



Analysis

Of the national mechanisms of judicial control over the execution of judgments in Ukraine

(in the context of the execution of the ECtHR judgments in the cases of "Yuriy Nikolayevich Ivanov v. Ukraine" and "Burmych and Others v. Ukraine")

Summary

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This analysis has been prepared within the framework of the Council of Europe Project “Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights” (the Project), funded by the Human Rights Trust Fund and implemented by the Justice and Legal Co-operation Department of the Council of Europe. The analysis is authored by Olesia Otradnova, Deputy Dean of the Faculty of Law, Professor at the Taras Shevchenko National University of Kyiv, and national expert for the Council of Europe project.

This analysis was prepared based on the results of working meetings with representatives of the Supreme Court and the Ministry of Justice of Ukraine concerning the implementation of specific general measures for the implementation of the Ivanov/Burmych group of European Court of Human Rights judgments.¹ In this group of cases, the European Court of Human Rights found violations of the right to a fair trial (Article 6.1 of the ECHR), pointing to a serious structural problem of non-execution or delayed execution of domestic judgments, as well as the lack of an effective remedy in this respect (Article 13 of the ECHR).²

In 2019, a comprehensive study was conducted which identified the root causes of non-execution of judgments, which include: excessively formalised procedures for the recovery of state judgment debts, as well as a redundant system of re-examination of court findings, which *de facto* amounts to disrespect for the final character of judgments and the independent process of the courts making and delivering judgments.³ In order to eliminate these root causes as well as to execute the judgments in the aforesaid group of European Court of Human Rights cases, the Ukrainian government, with the support of the Council of Europe, developed a draft National Strategy in 2019, which sets out general measures to be taken by public authorities. In particular, these measures include the implementation of a system of judicial control over the payment of state judgment debts. At the end of 2020, the Cabinet of Ministers of Ukraine adopted National Strategy №1218-r for Resolving until 2022 the Problem of Non-Execution of National Judgments against Government Bodies or State-Owned or Controlled Enterprises, Institutions, and Organisations as Debtors. It also stipulates the need to introduce effective and efficient judicial control over the execution of judgments.

Given the above-mentioned facts and to implement the proposed system of judicial control, the expert was assigned the following tasks:

- 1) to analyse the relevant Ukrainian legislation governing the established mechanism of judicial control over the execution of judgments, including the 2016 constitutional amendments, the Laws of Ukraine “On the Judiciary and the Status of Judges”, “On State Guarantees Concerning the Execution of Judgments”, and the procedural codes of 2017, as well as to assess the role of courts in overseeing the execution of judgments;
- 2) to monitor judgments delivered by the Supreme Court in 2018-2019 and to determine how the established mechanism of judicial control is applied in practice;
- 3) to make recommendations for improving relevant legislation, administrative and judicial practices in the context of developing and implementing appropriate judicial control tools to assist in the execution of judgments, avoid excessive formalism, and ensure expedited execution and compensation for delayed execution.

¹ The Ivanov/Burmych group of cases includes the following European Court of Human Rights cases: “Yuriy Nikolayevich Ivanov v. Ukraine”, the Zhovner group of cases, and “Burmych and Others v. Ukraine”(applications Nos. 40450/04, 56848/00, 46852/13)

² See the CMCE decision, 1369th Meeting of the Ministers' Deputies, March 3-5, 2020: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016809cc94f

³ See Agenda of the 1348th Meeting of the Ministers' Deputies of the CMCE, June 4-6, 2019: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168094756f

To perform the assigned tasks, the expert analysed the legislation listed above, described aspects of its dynamic development, and analysed, based on the Unified Register of Judicial Decisions, the case law of the Supreme Court (the Grand Chamber, the Administrative Court of Cassation, the Commercial Court of Cassation, the Civil Court of Cassation) concerning disputes arising in connection with appeals against decisions, actions or omissions of a public or private enforcement agent. Overall, she analysed 1,000 Supreme Court judgments concerning this class of cases. The researcher also analysed the Supreme Court-prepared digests of case law, namely the Digests of the Supreme Court Grand Chamber Case Law, overviews of the case law of cassation courts, as well as the Digest of the Supreme Court Case Law in Judgment Execution Disputes.⁴

Some aspects of judicial control over the execution of judgments that are carried out on the basis of Article 382 of the Code of Administrative Procedure of Ukraine were a separate subject of analysis. For this purpose, the expert analysed the case law of the courts of first, appellate and cassation instances concerning the consideration of petitions for the application of judicial control, as reflected in the Unified Register of Judicial Decisions. Overall, the expert analysed 500 judgments delivered upon consideration of relevant petitions.

Based on this analysis, it was found that the institution of judicial control over the execution of judgments, which is regulated, in particular, by the Constitution of Ukraine, is not absolute. It involves consideration by courts of appeals against decisions, actions or omissions of an enforcement agent at the enforcement proceeding stage. As a general rule, a court may not, on its own initiative, control the acts of officials authorised to enforce judgments, give them instructions, or demand reports from them. At the same time, there are some peculiar features of judicial control as exercised in administrative, judicial proceedings. In particular, Article 382 of the Code of Administrative Procedure provides for a supplementary method of control, namely the right of a court to demand a report on the execution of judgments from a holder of public authority, as well as to impose a fine in case of the latter's failure to take effective action.

The proper state of execution of judgments depends to a large extent on case law that is formed at the enforcement proceeding stage. Case law can fill existing legislative gaps as well as address issues of differences in interpretation of legislation that may arise between the parties to an enforcement proceeding and the public/private enforcement agent. Analysis of the Supreme Court case law as a whole show that the relevant issues get resolved through using an approach according to which the judgment in question should be enforced despite the existence of formal obstacles to this. Analysis of judicial control over the execution of judgments which is carried out on the basis of Article 382 of the Code of Administrative Procedure of Ukraine, shows that this procedural tool is not widely used today; however, it is still effective in case of obstacles to the execution of judgments.

Based on the results of the analysis performed, the expert also made the following recommendations:

- When resolving disputes arising in connection with appeals against decisions, actions, or omissions of a public or private enforcement agent, the courts of first and appellate instance should use the approach developed by the Supreme Court. It provides for resolving such disputes in favour of enforcing judgments and overcoming existing legislative ambiguities through the application of Article 129-1 of the Constitution of Ukraine, Article 6 of the European Convention on Human Rights, and the relevant case-

⁴ See the Digest of the Supreme Court Case Law in Judgment Execution Disputes: https://supreme.court.gov.ua/userfiles/media/Daidjest_VP_11_2019_1.pdf

law of the European Court of Human Rights.

- It is recommended to interpret Article 382 of the Code of Administrative Procedure of Ukraine in judgments of the Supreme Court to ensure a correct understanding of the legal instrument provided for therein.
- It is recommended for the National School of Judges of Ukraine to conduct training for judges on respective case-law of the Supreme Court.
- It is recommended for the Ministry of Justice of Ukraine to bring the practice of bailiff officers in compliance with the respective case law in order to prevent violations of the rights of parties of enforcement proceedings, which are subsequently restored in courts.