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Meeting: 1362nd meeting (December 2019) (DH)

Communication from an NGO (11/10/2019) and reply from the authorities (23/10/2019) in the case of Zelenchuk v. Ukraine (Application No. 846/16)

Information made available under Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1362^e réunion (décembre 2019) (DH)

Communication d'une ONG (11/10/2019) et réponse des autorités (23/10/2019) dans l'affaire Zelenchuk c. Ukraine (requête n° 846/16) (**anglais uniquement**).

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



1

The President of the Committee of Ministers
Department for the Execution of Judgments of the European Court of Human
Rights, Council of Europe, Strasbourg, France
DGI-execution@coe.int
20 September 2019

By E-mail Only

10 October 2019

Kyiv, Ukraine

Communication
from *EasyBusiness* pursuant to Rule 9.2 of the Rules of the Committee of
Ministers of the Council of Europe for the supervision of the execution of
judgment in the case *Zelenchuk and Tsytsyura v. Ukraine*
(application nos. 846/16 and 1075/16)

1. *EasyBusiness* is Ukrainian independent non-profit civil society organization with the mission to create favourable conditions for business operation by improving regulatory environment in Ukraine. Our primary goal is reducing state regulatory burden on business by simplifying procedures, reducing the number of regulatory authorities and frequency of inspections, abolishing unnecessary permits and licenses etc.
2. On May 23, 2018, European Court of Human Rights delivered the judgment in the case of *Zelenchuk and Tsytsyura v. Ukraine*, recognizing that the moratorium on farmland sale in Ukraine is a violation of property rights. Despite the fact that the decision came into force on 22 August 2018, the previous Ukrainian Government has not taken measures to restore the rights of 7 million Ukrainians. The implementation of the decision remains problematic and requires further supervision and meticulous review by the Committee of Ministers of the Council of Europe.
3. *EasyBusiness* was also involved in the proceedings before the Court as a third party intervener and as an entity that submitted *amicus curiae* has an intention to follow

up on the measures of implementation of the above judgment.¹ These submissions were summarised by the Strasbourg Court as follows:

“... 93. EasyBusiness submitted certain information concerning the history of the land reform in Ukraine and the structure of its agricultural sector. In particular, according to them, from 1996 to 2009 two thirds of Ukraine’s agricultural land was transferred into private ownership and 94% of the rural population converted their shares of land into land plots. As a result, legally the land was fragmented into small parcels. However, agricultural production had not been so fragmented since in practice the agricultural producers rented large areas from numerous owners, with the ten top agricultural companies renting from 150 to 654 thousand hectares. They were using the resulting economies of scale to accumulate additional financial resources which in turn skewed the balance in the rental market in their favour.

94. The intervener argued that the moratorium violated the constitutional provisions guaranteeing property rights (see paragraphs 24 and 25 above). It prevented the creation of a transparent land market and owners from earning adequate income from their land.

95. The existing situation did not mean that there was no market in land, but rather that it was non-transparent, leading economic players to use devious schemes to ensure control over land. It had also led to concentration of control over land in the hands of agricultural holding companies which, as the most common tenants, had disproportionate power over small land owners (the average plot size being four hectares) who had no choice but to accept low rents. The land market was fairly monopolised with the 100 biggest players renting 6.5 million hectares. This had led to abnormally low rents. The interveners pointed out that about two thirds of the seven million individuals who had obtained land in the course of privatisation were senior citizens, the average age of a landowner being fifty-seven, and 79% of them being over fifty.

96. The interveners considered the risks advanced to justify the continuation of the present situation exaggerated. Thus, as to the risk that the land would be sold at meagre prices, international experience showed, to the contrary, that in most countries the creation of a free land market had led to an increase in the value of land. As to the risk of land being bought out by foreigners, no international financial entity possessed the financial resources necessary to buy up the land in quantities which would

¹ Written submissions were received from EasyBusiness, an non-governmental organisation based in Kyiv, which had been granted leave by the President of the Section to intervene as a third party (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court) (see par. 5 of the judgment).

constitute a threat and high land fragmentation made this risk even less realistic. As to the possible lifting of the moratorium increasing the pressure on small farmers, the interveners considered, to the contrary, that the lifting of the moratorium would be beneficial to them by increasing their access to financing. ...»

