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OPINION

on the draft law

“On amendments to some legislative acts of Ukraine as to improvement of the judicial control under execution of national courts judgments”

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The opinion was prepared within the framework of the Council of Europe Project “Support to the Functioning of Justice in the War and Post-War Context in Ukraine” which is implemented by the Co-operation Programmes Division of the Council of Europe

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List of abbreviations

CCJE - Consultative Council of European Judges

CEPEJ – Council of Europe’s European Commission for the Efficiency of Justice

CEPEJ-GT-EVAL Working Group on the evaluation of judicial systems of the European Commission for the Efficiency of Justice (CEPEJ)

COMONEX - World Code on Enforcement; international principles on enforcement as developed by UIHJ, the International Union of Judicial Officers

The Convention - European Convention on Human Rights

The Court - European Court of Human Rights

UIHJ - the International Union of Judicial Officers

Introduction

1. The Council of Europe was requested by the Ukrainian Parliament on 29 March 2023 to review the draft law “On amendments to some legislative acts of Ukraine as to improvement of the judicial control under execution of national courts judgments”, to assess its compliance with relevant Council of Europe standards.
2. This opinion is delivered in the context of the Council of Europe project “*Support to the functioning of justice in the war and post-war context in Ukraine*”, which is implemented by the Co-operation Programmes Division as part of the Council of Europe Action Plan “Resilience, Recover and Reconstruction” (2023-2026) for Ukraine. It was drafted by Grzegorz Borkowski, an international consultant of the Council of Europe ¹.
3. Ukraine has been a member of the Council of Europe since 9 November 1995. The European Convention on Human Rights (hereafter “the Convention”) entered into force in respect of Ukraine on 11 September 1997.
4. Under Article 46 § 1 of the Convention, final judgments of the European Court of Human Rights (hereafter “the Court”) must be executed. Under Article 46 § 2 of the Convention, the Committee of Ministers of the Council of Europe shall supervise the execution of such judgments. After the finding of (a) violation(s) of the Convention, the respondent State must not only rectify the applicants’ situation (“individual measures”), but also adopt those measures which are needed to prevent violations similar to those found by the Court (“general measures”). With regard to Ukraine, one of the main execution issues pending before the Committee of Ministers (general measures) is the major structural problem of non-enforcement or delayed enforcement of domestic judicial decisions, mostly delivered against the state and the state enterprises, and to the lack of effective remedies in this respect (e.g. *Zhovner* group (56848, final on 29/09/2004, *Yuriy Nikolayevich Ivanov* (40450/04, pilot judgment, final on 15/01/2010) and *Burmych and Others* (46852/13, final on 12/10/2017). The execution of these judgments is followed by the Committee of Ministers under its “enhanced procedure”.
5. The present analysis takes into account the Memorandum of the Department for the Execution of Judgments of the European Court of Human Rights of the Council of Europe in cases examined by the Committee of Ministers concerning the non-enforcement or delayed enforcement of domestic judicial decisions in Ukraine (case of *Yuriy Nikolayevich Ivanov* against Ukraine and group of cases of *Zhovner/ Burmych and Others* against Ukraine),² as well as the recommendations of the Committee of

¹ Dr. Grzegorz Borkowski, Polish judge, former Head of Office of the National Council of Judiciary in Poland and Head of the International Cooperation Department of the National School for Judiciary and Public Prosecution in Poland, as well as former Head and member of the Council of Europe Consultative Board of HELP Programme, currently working as International Legal Expert in the Balkan region.

² Available at : [https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:\[%22HEXEC\(2021\)8-UKR-GROUPS-Ivanov-Zhovner-Burmych-ENG%22\]}](https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22HEXEC(2021)8-UKR-GROUPS-Ivanov-Zhovner-Burmych-ENG%22]})

Ministers to member states on enforcement of judicial judgments³ and respective guidelines of the European Commission for the Efficiency of Justice (the CEPEJ)⁴.

6. The draft opinion and its recommendations were presented and discussed during an online meeting with the relevant Ukrainian authorities on 2 June 2023. The present, final opinion takes into account the conclusions of these discussion.

