Support to the implementation of the judicial reform in Ukraine

ASSESSMENT OF THE UKRAINIAN LEGISLATION ON THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

December 2017

INTRODUCTION

1. By letter of 9 February 2017, the Minister of Justice of Ukraine requested the Council of Europe (hereinafter "the CoE") to provide an expert opinion on the compliance of the national legislation regulating the execution of judgments of the European Court of Human Rights (hereinafter "the ECtHR") with the Council of Europe standards. The Council of Europe invited the experts Mr Costas Paraskeva[1] and Mr Marius Emberland[2] (hereafter "the Experts") to provide the assessment in question with a particular emphasis on the mechanisms of cooperation between the Government Agent (GoA) before the ECtHR and domestic authorities involved.
2. Jointly with the GoA before the ECtHR, it was agreed that the Experts are to assess the following legislative acts or draft laws:
   - the law of Ukraine "On the execution of judgments and the application of the case-law of the European Court of Human Rights",
   - certain articles of the law of Ukraine "On enforcement proceedings" pertaining to the payment of just satisfaction awarded by the ECtHR in cases against Ukraine,
   - the resolution of the Cabinet of Ministers of Ukraine No. 553 "On organisational arrangements related to the support of Ukraine's representation during proceedings at the European Court of Human Rights",
   - the resolution of the Cabinet of Ministers of Ukraine No. 784 "On measures to implement the law of Ukraine "On the execution of judgments and the application of the case-law of the European Court of Human Rights",
   - certain articles of the Civil Procedural Code of Ukraine, of the Criminal Procedural Code of Ukraine, as well as of the draft amendments to these codes which were pending before the Parliament of Ukraine at the time of drafting of this report. The articles referred to by the Experts concern the reopening of judicial proceedings on national level following judgments of the ECtHR.
3. The assessment of the Experts is based on the translated version of these acts received from the Council of Europe.
4. The comments and observations of the stakeholders were also noted while drafting this report. The meetings and discussions between the stakeholders, the Experts and representatives of the Department for the execution of judgments of the European Court of Human Rights were held in July 2017 in Strasbourg, France, and in September 2017 in Kyiv, Ukraine.
5. The assessment was made within the Council of Europe project "*Support to the implementation of the judicial reform in Ukraine*".

---

1 Dr Costas Paraskeva is an Assistant Professor of Public Law, University of Cyprus.
2 Dr Marius Emberland is a Government Agent of the Kingdom of Norway before the European Court of Human Rights.

PART I. IDENTIFICATION AND ANALYSIS OF STANDARDS, RECOMMENDATIONS AND PRACTICES

1.1. Introduction

6. This part describes and analyses applicable Council of Europe standards and recommendations, as well as good practices of the Council of Europe Member States, concerning the implementation of judgments of the ECtHR and more specifically concerning the cooperation between the GoA before the ECtHR and relevant domestic authorities.
7. It provides the normative background against which the functioning of the GoA's cooperation with other domestic institutions is assessed in part two below.

1.2. The overarching normative framework

8. The overarching normative framework that can be derived from the standards, recommendations and practices enumerated below in 1.3. and against which the mechanisms of cooperation between the GoA and relevant authorities should be measured include the following.
   - The *primary responsibility of domestic authorities* to respect and ensure the rights and freedoms guaranteed by the European Convention on Human Rights (hereinafter "the ECHR") necessarily entails that *all branches of power are under an obligation to ensure the enforcement of final judgments of the ECtHR.* At the same time, the principal responsibility for the State's international legal obligations rests within the executive branch. However, this primary domestic responsibility also includes an obligation for all involved authorities to cooperate to ensure compliance with the ECHR and its system.
   - The system and the process of enforcement *must adhere to the democracy and rule of law* ideals and principles. This, inter alia, involves the participation – when needed – from all branches of government, including Parliament and the judiciary; a transparent and accountable process of implementation; the involvement of civil society and other relevant stakeholders; and rule based enforcement and implementation mechanisms and procedures.
   - Domestic authorities are under an obligation to respect and secure *the rights and freedoms guaranteed by the ECHR* also in the process of enforcing and implementing final judgments of the ECtHR.
   - *Good faith cooperation* between domestic authorities and the Council of Europe institutions is given by virtue of the State's membership in the organisation.
   - *Effectiveness and efficiency* necessitate the tailor-made solutions to fit the political and other landscape in which the process is to function.

1.3. Description of the relevant standards, recommendations and practices

9. The Experts identified the following set of the CoE sources with a varying degree of specificity.
10. *Treaty based* standards are found in two documents:
    - Article 1 a) of the *Statute of the Council of Europe* of 5 May 1949 (ETS 1) provides that the CoE's aim is "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress". Three sets of values

emerge from the Statute: (1) the "ideals and principles which are [the] common heritage" of the Member States, which are identified in the Preamble (2nd recital) as "individual freedom, political liberty, … the rule of law [and] democracy", (2) "economic and social progress"; and (3) what may be referred to as integration and co-operation ("unity") between the Member States as means to safeguarding and realising the two other sets of values.

- The *European Convention on Human Rights and Fundamental Freedoms* of 5 November 1950 (ETS 5) firstly specifies an obligation of all Member States to respect the rights and freedoms of the operative parts of the Convention (Article 1); non-implementation of a judgment of the ECtHR may in and by itself raise an issue of compliance with the rights and freedoms of the ECHR. Secondly, Article 46 § 1 of the ECHR mandates States to "abide by the final judgment of the Court in any case to which they are parties". Thirdly, the ECHR's Preamble defines values that streamline all activities within the framework of the Convention, and these values are unity (3rd and 5th recitals), effective political democracy, freedom and the rule of law (5th recital). The ECtHR has repeatedly emphasised the importance of respect for effective political democracy, which is regarded as being "of prime importance in the Convention system".[3]

11. The standards and recommendations adopted by *States Parties in the declarations following the 2010-2015 High Level conferences* held in Interlaken, Izmir, Brighton and Brussels include:

- *national authorities' primary responsibility* and *the subsidiary character of the CoE* mechanisms to secure observance with the Convention rights and freedoms (Interlaken para. 2; Izmir para. 5; Brighton para. 3);
- *effective domestic implementation* of the ECtHR's judgments (Interlaken para. 7; Brighton paras. 8 and 10; Brussels paras. 11 and 12);
- *efficiency at the CoE* with regard to the supervision of the execution of judgments (Interlaken para. 9; Izmir para. 2);
- *shared responsibilities* and *cooperation* between the State and the CoE in securing implementation of judgments (Izmir para. 6; Brighton paras. 3 and 4; Brussels paras. 11 and 13).

12. *Recommendations and standards* adopted under the auspices of the Committee of Ministers include several documents. *Recommendation CM/Rec(2008)2* on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, 6 February 2008, is of particular importance. The main ideas advanced by the Recommendation are as follows:

    - The *designation of a co-ordinator* of execution of judgments at the national level, a focal contact point for the Execution Department with reference contacts in the relevant national authorities involved in the execution process (recommendation no. 1);
    - The co-ordinator should have the central role in *identifying execution measures and drawing up action plans and reports* (recommendations nos. 4 and 6);

3 See, e.g., Melnychenko v. Ukraine, app. no. 17707/02, judgment 10 October 2004; United Communist Party of Turkey and Others v. Turkey, app. no. 19392/92, judgment 30 January 1998 § 45.

- The co-ordinator should have the *necessary powers and authority to liaise* with persons or bodies at the national level for deciding on the measures necessary to execute a judgment (recommendation no. 1);
- The co-ordinator should *facilitate* the adoption of any useful measures to develop effective synergies between relevant actors in the execution process at the national level and to identify their respective competences, including within the judiciary and national human rights structures and non-governmental organisations (recommendation no. 5);
- The co-ordinator should, as appropriate, *keep the Parliament informed* of the situation concerning the execution of judgments and the measures being taken in this regards (recommendation # 9);
- The co-ordinator should take necessary steps to ensure that all judgments and follow-up decisions of the Committee of Ministers are duly and rapidly *disseminated* (where necessary in translation) to relevant actors in the execution process; this also includes dissemination of the case-law of the ECtHR and relevant recommendations and decisions of the Committee of Ministers (recommendations nos. 3, 7 and 8);
- The existence of appropriate mechanisms for effective *dialogue and transmission of relevant information* between the coordinator and the Committee of Ministers (recommendation no. 2);
- Ensuring that *all necessary remedial action be taken at high level – political if need be* – where required by a significant persistent problem in the execution process (recommendation no. 10).

13. Other documents referring or related to Recommendation (2008)2 include:
    - Recommendation CM/Rec(2010)3 on effective remedies for excessive length of proceedings of 24 February 2010;
    - Steering Committee for Human Rights (CDDH): Meeting report on the work on Recommendation (2008)2 of 27 April 2016;
    - Department of Execution of Judgments: Round Table on "action plan and reports in the twin-track supervision procedure, 13-14 October 2014;
    - Steering Committee for Human Rights (CDDH): Guide to good practice on the implementation of Recommendation (2008)2, 7 September 2017.
14. Work under the auspices of the *Parliamentary Assembly* of the CoE include PACE Secretariat: The role of parliaments in implementing ECHR standards: overview of existing structures and mechanisms. Background memorandum, 8 September 2015.
15. To the Experts' knowledge, there is no uniform conception of what amounts to *best practice* with regard to the GoA's role in the implementation of judgments of the ECtHR. There is nonetheless recent evidence of *good practices* among the Council of Europe Member States found in the *Guide to good practice on the implementation of Recommendation (2008)2 of the Committee of Ministers on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights*, considered by the Rapporteur Group on Human Rights (GR-H) at its meeting on 7 September 2017 and by the Committee of Ministers at its 1293rd meeting on 15 September 2017.

16. The Experts observe that practice among the CoE Member States – with regard to functions of the GoA – varies and that a best practice may be impossible to identify as domestic constitutional and other institutional structures do not as such determine the efficiency of any given mechanism.
17. Different states approach the issue of efficiency by different means. The most common approach is to address the implementation of the ECHR and the execution of judgments of the ECtHR through institutional structure of the State already in existence. Additionally, some states create special bodies acting to resolve a particular systemic or structural problem, which seize to function after the problem is resolved at the domestic level. The most important element of these common practices is to gain efficiency through existing structures and not to create secondary or parallel institutional structure to replace the existing state institutions.
18. Additionally, some governments have chosen to have separate offices for the representation of the state before the ECtHR, and for coordination of the execution combined with the reporting to the Committee of Ministers. In such situations the best practices underline that the process of coordination is less substantive, from a legal point of view, as it is other states institutions who undertake individual and general measures. Thus, for the focal point or for the coordinator this process is more managerial: providing information about the content of the measures to be taken under the judgment, gathering replies of the authorities, preparing action plans and reports and reporting to the Committee of Ministers and Execution Department, and eventually, probably most importantly, giving feedback from these CoE bodies supervising execution of judgments, to the respective domestic decision-makers. This managerial process appears to be at heart of the current assessment.
19. This role is particularly important in situations of systemic problems that need to be addressed by the authorities in an ad hoc manner, i.e. through the establishment of special mechanisms to deal with the systemic problem or through widening the scope or functionality of the existing state mechanisms for the execution of judgments.
20. The role designated to the Government Agent of Ukraine by the legislation in force formally represents a sound approach to an efficient process of implementation. However, and as elaborated below, there seems to be a considerable discrepancy between the mechanisms as set out in the core legislation and other written procedures and the ways in which the interaction between the GoA and other domestic institutions actually function.

PART II. ANALYSIS OF THE DOMESTIC LEGISLATION PERTAINING TO THE GOVERNMENT AGENT'S ROLE

21. The present section provides comments on the provisions in the law of Ukraine "On the execution of judgments and the application of the case-law of the European Court of Human Rights" (hereinafter – "the 2006 Law"), with changes and amendments introduced in 2011 and 2012, as translated into English.
22. It should be added here that the Experts have decided to concentrate their analysis on the 2006 Law. The other domestic legislative documents, notably the resolutions of the Cabinet of Ministers nos. 553 and 784, must be considered supplementary to it. However, the issues dealt with in these resolutions may well be included in an act of parliament, such as the 2006 Law. This would bolster the significance of the issues of coordination between the executive branch and the other branches of government.

