage of the intended recipients – much higher than the postal service was willing to guarantee.

The SJA should also explore negotiating discounts with the postal service for the enormous and consistent business they provide to the courts. This is a standard procedure when private sector companies negotiate prices with each other; the greater the amount of reliable business the buyer can promise, the more willing the seller is to

discount the cost of goods and/or services. Several years ago while conducting a court administration assessment of the Serbian court system, the author recommended that the Serbian Ministry of Justice negotiate with the postal service on behalf of the courts for discounted services, given the millions of Euros they were paying every year for registered mailing costs. The negotiations were triggered by concern by the postal services that the Ministry might contract with a private sector service, resulting in substantial revenue losses in the postal service. Eventually the postal services agreed to a discounted rate for the courts, resulting over time in significant savings.

RECOMMENDATION: THAT THE SJA ON BEHALF OF THE JUDICIAL SYSTEM

- **EXPLORE WHAT OTHER PRIVATE SECTOR COURIER SERVICES ARE AVAILABLE NATIONALLY, REGIONALLY, AND IN MAJOR METROPOLITAN AREAS AT PRICES THAT ARE COMPETITIVE WITH OR LOWER THAN THOSE OF THE POSTAL SERVICES, AND**
- **APPROACH POSTAL SERVICES OFFICIALS ABOUT NEGOTIATING DISCOUNTED COSTS BASED ON THE ENORMOUS QUANTITY OF BUSINESS THE COURTS GENERATE FOR THEM**

ISSUE: UNDER CURRENT LAW, FUNDS APPROPRIATED FOR THE JUDICIAL SYSTEM BY THE LAW ON THE STATE BUDGET MUST BE EXPENDED BY 31 DECEMBER, THE END OF UKRAINE'S FISCAL YEAR. THIS OFTEN CREATES PROBLEMS BECAUSE FUNDS HELD IN RESERVE ARE NOT RELEASED UNTIL MID-DECEMBER. BY THEN IT IS TOO LATE TO CONDUCT THE REQUIRED TENDERS FOR THE PURCHASE OF GOODS AND SERVICES, AND THE SJA HQ AND TERRITORIAL SJAs SCRAMBLE TO TRY TO SPEND THE FUNDS THROUGH LEGITIMATE AVENUES

Under existing law, virtually all procurement of goods and services by the SJA must be conducted through the tendering process which entails a lengthy process of requesting competitive bids from vendors and selecting the one that offers the lowest cost. When funds held in reserve through most of the fiscal year are released by the Ministry of Finance in mid-December, the SJA offices do not have the time required to conduct tenders before the end of the year, and the funding is often lost. The Finance Ministry is reluctant to release such funds earlier because of unanticipated emergencies they would be used to fund. The amounts are not insignificant. The Kyiv City SJA officer reported that in a recent year, the Finance Ministry released two million Hryvna for the Kyiv City district courts in mid-December.

A similar problem in the federal court system in the United States resulted in changes to the law that permitted funds remaining at the end of the year on the court budget balance sheet to be carried over into the next fiscal year when they could be expended in a more rational manner. Such a provision in Ukrainian law would permit the SJA to expend these funds for critically needed court goods and services that could be purchased through properly executed tenders the following year.

Permitting to SJA to carry over these year-end funds would also help solve another serious challenge. At the beginning of the new fiscal year, the Parliament typically does not publish and release the Law on the Stage Budget until March or April. Thus, for the first two or three months of the new year, the SJA is unable to purchase goods and services for the general jurisdiction trial courts because it has no authority to do so and has received no budget allocation. As a consequence, the courts often run out of postage necessary to send out their notices and summons, creating an emergency situation throughout the judicial system.

RECOMMENDATION: THAT THE COUNCIL OF JUDGES AND THE SJA JOINTLY PETITION THE MINISTRY OF FINANCE AND THE PARLIAMENT’S JUSTICE COMMITTEE FOR AMENDMENTS TO THE RELEVANT BUDGETING LAWS AND REGULATIONS TO PERMIT THE SJA TO CARRY OVER YEAR-END FUNDING FROM THE END OF ONE FISCAL YEAR TO THE NEXT.

ISSUE: WHEN THE VERKHOVNA RADA APPROVES LEGISLATION THAT AFFECTS THE JUDICIAL SYSTEM, IT APPEARS TO DO SO WITHOUT SUFFICIENTLY ANALYZING THE IMPACT SUCH LEGISLATION WILL HAVE ON THE JUDICIAL SYSTEM’S LIMITED FINANCIAL AND OTHER RESOURCES. A good example is the Law on Access to Court Decisions. When it was passed and became effective, the SJA had not been sufficiently advised, had not had time to plan and prepare for implementation, and did not have the required resources to procure the substantial quantities of hardware, software, and technical support for infrastructure. As a result, the SJA had to rush to comply with the requirements, leading to costly errors and delays in planning and implementation.