³ See, e.g., Recommendation CM/Rec (2008)2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ae618

⁴The CEPEJ documents available at: [CEPEJ tools on enforcement of judicial decisions - European Commission for the Efficiency of Justice \(CEPEJ\) \(coe.int\)](https://www.coe.int/t/e/cepej/Tools_on_enforcement_of_judicial_decisions_-_European_Commission_for_the_Efficiency_of_Justice_(CEPEJ).aspx)

1. The Council of Europe and other international standards and practice regarding the execution of judgments

I. Related Council of Europe and international standards

1. General remarks

7. The Committee of Ministers of the Council of Europe adopted in September 2003 two Recommendations in the field of enforcement in non-criminal matters. Recommendation CM/Rec(2003)17 on the enforcement of judgments⁵ defines enforcement as "giving effect to judgments and other enforceable titles, whether judicial or non-judicial, in accordance with the law which obliges the defendant to do, to refrain from doing or to pay what has been decided". This Recommendation is mainly aimed at enforcement in civil matters, while Recommendation Rec (2003)16 focuses on the enforcement of court decisions in administrative matters⁶.

8. Following Recommendation CM/Rec(2003)17, the CEPEJ adopted in December 2009 its Guidelines for a better implementation of the existing Council of Europe recommendation on enforcement⁷. A specific study of the CEPEJ was also made on this subject.

9. The CCJE adopted in 2010 Opinion no.13 (2010) on the role of judges in the enforcement of judicial decisions. In the framework of this topic, the CCJE proposed concrete measures to improve efficiency of enforcement procedures⁸.

10. In December 2015, the CEPEJ took a further step in dealing with the issue of enforcement, by elaborating "Good practice guide on enforcement of judicial decisions"⁹ (CEPEJ (2015)10). This guide focuses its attention on the reception, in national law, of the principles enshrined in Recommendation CM/Rec (2003)17 and developed in the 2009 Guidelines.

11. On 30 March 2021, the CEPEJ Working Group on the evaluation of judicial systems (CEPEJ-GT-EVAL) published a preparatory document called "Specific Study of the CEPEJ on the Legal Professions" with the Enforcement Agents Contribution from the International Union of Judicial Officers (UIHJ)¹⁰.

12. In addition, the CEPEJ, through its questionnaire for the evaluation of judicial systems, evaluates regularly the duration of the enforcement procedures, which constitutes one of the

⁵ Recommendation CM/Rec (2003)17 of the Committee of Ministers to member states on enforcement https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805df135 (hereafter – CM/Rec (2003)17).

⁶ Recommendation CM/Rec (2003)16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805df14f (hereafter CM/Rec (2003)/16).

⁷ Guidelines for a better implementation of the existing Council of Europe's recommendation on enforcement adopted by the CEPEJ at its 14th plenary meeting (Strasbourg, 9 – 10 December 2009) - hereafter CEPEJ 2009 Guidelines - [https://rm.coe.int/ref/CEPEJ\(2009\)11](https://rm.coe.int/ref/CEPEJ(2009)11)

⁸ CCJE Opinion no. 13 on the role of judges in the enforcement of judicial decisions - <https://rm.coe.int/168074820e>

⁹ <https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-good-practice-/16807477bf>

¹⁰ CEPEJ-GT-EVAL(2021)7 - <https://rm.coe.int/cepej-specific-study-enforcement-agents-uihj-2018-data-2757-3579-0339-/1680a1fbac>.

components of the reasonable time of proceedings according to the case law of the European Court of Human Rights¹¹.

13. The Global Code of Enforcement (COMONEX)¹² was officially launched on 3 June 2015, during the 22nd International Congress of Judicial Officers, held in Madrid, Spain. The project was entrusted to the Scientific Council of the UIHJ, to be built around four sections: Guiding principles on enforcement, Provisional measures, Enforcement measures and Enforcement officers.

14. In November 2021, the UIHJ published the Global Code of Digital Enforcement. The UIHJ noted that enforcement professionals are strongly impacted by the digitalisation of justice and enforcement of court decisions, whether it is the electronic communication of documents, access to dematerialised registers, the dematerialisation of enforcement procedures, the digital management of professional activities, or the use of artificial intelligence to set up automated enforcement. In addition, new goods are appearing with digitisation (cryptocurrency for example), which forces us to think about seizure procedures adapted to these digital goods, which by their very nature are global.

2. Judicial control in enforcement

15. Regarding the relationship between courts and enforcement agents, the Recommendation CM/Rec(2003)17 states that the powers and responsibilities of enforcement agents in relation to the judge should be clearly defined to ensure a clear delineation of authority in carrying out the enforcement process.¹³

16. The CEPEJ 2009 Guidelines § 9¹⁴ also refer to the role of courts in the enforcement process. The CEPEJ Guideline § 10 confirms the principle envisaged in the Recommendation CM/Rec (2003)17:

“10. Notwithstanding the role of the court in the enforcement process, there should be effective communication between the court, the enforcement agent, the claimant, and the defendant. All the stakeholders should have access to information on the ongoing procedures and their progress”.

