



Analysis

**Of the National Strategy addressing the issue of non-execution of judgments where state bodies or state enterprises, institutions, or organisations are debtors until 2022
and of the Action Plan to support its implementation**

Executive summary

March 2021, Kyiv

Directorate General for Human Rights and Rule of Law of the Council of Europe provides ongoing support to the Ukrainian authorities in the execution of ECtHR judgments, in particular those where a violation of Article 6 of the ECHR has been found. Relevant technical assistance is provided within the project “Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights” (hereinafter, the Project), which is funded by the Human Rights Trust Fund and implemented by the Department for the Implementation of Human Rights, Justice and Legal Co-operation Standards of the Council of Europe. At the request of the Ukrainian authorities, the Project has organised a number of activities and prepared detailed and comprehensive recommendations for the development of a strategic document to address the structural and long-standing issue of failure to execute court decisions in Ukraine, which poses a serious threat to the rule of law, calls into question public confidence in the judicial system and the state as a whole. As a result, in September 2020, Ukraine adopted the respective National Strategy. In order to ensure the effective implementation of the necessary general measures to address this issue, the Project invited Mr Ruslan Sydorovych¹, who previously took an active part in the activities related to the execution of the ECtHR judgments in the *Burmych* group of cases², to analyse the adopted National Strategy and its Action Plan, as well as to take part in the following planned Project activities.

The general purpose of this analysis is to highlight those elements of the National Strategy and its Action Plan that need refining, and to provide the Ukrainian authorities with recommendations in respect of the general measures to be specified in these documents and then implemented with the view to address the failure to execute the judgments and enforce decisions in the *Burmych* group of cases. Thus, this analysis is going to also help improve the adopted National Strategy and Action Plan supporting its implementation.

This analysis has been prepared on the basis of the National Strategy and its Action Plan (as amended in December 2020 and March 2021) submitted by the Ministry of Justice of Ukraine. The expert has also used a number of documents provided by the Project³ and the relevant current Ukrainian legislation regarding the execution of judgments in the *Burmych* group of cases. In addition, the Project assisted in organising two working meetings between representatives of the Secretariat of the Government Agent before the European Court of Human Rights of the Ministry of Justice of Ukraine and the Department for the Execution of Judgments of the European Court of Human Rights to discuss issues related to the strategic documents and approaches to analysis. Thus, comments of the stakeholders have also been taken into account in preparing this analysis.

¹ Mr Ruslan Sydorovych is a partner of ARIIO law firm and a People's Deputy of Ukraine of the VIII convocation.

² The ECtHR judgments in the *Burmych* group of cases include: *Zhovner v. Ukraine* (2004), *Yuriy Nikolayevich Ivanov v. Ukraine* (2009); and *Burmych and Others v. Ukraine* (2017).

³ Among these documents are decisions of the Committee of Ministers of the Council of Europe on monitoring the execution of judgments in the *Burmych* group of cases, the Memorandum on cases considered by the CoE Committee of Ministers in respect of failure to execute or delayed execution of judgments of the domestic courts in Ukraine, general recommendations and conclusions of the Third Annual Forum on Execution of Judgements of Domestic Courts In Ukraine, 2019 Draft National Strategy (developed with the support of the Council of Europe Project) on implementation of general measures to execute the pilot judgment in *Yuriy Nikolayevich Ivanov v. Ukraine*, and the decision of the Grand Chamber in *Burmych and Others v. Ukraine*, and expert documents prepared by the Project in the context of identifying solutions to the problem of non-execution of court decisions.

The request made with the view to this analysis was to review the strategic documents provided in respect of their alignment with the relevant Ukrainian legislation and current principles and requirements for the form and content in order to ensure implementation of the necessary general measures to support execution of the judgments in the Burmych group of cases. Special attention was also paid to providing recommendations on a comprehensive legislative package to address the root causes of the systemic problem of non-execution, consistent with the requirements of the ECtHR case law and the National Strategy, which the CoE CM has repeatedly emphasized in its recent decisions.

General findings

The fact that the National Strategy and the Action Plan have been developed is, of course, a positive step aimed at identifying a solution to the stated systemic problem of non-execution and lengthy execution of court decisions. At the same time, a general identification of the issue is not enough to fulfil Ukraine's international legal obligations before the Council of Europe. Some provisions of the National Strategy and the Action Plan are questionable from the point of view of the quality of the reform, and some are so declarative and imprecise that in the course of their implementation, the purpose and essence of the general measures are likely to be lost. For instance, the documents reviewed contain a number of shortfalls that not only call into question the solution of the problems but may also create new ones. In particular, such shortcomings of the documents may be broken down into those related to the form and those related to the substance.

Form of strategic documents

The comments in respect of the form of the documents partially apply to their substance, this being rather an objection regarding the National Strategy's and the Action Plan's systemic lack of consistency in presenting and defining the really important elements of strategic and tactical nature of the reform of execution of court decisions. In particular, one can highlight under this head the following structural shortcomings:

1) Declarative nature of the provisions should be defined quite precisely. Clarity of definition is not only required by the rule of law's principle of legal certainty but is also a guarantee that the objectives set by the National Strategy will translate to specific general measures in a manner capable of resolving the structural elements of failure to execute judgments and delayed execution. For instance, inter alia, the National Strategy and the Action Plan point to a number of legislative changes that undoubtedly warrant implementation, but these documents often omit information as to the laws that need to be changed and to which extent.