23. According to the preamble of the 2006 Law its aims are: (a) to regulate the procedure for the execution of judgments of the ECtHR, (b) to address root causes of the established violations, (c) to introduce European human rights standards into the administration of justice of Ukraine and (d) to aim at reduction of the number of cases lodged with the ECtHR.
24. Article 1 of the 2006 Law provides definitions which are related to the execution of judgments, and also to other processes falling under the aims specified above. For instance, it examines issues of payment of the just satisfaction, as well as adoption of individual and general measures. The procedure for the execution of a judgment, in accordance with the Law, is clearly defined and prescribed by Article 1 of the 2006 Law (payment of the just satisfaction, adoption of individual and general measures). The procedure for the adoption of general and individual measures is aimed at restoring a situation which existed prior to the violation of the applicant's rights (*restitutio in integrum*), because operative parts of the ECtHR’s judgments rarely indicate these measures.
25. Moreover, the 2006 Law provides for a systematic review of the legislation aimed at identification of problems which were pointed out by the ECtHR, or for preventive work to ensure that judgments which have already identified problems and have found violations concerning other states would be taken into account in the process of the preparation of the legislation in Ukraine (Article 19(3) of the 2006 Law). The 2006 Law, however, does not provide for a procedure of ensuring that the Verkhovna Rada of Ukraine takes into account and is adequately prepared to deal with the judgments delivered against Ukraine, even though a specific procedure for informing the Rada’s Secretariat is envisaged by Article 14(4) of the 2006 Law. The 2006 Law envisages, nevertheless, a procedure by which the GoA informs the Cabinet of Ministers, under Article 14(1) of the 2006 Law, on the general legislative or other practical measures to be taken.
26. Additionally, there is no specific procedure for interaction of the GoA’s Office with the highest judicial authorities and law enforcement bodies, including the General Prosecutor’s Office. Article 14(3) of the 2006 Law provides for the GoA’s submissions to the Supreme Court on the basis of a judgment, with the analysis of circumstances that led to a violation and with proposals for changes in the judicial practice to comply with the ECHR’s requirements. However, no specific procedure is provided for interaction with the General Prosecutor’s Office and law enforcement bodies or bodies of executive branch of power. In more general terms, the 2006 Law regulates the identification by the GoA’s Office of a problem and of individual measures required (Article 11), and then eventually “control” over “the execution of additional individual measures” (Article 11(2) of the Law).
27. It appears that in general Ukrainian authorities and all those concerned with the application of the ECHR and of the case-law of the ECtHR do not have sufficient information about and understanding of the work of the Convention bodies, including the ECtHR and the Committee of Ministers,[4] and more specifically of judgments delivered against Ukraine. Some individual attempts to comply with the ECtHR’s judgments arise also on the horizon of lawmaking, which the experts witnessed on the basis of work of the newly established Rada’s subcommittee on the execution of

[4] Committee of Ministers’ work and its role in supervision process, just like the role of the Execution Department are overlooked in the 2006 Law.

judgments of the ECtHR. However, these measures do not fully satisfy the requirements of the execution of judgments of the ECtHR at the domestic level.

28. The 2006 Law, which is in addition to Article 46 of the ECHR's obligations to comply with the judgments of the ECtHR, provides for a highly complex, very formal and legalistic approach to the aims it has established. Such an approach might restrict domestic implementation of the ECHR, of judgments of the ECtHR delivered in cases concerning Ukraine and of the case-law in general. In our opinion, the 2006 Law contains certain issues, which are identified below and which may negatively affect the execution of judgments of the ECtHR by the Government. These problematic issues are enumerated in the following.

SECTION 1. GENERAL PROVISIONS

29. Specific comments on various parts of Article 1:

> **Article 1. Definitions**
>
> 1.1 For the purposes of this Law the following terms shall be used in the following meaning:
>
> *the Convention* – the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto agreed to be binding by the Verkhovna Rada of Ukraine;

30. The definition of the term "the Convention and Protocols thereto" contains some contradictions. Within the meaning of the 2006 Law, the ECHR and the Protocols thereto exist in the form in which they were ratified by the Parliament in 1997, without taking into account incorporated amendments by Protocols Nos. 11 and 14, Protocols being seen as separate legal instruments.

31. This concept is further in essence contrary to the ECtHR's case-law, where the ECtHR can reach a conclusion of non-compliance of certain reservations or derogations made to the ECHR and Protocols thereto (see, e.g., judgment in the case of *Nevmerzhitsky v. Ukraine*, app. no. 54825/00, § 114, ECHR 2005).

32. Eventually, the ECHR is not used in the text of the Law anymore. It is difficult to see how and why, from the point of international obligations of Ukraine and the Vienna Convention on the Law of Treaties, the ECHR should have a definition in Law. Moreover, one should take into account the derogations made by Ukraine on 9 June 2015 concerning the territorial scope of application of the ECHR and the Protocols thereto.[5]

> *the Court* – the European Court of Human Rights;
>
> *the Commission* – the European Commission of Human Rights;

[5] Derogation contained in a *note verbale* from the Permanent Representation of Ukraine, dated 5 June 2015, registered at the Secretariat General on 9 June 2015 - Or. Engl. On the 21st May 2015, the Verkhovna Rada of Ukraine approved the Resolution № 462-VIII by which it adopted the Declaration "On Derogation from Certain Obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms".

33. Article 1 of the Law defines the term "the Court" and is defined by a general concept of "the European Court of Human Rights". The Court can sit in different formations (in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges, see Article 26 of the Convention). It is unclear why exactly should one define what the European Court of Human Rights is in the Law, if the formations and the Court's functions are already defined in the Convention itself. It might be useful, for the purposes of executions of judgments, if the different formations of the ECtHR were mentioned here. The Law also lacks references to the relevant provisions of the Convention governing the competence of the Court, procedure before it and its functions (Articles 19 - 51 of the Convention). It is again doubtful that such references should be made in view of the Convention itself.

34. The 2006 Law further defines the term "the Commission" as "the European Commission of Human Rights". It is not entirely clear what is the need for the inclusion of the Commission in the present law. The Commission ceased to exist on 1 November 1998, in accordance with the Protocol No. 11 to the Convention, when the permanent Strasbourg Court was established. Thus, there is no case-law of the Commission to be implemented today. Surely, the Commission's case-law is a very interesting source of historical research into the Convention and its case-law, however, most of the Commission's case-law had already been overruled by the new Court and inclusion of the Commission's case-law might lead to confusion and misunderstandings in the case-law implementation at the domestic level.

35. Additionally, although the decisions of the Commission are yet regarded as part of the Court's case-law, they are used less and less because the Court's case-law, formed in accordance with the principle of existence of the ECHR as a "living instrument", has developed much further than the Commission's work. Moreover, the Commission's decisions on the admissibility have been completely replaced by the decisions on the admissibility of the Chambers of the Court (see above on Article 1 of the Law).

> *the Court's case-law* – the case-law of the European Court of Human Rights and the European Commission of Human Rights;

36. From the definition of the term "the case-law of the Court" (the definition rather refers to the "judicial practice of the Court"), it does not follow which practice of the Court forms its case-law. For example, should the Rules of the Court, inadmissibility decisions by a single judge or committee of three, procedural decisions in the cases considered by committees of three judges, for instance, practice of communicating cases or giving them priority, decisions of the President of the Chamber of the Court or the President of the Court made under Rule 39, be considered as also being part of the Court's case-law? Should they have consequences for the execution purposes or implementation of the case-law? For instance, should a communication of the case to the Government, with evident issues under Article 3 of the Convention, lead to some measures to be taken by the State? Is practice of examining applications under Rule 47 or declaring applications inadmissible also a practice of the Court in this respect? The Law should clarify this issue, first, establishing that the case-law of the Court is not an independent source of law. It is a source of interpretation of the content of the Convention provisions, which is an international treaty ratified by Ukraine.

37. It is quite unclear why should the 2006 Law, in its text, address these highly technical and complex issues, in essence of a doctrinal nature, which should rather to be addressed through *inter alia* the judicial practice of the highest judicial instances, including by the Supreme Court or the Constitutional Court. They can be nuanced there, with inclusion of some elements, such as ECtHR's case-law hierarchy. There, types of the judgments of the ECtHR (which make up the concept of "case-law of the Court") should be perhaps provided. The judicial practice also can address the legal nature of the Court's judgments – i.e. are they precedents indeed, do the courts agree to the concept or *erga omnes* effect fof the case-law of the ECtHR vis-à-vis other states or does such case-law have an effect of giving directions to the domestic judicial practice in the area of human rights.

Judgment – a) a final judgment of the European Court of Human Rights in a case against Ukraine, finding a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms; b) a final judgment of the European Court of Human Rights on just satisfaction in cases against Ukraine; c) judgments (decisions) of the European Court of Human Rights on a friendly settlement in cases against Ukraine; d) judgments/decisions of the European Court of Human Rights on accepting a unilateral declaration in a case against Ukraine.

38. Article 1 of the Law defines what counts as a judgment of the ECtHR. It may be clarified in this context that the relevant judgments are those liable to being executed. Such a judgment may be: (a) a judgment on the merits; (b) individual judgment on just satisfaction; (c) a judgment or decision of the ECtHR striking an application out of the list on the basis of a friendly settlement reached before declaring the application admissible (Article 37 § 1 of the ECHR) or after that (Article 39 of the ECHR); (d) judgments/decisions of the ECtHR on accepting a unilateral declaration in a case against Ukraine. Also, it should be noted that Protocol No. 14 allows for the execution of judgments on the basis of a friendly settlement reached before an application has been declared admissible (Article 37 § 1 of the ECHR) and for the supervision of the execution by the Committee of Ministers.

39. Such an exhaustive and predetermined by the Law list of types of judgments might create difficulties for the domestic authorities in complying with obligations under Article 46 of the ECHR. In particular, Article 46 clearly states that the judgments to be complied with are those which are (a) final and to which (b) the respondent State is a party. The rest is immaterial to the general obligation to enforce final judgments of the ECtHR, more so, in a situation where the obligations concern an unconditional obligation to pay just satisfaction under Article 41. Most importantly, and it is possibly correct that the 2006 Law does not distinguish between the "normal" judgments and the "pilot" or "quasi-pilot" judgments, i.e. judgments with specific indications either in reasoning part of the judgment or in its operative part, suggesting to the authorities which measures should be taken in the course of execution of a judgment.[6]

40. Moreover, judgments against Ukraine with a finding of a violation, either with or without just satisfaction awarded, should also be complied with, and relevant individual

[6] One of the examples of such a judgment is the case of *Oleksandr Volkov v. Ukraine*, where both the individual and general measures were directly indicated by the Court to the authorities. Another example is the judgment in the only «pure» pilot judgment in the case of *Yuriy Nikolayevich Ivanov v. Ukraine*.

and general measures should be undertaken (e.g., judgment in the case of *Savinskiy v. Ukraine*, app. no. 6965/02, 28 February 2006).

41. As to the judgments and decisions where the ECtHR found no violation of the ECHR (judgment in the case of *Gennadiy Naumenko v. Ukraine*, app. no. 42023/98, 10 February 2004) or declared an application inadmissible – they do not fall within the scope of regulation of the 2006 Law. However, they are a useful tool for guidance for the execution processes and the direct domestic implementation of the ECHR by the national courts, including the Constitutional Court. Also, the 2006 Law does not define (and should probably not) of what legal nature the judgments of the ECtHR may be, seemingly removing judgments made under Article 37 § 1 and Article 39 of the ECHR from the scope of application of this Law. These issues should not be regulated by a law, but should be explained and clarified by some form of bylaws of the executive branch of power or further guidance to the domestic authorities could be given through the judicial practice or the doctrinal academic studies.