The Guidelines refer to the transparency of enforcement in §§ 9 and 11 :

“9. Member states should take measures to ensure that information is available on the enforcement process and there is transparency of the activities of the court and those of the enforcement agent at all stages of the process, provided that the rights of the parties are safeguarded.

11. Member states should provide the potential parties to enforcement procedures with information on the efficiency of the enforcement services and procedures, by establishing performance indicators against specified targets and by indicating the time different procedures might take”.

¹¹ Ibidem p. 2-3.

¹² <https://www.uihj.com/>

¹³ Recommendation CM/Rec (2003)17 of the Committee of Ministers to member states on enforcement https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805df135, § IV.5 and explanatory memorandum, § 58.

¹⁴ Guidelines for a better implementation of the existing Council of Europe's recommendation on enforcement adopted by the CEPEJ at its 14th plenary meeting (Strasbourg, 9-10 December 2009) - [https://rm.coe.int/ref/CEPEJ\(2009\)11](https://rm.coe.int/ref/CEPEJ(2009)11)

Guideline 12 refers to the supervision (control) over the profession:

“12. Each authority should provide for the adequate supervision (having regard to any relevant case law of the ECtHR) of the enforcement process and should bear responsibility for the effectiveness of the service. Accountability may be achieved by management reports and/or customer feedback. Any reports should allow for verification that the judgment has been executed or (if not) that genuine efforts have been made within a reasonable time whilst respecting the equality of the parties”.

17. Most Council of Europe member states have introduced in their enforcement legislation legal remedies as a method for court intervention against irregularities in the enforcement process. Judicial control in the enforcement process in most countries is limited to this role.

18. Such role of the judiciary as the competent authority to rule on disputes in enforcement proceedings is confirmed by international standards. In this respect, CCJE Opinion no.13 (2010) states that:

“The enforcement procedure must be implemented in compliance with fundamental rights and freedoms (Articles 3, 5, 6, 8, 10, 11 of the [ECHR], data protection, etc.). The decision to be enforced must be precise and clear in determining the obligations and rights engaged in order to avoid any obstacle to effective enforcement.

In order for judges to fulfil their tasks, the judiciary should be entrusted with the following missions concerning enforcement:

- [...] an appeal to a judge if the enforcement is not initiated or is delayed by the relevant bodies; a judge should also be involved when fundamental rights of the parties are concerned; in all cases, the judge should have the power to grant just compensation;
- [...] an appeal or complaint to a judge if there is any abuse in the enforcement procedure;
- [...] an appeal to a judge in order to settle litigation concerning enforcement and to give orders to state authorities and other relevant bodies to enforce decisions; at the final stage, it should be up to the judge to use all possible ways to ensure enforcement;
- [...] to identify and take due account of the rights and interests of third parties and members of the family including those of children”¹⁵.

19. Article 22 of the COMONEX refers also to such principles: “Only a judge can rule on disputes arising from the enforcement and order the measures necessary for its implementation at the request of one of the parties or of the enforcement agent. The judge to whom an application is made by the debtor, an interested third party, the judicial officer or enforcement agent may suspend or cancel an enforcement measure should a sound reason justify such.”¹⁶.

¹⁵ CCJE Opinion no.13 (2010) on the role of judges in the enforcement of judicial decisions - <https://rm.coe.int/168074820e>

¹⁶ Global Code of Enforcement - UIHJ - Judicial officers - <https://www.uhj.com/downloads-2/global-code-of-enforcement/>

II. The case-law of the European Court on Human Rights on execution of domestic judgments

20. It is clear from the well-established case-law of the Court that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, it embodies the “right to a court”, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect.¹⁷ However, the Court emphasised, for the first time in its judgment *Hornsby v. Greece*¹⁸, that this right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. The Court stated also that it would be inconceivable that Article 6 § 1 should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the “trial” for the purposes of Article 6. The Court has accepted this principle also in cases concerning judgments given in interim proceedings¹⁹.