2) There is specificity regarding those in charge of the implementation of specific measures. Consequently, the Verkhovna Rada of Ukraine is not among those responsible for the implementation of a number of measures involving the preparation of certain draft laws. Furthermore, the indicator of completion regarding a draft law is defined as the registration of such law at the Verkhovna Rada of Ukraine, which contradicts the principles of predictability and applicability of such changes because, by their nature, they are incomplete.

3) The Government has not followed the procedure conforming with the full cycle of public policy, within which it was required to draft a Green Paper and a White Paper eliminating a number of inaccuracies and introducing much more specifics to the Action Plan, in particular, by engaging the reform's stakeholders who could become actively involved in identifying the structural

elements of the issue and propose changes that would necessarily be reflected in an updated Action Plan.

4) No financing has been specified to support the implementation of the National Strategy. Paradoxically, the solution of a systemic problem, where respecting financial obligations is key does not provide a proper financial basis. Of course, as of the time of this analysis, the exact amount of debt arising from court decisions is unknown, and an audit of this is envisaged in the Action Plan, but the statement that the implementation of the National Strategy does not require any financial support will not stand a reality check.

Substance of strategic documents

The substance of the National Strategy and the Action Plan needs to be significantly improved. In particular, this concerns the following:

1) The absence of remedies in case of failure to execute or delayed execution of court decisions has been identified by the Government as an issue. This definition of the problem points to the wrong cause-and-effect relationship. In addition to stating the fact, the Government noted the need to improve the remedies in both documents, however, it failed to indicate which remedies should be improved and, where the original term "absence" is concerned, what new remedies must be established.

2) The lack of any information on the development of bailiff institutions is the reason why the foundations laid in 2016 when the institution of private bailiffs was established were not used to continue building a system capable of enforcing court decisions.

3) Automating enforcement proceedings, as suggested in the National Strategy and Action Plan, by no means provides for the creation of institutions and mechanisms for automatic execution of judgments against a debtor who is a public authority or local government, nor automatic debt collection.

4) Budget allocations for paying out the existing debt are too small, and the envisaged audit of the existing state debt arising from court decisions against the debtors that are state-owned enterprises cannot produce a complete picture of the non-execution status.

5) The proposals to establish a non-budgetary fund to guarantee the execution of court decisions against enterprises subject to moratoria do not only fail to solve the non-execution problem but may further aggravate it.

Interrelation of strategic documents with the relevant national legislation

The national legislation supporting the execution of court decisions, which this analysis was based upon, includes e.g.: the Constitution of Ukraine, the ECHR, Ukraine's Code of Administrative Proceedings, Civil Procedure Code, Commercial Procedure Code, the Laws of Ukraine On the Bodies and Persons Enforcing Judgments and Decisions of Other Bodies, and On Enforcement Proceedings, On Execution of Decisions of the European Court of Human Rights, On Guarantees of Execution of Judgments, On the Budget for 2021, On the Constitutional Court of Ukraine, On the Rules of Procedure of the Verkhovna Rada of Ukraine, On Committees of the Verkhovna Rada of Ukraine, On the Cabinet of Ministers of Ukraine, On the Judiciary and the Status of Judges, the Budget Code, the Resolution of the Verkhovna Rada of Ukraine On Measures Implementing Recommendations in Respect of Internal Reform and Enhancement of the

institutional Capacity of the Verkhovna Rada of Ukraine, Resolution of the Cabinet of Ministers of Ukraine approving the Rules of the Cabinet of Ministers of Ukraine, Order of the Cabinet of Ministers of Ukraine dated 30.09.2020, no. 1218-p, Approving the National Strategy for resolving the issue of failure to execute court decisions against the debtors who are state bodies or state enterprises, institutions, organisations, for the period ending in 2022.

Based on the analysis of the National Strategy and the Action Plan to support its implementation, the **following recommendations** in the context of necessary legislative changes have been provided:

1. Amend the Procedural Codes, the Laws of Ukraine On the Bodies and Persons Enforcing Judgments and Decisions of Other Bodies, On Enforcement Proceedings and other normative legal acts concerning Ukraine's transition to a private-sector model of execution of court decisions, with a gradual reduction of the role of the State Executive Service until its complete liquidation.
2. Amend the Procedural Codes, the Laws of Ukraine On the Bodies and Persons Enforcing Judgments and Decisions of Other Bodies, On Enforcement Proceedings, the record-keeping regulations of relevant courts, and other normative legal acts with the view to strengthen judicial oversight over enforcement of court decisions.
3. Create a single database of court decisions, with an appropriate categorization of cases, which will ensure full execution of court decisions.
4. Amend the Procedural Codes, the Laws of Ukraine On the Bodies and Persons Enforcing Judgments and Decisions of Other Bodies, On Enforcement Proceedings and other normative legal acts with a view to automatic execution of judgments where the debtor is a public authority or body of local government.
5. Amend the Procedural Codes, Laws of Ukraine On the Bodies and Persons Enforcing Judgments and Decisions of Other Bodies, On Enforcement Proceedings and other normative legal acts on automated debt collection.
6. Perform audit of all pending cases, including those where the debtors are not public authorities, bodies of local government, or state-owned enterprises, in respect of the total number of persons and the total amount of debt.
7. Amend Article 1 of the Law of Ukraine "On Execution of Judgments of the European Court of Human Rights" regarding the definition of "judgment".
8. Make appropriate amendments to the legislation on strengthening the institutional capacity of Verkhovna Rada's Subcommittee for the execution of ECtHR judgments.
9. Make appropriate amendments to the legislation to put a relevant Deputy Prime Minister in charge of coordinating the central executive authorities with regard to the execution of ECtHR judgments.