> *Creditor* – a) a person in whose favour the European Court of Human Rights rendered its judgment; b) his/her representative or successor; c) a person (a group of persons) in whose favour the Court found in its judgment an obligation of Ukraine upon an inter-State case;

42. The term "the Creditor" ("the Claimant") as used in Article 1 of the 2006 Law, in our opinion, calls for improvement, because it implies primarily the need to meeting of financial requirements imposed by the judgment. However, the applicant may also be the recipient of other, non-financial remedies as indicated by the ECtHR. The term "applicant" may possibly better denote the person in question. As to the definition of "the applicant", there is a need to make a clear reference to Article 34 of the Convention. Possible references could be made to Articles 41 and 46 of the Convention, in respect of individual measures taken with regard to *restitutio in integrum* relating to specific applicant. However, overregulating these issues might also be counterproductive and this should be born in mind by the authorities. Possibly, as a general remark, instead of reproducing the norms of the ECHR, incorporating case-law requirements and recommendations of the Committee of Ministers into a text of the 2006 Law, references could be made to these documents and their text should be made available to the authorities in translation.

43. The applicant's representative needs to be "empowered" to participate in the process of the execution. The same applies to a lawful successor to a judgment debt, an heir or another person having standing and eligibility with regard to the obligations arising from a judgment. It is not clear from the definition how such representatives are identified and whether they would be the same persons who acted as representatives in the case before the ECtHR.

> *Compensation* – a) an amount of just satisfaction, defined in the Court's judgment in accordance with Article 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms; b) an amount of payment referred to in the Court's judgment (decision) on a friendly settlement or on accepting a unilateral declaration to be paid in favour of Creditor;

44. As to the compensation referred to in the 2006 Law, the legislative provisions seem to create an overarching concept which simultaneously cover the notion of the just satisfaction and payments under friendly settlements or unilateral declarations.

45. However, as to the definition given to "the just satisfaction" used in Article 1 of the 2006 Law, one might turn to the more detailed definition provided by Article 41 of the ECHR as understood in the ECtHR's case law. The ECtHR generally is entitled to award three forms of monetary remedies: a) compensation for non-pecuniary damage, b) compensation for pecuniary loss, and c) costs and expenses for the proceedings in Ukraine and before the ECtHR. The judgments of the ECtHR further provide a sum of default interest to be paid, which is an issue that should be further referred to in the law or, even better in some form of bylaws or explanatory instructions or recommendations. The 2006 Law appears to be largely focused on establishing a mechanism for payment of compensations as such and providing necessary funding for such an exercise (Articles 7 – 9 of the 2006 Law), which are undoubtedly very important elements. However, one should still bear in mind that the principle of the *restitutio in integrum* includes also individual measures to be taken, and the aim of the 2006 Law is to ensure resolution of systemic problems and eventually to strengthen the domestic capacity to deal with human rights violations and to decrease the number of cases lodged with the ECtHR.

46. Also, the ECtHR may in some cases indicate the adoption of individual and/or general measures in the judgment even if not directly specified in its operative part (i.e. enforcement of a domestic judicial decision, amendment of legislation, re-opening of the domestic proceedings, or new investigations, i.e. any other form of individual measures resulting in *restitutio in integrum* and general measures preventing future similar violations, etc.). It is not clear whether such forms of indicated remedies are encompassed by the Law's definitions, of both "compensation" and "effecting additional individual measures", as the 2006 Law does not suggests that measures aimed at stopping the violation from continuing, restoring breached rights and providing a remedy, where it did not exist, are a part of the measures to be taken (even though Article 2(1) of the Law eventually refers to Article 46 of the ECHR).

> *Execution of judgment* – a) payment of compensation to Creditor and taking of additional individual measures; b) taking of general measures;
>
> *Representative body* – a body in charge of representation of Ukraine before the European Court of Human Rights and coordination of the execution of a judgment rendered by the latter;
>
> *Original text* – an official text compiled in an official language of the Council of Europe of: a) the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto; b) judgments and decisions of the European Court of Human Rights; c) decisions of the European Commission of Human Rights.

47. With regard to the definition of "the execution of judgment", see comments above on the variety of remedies that may be included in a judgment by the ECtHR. However, it is quite clear that the text of the 2006 Law refers to "the execution" as a process and not a result. The result should possibly be reflected in the 2006 Law – execution of a judgment is taking of individual measures (including just satisfaction as an unconditional obligation) and taking of necessary general measures (where necessary). The result

should be based on the *restitutio in integrum,* and on taking of necessary measures to prevent similar violations. Once again, the result and not the process should be the aim of the execution exercise.

48. The term “representative body” is loosely defined. Is it not the intention of the 2006 Law to designate the GoA as the body in question? In any case, the main functions of the GoA are provided as follows: coordination of the execution of judgments (a managerial process facilitating contacts and the required execution outcome described above), between various state actors. Possibly the wording of the 2006 Law should clearly reflect that it is a function and responsibility of the Ministry of Justice – both to represent the State and to deal with coordination of the execution – and the Office of the Agent, which with its Secretariat belongs to that Ministry. Otherwise, it remains unclear whether the GoA (or Representative Body) is directly subordinate to the Cabinet of Ministers that appoints him/her to the position or the Ministry itself. It further leads to misunderstanding as to which state institution, within executive, is really responsible for the coordination task. This hierarchical lacuna should be clarified.

49. The concept of "ухвала" (by this the 2006 Law probably means "decision", for example a decision on admissibility or a strike out decision) of the ECtHR or the European Commission of Human Rights is, however, not explained, and in our opinion it does not reflect the legal content of the admissibility or a strike-out decision, which is not purely procedural, and includes elements of review of the case on its merits (in our opinion it would be more appropriate to use the term "decision on admissibility” or “decision as to a strike-out of the case”). Similarly, the ECtHR’s judgments might deal with admissibility issues only, leading to a finding of no violation or with an issue of cases’ strike out, like most recently in the case of *Burmych and Others v. Ukraine*.

50. Comments on Article 2:

> **Article 2. Execution of Judgments**
>
> 2.1. Judgments are binding and subject to execution throughout the whole territory of Ukraine pursuant to Article 46 of the Convention.
>
> 2.2. Procedure for the execution of Judgments is determined by the present Law, the Law of Ukraine “On Enforcement Proceedings”, and other legislative acts subject to peculiarities provided for by the present Law.

51. It should be noted that pursuant to Article 9 of the Constitution of Ukraine, Article 46 of the ECHR, as a constituent part of an international treaty ratified by Ukraine, is a part of the national legislation. Article 46 of the ECtHR therefore, by itself, constitutes sufficient legal basis for taking action regarding the execution of the ECtHR's judgment. Thus, Article 2 (2) of the Law – see below – in our view should take such an approach into account. International law, including the relevant provisions of the Vienna Convention on Law of Treaties, and case-law of the ECtHR, decisions of the Committee of Ministers, suggest that the domestic legal order should not rely on the absence of domestic law for a judgment to become enforceable.

52. It might also be appropriate in this provision to make reference to the Committee of Ministers’ Recommendation on the execution of judgments of the ECtHR.

53. Article 2(2) of the 2006 Law provides that the enforcement procedure is regulated by the Law "On enforcement proceedings”. Even though the reference to the Law “On

enforcement proceedings" is a useful step to ensure commencement of payments through initiation of domestic enforcement procedures, this might artificially create a conflict of provisions or a legal gap in regulation of the process of execution of judgments of the ECtHR.

54. Comments on Article 3:

> **Article 3. Financing of expenses for the execution of Judgments**
>
> 3.1. Judgments shall be executed at the expense of the State Budget of Ukraine.

55. It is clear that Article 3 relates only to the funding of the execution of specific judgments and not only the execution process itself. However, it is worth amending this provision as to ensure that necessary funding shall be provided for activities related to coordination of execution of judgments.

56. It would be helpful if the 2006 Law made clear that the funding also covers the adoption of individual and general measures, so as to avoid uncertainty on whether financing of such measures is guaranteed by law.

SECTION 2. ACCESS TO JUDGMENTS

57. Comments on Article 4:

> **Article 4. Summary of a Judgment**
>
> 4.1. Representative body within ten days from receipt of a notification that a Judgment has become final shall prepare and submit for the publication in the "Government's Currier" [*Uriadovyi Kurier*] newspaper a summary of the Judgment in Ukrainian (hereinafter referred to as "a summary of a Judgment") which shall contain:
>
> a) an official title of the Judgment in original and in Ukrainian translation;
>
> b) number of the application before the Court;
>
> c) the date of the Judgment;
>
> d) brief statement of facts in the case;
>
> e) brief statement of law in the case;
>
> f) translation of the resolving part of the Judgment.
>
> 4.2. The newspaper mentioned in Article 4.1. shall publish the summary of the Judgment within seven days from its receipt.

58. When Article 4 refers to the "summary of the judgment" it is not entirely clear which goal exactly the "representative body" is trying to achieve – is it publication of the judgment or its promulgation? If the former is the case, we note that further in the law the term "summary of the judgment" is not used.

59. The time limits encompassed in this article seem to be too ambitious. It would often be impossible to perform a translation of the required *excerpts* of the text of the judgment

within 10 days, as stipulated by the 2006 Law. To decide what in the judgment is crucial and what can be summarised is also a comprehensive and difficult task, which probably could be delegated to a specialised technical body dealing with translations.

60. Additionally, for most judgments the ECtHR itself produces a legal summary or a press release, sometimes even in Ukrainian language (like it was done most recently in the case of *Burmych and Others*). The usefulness of this exercise for the process of implementation of judgments is therefore unclear (it appears that summary of a judgment is not important for actions to be taken by the Bailiffs service to pay just satisfaction, it is rather a "full original text" that is needed and translation of "the operative part of the judgment", as stipulated in Article 7(1) of the Law).

61. Thus, according to the 2006 Law, there are three documents that are being produced on the basis of judgments of the ECtHR: a summary of the translated operative part of the judgment (which is to be enforced), a complete authentic translation (for publication and application) and a complete translation for the judges, see Article 6 (4). It is not clear what is the relationship between Article 4 and Article 6 (4) in a sense as to how the judiciary is being provided with a translated text of the judgment and how the judgment is brought to the attention of the judiciary. It is also unclear what is the difference between the complete translation and an authentic translation. Additionally, this adds to the problem of application of other judgments of the Court, for example against other states, whereas authentic and full translations of the judgments are not envisaged in the Law (and probably they should not be included into the functions of the Government Agent's Office).

62. As regards the "brief statement of law", the category of cases which are considered under the simplified procedure, i.e. on the admissibility and merits together (Article 29 § 3 of the ECHR and Rule 54A of the Rules of the ECtHR), may be highlighted. This further includes well-established case-law cases that are examined by the ECtHR in summary manner by a committee of three judges, with minimal reasoning and reference to the leading case on the issue. It is to be noted that questions of admissibility can also be important. This applies to the translation of "the operative part" of the judgment, which in our view should be set out and translated completely, not only summarised.

63. In general, it would be advisable for the 2006 Law to require a full translation of the judgment within a reasonable time limit. See also comments on Article 6 (4) below. It also appears that translation of judgments, producing summaries and excerpts from the operative parts altogether form one of the major functions of the Government Agent and take a lot of resource from his/her office. It might be advisable to review this function in order to lighten the Agent's Office.

64. Comments on Article 5:

> **Article 5. Notification of the Judgment**
>
> 5.1. Representative body shall send the summary of the Judgment to the Creditor, the Ombudsperson, all state bodies, officials, and other persons directly affected by the Judgment within ten days from receipt of notification about the Judgment becoming final.

65. Article 5 provides for informing the parties to the execution process of the adopted judgment. The applicant (or "the Creditor" under the 2006 Law) will most probably

already have been informed by the Registry of the ECtHR at the time of the delivery of the judgment. We gather that the purpose of informing the applicant again at the time when the judgment has become final is to notify the applicant of her/his/its rights in the process of enforcement. Additionally, it might serve as an indication that the authorities are ready to pay just satisfaction awarded by the judgment or indicated in a decision. This is commendable and should be strengthened in a text.