21. In every such case the Court is obliged to examine whether, in a given case, the authorities have complied with their positive obligations under Article 6 and more particularly whether the measures adopted to ensure the implementation of a judicial decision were adequate and sufficient. It is for each Contracting State to equip itself with adequate and effective means to ensure compliance with its positive obligations in this area. This does not mean, however, that the State is always under an obligation to enforce a judgment in a civil case, regardless of its nature and circumstances. In such cases, the State can be held responsible only if it is established that the measures taken by the national authorities were not adequate and sufficient²⁰. The positive obligation on the State as regards execution consists solely in making available to individuals a system by which they can obtain payment from recalcitrant debtors of the sums awarded by the courts. The Court emphasised in this context, that the administrative authorities, at the national or local level, form one element of a State subject to the rule of law and their interests accordingly coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees under Article 6 enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose²¹. Execution must also be full and exhaustive and not just partial.²² Once a final decision is rendered by the domestic courts, it

¹⁷ *Golder v. the United Kingdom* (No. 4451/70), 21 February 1975, §§ 28-36, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57496%22%5D%7D>

¹⁸ *Hornsby v. Greece* (No. 18357/91), 19 March 1997, <https://hudoc.echr.coe.int/eng?i=001-58020>

¹⁹ *Sharxhi and Others v. Albania* (No. 10613/16), 11 January 2018, § 92, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-179867%22%5D%7D>

²⁰ *Ruianu v. Romania* (No. 34647/97), 17 June 2003, § 66, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-65700%22%5D%7D>

²¹ *Fuklev v. Ukraine*, (No. 71186/01) 7 June 2005, § 67, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-69261%22%5D%7D>

²² *Sabin Popescu v. Romania* (No.48102/99), 2 March 2004, §§ 68-76, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-66206%22%5D%7D>; *Matheus v. France*, (No. 62740/00), 31 March 2005, § 58, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-68681%22%5D%7D>

must be implemented with reasonable clarity and consistency by the public authorities, to avoid as far as possible legal insecurity and uncertainty for persons concerned by its application.

22. In *Hornsby case* the Court noted also that the above principles are of even greater importance in the context of administrative proceedings concerning a dispute whose outcome is decisive for a litigant's civil rights. By lodging an application for judicial review with the State's highest administrative court the litigant seeks not only the annulment of the impugned decision but also and above all the removal of its effects. The effective protection of a party to such proceedings and the restoration of legality presupposes an obligation on the administrative authorities' part to comply with a judgment of that court.

23. The authorities should have a reasonable time in order to choose the most suitable means to give effect to the judgments concerned. An unreasonably long delay in enforcement of a binding judgment may therefore breach the Convention. The reasonableness of such delay is to be determined having regard in particular to the complexity of the enforcement proceedings, the applicant's own behaviour and that of the competent authorities, and the amount and nature of the court award. A stay in the execution of a judicial decision, until such time as is strictly necessary to enable a satisfactory solution to be found to public-order problems, may be justified in exceptional circumstances. While the Court has due regard to the domestic statutory time-limits set for enforcement proceedings, their non-respect does not automatically amount to a breach of the Convention. Some delay may be justified in particular circumstances, but it may not, in any event, be such as to impair the essence of the right protected under Article 6 § 1²³.

24. The state has to ensure that any final judicial decisions taken against its organs, institutions or companies owned or controlled by the state are implemented following the requirements of the Convention. A person who has obtained a judgment against the State may not be expected to bring separate enforcement proceedings. In such cases, the defendant State authority must be duly notified of the judgment and is thus well placed to take all necessary initiatives to comply with it or to transmit it to another competent State authority responsible for execution. This is particularly relevant in a situation where, given the complexities and possible overlapping of the execution and enforcement procedures, an applicant may have reasonable doubts about which authority is responsible for the execution or enforcement of the judgment²⁴.

25. A successful litigant may be required to undertake certain procedural steps to recover the judgment debt, be it during a voluntary execution of a judgment by the State or during its enforcement by compulsory means. Accordingly, it is not unreasonable that the authorities request the applicant to produce additional documents, such as bank details, to allow or speed up the execution of a judgment. The requirement of the creditor's cooperation must not, however, go beyond what is strictly necessary and, in any event, does not relieve the authorities of their obligation under the Convention to take timely action of their own motion, on the basis of the information available to them, to honour the judgment against the State. The Court thus considers that the burden to ensure compliance with a judgment against the State lies primarily with the State authorities starting from the date on which the judgment becomes binding and enforceable. The state is responsible for the lack of progress in this

²³ *Burdov v. Russia* (No. 59498/00), 7 May 2002, §§ 35-37,
<https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2259498/00%22%2C%22itemid%22:%5B%22001-60449%22%2D%22%22%7D>

²⁴ *Burdov v. Russia* (No. 2) (No. 33509/04), 15 January 2009, § 68,
<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-90671%22%2D%22%22%7D>

regard when the factors which impede or block full and timely enforcement of the judgment remain under the control of the authorities²⁵.

