Supporting Ukraine in execution of judgments of the European Court of Human Rights

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

25 October 2018

EXPERT REPORT

following a series of expert discussions on enforcement of national judgments in Ukraine in the context of the execution of judgments of the European Court of Human Rights *Yuriy Nikolayevich Ivanov v. Ukraine* and *Burmych and others v. Ukraine*

Contents

Introduction 3
Background 3
Summary of the discussions 4
General questions 4
Specific questions 11
In-kind obligations 11
Social Benefits 12
State-owned enterprises debts 12
Conclusions and recommendations 14

Introduction

Under the authority of the Directorate General of Human Rights and Rule of Law of the Council of Europe ("the DGI") the Council of Europe Project "*Supporting Ukraine in execution of judgments of the European Court of Human Rights*" ("the Project") organised 3 expert discussions aiming at encouraging a dialog with and amid the Ukrainian authorities on the topic of pilot judgment execution in the case of *Ivanov*[1] and its follow-up judgment of *Burmych*[2]. A particular objective of these events was to identify the main root causes of non-enforcement and to assist Ukrainian authorities in finding appropriate solutions, including through improvement of the legislation and implementation of good practices.

These expert discussions were held on the 22nd of June, the 19th of July and the 31st of August 2018 in Kyiv, featuring open and informal discussions format. Representatives of the relevant Ukrainian ministries, governmental and non-governmental agencies, judiciary, as well as civil and human rights organisations attended the events. The experts[3] made presentations on relevant Council of Europe standards concerning each topic of discussions thus commencing exchange of thoughts on the Ukrainian context and the most controversial issues. The simplified versions of **presentations are enclosed** to the present Report.

The present Report summarises the main topics of discussions and provides basic brainstorming ideas. It intends neither to subdue the official position of the Ukrainian authorities nor to serve as an instruction on behalf of the Council of Europe or any other official institution involved in the execution proceedings. Its purpose is only to provide a third-party expertise outside of the official execution framework. Any opinions expressed in the present Report should be attributed to the author only, bearing none of the above-mentioned authorities and institutions.

Background

Before going into the operative part of the present Report, some general considerations on the non-enforcement problem in Ukraine are required. It is a long-standing problem. The *Kaysin*[4] case of 1998, though settled by the Ukrainian Government, was already the first clue. Later cases, such as *Zhovner*[5]case*,* have formally registered the problem in terms of the Convention. In 2004, the European Court of Human Rights ("the ECtHR") found first violation concerning non-enforcement of domestic courts' decisions in Ukraine. It has been followed by a number of judgments under the same pattern that were regularly assembled in groups for the follow-up supervision by the Committee of Ministers of the Council of Europe ("the CM"). The leading group of cases pending before the CM was the *Zhovner group*. Some judgments, such as *Novoseletskiy*[6] or *Dzemyuk*[7] , were distinguishable though in the essence they employed similar problems of non-execution or delayed enforcement at the domestic level. Such cases were treated as isolated and dealt with separately.

[1] *Yuriy Nikolayevich Ivanov v. Ukraine,* no. 40450/04, 15 October 2009.
[2] *Burmych and others v. Ukraine*, nos. 46852/13, 47786/13, 54125/13, et seq. (GC) (Struck out), 12 October 2017.
[3] Mr **Mathieu Chardon**, Judicial Officer, Secretary General of the International Union of Judicial Officers, international expert of the Council of Europe on enforcement of judgments (participated only at the expert discussions of 22 June 2018) and Mr **Lilian Apostol**, international expert of the Council of Europe on execution of judgments of the European Court of Human Rights (participated in all 3 events).
[4] *Kaysin and others v. Ukraine* (No. 46144/99) (friendly settlement).
[5] *Zhovner v. Ukraine*, No. 56848/00, 29 June 2004.
[6] *Novoseletskiy v. Ukraine*, No. 47148/99, 22 February 2005.
[7] *Dzemyuk v. Ukraine,* no. 42488/02, 04 September 2014.

Later, the *Ivanov* case issued in 2009 revealed the magnitude of the problem. It recognised structural systemic dysfunction in Ukraine concerning non-enforcement or delayed enforcement of the domestic judicial decisions (hereafter "the non-enforcement problem"). Many similar cases pending before the ECtHR were suspended and referred back to the Ukrainian authorities seeking appropriate resolution in terms of individual and general measures. However, it eventually has been followed by the *Burmych* judgment of 2017, by which thousands of applications has been sent back to be dealt with in the framework of the *Ivanov*-pilot judgment pending before the CM. The language employed thereafter in all discussions surrounding non-enforcement called the problem as "*Burmych crisis*".