66. The term "other persons directly affected by the judgment" is vague. It is not clear whether it is left to the discretion of the "representative body" to identify the persons, institutions and processes involved. The identification of the bodies concerned should be matched with the summary of the judgment produced.

67. Comments on Article 6:

Article 6. Translation and publication of the Judgment

6.1. With the aim of taking general measures the State ensures the translation into Ukrainian and the publication of full texts of Judgments in a publication specialized in the Court's case-law and disseminated in the legal community.

6.2. Authenticity of translations of full texts of Judgments shall be certified by the Representative body.

6.3. Representative body shall select on a competitive basis an edition, which will translate and publish the full texts of Judgments, as well as order the necessary quantity of copies of that edition to provide courts, prosecutor's offices and justice, law-enforcement and security services bodies, penitentiaries and other interested agencies with it.

6.4. The state body in charge of courts' material-organizational support shall provide judges with the translation of full texts of Judgments.

68. As regards Article 6 of the 2006 Law, which regulates the question of "translation and publication of the judgment", it should be specified how exactly "the state ensures the translation"; so as to clarify that it is financed in accordance with Article 3 of the 2006 Law. It is not clear which institution has the responsibility for dissemination and publication of judgments "in a publication specialized in the ECtHR's case-law and disseminated in the legal community". The publication and dissemination should be probably addressed in the respective bylaws.

69. Further in this provision it should be clearly and explicitly stated that the question of the procurement of translation of full texts of judgments to national judges is a responsibility of the State Judicial Administration of Ukraine. See also our comments on Article 4 above.

SECTION 3. EXECUTION OF JUDGMENTS

70. Comments on Article 7:

> **Article 7. Execution of a Judgment with regard to the payment of compensation**
>
> 7.1. Representative body within ten days from receipt of the Court's notification that a Judgment has become final shall:
>
> a) notify Creditor and explain his/her right to file an application with the State Bailiff's Office on the payment of compensation; the application shall contain the data of the Creditor's bank account for the transfer of funds;
>
> b) send to the State Bailiff's Office the authentic text and the translation of the operative part of the a final judgment of the Court finding a violation of the Convention in a case against Ukraine; the authentic text and the translation of the operative part of the a final judgment of the Court on just satisfaction in a case against Ukraine; the authentic text and the translation of the operative part of the decision of the Court on a friendly settlement in a case against Ukraine; the authentic text and the translation of the operative part of the decision of the Court on accepting a unilateral declaration in a case against Ukraine. The authenticity of the translation is certified by the Representative body;
>
> The State Bailiff's Office within ten days from receipt of documents specified in Article 7.1.(b) shall open enforcement proceedings.
>
> 7.2. Failure of the Creditor to submit an application on the payment of compensation shall not halt the execution of the Judgment.

71. As regards Article 7 of the Law, we observe that execution of the judgment insofar as it concerns the payment of just satisfaction, is made under Articles 41 and 46 of the Convention, and not on the basis of national legislation, since the Convention in questions of compensation has supremacy over the domestic legislative act. Article 7 of the 2006 Law and its Article 1 speak about "compensation" to be paid, which wraps up "just satisfaction" in its notion. The 2006 Law should provide for ensuring payment of just satisfaction and default interest where necessary as a primary obligation. It should also ensure payment of awards under a friendly settlement or unilateral declarations accepted by the Court. Thus, this strictly speaking difference in terminology leads to failure to pay just satisfaction, which had been an issue according to the public information available from the Execution Department web-site.[7]

72. Also, the State should notify the applicant of the availability of funds and to offer ways in which the applicant can receive the funds awarded by the judgment. The authorities should make sure that the relevant funds are made available to the applicant.

[7] Information on the web-site of the Execution Department as to Payment that has not been made or is incomplete. There were quite a number of cases pending information or payment in this respect: https://www.coe.int/en/web/execution/payment-information

73. Comments on Article 8:

Article 8. Payment of a compensation
8.1. Payment of compensation to the Creditor shall be effected within three months from the date when the Judgment has become final, or within a period stipulated in the Judgment. 8.2. In case of failure to pay compensation within the time-limits set forth in Article 4.1. a simple interest shall be payable on the above amount in accordance with the Judgment. 8.3. Within one month after the opening of the enforcement proceedings the Representative body shall send the ruling on the opening of the enforcement proceedings and documents specified in Article 7.1.(b) of this Law to the central executive body, which implements the state policy in the treasury administration of budget funds. 8.4. The central executive body, which implements the state policy in the treasury administration of budget funds within 10 days from the date of receipt of the documents mentioned in Article 8.3. of this Law shall transfer the money from the relevant budgetary program of the State Budget of Ukraine to the bank account specified by the Creditor; in case of absence of the latter money shall be transferred to the deposit account of the State Bailiff's Office. 8.5. The confirmation of the transfer received from the central executive body, which implements the state policy in the treasury administration of budget funds, and confirmation of the fulfillment of all the requirements specified in the operative part of the final judgment of the Court in the case against Ukraine, which found violation of the Convention, the operative part of the final judgment of the Court on just satisfaction in a case against Ukraine, in the decision of the Court on a friendly settlement in a case against Ukraine, in the decision of the Court on accepting a unilateral declaration in a case against Ukraine, is a ground for the State Bailiff's Office to terminate the enforcement proceedings. 8.6. The State Bailiff's Office within three days shall send to the Representative body the ruling on closure of the enforcement proceedings as well as the confirmation of the transfer of money.

74. Article 8 of the 2006 Law includes specific deadlines for the execution of judgments which may conflict with those laid down in the operative part of the judgment. In order to comply with the ECtHR's judgments, it will be necessary to amend the 2006 Law and other regulations. The same concerns the provision on opening of enforcement proceedings, sending a copy of the judgment to the State Treasury, calculation and payment of default interest, etc. (Article 8(3) of the Law) that could potentially conflict with the terms laid down in the operative part of the judgment.

75. It is not clear whether the interest referred to in Article 8(2) intends to correspond with the interest indicated in the ECtHR's judgments. Also, it is not clear whether the interest's main purpose would be to assure that the economic value of the award would be maintained.

76. Placement of the amount of just satisfaction to the deposit account of the State Bailiff's Service is a ground for termination of execution proceedings under the judgment and thus constitutes execution of a judgment. However, from the point of view of the ECHR and the practice of the Committee of Ministers, such a transfer of funds from one State body account to another will not suffice as execution. It cannot be considered as a ground for termination of the enforcement proceedings. Alternatively, it could be possible to open a bank account in the applicant's name and to transfer the right of access

to the funds at the account to the applicant ("the Creditor") or another person eligible to receive an award under the judgment. This would suffice as a measure of payment of just satisfaction.

77. Comments on Article 9:

> **Article 9. Certain aspects of the payment of compensation**
>
> 9.1. In cases when it is impossible to identify the place of residence (location) of the Creditor - natural person as well as in case of death of the Creditor - natural person or reorganisation/liquidation of the Creditor - legal entity, the amount of compensation shall be transferred to the deposit account of the State Bailiff's Office. The same procedure shall be used in the case specified in Article 7.2 .of this Law.
>
> 9.2. The amount of compensation deposited in the account of the State Bailiff's Office shall be transferred to:
>
> a) the Creditor's account after his/her submission of the required application;
>
> b) accounts of heirs of the Creditor - natural person after they have presented duly certified documents entitle them to obtain the heritage;
>
> c) account of successor of the reorganised Creditor - legal entity after it have presented duly certified documents proving the succession;
>
> d) accounts of the founders (participants, shareholders) of the liquidated Creditor - legal entity after the have submitted court decisions confirming their status of founders (participants, shareholders) of the liquidated Creditor - legal entity at the moment of liquidation and determining the share of compensation to be paid to each of the founders (participants, shareholders).
>
> 9.3. Within three days from the moment of transfer to the State Bailiff's Office's deposit account of the amount of compensation, the State Bailiffs Service informs the Recipient about this.
>
> 9.4. Information on the availability of funds on the deposit account of the State Bailiff's Office and on informing the Recipient of this, the State Bailiff's Office shall send to the Representative body.
>
> 9.5. Representative body shall act as the claimant in cases concerning indemnification of losses inflicted on the State Budget of Ukraine as a result of payment of compensation and shall be obliged to lodge such a claim with a court within six months from the moment specified in Article 8.4. of this Law. The overall limitation period for filing such claims is determined in accordance with the Civil Code of Ukraine.

78. The same comments as made with regard to Article 8 apply to Article 9 of the 2006 Law, because, as mentioned earlier, transfer from one bank account of the State to another is not an execution of a judgment. Moreover, the procedure to obtain a decision in favour of the applicant is overcomplicated, which is executed on the basis of "properly issued documents".

79. Article 9(4) of the 2006 Law seems to be interesting but impractical from the point of view of execution of judgments by Ukraine. This Article states that the Representative body has the right to appeal to a court for compensation of damages caused to the state budget, especially when it comes to other budgetary organizations and state institutions, not private individuals.

80. Comments on Article 10:

Article 10. Additional individual measures
10.1. Additional individual measures shall be taken in addition to the payment of compensation and are aimed at restoring the infringed rights of the Creditor.
10.2. Additional individual measures include:
a) restoring, as far as possible, the previous status which the Creditor has had before his/her Conventional rights were breached (*restitutio in integrum*);
b) other measures, envisaged in the Court's judgment;
10.3. The previous status of the Creditor shall be restored, *inter alia*, by means of:
a) repeat consideration of the case by the court, including the reopening of proceedings in the case;
b) repeat consideration of the case by the administrative body.

81. In Article 10 (1) of the 2006 Law "additional individual measures that shall be taken in addition to the payment of compensation and are aimed at restoring the infringed rights of the Creditor", do not include individual measures that may be indicated in the operative part of the judgment (e.g. for instance to reinstate the applicant in his position, as in the judgment of *Oleksandr Volkov v Ukraine,* app. no. 21722/11, 9 January 2013).

82. It is unclear why the 2006 Law calls these measures "additional". The suggestion that individual measures of redress are "less important" than payment of just satisfaction is very wrong. This is especially important in situations where urgent individual measures are required in relation to continuing breaches of Articles 3 or 5 of the Convention. A measure of individual investigation or re-opening of the proceedings or other measures of individual redress for the applicant should be thus seen not as complementary measures, but measures equally pertinent in relation to the requirement of *restitutio in integrum*. The 2006 Law should also reflect on this approach.

83. The 2006 Law seems to be limited to two types of additional judicial measures, notably "re-examination of the case including reopening of proceedings" and "re-examination of the case by administrative authority". We note that there are additional individual measures that could be indicated in the ECtHR's judgment, such as for example enforcement of a domestic court's decision or taking certain actions within official investigation or reopening of proceedings of national courts.

84. It might be advisable to make a direct reference to recommendations of the Committee of Ministers on the execution of judgment of the ECtHR, thus giving them the status of legally binding on the national level. Additionally, it might not be advisable to regulate the issues of individual measures in great detail in the 2006 Law itself but rather regulate them strategically in the legislation and leave remaining details and relevant Council of Europe recommendations to be adopted through judicial practice or other domestic soft law instruments or even bylaws, specifying what, for instance, the General Prosecutor's Office or the police should do in the event of a finding of a breach of Articles 2 or 3 of the ECHR. What kind of action should they take on the basis of information received from the coordinating body in order to comply with the ECtHR's judgment?

85. It would be advisable to align provisions of the 2006 Law on re-opening of the proceedings with the relevant provisions of the procedural codes, which were adopted recently (24 November 2017), and possibly with the Law "On the prosecutor's office" (or with the legislation regulating the functioning of the State Bureau of Investigations[8] or other law-enforcement bodies or bodies of executive power). Additionally, in the light of these provisions it would be important for re-opening purposes to ensure, through the respective provisions of the current law, that the relevant judicial instances involved in the process have necessary capacity to deal with re-opening, both from the procedural and substantive point of view. They should also have enough expert capacity to deal with issues of re-opening, possibly with the assistance provided by the Office of the GoA and bearing in mind the respective division of labour and principles of separation of powers. The re-opening procedure should be driven by informed decisions of the judicial authorities, which should be provided with all the relevant information by the GoA's Office. This could include submissions of the parties made in the course of the proceedings before the ECtHR and other elements relevant for such assessment.