26. The complexity of the domestic enforcement procedure or the State budgetary system cannot relieve the State of its obligation under the Convention to guarantee to everyone the right to have a binding and enforceable judicial decision enforced within a reasonable time. Nor is it open to a state authority to cite the lack of funds or other resources (such as housing) as an excuse for not honouring a judgment debt. It is for the Contracting States to organise their legal systems in such a way that the competent authorities can meet their obligation in this regard. The Court accepts that a situation may exceptionally arise where the *restitutio in integrum* enforcement of a court judgment, declaring administrative acts unlawful and void, may, as such, prove objectively impossible due to insurmountable factual or legal obstacles. However, in such situations and in accordance with the right of access to court, guaranteed by Article 6 § 1 of the Convention, a Member State must, in good faith and on its own motion, examine other alternative solutions that can remedy the unlawful effects of its acts, in particular, the awarding of compensation²⁶.

27. Regarding the specific situation in Ukraine, in the pilot judgment (2009) *Yuriy Nikolayevich Ivanov v Ukraine*²⁷, the Court stressed the urgency to adopt specific legislative and administrative reforms to resolve the systemic problem of the non-enforcement or delayed enforcement of national court decisions in Ukraine. The deadlines that were set for the creation of an effective national remedy were not met.

28. On 12 October 2017, the Court delivered another judgment against Ukraine in the case of *Burmych and Others v. Ukraine*²⁸. 12 148 Ivanov-type cases were removed from the list of pending cases against Ukraine. The Court concluded that since the Ivanov judgment, the required general measures were still not implemented and an effective remedy regarding the non-enforcement of judicial decisions was still missing. The Court further noted that the root causes of the problems were of a fundamentally financial and political nature. The above-mentioned judgements are discussed in detail in the Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights on “Cases examined by the Committee of Ministers concerning the non-enforcement or delayed enforcement of domestic judicial decisions in Ukraine (case of *Yuriy Nikolayevich Ivanov against Ukraine* and group of cases of *Zhovner/ Burmych and Others against Ukraine*)”²⁹.

²⁵ *Burdov v. Russia (No. 2)* (No. 33509/04), 15 January 2009, § 69, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-90671%22%7D>

²⁶ See the Report Access to justice in the context of the judgments of the European Court of Human Rights against Armenia, p. 24-26

²⁷ Pilot judgment *Yuriy Nikolayevich Ivanov v. Ukraine* (no. 40450/04), judgment of 15/10/2009, final on 15/01/2010, <https://hudoc.echr.coe.int/eng?i=001-95032>

²⁸ *Burmych and Others v. Ukraine*, (Nos. 46852/13, 47786/13, 54125/13, 56605/13, and 3653/14), judgment of 12/10/2017, <https://hudoc.echr.coe.int/eng?i=001-178082>

²⁹ See at: [https://hudoc.exec.coe.int/eng?i=HEXEC\(2021\)8-UKR-GROUPS-Ivanov-Zhovner-Burmych-ENG](https://hudoc.exec.coe.int/eng?i=HEXEC(2021)8-UKR-GROUPS-Ivanov-Zhovner-Burmych-ENG) .

2. The draft law “On amendments to some legislative acts of Ukraine as to improvement of the judicial control under execution of national courts judgments”

29. The draft law envisages a number of amendments to the Civil Procedural Code of Ukraine, Administrative Procedural Code of Ukraine and Commercial Procedural Code of Ukraine. They can be summarised into the following groups:

- 1) introduction of the institute of judicial control under the execution of a final and binding judgment;
- 2) enhancing the right of a party to the enforcement proceedings to challenge the activity/inactivity/decisions of the state bailiff;
- 3) developing the grounds for changing the methods and order of the execution of the judgment if it is not executed by a debtor within particular time-limits;
- 4) possibility for the court to examine requests of the parties to the enforcement proceedings to remove shortcomings of the executive document, to suspend the enforcement proceedings or to order payment by instalments, to change the methods and order of the execution without case materials if they are transferred to the court of appeal or cassation court with the respective appeal.

As to the first group

30. The draft law envisages that the judicial control under the execution of a judgment shall be exercised by a court which adopted the judgment.