5. Once again, EasyBusiness, reconfirms its previous position made before the European Court, in that the continued existence of the moratorium would continue to violate the property rights of vast number of persons, who remain victims of this unjustified, arbitrary and disproportionate prohibition on sale of agricultural land. It also notes that *de facto* the position of EasyBusiness, which was very much similar to the position of the applicants, had been reconfirmed by a final and binding judgment of the European Court of Human Rights. Already almost two years have passed since the judgment became final, but the moratorium continues to exist, with no major action taken by the authorities for its full annulment. Some of the reported actions of the authorities include individual measures of payment of just satisfaction (costs and expenses) as well as the general measures, which notably included development of a Draft Law "On sale of agricultural land", judicial practice and dissemination and publication measures.²

ECHR judgment

6. In 2018 in the case of *Zelenchuk and Tsytysyura v. Ukraine* (application nos. 846/16 and 1075/16) **European Court of Human Rights** found that the moratorium Ukraine's absolute ban on buying and selling of land violates the property rights³. The court has judged that the moratorium causes the violation of Article 1 of Protocol No. 1 of the European Convention on Human Rights (protection of property).

7. Additionally, the Court in its judgment underlined several specific traits of the moratorium, i.e. that it existed for a lengthy period of time, had broad scope and was of

² The Ukrainian authorities submitted an action plan on 1 March 2019 (see [DH-DD\(2019\)254](#)) and provided the following information, which is being assessed by the Department for the Execution of judgments of the European court of human rights. <http://hudoc.exec.coe.int/eng?i=004-50173>

³ See, *Zelenchuk and Tsytysyura v. Ukraine* (judgment on the merits): [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-183128%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-183128%22]})

its blanket and inflexible nature. The judgment also ruled that the state had not struck a fair balance between the general interest of the community and the property rights of the applicants and imposed on them the excessive burden of the authorities' failure to meet their self-imposed goals and deadlines (§147). The Court also held under Article 46 of the Convention that the problem underlying the violation of Article 1 of Protocol No. 1 concerns the legislative situation itself and that its findings extend beyond the sole interests of the applicants in the instant case as exceptionally large number of individuals are affected by the moratorium.⁴

8. In terms of the general measures, the Court requested that "*... the respondent State should take appropriate legislative and/or other general measures to ensure a fair balance between the interests of agricultural land owners on the one hand, and the general interests of the community, on the other hand, in accordance with the principles of protection of property rights under the Convention*" (§ 150 of the judgment).

Current Status

Legislative actions.

8. As of now, no legislative measures as requested by the Court were taken. In July 2018 (after the decision was adopted but before its entry into force) the Verkhovna Rada by the adoption of the Law no 2498-VIII tightened the provisions of moratorium (the exception to moratorium allowing exchange contracts was limited to land parcels within one tract of land).

9. Moreover, despite the European Court of Human Rights decision, in 2018 the moratorium was technically "extended" for at least one more year (Law of 20 December 2018 No.2666-VIII). This extension is only technical as in fact the moratorium can be terminated only through a separate legislative action (this particular wording of the relevant provision of the Land Code of Ukraine were analyzed in much detail in the decision of the Court). Still, the extension is a very alarming indicator.

⁴ Hudoc-exec information on the Zelenchuk and Tsytsyura judgment:

Court practice.

10. Despite several decision of the courts of lower instances (in Donetsk Region) directly applying the provision of the Convention and the judgement in the *Zelenchuk and Tsytsyura* case to the effect that the provisions on the moratorium are not applicable⁵, the Grand Chamber of the Supreme Court in one of these cases failed to rule on the issue of compatibility of moratorium with the Constitution of Ukraine and the Convention, limiting itself to the conclusion that the provisions on the moratorium did not extend to the matter before the court⁶.

11. At the same time, there are reports⁷ that other courts of the first instances applied the provisions on moratorium to the effect that alienation of agricultural land is prohibited without paying attention to the judgment in the *Zelenchuk and Tsytsyura* case.