Summary of the discussions

It is not the scope of the present Report to describe in detail all relevant findings of the ECtHR and the recommendations given by the CM to the Ukrainian authorities. Nor it is the purpose to describe the Ukrainian authorities' measures already taken or envisaged. Indeed, there is a plenty of relevant documents. Its number is growing thereby feeding the overall confusion surrounding the problem. It is already difficult to find sense in all events, discussions, expert opinions and official documents issued in this respect. The Ukrainian authorities seem to see no light in the tunnel, while the Convention institutions are already exhausted to repeat the same – the non-execution problem in Ukraine must be dealt with urgently. Thus, the purpose of the 3 expert discussions was more than just finding solutions or assessing the problem *per ensemble*. It was actually an attempt to find the key-issues seeking to change both the attitude and the methodology in addressing the problem. That is why the discussions were held in rather an **informal way**. The authorities were invited to reveal their substantive concerns, not only to reiterate their official position as submitted before the international community and domestic civil society. This brainstorming approach has been helpful and might be used lately for engaging authorities into more open dialog.

However, some pressing problems as identified by the ECtHR and the CM, from both judicial and execution perspectives, have been reiterated. It was an overall agreement between the participants in the events that key-issues should be identified first before moving to discuss possible solutions. In other words, identification of the problem is part of the solution. And currently, from the authorities' perspective, the identification of pressing and substantive problems requiring urgent solutions is an issue in itself. The Ukrainian authorities acknowledge unconditionally that they face serious problem of execution but, it seems, they still remain confused from where it stems; what is the essence thereof and form where to start. That is why, the said 3 events took as a priority identification of the roots and then to breakthrough by solutions.

It also must be noted that most of the undergoing measures and envisaged solutions were subjected to scrutiny pending the discussions. In this sense, the Ukrainian authorities needed to be convinced that their strategy, in particular their *post-Burmych* measures, was consistent with the identified roots of the problem. In other words, the scope of the expert discussions was not only brainstorming for new solutions but also endorsement of measures already pending or envisaged.

The discussed questions should be divided into **general** and **specific**. During the expert discussions some common issues branded all arguments. Other questions were specific to a particular topic. Henceforth, the questions will be chaptered accordingly.

General questions

One of the background questions concerns the **time-limits** set up by the *Burmych* judgment and by the CM, respectively. The ECtHR's deadlines are prerequisite, while the time-limits set up by the CM

are essentially non-compulsory in character. They mean to assist the authorities, to plan and organise their own actions. However, the CM is also bound by the *Burmych* time-limit. Most of the participants were concerned about short time given to deal with the problems. However, they all agreed that the time-pressing situation is due to their own past failures, though attributed to previous governments. Nonetheless, it was also agreed that some of identified roots of the problem, by their character, could be time-consuming and thus unfeasible to deal within these time-limits. Accordingly, the strategy must employ not only finding solutions to a particular rooted problem, but also to build clear vision as to the time-framework and implementation perspectives. In other words, the assessment should extend to not only what needs to be done, but also to how long it will take.

Another element has been observed after a series of discussions. The Ukrainian authorities still formally and in practice **distinguish execution of the ECtHR's judgments and domestic decisions in terms of priority.** In other words, if a domestic decision is not enforced for a long time it would be given priority and the authorities' attention only if it would pass through the ECtHR and be referred back. This phenomenon explains why the Ukrainian legal system has two types of enforcement proceedings, those dedicated to the ECtHR judgments and a common procedure with regard to the domestic national courts and bailiff service. It also explains why the Ukrainian authorities after the *Burmych* judgment have actually dedicated all their efforts to regulate the so-called "historical debt" and the *Burmych-Ivanov*-type cases by *ad-hoc* remedies. For them the domestic judicial decisions are of two types, before and after the ECtHR. During expert discussions the distinction between these types of domestic judgments was clearly visible. Sometimes, during discussions, there was even an impression that a domestic decision would have more executive value if confirmed by the ECtHR.

In any case, in the opinion of the undersigned expert, it remains unclear whether such distinction helps the execution of domestic decisions in the Ukrainian context. The Ukrainian non-execution dossier clearly shows that the authorities are more concerned about the cases passing through the ECtHR and the CM than with their own domestic non-execution cases. They would rather implement individual measures in each case after the ECtHR judgment. The Ukrainian authorities considered as a better option, in order of priority, to execute a judgment of the ECtHR and then each other domestic judgment. Only thereafter, in the Ukrainian authorities' view, it would be feasible to deal with non-enforcement system overall. In other words, reading between the lines of the *Burmych* judgment, the Ukrainian authorities within almost 20 years of non-execution problem, dealt with the consequences but not with the causes.

The above element is the most difficult one. It reflects different degree of credibility of the domestic courts and the ECtHR in Ukraine. While the initiative to give priority to the ECtHR judgments execution is commendable, however in the particular Ukrainian context it played against the authorities. It is undisputed that Ukraine manifests willingness to reach the Convention standards. Nevertheless, as it seems, the Ukrainian authorities misplaced the ECtHR in their domestic system. They bestowed a "fourth instance mission" on the ECtHR at the expense of the Ukrainian own judicial and enforcement systems. This is why the ECtHR has been bombarded by the domestic non-enforcement judgments all these last 20 years. This is why the authorities gave priority to the execution of the ECtHR judgments, having less credibility in their own judicial system and domestic bailiff service. This is why they misinterpreted the *Ivanov* pilot judgment having read it only in terms of individual measures. General measures, to which the ECtHR has rightly pointed as a priority, remained outside of the authorities' attention as complex and time-consuming problem.