31. Following the application of a creditor if a final judgment is not executed within the enforcement proceedings, the court may oblige a debtor to submit, within the period established by court, a report on the execution of the judgement in some categories of:

- 1) commercial cases related to protection of business reputation, to protection of economic competition, limitation of monopolies in economic activities, and protection of fairness of a competition as well as in other cases of non-pecuniary nature. If a debtor is a state authority the court can apply the judicial control in all categories of commercial cases;
- 2) civil cases related to labour relations, family relations, compensation for damage caused by injury, other harm to health or death of an individual, or harm caused as a result of a criminal offence, compensation for damage caused to a person by unlawful decisions, acts or omissions of the state authority conducting the operational-search activities, pre-trial investigation, prosecution or court; compensation for moral damage, protection of consumer rights; protection of honour, dignity and business reputation; in other cases of non-pecuniary nature.

32. The draft law proposed that in administrative cases the court can apply judicial control under the request of a creditor or by its own initiative in any administrative case. However, such control can be applied by the court only under the request of the creditor in cases related: to pension payments, social benefits for the incapacitated citizens, compulsory state social insurance, social benefits to children of war, other social benefits, social services, assistance, protection, and allowances.

33. Under the draft law the court may decline or allow the application of the creditor to apply the judicial control to the debtor. The decision shall be taken within 10 days. If the application is allowed, the court issues a final decision to oblige the debtor to submit the report on

execution of the judgment within the period from 10 days to 3 months. The judicial control under the execution of a judgment against a state authority can be applied at the stage when the court delivers a judgment in the case.

34. The report on execution of the judgment submitted by the creditor shall, among others, contain information on execution of the judgment or explanation why it is not executed, how the debtor plans to execute the judgment and whether there are obstacles for its execution. The report shall be examined by the court within 10 days of its receipt. If the debtor submits the report out of time-limit or the report is unsubstantiated the court shall decline it, oblige the debtor to resubmit the report. Besides, in such cases the court can apply a fine to the debtor and examine a possibility to change the methods and order of the execution of the judgment to ensure its full execution. The draft law envisages the fine in the amount of twenty to forty sizes of the subsistence minimum for employable persons.

35. Amendments to the Civil Procedural Code of Ukraine and Commercial Procedural Code envisage that the fine shall be collected from a defendant, debtor or a debtor's manager (if the debtor is a legal entity) to the state budget.

36. Amendments to the Administrative Procedural Code envisage the same fine but it shall be collected partly to the state budget and partly to the creditor. If the debtor - state authority prove that all respective and sufficient measures were done to execute the judgment the court can reduce the fine or exempt the debtor (its manager) from the fine. Besides, the fine shall not be imposed if the execution of the judgment is blocked by lack of budget funds.

37. In all cases the decision to impose a fine is subject to appeal except when it is imposed by the Supreme Court.

As to the second group

38. As to the right of a party to the enforcement proceedings to challenge activity/inactivity/decisions of the state or private bailiff, the draft law envisages such novelties as:

- 1) increasing the time-limit for examining the complaint by the court from 10 to 20 days;
- 2) the possibility for the court to examine the respective complaint without case materials if they are transferred to the appeal court or court of cassation except the cases when the enforcement of the final judgment is suspended by the court of cassation;
- 3) the possibility for the court not only to recognise activities/inactivity/decisions of the bailiff illegal but to cancel the impugned decision.

As to the third group

39. As to the grounds for changing the methods and order of the execution of the judgment if it is not executed by a debtor the draft law envisages that the failure of the debtor to execute the judgement on the obligation to take certain actions in respect of the creditor's property or property awarded to the creditor within two months after the opening of the enforcement proceedings is a sufficient ground for changing the method and order for execution by collecting the amount value of the relevant property from the debtor (unless the creditor prevents the execution of executive actions the property value cannot be determined or property cannot be evaluated according to the law). Such amendments are proposed to the Code of Civil Procedure of Ukraine and Code of Commercial Procedure of Ukraine.

40. As to the amendments to the Administrative Procedural Code of Ukraine in this part the draft law envisages that the failure of the state authority to execute the final judgement on calculation, assignment, recalculation, receipt of pension payments, social benefits for the incapacitated citizens, payments for compulsory state social insurance, payments and benefits to children of war, other social benefits, social services, assistance, protection and allowances within two months after the judgement became final and binding is a sufficient ground for changing the method and procedure for execution of such judgement by collecting the relevant payments from this public authority.

As to the fourth group

41. Amendments to all three procedural codes envisage a possibility for the court to examine requests of the parties to the enforcement proceedings to remove shortcomings of the executive document, to suspend the enforcement proceedings or to order payment by instalments, to change the methods and order of the execution without case materials if they are transferred to the court of appeal or cassation court with the respective appeal.