Economic context of the moratorium.

12. The moratorium was introduced in order to prepare the legislative base for farmland turnover and prevent the concentration of land. In fact, the restriction does not reflect public interest. It serves as a detrimental factor not only for the individual landowners, but also to the entire society.

13. The small average size of land plots (4 hectares) makes it economically unreasonable for the owners (most of whom are elderly people or reside in other locations) to farm the land on their own. The only available option is to lease out the land plots, but insofar this is the only option the lease rates are extremely low (around USD 60 in 2018⁸). Also, the inability to sell land plots fully precludes the owners from using the land as collateral.

⁵ See <http://reyestr.court.gov.ua/Review/79616669> and <http://reyestr.court.gov.ua/Review/795>. The approach of the court of the first instance was upheld by the appellate court.

⁶ See http://www.reyestr.court.gov.ua/Review/82568415?fbclid=IwAR3egn_u3PEIcyeYX2EDjYZCBravDK-8klIHQx8yjKblikZ1H053xNHmApk.

⁷ See, for instance, <https://uba.ua/ukr/news/6754/>

⁸ The State Service of Ukraine for Geodesy, Cartography and Cadastre (StateGeoCadastre) statistics regarding farmland rent prices in Ukraine: <https://land.gov.ua/orenda-silskohospodarskykh-zemel-zberihaietsia-dvorazovyi-rozryv-mizh-platoiu-za-derzhavni-ta-pryvatni-zemli/>

14. Moreover, the moratorium affects the efficiency of the Ukrainian agricultural business. The structure of agricultural ownership resulting from the existence of the moratorium is inefficient (around 5 million hectares belong to the top 100 agricultural holdings while the other 85% of the land is owned by small landowners)⁹.

15. Inadequate financing of the agricultural sector due to the lack of access to cheap credit resources of SME leads to low profitability of the sector (EBITDA USD 150-200). Only some agricultural holdings have the opportunity to attract financial resources through loans, IPO, Eurobonds (MHP, Ukrlandfarming, Nibulon, Kernel), which discriminates the rest of agricultural producers and distorts competition.

16. According to *EasyBusiness*' recent calculations, lifting the moratorium and launching the farmland market will lead to significant increase in landowner's welfare. First of all, under market conditions lease rate will be growing rapidly demonstrating the growth of **up to 260%** for ten years. Secondly, landowners will be able to sell their land for a fair price, that can reach **USD 1 200 - 3 500** depending on the introduced market model. Also, landowners will get a possibility to use their land plots as a collateral to get a bank loan.

17. The abolishment of the moratorium will also lead to an increase in competitiveness of Ukrainian agribusiness. Companies that do not rent but actually own farmland are more interested in making long-term investments. The free turnover of farmland will also boost the development of new financial instruments that will serve companies' needs, and attract foreign investors to Ukrainian agricultural industry.

18. *EasyBusiness* estimates a total effect of land reform in Ukraine to be **between USD 70 and 105 billion of additional GDP** for ten years that will consist of an increase in consumer spending, domestic and foreign investments and tax revenues.

19. In addition to the above, lifting a land moratorium is a requirement (in a sense a binding recommendation) from the IMF, which considers the agricultural land market underdeveloped due to a moratorium, limiting the expansion of this key sector and leaving

⁹Calculations are based on data from <https://lalifundist.com/rating/top100>

the rural population poor.¹⁰ Similar position is taken by the experts from the World Bank, who state that: "The economic case for lifting the moratorium is clear. But unless this is done transparently, the risks may outweigh the benefits. In a country that has seen enormous public wealth disappear through corruption and theft, and with public institutions charged with the prevention of this kind of malfeasance yet to demonstrate their effectiveness, many fear that any change to the current system will lead to concentration of land in the hands of the elite. Thus, beyond the economic reforms/measures listed above, fair and transparent reform of Ukraine's land market would demonstrate to Ukrainians—and the world—that the country can ensure that its unique natural resources can benefit all of its citizens."¹¹ The

New developments

20. The election of new President, Parliament and appointment of new Cabinet of Ministers has established preconditions for the implementation of long-awaited changes and the execution of the judgement. The necessity of opening farmland market is recognized by President Volodymyr Zelenskyi¹², members of the ruling party¹³ and new Minister of Economic Development, Trade and Agriculture of Ukraine¹⁴.

