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Communication from Ukraine concerning the case of Agrokompleks against Ukraine (Application No. 23465/03)

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Réunion : 1250 réunion (8-10 mars 2016) (DH)

Référence du point : Plan d'action mis à jour

Communication de l'Ukraine concernant l'affaire Agrokompleks contre Ukraine (Requête n° 23465/03) (***anglais uniquement***)

Annex to the letter of the Acting Government
Agent of Ukraine before the ECHR
of 07.12.2015 no. 8036/12.0.1-41-15

Updated Action plan
on measures to comply with the Court's judgment
in the case of Agrokompleks v. Ukraine
(appl. no. 23465/03, judgment on merits of 06/10/2011, final on 08/03/2012; judgment on just satisfaction of 25/07/2013, final on 09/12/2013)

Case summary

This case concerns the insolvency proceedings initiated by the applicant-company against the biggest oil refinery in the country, in which the State was the major shareholder.

In this case the Court found three violations of Article 6 § 1 of the Convention due to the lack of independence and impartiality of the domestic courts hearing the case, the excessive length of the proceedings (1997-2004) and due to the quashing of the final judicial decision awarding payments of arrears to the applicant company under newly-discovered circumstances in breach of the principle of legal certainty. The Court also found violation of Article 1 of Protocol No. 1 on account of interference with the applicant company's rights to peaceful enjoyment of possessions on account of the reduction of the amount of the debt due to it under the final and binding judgment, as a result of the reopening of the case on the basis of newly-discovered circumstances. The Court also noted that no "fair balance" was struck between the demands of the public interest and the need to protect the applicant company's right to peaceful enjoyment of its possessions.

I. Individual measures

Just satisfaction

The court awarded the applicant company total sum of EUR 27, 000, 000 (twenty-seven million euros) in respect of pecuniary and non-pecuniary damage that had to be paid in two instalments:

1. EUR 13,500,000 (thirteen million five hundred thousand euros) within twelve months and
2. the remaining EUR 13,500,000 (thirteen million five hundred thousand euros) within twenty-four months of the date on which the judgment becomes final,
3. EUR 30,000 (thirty thousand euros) in respect of costs and expenses.

In their previous action plan (09 July 2015) the Government informed the Committee that the amount of EUR 30,000 was transferred to the applicant's account on 25 December 2014, and default interest in the amount of UAH 15 492,84 was paid on 16 February 2015.

The first installment of just satisfaction awarded to the applicant company in the amount of EUR 13 500 000 (UAH 335 036 547,00) was transferred to the applicant's account on 17 September 2015 (payment order of 15 September 2015).

As to the remaining part of the just satisfaction, the Government would like to note that in compliance with Committee's decision adopted at its 1236th meeting on 24 September 2015, the authorities would undertake the necessary measures in order to ensure the payment of the second instalment, together with any possible default interest.

Restitutio in integrum

While examining the applicant company complaints, the Court came to the following conclusions in this case:

"83. In establishing the pecuniary damage flowing from violations of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 on account of setting aside a final judicial decision in an applicant's favour contrary to the res judicata principle, the Court's traditional approach has been to award the applicant the sum which he/she would have received had the judgment in question not been quashed, deducting the subsequent domestic award if there had been any (see, for example, Stanislav Volkov v. Russia, no. 8564/02, § 40, 15 March 2007; Zheltyakov v. Ukraine, no. 4994/04, § 73, 9 June 2011; and Bezrukovy v. Russia, no. 34616/02, § 53, 10 May 2012).

84. Bearing this in mind, the Court considers that in the present case the applicant company should have the right to recover the money to which it was entitled by virtue of the HAC ruling of 2 July 1998, less the value of the LyNIK shares transferred to it by way of repayment of the debt in 2003 (see and compare Oferta Plus SRL v. Moldova (just satisfaction), no. 14385/04, § 71, 12 February 2008).

...

93. Having regard to the lapse of time, the large number of imponderables involved and the impossibility of quantifying the applicant company's pecuniary and non-pecuniary losses in exact terms, the Court considers that it must rule in equity and make a global assessment, taking as a starting point the award under the HAC ruling of 2 July 1998 (see paragraph 84 above).

94. In view of the above, the Court considers it reasonable to award the applicant company an aggregate sum of EUR 27,000,000, covering all heads of damage, plus any tax that may be chargeable on that amount."

Thus, the amount of just satisfaction awarded by the Court includes all heads of damages to the applicant company. Moreover, in assessing the amount of damages, the Court acknowledged the fact that the debtor went bankrupt and was liquidated.

As in the present case the violations found by the Court steam mainly from unfairness of the proceedings before the domestic courts, the reopening of proceedings could have been the only additional individual measure capable of redressing the violations at issue. However, the procedure of reopening of proceedings based on Court's judgments is established by Articles 111^{14} – 111^{28} of the Commercial Procedural Code of Ukraine, according to which only the person in whose favor the judgment was delivered by the Court, may request the reopening of proceedings. Such a request should be lodged within one month from the date when the person found out about the fact the judgment of the Court became final.

As the Government noted in its action plan of 13 December 2012, by the letter of 12 April 2012 the applicant company was informed that the Court's judgment became final, as well as about the possibility provided by national legislation in force to apply for the review of the impugned proceedings. However, the applicant company did not avail itself of such possibility.

In such circumstances, the current legislation does not provide for additional individual measures, which could be taken by the State after such a lapse of time and in the absence of the applicant's request.

Moreover, the applicant company itself noted in its communication to the Committee that the review by the Supreme Court of Ukraine is ineffective due to liquidation of the debtor company. Additionally, in many letters addressed to the Government Agent since the delivery by the Court of its judgment on just satisfaction, the applicant company didn't express its interest in reopening of proceedings or any other form of *restitutio in integrum*, and only complained on failure of the State to pay amounts awarded by the Court.

Thus, in view of the above, and also in view of the Court's conclusions in this case it appears that no individual measures are required.

However, shall the applicant company wish to bring the question of individual measures up, the Government would be ready to discuss it in cooperation with the Committee.

II. General measures

In addition to the information provided by the Government in their action plan for the case of *Oleksandr Volkov v. Ukraine* (09 April 2015), the Government would like to note that the process of judiciary reform is still ongoing in Ukraine.

Thus, on 27 October 2014 and on 03 March 2015 by his Decrees the President of Ukraine established the Council of Reform of Judiciary in Ukraine and the Constitutional Commission respectively. These high-level bodies consist of heads of central executive authorities, representatives of judiciary, law schools, international organizations as well as leading experts in the area of judicial reform, and they work on development and implementation of the State policy on reform of judiciary in Ukraine.

Following the adoption by the Parliament of the Law of Ukraine on Ensuring the Right to Fair Trial which put into effect the new Law on Judiciary and Status of Judges (*see abovesaid Action plan for Volkov case*), on 25 November 2015 President of Ukraine submitted to the Verkhovna Rada of Ukraine the draft law of Ukraine "On Amendments to the Constitution of Ukraine (on justice)" (no. 3524). This draft law which was approved by the Constitutional Commission on 30 October 2015, proposes amendments aimed at improvement of constitutional principles of justice and of the rule of law in order to ensure every citizen's right to fair trial by an independent and impartial court within a reasonable time.

Simultaneously with the Constitutional reform, the authorities work on legislative amendments concerning procedures before the national courts. The Government would make sure these draft laws comply with European standards, the Court's case-law being one of them.

The Government would keep the Committee informed on the progress with the respect of any further developments related to the processes at isse.

III. Conclusions of the Respondent Government

The Government will keep the Committee of Ministers informed about further developments and measures taken.