42. At that, the proceedings under such requests are not possible in cases when the court of cassation suspended the execution of the judgment or the enforcement proceedings are suspended according to law.

43. The amendments also proposed 20 days as a time-limit for the court to examine such types of requests.

44. These amendments are meant to tackle some of the deficiencies of the system of the execution of domestic judgments in Ukraine, which have been presented in the Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights mentioned above.

45. The Memorandum is discussing, among others³⁰, the issue of the judicial control over the execution of judgments, to facilitate execution, avoiding excessive formalism, ensuring acceleration of execution and compensation for delays (further amending and developing ideas on the basis of the constitutional amendments of 2016 and the 2012 Law on the State Guarantees for Enforcement of Judgments).

46. Namely, according to the amendments to the Constitution of Ukraine of 2 June 2016 the State ensures execution of a court decision in accordance with the procedure established by law. The domestic courts control the execution of their decisions. These amendments were noted with interest by the Committee at its 1280th meeting (DH) in March 2017 and the authorities were invited to explore this avenue with a view to strengthening the role of the judiciary in the execution process³¹. A specific form of judicial control was already in place for the courts of administrative jurisdiction by Article 267 of the Code of Administrative Justice of Ukraine, which provided the courts with a right to: require the State authority to submit a report on the execution; upon consideration of such report, set a new deadline for the reporting on the progress in execution or the provision of information on the outcome of the enforcement proceedings; impose a fine on the head of the State authority responsible for the execution of the decision or on the relevant authority.

³⁰ See points 67-71

³¹ Ministers' Deputies 1280th meeting 7-10 March 2017 H46-36 *Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine* (Applications No. 40450/04, 56848/00, 46852/13) (Supervision of the execution of the European Court's judgments), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806fad41

47. Judicial control over the execution of judgments in the civil and commercial jurisdictions was provided for by the new procedural codes adopted on 3 October 2017. The court may issue a separate ruling in relation to a bailiff, or another State body responsible for enforcement and send it to the bodies authorised to bring these persons to disciplinary responsibility, or to the pre-trial investigation body. There are several recent decisions of the courts in this respect.

48. In the Recommendations, the Memorandum states that “it follows from the Resolution No. 13 of 29 September 2016 of the High Administrative Court of Ukraine “On the synthesis of the practice of administrative courts related to disputes emerging due to the enforcement of court decisions, under which State authorities or State institutions, enterprises or organisations are debtors, to recover funds”, that judicial control will not eliminate the problem if there is no relevant funding. Such judgments will remain unenforced, as its source is the lack of funds in the budget when the State Treasury Service cannot automatically write off funds under judgments to recover funds from the State budget and local budgets.

49. The Ukrainian judicial practice indicates that the courts and the parties have started to use this instrument more and more. It is therefore important that the practice develops uniformly and in accordance with the principles of the Court’s case-law, the practice of the Committee of Ministers, and Council of Europe standards. The participation of courts in the execution of their judgments should be shaped by coherent judicial practice, and the limitations on the role of the judiciary and courts in the execution of judgments should be clearly defined. The aim should be to facilitate enforcement, avoid revision of the previous judicial findings that have res judicata force and strengthen, by procedural means and without excessive formalism, where necessary, the enforcement action, facilitating full and timely execution of the judgment. Judicial recourse to revision or interpretation of a judgment or its operative part should be strictly limited to avoid abuse of process in execution of a judgment, ensure legal certainty and to prevent questioning of a judgment’s finality and binding nature.”

50. In the decision of 5 March 2020, the Committee of Ministers of the Council of Europe: “...noted the recent legislative amendments and other measures undertaken; reiterated however their utmost concern at the lack of further tangible action in adopting the relevant institutional, legislative and other practical measures for the execution of this group of cases and expressed serious concern that since the previous examination by the Committee the authorities have not submitted any information on the adoption of the National Strategy, the mandate of the Legal Reforms Commission and the body, at the highest political level, which should be responsible for taking the lead in this matter; reiterated their call to submit the information mentioned above”.³² The role of the judiciary in enforcement in most Council of Europe member states is limited to the decisions in case of infringements during the enforcement process, opposition to the enforcement or attachment, to decide on the challenges to the enforcement agent or to decide on other issues raised by the enforcement agent, by parties or by third parties.³³

³² Ministers’ Deputies 1369th meeting 3-5 March 2020 H46-36 *Yuriy Nikolayevich Ivanov, Zhovner group and Burmych and Others v. Ukraine* (Applications No. 40450/04, 56848/00, 46852/13) (Supervision of the execution of the European Court’s judgments). Document CM/Del/Dec (2020)1369/H46-36.