21. On 26 October 2019 the draft law "On farmland turnover" was introduced by the Cabinet of Ministers in Verkhovna Rada (registrational no. 2178¹⁵). The draft law provides for relatively liberal rules on agricultural lands turnover but is designed to come in effect starting with 1 October 2020. The necessity for such a long transitional period is explained

¹⁰ IMF information on major reforms required in Ukraine: <https://www.imf.org/en/News/Articles/2017/04/03/na040417-ukraine-receives-imf-support-but-must-accelerate-reforms>

¹¹ World Bank review of the land market reforms: <https://www.worldbank.org/en/news/opinion/2017/10/02/ukraine-can-boost-annual-output-us15-billion-with-land-reform>

¹² President of Ukraine Volodymyr Zelenskyi interview regarding moratorium on farmland sale: <https://www.pravda.com.ua/news/2019/09/2/7225078/>

¹³ Head of the Servant of the People political party David Arahamia interview regarding moratorium on farmland sale: <https://agropolit.com/news/12974-yaki-zmini-bidbudutsya-v-minagropolitiki-ta-koli-chekati-vidkrittya-rinku-zemli--david-arahamiya>

¹⁴ Minister of Economic Development, Trade and Agriculture of Ukraine Tymofiy Mylovanov interview regarding moratorium on farmland sale: <https://biz.nv.ua/ukr/economics/rinok-zemli-milovanov-nazvav-dva-golovni-kriteriji-novini-ukrajini-50041004.html>

¹⁵ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66948

by the need to provide Ukrainian farmers with the financial instruments facilitating land acquisition.

22. The major provisions of the draft law are as follows:

- to lift moratorium on 1 October 2020;
- to allow sale of land to citizens of Ukraine, legal entities founded under the laws of Ukraine (currently this possibility is open only to entities founded by Ukrainian citizens), municipalities and the State;
- to put a cap on ownership of land per subject of ownership and affiliated persons and entities by not more than 15% of the agricultural lands within the region, including the Crimea, and 0,5% of agricultural lands in Ukraine;
- to create contract prices on sale of land registration system (through the registry of titles);
- to grant those with a right to permanent tenancy of land a possibility to purchase land at its normative price (which is regularly lower than a market price).

23. *EasyBusiness* welcomes the introduction of the draft law, which, in our opinion, is essentially in line with the provisions of the Convention. Citizenship requirement and requirements as to the nationality of the legal entities do not raise the issue under the Convention and remain within the wide margin of appreciation on behalf of the state. The preferential conditions for conversion of permanent tenancy title into the ownership title seem reasonable and justified and do not infringe the permanent tenancy title.

24. However, the proposal to adjourn the enactment of the law to 1 October 2020 raises serious concerns and creates serious legal and economic risks. Considering the seriousness of the situation with the violation of fundamental human rights in this case, the date of coming the *Zelenchuk and Tsytsyura* judgment into force (22 August 2018), the number of the owners affected (7 million, while more than a million of original owners have died by now), we think that such a delay is unreasonable. The risk of mass claims being lodged with the domestic courts and/or the European Court of Human Rights with a view to compensation for inability to sell land is high.

25. It seems not realistic that Ukraine would be able to develop and support economically any adequate mechanism allowing effective remedies for the transitional period covering the losses of approximately 7 million of victims. Therefor the only solution to the problem and the only way to mitigate the risks is to lift moratorium as soon, as possible.

26. There should be no delay in implementation of normative acts and provision of required funding, which is necessary to implement the draft law. The absence of implementation mechanism and funding should not create new obstacles for agricultural lands turnover. Excessively formalistic procedures for checks of land and registration should also be avoided, not to create yet another "excessive individual burden".

27. The Deputy Minister of Economy, Trade and Agriculture Taras Vysotsky announced that the adoption of the Law is expected before the 1 December this year¹⁶. The law "On farmland turnover" can be passed now since pro-presidential party has a majority in the Parliament. As a result, the political will for adopting changes now might be higher than ever.