86. Comments on Article 11:

Article 11. Actions which the Representative body shall take with regard to additional individual measures 11.1. Representative body within ten days from receipt of the Court's notification that the Judgment has become final shall: a) send the Creditor a notification explaining his/her right to initiate proceedings on the review of his/her case and/or to reopen the proceedings in compliance with current legislation; b) notify the bodies in charge of the execution of additional individual measures specified in the Court's judgment about the contents, manner and terms of these measures' execution. This notification shall be appended with translation of the judgment the authenticity of which is certified by the Representative body. 11.2 Control over the execution of additional individual measures specified in the Judgment, which are carried out under the supervision of the Committee of Ministers of the Council of Europe, is exercised by the Representative body. 11.3 Representative body – while exercising the control as provided for in Article 11.2. of this Law – shall be entitled to request from the bodies in charge of the execution of additional individual measures specified in the Court's judgment on the course and results of these measures' execution as well as to present a motion to the Prime Minister of Ukraine to secure the execution of additional individual measures.

87. Article 11 of the 2006 Law states that the applicant should himself/herself initiate the restoration of his/her violated rights. This might be applicable to a situation where the applicant should provide respective information to the authorities as to the payment of just satisfaction, i.e. provide banking details, address, relevant identification documents, etc.

[8] A body required to appear as a remedy for ill-treatment complaints as seen by the process of execution of the Kaverzin/Afanasyev group of cases.

88. According to the practice of the Registry of the ECtHR, the applicant is being notified that he/she should send his/her bank details to the authorised representative body to enable enforcement. Any complication of the procedure for the applicant at the national level is undesirable. The 2006 Law should also reflect this trend.
89. Moreover, this provision should be clarified to the effect that coordination and supervision of execution of the ECtHR's judgment is carried out by the Representative body. This might raise an issue of relations of the Agent's Office, being a part of the executive, with other branches of power, i.e. judiciary and the legislative. The Agent's Office coordinates, as stated in the Law, the process of execution "at the national level", as "supervision of the execution of judgments of the ECtHR" under the ECHR is a function of the Committee of Ministers of the Council of Europe, which in turn is assisted in this process by the Execution Department.
90. It should also be noted that individual measures must be coherent with reasonable claims of the applicant, and should be based on the guidance given by the Committee of Ministers of the Council of Europe and the Department responsible for supervision of the execution of the ECtHR's judgments.
91. Comments on Article 12:

Article 12. Actions which the bodies in charge of the execution of additional individual measures shall take

12.1. The bodies in charge of the execution of additional individual measures shall:

a) immediately and within the time-limit set forth in the Judgment and/or current legislation execute additional individual measures;

b) provide information about the course and results of additional individual measures' execution upon requests of the Representative body;

c) effectively and without undue delays reply to submissions by the Representative body;

d) inform the Representative body about the completion of additional individual measures' execution.

92. Article 12 of the 2006 Law provides for vague deadlines for the implementation of instructions issued by the Representative body. It is not very clear on how, taking into account the principles of separation of powers, these instructions can be set by a body which, being a part of the executive branch of power, cannot impose decisions and demand their execution. Perhaps it would be better to clarify that these are "friendly recommendations" and that the time-limits are consensual, in view of the reporting needs of the State before the Committee of Ministers of the Council of Europe. It would be also important to add that the obligation to provide information and assist the Agent in coordination of execution measures is a part of general international obligations of the State before the Council of Europe and supervising body – i.e. the Committee of Ministers of the Council of Europe.

93. Comments on Article 13:

Article 13. General measures

13.1. General measures shall be taken by the State in order to secure the respect of Convention's provisions the violation of which has been found in Judgment, to eliminate underlying systemic problems which are at the heart of violation found by the Court as well as to eliminate the reasons for submission to the Court of applications against Ukraine caused by the problem which has been already considered by the Court.

13.2. General measures are aimed at eliminating underlying systemic problem indicated in Judgment as well as its origin through:

a) amendments to the current legislation and changes in the practice of its application;

b) changes in administrative practice;

c) legal review of the draft legislation;

d) professional training on the Convention and the Court's case-law of prosecutors, lawyers, law-enforcement bodies' officers, immigration service employees, other persons whose professional activity is connected with law enforcement and restriction of person's liberty;

e) other measures, which shall be determined under the supervision of the Committee of Ministers of the Council of Europe by the respondent State in accordance with Judgment. These measures shall be aimed at eliminating underlying systemic problems, ceasing violations of the Convention caused by these shortcomings and securing the maximum redress for these violations.

94. Article 13(2) of the 2006 Law provides for "general measures aiming to eliminate underlying systemic problems which are at the heart of violation found by the Court", which would be better to clarify with the recommendations of the Committee of Ministers, not just with extracts from them. An inconsistency of the 2006 Law should also be eliminated here – a presumption that there are some measures that are not being supervised by the Committee of Ministers. A Law should clarify the role of the CoM in the process of supervision of execution, clearly stating that it applies to all judgments delivered against Ukraine.

95. The "general measures" are not necessarily measures to eliminate the "systemic problem" as defined in the 2006 Law; they may apply to specific problems, not global in nature and at the same time legally defined. The Committee of Ministers in its documents gives clarification on the "systemic nature" of the violations. In particular, the case-law and "soft law" recommendations make a different between complex issues, systemic problems or structural problems. In some particular circumstances they can be seen as synonyms describing the same legal issue requiring legislative intervention. However, structural problem might not necessarily be of systemic nature. For instance, an institution which is non-compliant with the Convention might function without leading to systemic violations. Repetitive cases might stem from a systemic issue, rather than a structural issue.

96. It also may be necessary to draw attention to the provisions of Protocol No. 14 that extend ways of solving the problem of general measures relating to the functioning of the ECtHR. This specifically refers to the pilot judgment procedure introduced by Rule 61 of the Rules of ECtHR. Such a procedure had been used in the case of *Yuriy*

Nikolayevich Ivanov v. Ukraine and confirmed in the case of *Burmych and Others v. Ukraine*. It would be better to write down categories of subjects of professional training, focusing on "public servants". As for lawyers, it is not clear whether this is a duty of the state. It may be appropriate to focus on the state-appointed lawyers who receive funds from the state budget. Shortcomings can be of systemic nature (systemic nature is found in judgments and applies most of all to structural problems), see. e.g. judgments in the cases of *Broniowski v. Poland* [GC], app. no. 31443/96, judgment 22 June 2004, ECHR 2004-V, *Sejdovic v. Italy* [GC], app. no. 56581/00, judgment 1 March 2006 ECHR 2006-II).

97. Comments on Article 14:

Article 14. Actions which the Representative body shall take with regard to general measures

14.1. Representative body shall prepare and send quarterly to the Cabinet of Ministers of Ukraine a motion on general measures (hereinafter referred to as "the Motion").

14.2. The Motion shall contain proposals on settlement of an underlying systemic problem indicated in the Judgment as well as its origin, namely:

a) analysis of circumstances which caused the breach of the Convention;

b) proposals as to the amendments to the current legislation;

c) proposals as to the changes in administrative practice;

d) proposals to be taken into account during the drafting of laws;

e) proposals as to the professional training on the Convention and the Court's case-law of judges, prosecutors, lawyers, law- enforcement officers, immigration service employees, and other persons whose professional activity is connected with law enforcement and restriction person's liberty;

f) proposals as to other general measures aimed at eliminating the underlying systemic problems, ceasing violations of the Convention caused by these shortcomings and securing the maximum redress for these violations.

g) list of central executive bodies in charge of execution of measures proposed in the Motion.

14.3. Representative body, at the same time, shall prepare an analytical review for the Supreme Court of Ukraine which shall include:

a) analysis of circumstances which caused the breach of the Convention;

b) proposals on the bringing of national courts' case-law in line with requirements of the Convention.

14.4. Representative body, at the same time, shall prepare and send to the secretariat of the Verkhovna Rada of Ukraine proposals to be taken into account during the drafting of laws.

98. It should be noted that according to Article 14 of the Law, the Representative body has an obligation to offer taking certain general measures to the Cabinet of Ministers, the Supreme Court and the Parliament of Ukraine. The Representative body shall present the facts referred to in the judgment that caused the finding of a violation of certain provisions of the Convention or of the protocols thereto, and not those that are worth attention in the Representative body's opinion.

99. Proposals for amendments to the legislation may be different, but the proposals on bringing judicial practices into line with the requirements of the Convention as referred to in Article 14(3) of the 2006 Law should be drafted in such a way as not to be considered as an interference with the jurisdiction of courts or reassessment of the findings of the ECtHR, identifying root causes of a problem, since only the ECtHR can make conclusions on compliance of judicial practices with the ECHR or the protocols thereto.

100. It may be advisable to expand the range of subjects that ensure adoption of general measures. For example, if a violation of the ECHR originates from certain State bodies that are not hierarchically subordinate to the Cabinet of Ministers (potentially the President and the Presidential Administration, like in the case of *Sovtransavto Holding v. Ukraine*, app. no. 48553/99, judgment 25 July 2002, where the President was attempting to give instructions to the High Commercial Court, etc.).

101. Article 14(3) refers to the analytical review for the Supreme Court of Ukraine, provided by the Representative body, i.e., the Government Agent, which is subordinate to the Ministry of Justice. Perhaps it might suffice to inform the Supreme Court of Ukraine or other high courts of the rendered judgment and, possibly, indicate reasons that in the opinion of the Representative body (clearly indicating that this is an analytical opinion of that body) were the cause of the violation. It would be then for the Supreme Court itself to carry out its analysis of these indications and the judgment of the European Court itself. For the sake of ensuring independence of the national courts this may be an advisable course of action. However, the 2006 Law can also presuppose some other forms of further interaction between the Supreme Court and the Government Agent and his/her Office, i.e. amicus curia briefs, third party intervention in the re-opened proceedings, expert and technical exchanges between the secretariats of both institutions, joint research and expertise, conferences, etc.

102. In our opinion it is recommended to amend this provision by making a separate article on the role of the Supreme Court in the execution and application of judgments of the ECtHR (taking into account recently adopted procedural codes, provisions of which were not available at this stage of expert review).
It should also be possible to address the issue of the role of the Constitutional Court in the execution of judgments, for instance, by providing a right to the Government Agent to bring constitutional proceedings , in order to ensure compliance with the judgment of the ECtHR. Other forms of procedural participation of the GoA could be thought of (amicus curiae, third party intervention, etc.).

103. Comments on Article 15:

Article 15. Actions which the Cabinet of Ministers of Ukraine shall take with regard to general measures

15.1. The Prime Minister of Ukraine, following the Motion provided in Article 14 of this Law, shall determine central executive bodies in charge of the execution of general measures and immediately provide them with relevant instructions.

15.2. The central executive body determined in the Prime Minister's instruction, within the term set in the instruction, shall:

a) ensure, within his/her competence, the adoption of acts to execute general measures and control the execution thereof;

b) make a submission to the Cabinet of Ministers of Ukraine on the adopting of new, abolishing or amending active acts of national legislation.

15.3. The Cabinet of Ministers of Ukraine shall:

a) adopt, within its competence, acts to execute general measures;

b) submit to the Verkhovna Rada of Ukraine according to the legislative initiative procedure draft laws proposals on the adopting of new, abolishing or amending of active laws.

15.4. These acts shall be adopted and relevant draft laws shall be submitted by the Cabinet of Ministers of Ukraine to the Verkhovna Rada of Ukraine within three months from the date when the Prime Minister of Ukraine has issued the instruction specified in Article 15.1. of this Law.

