

# ROUND TABLE ON “REOPENING OF PROCEEDINGS FOLLOWING A JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS”

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The Moldovan experience

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Dear colleagues,

I have the honour to speak almost at the end of our round table, so I can benefit from the discussions that we have already had. My task in presenting the Moldovan system of reopening is rather easy because our domestic courts and authorities do not oppose, in principle, to the reopening of the proceedings, save some exceptional cases. However, I am sure; every state has its own exceptional cases and the present round table, in my opinion, should in particular address both – the good practices and some difficult situations that raise questions. So, while sharing the experience of the Republic of Moldova in reopening of the civil proceedings I will describe both: our good practices and situations that require attention.

In the beginning, very briefly, about our proceedings on civil reopening. In the legal system of my country, the law allows both the applicant and the Governmental Agent to seek reopening of the domestic civil proceedings by lodging an extraordinary revision appeal before the Supreme Court. The procedural conditions are rather formal; the existence of a judgment of the European Court finding a violation and the six-month time limit since it was delivered. Concerning the last point, as you may observe, the applicant is allowed to apply to the Supreme Court even when the judgment is not yet final. This may create some issues, if for example, the Government would seek referral of the case to the Grand Chamber or it is premature to ask reopening until the just satisfaction has been paid. But we did not have such situations in practice because the applicants usually apply for reopening on the very last day of that six-month time-limit.

The text of the relevant article from the Civil Procedure Code regulating such a revision procedure repeats the logic of the Committee of Ministers Recommendation on reopening, stating specifically that reopening can be requested “if the European Court found a violation, or the Government made unilateral declaration admitting a violation, which can be remedied, at least in part, by revision and annulment of a domestic judgment”.

A specific feature of our procedure of reopening of the civil proceedings is that, after the amendments of 2012, the Agent for the Government can seek reopening of the civil proceedings on his own. I am not sure whether others countries have the same powers afforded to the Agent, though I know that in some countries the agent is allowed to intervene in the proceedings. This possibility for the Agent was introduced in Moldova mainly for two reasons: first, in order to give guidance and opinion of the Agent before the Supreme Court about the requested reopening and its

limits, and, secondly, in order to seek reopening when the applicant does not seek such a reopening, though it may be needed.

I will explain in detail both situations:

1) The first situation is the following

The practice of our Supreme Court reveals that it is rather difficult for it to assess whether the case needs to be reopened and, if yes, what are the limits of such a reopening. We discussed during our round table that in particular in the civil proceedings the limits of reopening are not clearly defined because the European Court cannot speculate on the outcomes of the domestic case. So, the European Court finds a procedural violation of the Convention which does not necessarily affect the outcomes of the domestic case, be that, for example, non-summoning of a party to the hearing or admission of an appeal out of time without proper reasoning. In many cases these kind of violations would not influence the outcomes of the case at the domestic level and the reopening should specifically look only into repairing this violation. Nevertheless, the applicant sometimes seeks by means of reopening to overrule the entire case in his favour, which is not always grounded. In other situations, the violation found by the Court is so fundamental that it actually affects the outcomes. For example, in some civil cases there could be an admission of a civil action outside of statute of limitations or lack of personal capacity to lodge an action. So, these actions are already fundamentally flawed in such a way that should the domestic courts had observed these shortcomings the results of the case would have been different. The applicants are sometimes unwilling or unable to explain this before the Supreme Court and rely entirely on the European Court's judgment, which being declaratory may or may not address these questions. Therefore, the Agent comes with his knowledge of the case and may provide the Supreme Court with his view on the reopening. Also, I had situations in my experience when the applicants speculated at the domestic level on the violations found by the European Court and in such cases the involvement of the Agent was helpful to balance the extensive claims.

The Government Agent can also support the request for reopening lodged by the applicant. Thus, in a case (Grafescolo S.R.L.) the applicant requested reopening of the proceedings following the European Court's judgment finding violation of Article 6 para 1 of the Convention. The Supreme Court initially refused to reopen the domestic proceedings. Then the Government Agent intervened *proprio motu* with a request for reopening supported by proper argumentation that was finally accepted by the Supreme Court.

2) And here we arrived to the second situation:

We had several cases before the respective amendments of 2012 giving the Agent the power to seek reopening, in which the European Court delivered judgments on the merits while reserving the procedure on just satisfaction because of the complexity of the claims and inviting the parties to reach an agreement. In order to find that agreement and decide on awarding the financial claims, the case usually should have been reopened but, as I mentioned, before the amendments the applicant was the only subject to seek the reopening on the case. The applicant did not seek reopening but rather preferred to continue the proceedings at the European Court hopping for bigger financial perspectives, and the Government though afforded the legal possibility for reopening could not have them reopened. Therefore, it was agreed to introduce the possibility for reopening in such situations at the motion of the Governmental Agent. This would support my assertion from yesterday that the reopening of the proceedings should serve the scope of repairing a violation alongside with the just satisfaction.

In this sense, following the questions discussed yesterday, I would like to mention that we also had cases in which applicants' claims for just satisfaction were refused by the European Court on account of the lack of causal link between the violation and the claims. In several such situations, the applicants sought the reopening of domestic proceedings claiming the same just satisfaction, but this time before the domestic courts.

Currently there is another case against Moldova pending execution that concerns violation of the right of access to a court of the applicants in the defamation actions lodged against a high-ranking state official due to his immunity against libel actions. I think that the applicants might seek re-initiation of their defamation actions by means of legal provisions allowing reopening of civil proceedings following the European Court's judgment. For us it will be a new situation to deal with.

Finally, I would like to say that I can bring many examples in which the question of reopening is not so simple as it appears from the outset. To me it seems that it is not anymore sufficient to set out the legal way for an applicant to seek reopening and to pass him/her the full discretion on whether to ask it or not. This procedure would benefit, in my opinion, if it will involve the Governmental Agent. Also, I think that the European Court should be more explicit in its judgments as regards reopening. As I mentioned yesterday, only a judicial power such as the European Court can directly recommend reopening to another judicial power.