28. However, the political pressure on the Government from the agricultural lobby benefiting from moratorium is rather strong. The risk is very high that this pressure can undermine the efforts to lift the moratorium. The opposition politicians introduced the alternative draft laws (registration nos. 2178-1¹⁷, 2178-2¹⁸, 2178-3¹⁹, 2178-4²⁰). All those initiatives are aimed at preserving the moratorium and/or introduction of unreasonable and disproportional limitations contrary to Convention on the property rights affected now by the moratorium (for instance, the suggestion is made to resolve the issue on moratorium lifting through referendum). There is also a significant risk that separate legislative initiatives will be launched with the same aim (in particular, aimed at the

¹⁶ <https://biz.liga.net/ekonomika/all/novosti/u-agrarnoy-akademii-zaberut-bolee-80-zemel>

¹⁷ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66957

¹⁸ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66961

¹⁹ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66975

²⁰ http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66979

establishment of disproportionate preemption rights for existing tenants, mostly large agricultural enterprises).

EasyBusiness' recommendations

29. Considering everything mentioned above, it is crucial for the Government to pass the draft law no. 2178, enact and implement it, through respective implementing normative acts suggested in the law, in its transitional provisions, as soon as possible without introduction of new unreasonable limitations of property rights currently affected by the moratorium. Any delay can cause extreme negative economic and social consequences. Even a delay until the date of entry of the law into force can lead to substantial problems.

30. Our NGO would also suggest that the Ukrainian authorities should look into adoption of the necessary measures to lift the moratorium and to ensure liberalization of the land market jointly with their international partners, including the World Bank and International Monetary Fund, as well as the European Union through its projects.

31. *EasyBusiness* is concerned with the developments in the domestic judicial practice, however, considers that these developments could be put down by the adoption of respective legislation, mentioned above.

32. *EasyBusiness* would like to ask the Committee of Ministers of the Council of Europe to put this matter into serious consideration and request from Ukrainian Government to take quick and appropriate measures to fulfill the general measures prescribed by the Court, ensuring full compliance with the obligation to enforce the judgment of the Court, a requirement that ensues from Article 46 of the Convention.

33. Our NGO would continue to inform the Committee of Ministers of the domestic developments with regards to this case.



EasyBusiness NGO


DGI

23 OCT. 2019

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**УКРАЇНА
УПОВНОВАЖЕНИЙ У СПРАВАХ ЄВРОПЕЙСЬКОГО
СУДУ З ПРАВ ЛЮДИНИ**

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Mr Pavlo Pushkar

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*As to the case of
"Zelenchuk and Tsytsyura v. Ukraine"*

Dear Mr Pushkar,

Please let me emphasise once again that the Government of Ukraine do not cast any doubt on the binding force of the European Court's of Human Rights (the "Court") judgments.

In this regard the Government would like to express appreciation to civil society organisation *EasyBusiness* for their genuine interest to the issues of ensuring of property rights in Ukraine, especially in providing of a comprehensive analysis of economic conditions and new legislative developments relating to the land market reform.

The Government of Ukraine would like to note that *EasyBusiness* conclusions and recommendations submitted under the Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, relating to general measures, that should be taken in order for effective implementation of the Court's judgment in case of "*Zelenchuk and Tsytsyura v. Ukraine*" (appl. nos. 846/16 and 1075/16) are taken into account by all authorities concerned.

It should be noted, however, that the information on measures already taken within the execution of the above judgment, with required comprehensive approach addressing to a problem of land moratorium, was submitted in the Government updated action plan of 16 October 2019.

Moreover, the Government of Ukraine would like to note that formation of transparent agricultural land market is a strategic goal of Ukraine. In this regard, the authorities will continue to take all necessary measures for implementation of the Court's judgment in this case and in order to prevent further similar violations of the Convention.

The Government of Ukraine underline that they are open to any comments and recommendations provided by the non-governmental organisations which will be able to facilitate the execution of the Court's judgments.

Yours sincerely,

Ivan LISHCHYNA
Agent
before the European Court of Human Rights