The federal courts of the United States used to have to deal with the same types of issues. To provide for a smoother transition, the leadership of the courts met with key members of the parliament to negotiate a solution. The solution included the following elements:

- When the parliament is preparing new legislation that affects the federal courts, it will transmit drafts of the legislation for analysis by the judicial system’s Office of Legislative Affairs (OLA).
- The OLA will be accorded a certain period of time during which it will
 - ❖ Carefully analyze the draft legislation
 - ❖ Determine its impact on the operations of the judicial system
 - ❖ Calculate what additional resources will be required to implement the provisions of the legislation
 - ❖ Calculate how much time the judicial system will require to plan for and implement the provisions of the legislation, including the training of all relevant staff.

- ❖ Prepare a *legislative impact statement* that is then submitted to the U.S. parliament to be taken into consideration when determining the effective date and the funding and other resources that should be made available to the judicial system as a part of the cost of implementing the new legislation.

The U.S. parliament has honored the new agreement, and the burden of implementing new legislation has been considerably diminished as a result. In some instances, the parliament has delayed the effective date to allow the judicial system additional time to prepare for the implementation, leading to a smoother transition.

RECOMMENDATION: THAT THE HEADS OF THE COUNCILS OF JUDGES AND THE SJA JOINTLY PETITION THE PARLIAMENT FOR A FORMAL AGREEMENT ENABLING THE JUDICIARY TO REVIEW PENDING LEGISLATION AND, WHERE APPROPRIATE, PREPARE A *LEGISLATIVE IMPACT STATEMENT* THAT OUTLINES THE TIME AND RESOURCES REQUIRED FOR ITS IMPLEMENTATION

ISSUE: INITIATING LEGISLATION ON BEHALF OF THE JUDICIARY: The various ministries of the Ukrainian Government are authorized by law to initiate legislation on their behalf for consideration by the Parliament. This is an important privilege that enables them to (i) draft laws and regulations relevant to their mission and responsibilities, and (ii) draft amendments to existing laws and regulations. By comparison, however, the judicial power of the government has no such authority and, notwithstanding its independence, is relegated to pursuing other secondary avenues for pursuing its legislative interests and needs. The Supreme Court used to exercise such authority but it was withdrawn on grounds that the exercise of such authority violated the separation of powers principles.

It is curious indeed that separation of powers principles would be invoked to prohibit the Supreme Court from initiating legislation but that invocation of those same principles permit the various ministries which are generally included within the executive power of the state to continue to exercise that function. It also is surprising that the judicial power has not filed a case in the Constitutional Court challenging that interpretation and the inconsistent application of the separation of powers principles.

In the United States, the judicial power has the authority to draft amendments as well as new rules regarding civil procedure, criminal procedure, bankruptcy procedure, appeals procedure, and evidence. And it has established permanent committees that

meet twice yearly to review existing procedural codes and determine whether changes to them are required. Drafts of new rules and amendments to existing rules are then approved by the congress of judges and sent directly to the parliament. The parliament then has 90 days in which to either modify the drafts or to reject them. Under law, if the U.S. parliament does neither, the drafts changes automatically become law.

RECOMMENDATION: THAT THE FOUR HEADS OF THE COUNCILS OF JUDGES JOINTLY SEEK PASSAGE OF LANGUAGE AMENDING THE RELEVANT LAW(S) TO PROVIDE FOR COUNCIL OF JUDGES AUTHORITY TO INITIATE LEGISLATION ON BEHALF OF THE UKRAINIAN COURT SYSTEM

RECOMMENDATION: THAT ONCE SUCH AUTHORITY IS GRANTED, THE COUNCILS OF JUDGES CONSIDER ESTABLISHING WITHIN THE SJA AN OFFICE OF LEGISLATIVE AFFAIRS

Such office would be staffed with a small number of experienced professionals such as former Verkhovna Rada staff members with legislative drafting experience. Their primary function would be to assist the Councils of Judges in preparing and shepherding proposed legislation through the process of having it considered and approved.

CONCLUSIONS

In spite of its limited scope, this review has identified a huge number of critical budgeting factors impairing Ukraine's efficient court operations. Many of the changes suggested in this report have been designed as long-term goals for the judiciary, given the need to introduce changes to the legislation, and consideration should be given to them as part of any strategic planning efforts undertaken by the judiciary. However, there are several recommendations which the Council of Judges jointly with the State Judicial Administration may work to implement without any legislative changes. We recommend that FAIR jointly with the SJA and the COJ review these recommendations

and if appropriate, explore the possibility to launch pilot programs in order to test their viability and efficiency.