³³ See the Analysis “Best practices of the Council of Europe member states and the Council of Europe standards pertaining to the judicial control over the execution of national judgments” (October 2020) drafted in the framework of a previous Council of Europe project, available at: <https://rm.coe.int/analysis-judicial-control-by-jos-uitdehaag-nov-2020-final-eng/1680a07713>

51. The main provisions regarding the use of legal remedies in Ukraine can be found in Section 10 of the Law of Ukraine “On enforcement procedure”. Both the legal remedies as well as the role of the courts must be clear. A delay in the execution of a judgment may be justified in particular circumstances, but this delay may not be such as to impair the essence of the right protected under Article 6 paragraph 1 of the Convention. In that respect, the wide discretionary powers of the Ukraine Bailiff Service were mentioned, as not being in line with other countries. “Errors or lack of information in the documents submitted to the Bailiff Service or unclear formulation in the court decisions (as mentioned in the Draft Strategy) should be addressed to the court. It should not be a reason to immediately refuse the enforcement of judgments”.

Conclusions

52. The proposed amendments in the draft law “On amendments to some legislative acts of Ukraine as to improvement of the judicial control under execution of national courts judgments” aim to introduce changes to three procedural laws in Ukraine, the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, and the Code of Administrative Court Procedure of Ukraine.

53. The amendments are of a twofold nature, some of them clearly stem from everyday practice of the execution of judgments in Ukraine (e.g., the change of terms from ten to twenty days) and aim at precisising the requirements of certain acts and documents (e.g., regulating in details what statement of claim or debtor’s report on the execution of the judgement shall contain), whereas the other amendments regulate the judicial control over the execution of judgements.

54. The proposed amendments precisising the requirements of certain acts and/or documents or changing the deadlines do not seem controversial.

55. The other group of amendments regulates, as mentioned above, the judicial control over the execution of judgments. Those amendments appear to be in line with the CEPEJ Guidelines for a better implementation of the existing Council of Europe recommendation on enforcement, especially regarding the judicial control over the enforcement of judgments (e.g., Guideline 12 regarding the adequate supervision of the enforcement process). They also foresee the implementation of other Council of Europe standards presented above, such as “an appeal to a judge if the enforcement is not initiated or is delayed by the relevant bodies; a judge should also be involved when fundamental rights of the parties are concerned; in all cases, the judge should have the power to grant just compensation”, as well as an appeal or complaint to a judge if there is any abuse in the enforcement procedure.

56. The amendments also address concerns which were defined in the Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights on “Cases examined by the Committee of Ministers concerning the non-enforcement or delayed enforcement of domestic judicial decisions in Ukraine (case of *Yuriy Nikolayevich Ivanov* against Ukraine and group of cases of *Zhovner/ Burmych and Others* against Ukraine)”, by regulating the issue of the judicial control over the execution of judgments, to facilitate execution, avoiding excessive formalism, ensuring acceleration of execution and compensation for delays.

57. As mentioned above, the Recommendation of the Memorandum contains, among others, suggestion that the aim of the judicial control over the execution of judgments should be to facilitate enforcement, avoid revision of the previous judicial findings that have res judicata force and strengthen, by procedural means and without excessive formalism, where necessary, the enforcement action, facilitating full and timely execution of the judgment. Judicial recourse to revision or interpretation of a judgment or its operative part should be strictly limited to avoid abuse of process in execution of a judgment, ensure legal certainty and to prevent questioning of a judgment’s finality and binding nature. The proposed amendments go clearly in that direction (e.g., amended Art. 328 and 331 of the Economic Procedural Code of Ukraine and their counterparts’ other procedural laws).

58. As the Memorandum stated, the participation of courts in the execution of their judgments should be shaped by coherent judicial practice, and the limitations on the role of the judiciary and courts in the execution of judgments should be clearly defined. **The proposed amendments thus appear to be generally in line with the Council of Europe standards and the Court's case-law and if their adoption is followed by a coherent judicial practice of the courts in Ukraine, they could constitute a step forward in the improvement of the system of execution of judgments in accordance with the European standards.** In order to facilitate building a coherent judicial practice, trainings for judges would need to be introduced on the issue of the judicial control (which is in fact an oversight) of the execution procedure, which might be preceded by a training needs assessment carried by the National School of Judges of Ukraine – such steps would not require any further legislative amendments, but might be very efficient in the proper implementation of the current changes.