104. We note that Article 15 gives a prominent role to the Prime Minister's office in the execution of measures of a general nature. This is commendable in itself. It is however not entirely clear what is the difference, if any, between the suggestion (the "motion") offered by the Representative body (see Article 14) and the instructions that would emanate from the office of the Prime Minister. This could possibly be clarified in the text of the Law.

105. It is also not very clear whether these powers are being used and why they are not being used, if this is the case. It appears that the role of the Ministry of Justice and the Agent, who are responsible for coordinating the execution process, should be clarified in this procedure, permitting some form of urgent access to the decision-makers at the level of Cabinet of Ministers or Prime-Minister to resolve the issue.

106. Comments on Article 16:

Article 16. Responsibility for the non-execution or improper execution of Judgments

16.1 Those officials who are in charge of the execution of Judgments and failed to execute it or did it improperly shall bear administrative, civil, or criminal responsibility as provided for by laws of Ukraine.

107. Article 16 of the 2006 Law stipulates that in case of failure or improper execution of the judgment of the ECtHR "officials who are in charge of the execution of judgments shall bear administrative, civil, or criminal responsibility as provided for by laws of Ukraine. The obligation to comply with the judgment of the ECtHR lies with all relevant domestic authorities.

108. However, it does not explicitly say which types of responsibility are imposed and how, in particular who will determine whether an official failed to execute a judgment or did so improperly (written submission by Representative body to the prosecutor or higher authority), properness of the execution, type of liability, which shall be borne by the official, etc. This provision of the law therefore seems to be redundant and unenforceable.

SECTION 4. APPLICATION OF THE ECHR AND OF THE CASE-LAW OF THE ECTHR IN UKRAINE

109. Comments on Article 17:

> **Article 17. Application by courts**
>
> 17.1. While adjudicating cases courts shall apply the Convention and the case-law of the Court as a source of law.

110. This is a useful provision, which should also be synchronised with the relevant provisions of the procedural codes and be reflected in the judicial practice.

111. Comments on Article 18:

> **Article 18. Order reference**
>
> 18.1. In order to make a reference to the text of the Convention courts shall use the official translation of the Convention into Ukrainian (hereinafter referred to as “the translation”).
>
> 18.2. In order to make a reference to judgments and decisions of the Court and decisions of the Commission courts shall use translations published in the outlet specified in Article 6 of this Law.\
>
> 18.3. In case of the absence of the translation of Judgment or decision of the Court or decision of the Commission, courts shall use their original texts.
>
> 18.4. If a linguistic discrepancy between the translation and the original text is found, courts shall use the original text.
>
> 18.5. If a linguistic discrepancy between the original texts is found and/or if need be to carry out a linguistic interpretation of the original text courts shall use the relevant case-law of the Court.

112. Article 18 states that "in order to make a reference to the text of the ECHR courts shall use the official translation of the ECHR into Ukrainian (hereinafter referred to as "the translation")". However, it does not indicate which version of the text of the ECHR is the "most official". Possibly the one published on the web-site of the Verkhovna Rada of Ukraine or made formally public by other means. Also, it should be kept in mind that the ECHR is part of the Ukrainian national legislation, as provided by Article 9 of the Constitution and the law on ratification of the ECHR. The ECHR is an international treaty and the case law of the ECtHR clarifies the scope of the provisions of the ECHR and their applicability. This should be reflected in the text of the 2006 Law, including the parts defining the terms used in the Law.

113. Moreover, it is unclear how the judges would use the texts of the ECtHR's judgments published in the special magazine referred to in Article 6 of the Law. This should be clarified by means of bylaws, possibly a decision produced by the State Judicial Administration, who is responsible for logistical support to the administration of justice by the courts.

114. It appears desirable to encourage judges to use the original texts of the ECtHR's judgments, especially if the translation is unavailable. They should be encouraged to use the official database of the ECtHR (HUDOC) and the database concerning execution of judgments (HUDOC-Exec), where the authorities have also supplied most of the Ukrainian language translations from the official languages used by the ECtHR and the Committee of Ministers.

115. The criteria for selection of judgments for publication are relative and vague. Maybe in terms of application of case-law of the ECtHR (we are referring to "case-law", having a form of *erga omnes* effect or effect of guidance for the judicial practice) it would be more important to say that the parties in cases pending before the national courts may refer to the ECtHR's judgments, relevant for their cases, and that the courts must take them into account when deciding on the merits of the cases.

116. Comments on Article 19:

Article 19. Application in the legislative sphere and administrative practice

19.1. Representative body shall carry out a legal review of all draft laws, as well as by-laws subject to state registration, as to their compliance with the Convention and shall prepare an opinion thereon.

19.2. If the review specified in part 1 of this Article was not carried out or an opinion on the inconsistency of the by-law was issued, its state registration refused.

19.3. Representative body shall provide regular and reasonably periodic examination of current legislation on its consistency with the Convention and the Court's case-law, especially in the spheres relating to the activity of law-enforcement bodies, criminal proceedings, and restriction of liberty.

19.4. Following the examination set forth in Article 19.3. of this Law, the Representative body shall submit proposals to the Cabinet of Ministers of Ukraine on amendments to the current legislation in order to bring it in conformity with requirements of the Convention and the relevant Court's case-law.

19.5. The ministries and other central executive bodies shall provide within their competence a systematic control over the adherence of administrative practice to the Convention and the Court's case-law.

117. With regard to the provisions of Article 19 of the 2006 Law and the legal review of draft laws by the Representative body as to their compliance with the ECHR and the ECtHR's case-law, this provision also seems virtually unenforceable and is quite ambitious in connection with the amount of draft-laws and by-laws that need to be reviewed. The Experts are not sure whether the Government Agent's Office should be indeed responsible for this function, already having scarce resources for execution of judgments pending.

118. There is also duplication of functions of other legislative institutions, in particular the Parliamentary Sub-Committee on Human Rights of the Verkhovna Rada, whose role, just like the role of the Sub-Committee on Execution of Judgments of the Court, is not fully clear and established in this law. The procedure for communicating with Parliament and that sub-committee should be clarified, with a view to establishing a process of informing the Parliament about the judgments, preparing draft laws identified in the judgments of the Court and undertaking necessary legislative action to ensure compliance with required general measures.

SECTION 5. FINAL PROVISIONS

119. Comments on Article 20:

> 1. This Law shall enter into force on the date of its publication.
>
> 2. The Cabinet of Ministers of Ukraine shall:
>
> 1) within one month from the entrance into force of this law:
>
> bring its acts in line with this Law;
>
> ensure that acts of the central executive bodies are brought in line with this Law;
>
> 2) take action and, if necessary, submit proposals to the Verkhovna Rada of Ukraine on the incorporation of questions of the study of the Convention and the Court's case-law in:
>
> qualifying requirements for some categories of judges, prosecutors, advocates, and notaries;
>
> programmes of initial training and further raising of qualification of judges, prosecutors, advocates, law- enforcement officers, immigration service employees, and other persons whose professional activity is connected with law enforcement and restriction of person's liberty.
>
> 3) annually envisage in a separate budgetary program of the draft State Budget of Ukraine the funds for the execution of Judgments of the European Court of Human Rights.

120. The final provisions indicate the need for training and retraining of certain categories of judges, but not all the judges. Perhaps it would be better to supplement the provision with training of law enforcement officials and lawyers in general. Some Recommendations of the Committee of Ministers in respect of dissemination and training activities can be referred to here.

121. We believe it should be indicated and clarified that other measures – publication and dissemination of the ECtHR's judgments, payment of just satisfaction, adoption of individual and general measures, etc. are financed from the state budget.

PART III. ASSESSMENT OF THE CORE UKRAINIAN LEGISLATION

3.1. The role of the Government Agent in the process of the execution of ECtHR judgments

122. In Ukraine, as in the vast majority of member states of the Council of Europe, the Government Agent has been designated as a co-ordinator of the execution of judgments of the ECtHR. While the 2006 Law refers to the GoA as a controlling body (Article 11.2 of the 2006 Law), its main function, under the 2015 Brussels Declaration, is essentially to be a focal point in the execution process, linking the supervision of execution by the Committee of Ministers (CoM) with coordination of individual and general measures by all domestic actors in the Ukrainian legal order.

123. The Government Agent under the Ukrainian law is appointed by the Cabinet of Ministers upon recommendation of the Minister of Justice. At present, his/her office is situated and carries out its functions within the Ministry of Justice itself.

124. The consequences of the fact that the GoA and the GoA's Secretariat are placed within the Ministry of Justice are not clear. It appears that his/her placement within the Ministry of Justice has the potential to improve the coordination of the execution activities, at least, with the Ministry itself (*vis a vis*, *inter alia*, the State Penitentiary Service and the State Bailiff Service). Nonetheless the relationship between the GoA and Prime Minister/Cabinet of Ministers *vis a vis* the functions specified in Articles 14 and 15 of the 2006 Law,[9] remain unclear. More specifically, it is not clear whether the model of interaction between the GoA and these bodies of executive power has previously been employed successfully. Furthermore, the placement of the GoA office under the auspices of the Ministry of Justice, which is part of the executive branch, might prove problematic in its interaction with the legislative and the judiciary authorities. A suggestion in this respect could be made to make it clear that the Representative Body under the Law or the Government Agent is a part of the responsibilities of the Ministry of Justice and eventually it is this Ministry that acts and coordinates the execution of judgments' process.

125. According to Article 11.1 (b) of the 2006 Law, the GoA shall "notify the bodies in charge of the execution of "additional" individual measures specified in the ECtHR's judgment (decision) on the contents, manner and terms of the execution of these measures. This notification shall be appended with translation of the judgment, the authenticity of which is certified by the Representative body". While the issue of the notion of "additional" individual measures had been discussed in the main body of this analysis, it is worth noting that due to the delicate role of the Government Agent, being within the executive, vis-à-vis judiciary and Parliament, the process of identifying the necessary measures should have a consensual form. The judiciary and legislator should

[9] For instance, under Article 14.1 the GoA, i.e. Representative body within one month from receipt of the Court's notification that Judgment has become final shall prepare and send to the Cabinet of Ministers of Ukraine a motion on general measures. Eventually, the Cabinet of Ministers/the Prime-Minister have to act on the basis of the judgment, with a view to introducing necessary general and individual measures.

be informed of the requirements of the judgment and should have their own capacity to elaborate and enact measures required by the judgments of the ECtHR. This means both the capacity to analyse the judgment, if necessary with assistance of the Government Agent's Office, and to implement measures, informing the Government Agent about the results.

126. It appears that there is a problem concerning the understanding and/or familiarity of the authorities regarding the role and functions of the GoA within the execution process in general. It is often the case, that domestic authorities with a crucial role in the process of execution of judgments are not sufficiently aware of the GoA office (and its mandate). It is therefore suggested that the GoA's office take such steps as necessary to increase its visibility and to ensure that other domestic authorities become sufficiently acquainted with its crucial role in the process of the execution of judgments. This could be done by direct action of the Ministry of Justice vis-à-vis the Cabinet of Ministers. The forms of action to increase understanding of the problems arising from the judgment and to allow action to be undertaken should be provided in the 2006 Law or in bylaws of the Cabinet of Ministers. They could be aimed at increased coordination of execution measures between various ministries or might also relate to setting up separate ad hoc structures or widening the capacity of the existing institutional framework or bylaws framework to address a particular systemic or structural problem.

127. The main emphasis of the current legislation is on the direct implementation of the ECHR and the ECtHR's case-law by courts (see Article 17 of the 2006 Law) and other law enforcement bodies (more generally, see Article 2 of the 2006 Law).[10] As things stand, the role of the Committee of Ministers in the execution process and the process itself are not generally known to the authorities. In particular, the 2006 Law does not provide for a process of remitting information to respective decision-makers from the Committee of Ministers. There is no specific procedure or requirement for the Government Agent to inform the respective state institutions of the decisions or resolutions of the Committee of Ministers guiding the execution process and recommending the state authorities a particular course of action with regard to execution of the individual and general measures. As a result, knowledge of the Committee of Ministers' supervision and their involvement in the execution process remains minimal, if any, which undermines the effective implementation of the ECtHR judgments in the domestic legal order. Characteristically the 2006 Law itself pays little attention to the process before the Committee of Ministers (see *inter alia* Article 11.2 and 13.2 (e) of the Law).

128. In the light of the general obligation for all domestic authorities to comply with the judgments under Article 46 of the ECHR, the 2006 Law should include a procedure whereby the measures indicated by the Committee of Ministers are brought to the attention of the relevant domestic authorities; this would ensure that the required action is taken within the established time limits. This might also include translation and dissemination of the decisions and resolutions, other documents produced by the Committee of Ministers and the Execution Department to the attention of various domestic authorities engaged in the process of the execution of judgments. Such an action should be taken on a regular basis, as a follow-up to the meetings of the Committee of Ministers.

[10] Essentially, through the provisions of the Constitution of Ukraine (Article 9), the Law on Ratification of the Convention and the relevant provisions of specific legal acts, including procedural Codes (Codes of Criminal, Civil and Commercial Procedure as well as the Code of Administrative Justice).

129. Under the 2006 Law, analytical information notes summarising the ECtHR findings in particular judgments are being prepared by the GoA office. These notes are useful tools for ensuring access to and dissemination of the ECtHR's case-law in cases concerning Ukraine (Article 2 of the 2006 Law). Nonetheless, these analytical notes have proven ineffective in promoting the process of considering the appropriate individual and general measures. In particular, this relates to the procedure of informing the Cabinet of Ministers of Ukraine and the necessary follow up on general measures specified in Articles 14 and 15 of the 2006 Law (in relation to the Parliament and the Cabinet of Ministers). The same is true about the individual measures to be taken (see Article 10 of the 2006 Law). Analytical notes should be transformed into some form of domestic action plans to be submitted by the Ministry of Justice to the attention of the Cabinet of Ministers, which in turn should adopt a framework strategy of execution of particular measures required by the judgment, distributing tasks and ensuring follow up and result from the action to be taken.

130. It is noted that by means of Article 2.1 of the 2006 Law, Article 46 of the ECHR (i.e. the binding force and the obligation to execute the judgments of the ECtHR) is enshrined in Ukrainian national legislation. Article 2.1., which incorporates the obligations of a member state under Article 46 of the ECHR, constitutes the correct legal basis for taking action for the execution of the ECtHR 's judgment. In that respect, Article 2.2 of the 2006 Law may prove to be in conflict with the relevant case-law of the ECtHR: the latter requires the enforcement of the judgments of the ECtHR irrespective of the existence of any domestic law. This part of the 2006 Law should be clarified to avoid any conflicts with the general principles of international law, the Vienna Convention on the Law of Treaties, as well as the provisions of the domestic constitutional order, including Article 9 of the Constitution.

131. Although the 2006 Law outlines in general terms the actions that need to be taken in order to comply with the ECtHR judgments, in practice, the relevant decision-making process has proven problematic. It is suggested that strengthening the capacity and authority of the GoA's Office would substantially improve the process. Thus, practical steps should be taken to enhance the GoA's role and improve his/her visibility as a focal point in the process of the execution. It is further emphasised that the role of the GoA as a focal and launching point, as specified in the 2015 Brussels Declaration, must be followed up by the other interlocutors in the domestic legal order who should be empowered accordingly. It should be made very clear in the 2006 Law that the Government Agent is a part of the Ministry of Justice and it is responsibility of the Ministry of Justice to coordinate the execution process within the executive branch of power, drawing attention of the Cabinet of Ministers to these issues, and also outside, notably within the judiciary and the legislative branch of power.

132. Consequently, it is of paramount importance to involve at the earliest possible stage all the relevant domestic actors in the preparation and drafting of the action plans or action reports (if the measures were already taken). This process should surely involve the Verkhovna Rada, which at present appears to be inadequately informed and prepared regarding the judgments of the ECtHR against Ukraine and the issues raised therein. There is no persistent lack of dissemination of information on the work of the relevant Convention bodies among state authorities or other stakeholders involved in the application of the ECHR and the case-law of the ECtHR. However, this information disseminated, either due to its form or vague content, is not reaching the attention of the decision-makers and does not result in the actions taken by the respective authorities involved in the implementation process.

133. Any authory responsible for adoption and implementation of individual and general measures should be made aware of the State's, as a whole, responsibility to comply with the execution of the ECtHR judgments and the consequences of non-compliance thereof. Such actions should be taken not only at the political level, proving that there is a commitment of the State to comply with judgments of the ECtHR and implement the ECHR, but should also be taken at the technical level – through respective action taken by the Prime Minister and the Cabinet of Ministers of Ukraine, based on the motions from the Minister of Justice and its subordinate Government Agent. In addition, these bodies and the public officials involved in the decision making process should be well aware of their responsibility for non-execution or improper execution of the ECtHR judgments as provided by Article 16 of the 2006 Law and Article 382.4 of the Criminal Code.

134. In this respect, it should be noted that the CDDH indicated that "the formal appointment of contact persons in other ministries and public authorities with whom the co-ordinator will liaise may also facilitate the process". Similarly, in its report on the longer-term future of the system of the ECHR, the CDDH concluded that the establishment, wherever appropriate, of contact points specialised in human rights matters within the relevant executive, judicial and legislative authorities should be encouraged, especially when no mainstreaming model exists within the relevant governmental bodies.

135. The formal designation of contact persons at the decision-making level in the Ukrainian domestic legal order, promoting more transparency and visibility in the process, would contribute effectively to the domestic execution process and might counteract any reluctance on behalf of the interlocutors to assume responsibility for the execution. Moreover, this would allow the establishment of a permanent network of interlocutors with the necessary authority and experience, integrated within State bodies; this, in turn, would facilitate to a decisive extent the coordination to be carried out by the GoA's office. Clearly, such a network could meet regularly in order to discuss implementation of the ECtHR's judgments and specific implementation issues as they arise from time to time.

136. Additionally, such a network should be provided with necessary institutional and expert support. This means that the creation of special expert structures would be of interest to support the execution process and to act as permanent "technical" interlocutors for the office of the Government Agent. This should be specifically ensured for such institutions as the Supreme Court, the Constitutional Court, the General Prosecutor's Office and the Verkhovna Rada. Such interlocutors should have expert capacity to deal with execution issues, but also should have access to decision-makers, to ensure that these are properly informed on the contents and legal obligations stemming from the judgments of the ECtHR.

137. The setting up, on an *ad hoc* basis, of inter-institutional communication channels might be necessary in order to include all concerned actors in contributing to the process of drafting of an action plan or report. These could focus on the execution of particularly problematic ECtHR judgments, they could be viewed as complementing and strengthening the suggested permanent process of the execution in view of the complexity of issues which cannot be resolved by the GoA operating alone. Such a possibility should be addressed in law, with the preference being given to permanent network, dealing with the execution of ECtHR's judgments' full-time. Additionally, the

existing institutional framework could be extended to deal on an *ad hoc* basis with systemic or structural problems identified in judgments. This, however, does not apply to situations where a need arises to set up a special institution or body to deal with the specific legal problem identified in the judgment on provisional basis.

3.2. The capacity of the Government Agent's Office to deal with the execution

138. The Brussels Conference called upon States Parties "to develop and deploy sufficient resources at national level with a view to the full and effective execution of all judgments, and afford appropriate means and authority to the Government Agents or other officials responsible for coordinating the execution of judgments".

139. It is therefore important that the institution in charge of co-ordination of the execution of judgments is equipped with appropriate human and financial resources as well as sufficient authority in order to fulfil its function of ensuring a full and rapid execution of the ECtHR's judgments.

140. Under the 2006 Law, the GoA has a range of responsibilities, including *inter alia* ensuring access to the ECHR judgment through preparing a summary translation of it (Article 4 of the 6006 Law); informing all the relevant authorities about it (Article 5 of the 2006 Law); and preparing a full text of authentic translation for the publication and further use in the judicial process (Article 6 of the 2006 Law). These responsibilities together with the task of preliminary analysis of draft legislation and acts of the executive branch of power take up valuable time at the GoA's Office, which already has very limited resources allocated to the execution process.

141. At the same time the 2006 Law has widely empowered the GoA with a number of competences, including the power to access the necessary information (Article 11 of the 2006 Law) from the bodies responsible for individual and general measures. However, this has not so far delivered concrete results in pursuit of the 2006 Law's objectives.

142. It would be recommended to reconsider some of the very ambitious functions of the Government Agent's Office, like translation tasks or tasks related to review of the legislation and bylaws, in order to allow the Office to concentrate more specifically on the tasks of representation before the ECtHR and coordination of execution of judgments.

3.3. The model on execution of judgments suggested by the 2006 Law

143. Subject to supervision by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the ECHR in order to abide by the final judgments of the ECtHR. To promote the effectiveness of the mechanism for monitoring the execution of the ECtHR's judgments, it is crucial that the respondent State indicates, as soon as possible after a judgment becomes final, what it considers should be done for the judgment to be executed. In general, it is the Government Agent's responsibility to identify in the first place the execution measures, in close co-operation with the authorities concerned. The Government Agent then sends the proposals regarding the measures to be taken to the ministries and State institutions and bodies affected by the finding of a violation, which in turn are responsible for implementing national measures to execute the judgment.

These are usually the authorities which were involved in preparing the Government's observations in the proceedings before the ECtHR. The persons and institutions who were responsible for submissions before the ECtHR are, in principle, best placed to identify the problems that led to the violations established, spell out their root causes, and thus define and propose the most appropriate execution measures. Specific deadlines, possibly through the offices of the Cabinet of Ministers and via action taken by the Minister of Justice, should be fixed to receive timely replies from the executive bodies for the submission by the GoA of the action plans and/or action reports to the Department for the Execution of Judgments.

144. The deadlines provided for the implementation of instructions of the Representative Body (Article 12 of the 2006 Law) suffer from vagueness. These deadlines should be clearly defined so that the deadlines set out by ECHR bodies are more likely to be met and the responsibility for noncompliance lies with Representative body. The Representative Body could be authorised, when issuing instructions, to indicate specific deadlines to each body involved within which such instructions should be acted upon. This should however pay due account to the delicacy of addressing the judicial and legislative branches of power, where any action should take more consensual forms.

145. In this respect, it should be noted that the 2015 Brussels Conference called upon States Parties to "continue to increase their efforts to submit, within the stipulated deadlines, comprehensive action plans and reports, key tools in the dialogue between the Committee of Ministers and the States Parties, which can contribute also to enhanced dialogue with other stakeholders, such as the ECtHR, national parliaments or National Human Rights Institutions".

146. In many States (*Belgium, Bulgaria, Croatia, Estonia, Finland, France, Greece, Latvia, Lithuania, Romania, Russian Federation, Slovak Republic, Spain, Sweden, Switzerland*), the drawing up of action plans and reports lies with the GoA, on the basis of information provided by the relevant national bodies. In some States the task lies with the ministry which is responsible for the subject-matter concerning the judgment (*Ireland, the Netherlands, Norway, Poland*). It might be recommended that the second course of action is taken by the domestic authorities, in certain especially complex situations or situations requiring detailed legal expertise or assessments, which the Government has no capacity to produce on itself, whereas the ministry or state institution concerned prepares an action plan or action report and the GoA assists in its technical preparation and submission to the Committee of Ministers.

147. The 2006 Law provides for a model of cooperation involving the Cabinet of Ministers and the Prime Minister, and establishes clear procedures for communicating the content of a judgment to the Parliament and the Supreme Court. However, the 2006 Law still lacks a clear model of interaction between these bodies, a model for identifying, proposing and implementing measures required by the judgment. Such a model should obviously take into account the independence of these bodies. It also should aim at achieving concrete results by establishing clear priorities, deadlines, benchmarks for the execution process. It should also allow for enhanced dialogue between various domestic interlocutors before the action plans and action reports are prepared and the necessary implementation measures are undertaken. This dialogue should be established through a permanent expert institutional network, within the institutions of the interlocutors in the execution process, i.e. the Parliament and the judiciary.

148. Additionally, in developing a model of interaction with the Parliament and the Supreme Court, as well as with the law-enforcement authorities, the Prosecutor

General's Office and the Ministry of Interior, special consideration should be given to their autonomy and independence. It would also be useful to see whether a model of cooperation can be envisaged for involving the Constitutional Court in this process. The model can be based on some form of procedural briefs submitted by the Government Agent's office as a third party, in a procedural form of, for instance, amicus *curia briefs* for courts. Some other less formal methods of regular information exchanges should be established between secretariats of the relevant institutions, and the Office of the Government Agent.

3.4. Closing remarks

149. The implementation of the 2006 Law, and the establishment at the national level of a specialised body dealing with the coordination of execution the ECtHR judgments, is a very welcoming development. However, its mere adoption is not sufficient to ensure the full and timely execution of the ECtHR judgments. Thus, the 2006 Law as such does not offer solutions to various issues found by the Convention institutions, i.e. the ECtHR and the Committee of Ministers of the Council of Europe, both having one of the largest workloads in Europe vis-à-vis cases concerning Ukraine. The inefficient implementation of the ECHR at the domestic level leads to multiple repetitive applications submitted to the ECtHR, which until *Burmych and Others* judgment, delivered on 12 October 2017, had some 19,500 applications pending against Ukraine.[11]

150. According to the CDDH report on the longer-term future of the system of the ECHR, the execution in some cases can be blocked by political, technical, financial or other impediments. According to the statistical data available from the Department for the Execution of Judgments, Ukraine has a poor record of compliance with judgments of the ECtHR as it faces most of the aforementioned problems.[12] In particular, according to the 2016 Annual Report on execution of judgments, Ukraine had most of the complex leading cases pending supervision before the Committee of Ministers of the Council of Europe for more than 5 and even 10 years. In particular, the issue of non-enforcement of domestic judicial decisions awarded against the State, has been pending before the Committee of Ministers since 2004 (even before the 2006 Law is adopted).

151. Additionally, the rate of closure of supervision of cases concerning Ukraine is very low. In particular, out of 1,337 judgments adopted against Ukraine since 1997, supervision in some 191 judgments was closed by the Committee of Ministers of the Council of Europe. Such a disproportionate outcome is due to both difficulties in complying with general measures to address systemic and structural problems identified in the ECtHR's judgments, but also due to the identified difficulties in reporting on payment of just satisfaction and compliance with required individual measures aimed at *restitutio in integrum*. Some of the difficulties are also due to inconsistencies between the ECHR, the case-law of the ECtHR and the notions and terminology used in the 2006 Law, which also should be rectified.

152. It is crucial that the GoA has the necessary capacity and authority, originating in the legislation or in his/her position within the hierarchy of the state bodies. In this way, he/she would be best placed to exercise a decisive influence on the political actors and

[11] Eventually, as a result of Burmych and Others, 12,148 applications were transmitted by the Court to the authorities to be dealt with in framework of general measures supervised by the Committee of Ministers.

[12] The factsheet on the execution of judgments concerning Ukraine (1 October 2017): https://rm.coe.int/1680709769.

interlocutors involved in the execution process, so that all the necessary steps required by the general and individual measures are duly taken. Introducing relevant legislation, amending existing legislation or changing long standing policy or practice in order to comply with the ECtHR's judgments require political will; for that reason, the GoA's office should be able to secure the necessary political support and leverage and have at its disposal all available legal tools. It is therefore recommended to clarify that the main responsibility for coordinating the execution process lies with the Ministry of Justice, the Government Agent being a part of that Ministry. The Ministry of Justice should on a regular basis inform the Cabinet of Ministers of Ukraine about the difficulties and progress in its coordination work. This could be effectuated through separate sessions of the Cabinet of Ministers. A system of Parliamentary reporting should also be envisaged in the 2006 Law based on respective Council of Europe recommendations. Such a system should include Parliamentary hearings to raise visibility of the reporting process and any progress achieved or difficulties encountered.

153. Hence, the GoA has a key role in raising awareness regarding the problem of compliance with the judgments of the ECtHR at the domestic level, seeking necessary support from its own hierarchy within the Ministry and the Cabinet of Ministers or via complementary ad hoc mechanisms or solutions necessary to resolve the execution problems at the domestic level. This is especially important in the light of the findings of the CoM in cases raising repetitive problems such as *Ivanov / Zhovner*, where the CoM strongly urged the authorities to resolve the issue at the highest political level.[13] Such an approach was reconfirmed in the recently adopted Grand Chamber judgment in the case of *Burmych and Others v. Ukraine,* app. no. 46852 et al, 12 October 2017.

154. As highlighted by the Director General of the Directorate General of Human Rights and Rule of Law in the 9th Annual Report of the Committee of Ministers on the supervision of the execution of judgments and decisions of the Court, "one of the fundamental conditions to further advance the execution of controversial or politically sensitive judgments is undoubtedly establishing dialogue with key interlocutors. This dialogue should in particular aim at creating a common understanding of the execution requirements and the consequences that should flow from them". Clearly, this is the main recommendation applicable for the Ukrainian authorities, whereas this dialogue should be supported, by efficient implementation of the domestic laws.

[13] Interim Resolution Execution of the judgments of the European Court of Human Rights Yuriy Nikolayevich Ivanov and Zhovner group against Ukraine concerning the non-enforcement or delayed enforcement of domestic judicial decisions and the lack of an effective remedy in respect thereof *(Adopted by the Committee of Ministers on 7 June 2017 at the 1288th meeting of the Ministers' Deputies).* https://search.coe.int/cm/pages/result_details.aspx?ObjectId=090000168071e6fd

PART IV: GENERAL CONCLUSION

155. The implementation of the 2006 Law and the establishment at the national level of a specialised body dealing with coordination of the execution of the ECtHR judgments is a very welcome development. However, its mere adoption, without implementation of the necessary actions by domestic authorities, is not sufficient to ensure full and timely execution of the ECtHR judgments.

156. It is crucial that the GoA has the necessary capacity and authority, originating in law or in his/her position within the hierarchy of state bodies authority, to comply with his/her function of a coordinator. In this way, he/she would be best placed to exercise decisive influence on political actors and interlocutors involved in the execution process, so that all the necessary steps required for by the general and individual measures are duly taken. Introducing relevant legislation, amending existing legislation or changing long standing policy or practice in order to comply with the ECtHR's judgments require political will; for that reason, the GoA's office should be able to secure the necessary political support and leverage, within its hierarchy, Ministry of Justice and the Cabinet of Ministers, and have at its disposal all available legal tools.

157. The GoA has a key role in raising awareness on the execution of judgments of the ECtHR at the domestic level, seeking necessary support from his/her own hierarchy within the Ministry and the Cabinet of Ministers or via complementary ad hoc mechanisms or solutions necessary to resolve the execution problems at the domestic level.

158. As highlighted by the Director General of the Directorate General of Human Rights and Rule of Law in the 9th Annual Report of the Committee of Ministers on the supervision of the execution of judgments and decisions of the Court, "one of the fundamental conditions to further advance the execution of controversial or politically sensitive judgments is undoubtedly establishing dialogue with key interlocutors". This dialogue should in particular aim at creating a common understanding of the execution requirements and the consequences that should flow from them". Clearly, this is the main recommendation applicable for the Ukrainian authorities, whereas this dialogue should be supported by efficient implementation of the domestic laws.

159. Although the 2006 Law provides solid legislative basis for mechanisms of the execution of the ECtHR's judgments, this Law could be further strengthened so as to ensure more coherent, coordinated – and thus effective – execution of the ECtHR judgments.

160. Detailed recommendations of the experts, based on the assessment above, could be highlighted and summarised as follows:

1) the 2006 Law should clearly emphasize that the coordination of execution of judgments of the Court is a part of the responsibilities of the Ministry of Justice and eventually that it is this Ministry that acts and coordinates the execution of judgments' process, within the structure of the executive;

2) the notions and terminology used in the 2006 Law should be further aligned with the requirements of the Convention, case-law of the Court, decisions and recommendations of the Committee of Ministers of the Council of Europe;

3) the GoA's office, its hierarchy, the Ministry of Justice and the Cabinet of Ministers of Ukraine, should take ownership of the execution process and should take necessary steps to increase visibility and to ensure that domestic authorities become sufficiently acquainted with the Agent's crucial role in the process of the execution of judgments;
4) the 2006 Law should include a procedure whereby the measures indicated by the Committee of Ministers are brought to the attention of the relevant domestic authorities and thus the required action should be taken within the established time limits;
5) the analytical notes, envisaging individual and general measures to be taken, should be transformed into some form of domestic action plans, having binding force, to be submitted by the Ministry of Justice to the attention of the Cabinet of Ministers, which in turn should adopt a framework strategy of execution of particular measures required by the judgment, distributing tasks and ensuring follow up and result from the action to be taken;
6) the capacity of the judiciary and the legislative branch of power, of the Constitutional Court and the General Prosecutor's Office to elaborate and enact measures required by the judgments of the Court should be strengthened and a model of interaction of these authorities with the GoA should be elaborated, not necessarily through the 2006 Law itself, but through respective bylaws regulating such joint action;
7) the authorities might wish to review the form of dissemination of information about the judgments, judgments' translations, their summaries, and to ensure that it reaches the attention of the decision-makers and results in the actions taken by the respective authorities involved in the implementation process;
8) the 2006 Law and relevant implementing bylaws should strengthen a legal and political commitment of the State to comply with the judgments of the Court and implement the Convention, permitting action at a technical level – through respective action taken by the Prime Minister and the Cabinet of Ministers of Ukraine, based on the motions from the Minister of Justice and the Government Agent;
9) the 2006 Law should provide for establishment of a preferably permanent network of domestic interlocutors dealing with the execution of Court's judgments full-time;
10) additionally, the 2006 Law could provide for complementing the current permanent institutional framework with an *ad hoc* institutional and legislative solutions dealing with systemic or structural problems identified in the judgments;
11) the institution in charge of the co-ordination of the execution of judgments, i.e. the the Government Agent and his Office, should be equipped with appropriate human and financial resources as well as with sufficient authority in order to fulfil its function of ensuring full and rapid execution of the ECtHR's judgments;
12) it would be recommended to reconsider some of the very ambitious functions of the Government Agent's Office, like translation tasks or tasks related to review of legislation and bylaws, in order to allow the Office to concentrate more specifically on the tasks of representation before the Court and coordination of execution of judgments;
13) the Government Agent should be empowered to indicate specific deadlines to each body involved, within which such instructions should be acted upon;

14) it might be recommended that the second course of action is taken by the domestic authorities, whereas the ministry or state institution concerned prepares an action plan or action report and the Government Agent assists in its technical preparation and submission to the Committee of Ministers;

15) the binding instructions should obviously take into account the independence of different branches of power. It also should aim at achieving concrete results by establishing clear priorities, deadlines, benchmarks for the execution process and respective preparation of actions;

16) the domestic dialogue on the execution of judgments should be established within the current institutional network of the relevant authorities, including the Parliament and the judiciary;

17) this dialogue, involving the judiciary and the Constitutional Court, can be based on some form of procedural briefs submitted by the Government Agent's office as a third party, in a procedural form of, for instance, *amicus curia* briefs for the courts;

18) it is also recommended that some other less formal (and more flexible) methods of regular information exchanges, leading to concrete action, should be established between the secretariats of institutions involved in the execution process and the Office of the Government Agent;

19) the Ministry of Justice should on regular basis inform its hierarchy, including the Cabinet of Ministers of Ukraine and the Prime Minister, on the difficulties and progress in its coordination work. This could be effectuated through separate dedicated sessions of the Cabinet of Ministers, where these issues could be effectively resolved;

20) a system of Parliamentary reporting should also be envisaged in the 2006 Law, in line with the relevant Council of Europe recommendations.