In this sense, all discussions during the events have been redirected to shifting priorities into implementation of general measures implying simultaneous and holistic approach. The experts pointed out that the pilot-judgment proceedings are to be distinguished from other ECtHR

judgments. Pilot-judgments expressly require adoption of general measures and introduction of remedies as the first step. The individual aspects of each pilot and post-pilot case must be solved in parallel. The authorities should not prioritise execution of each claim as based either on a final domestic judicial decision or that "re-confirmed" by the ECtHR. Only the nature of execution claims may serve as a criterion for prioritisation. In other words, the ECtHR is subsidiary and its judgments must have other rather general and preventive effects. They cannot and should not be assimilated with a domestic judgment.

Turning back to the discussions, it must be noted that none of the participants actually questioned the validity of the problems as identified by the ECtHR and by the CM. All in unison agreed that Ukraine faces major challenge of **credibility in its domestic enforcement system**. This is also augmented by low level of credibility in the Ukrainian judicial system as such, which, *inter alia*, is subjected to reformation within the context of other ECtHR cases and supervision groups within the CM. Indeed, the *Salov*, *Oleksandr Volkov* and *Agrokompleks* group[8] of cases revealed issues of judicial independence, undue interference, deficient system of judicial discipline and organisation of judiciary. Plus, the *Svetlana Naumenko* group[9] on the unreasonable length of civil proceedings also needs to be taken into consideration. Although being collateral to the non-enforcement problem, such issues were also examined during the expert discussions. It was agreed that the problems within judiciary affect the authority of the domestic judgments and thus may lead to either reluctance or disobedience in execution. Nevertheless, the discussions were oriented towards separating these concerns from the non-execution topic. The participants agreed that the domestic decisions, regardless of their quality and credibility, must be unconditionally executed. In this sense, some leading structural problems concerning non-execution were reiterated.

Briefly, 3 main issues, as identified by the ECtHR, are relevant in the Ukrainian context. Ukraine fails to set up (i) an **efficient enforcement system** (ii) keeps **legislative restrictions** affecting domestic execution (moratoriums) and (iii) has not yet introduced **effective remedies**. They could be considered as **primary roots of non-enforcement** but only in view of the ECtHR and the CM. The domestic authorities observe them from a bit different angle, as implying a number of other problems stemming from or correlated to execution. For example, a reform of the enforcement system as a whole is required but it would imply difficult choices. The authorities still have not found consensus whether to keep bailiffs under the authority and state control or to shift them into the private sector. Pending discussions, there were opinions that the late Ukrainian model of bailiffs under the authority of courts could be revisited and considered as an option. Another example, the problem of moratoriums raised questions as to the authorities' discretion to preserve public funds and state propriety from raider-attacks aiming at public assets[10]. The participants agreed that the moratoriums should be reviewed but not abolished immediately. And, the last example, the need to introduce effective remedies hits with the lack of sufficient financial coverage and blanket immunity of the state authorities from unjustified and excessive monetary claims. In view of the authorities, though a remedy is needed, it must be first *ad-hoc* in character, i.e. dealing with the pressing problems of non-execution by paying principal debt, and then to provide compensatory mechanism for delayed enforcement in general.

[8] Salov v. Ukraine (65518/01) is a Leading Case for 5 Repetitive Cases; Oleksandr Volkov v. Ukraine (21722/11) is a Leading Case for 1 Repetitive Case; Agrokompleks v. Ukraine (23465/03) is a Repetitive Case for 3 Leading Cases.

[9] Svetlana Naumenko v. Ukraine (41984/98) is a Leading Case for 244 Repetitive Cases

[10] See for example the study on the 'reyderstvo' phenomenon in Ukraine, https://ti-ukraine.org/wp-content/uploads/2016/12/raider_attacks_-_ti_ukraine_eng.pdf.

There was another, not less important, element discussed. It is how the ECtHR has actually examined the Ukrainian non-enforcement cases. It was generally agreed that contrary to other pilot-judgment proceedings employed by the ECtHR, the *Ivanov* pilot has one fundamental weak point, at least in the opinion of the Ukrainian authorities. It has not distinguished **the substance of non-execution complaints** throwing them into one bucket[11]. In other words, the *Ivanov* judgment build strong supposition that in Ukraine all domestic judgments are to be presumed as non-enforceable. This is so due to the structural inefficiency of the domestic system overall, lack of remedies in this respect. The ECtHR extended this rationale to any domestic judgment regardless of its nature of non-execution claims[12]. However, in fact only some types of the domestic judicial decisions are difficult to enforce, such as those distinguished below.

For this reason, the Ukrainian authorities seem to be confused by both *Ivanov* and *Burmych* judgments that kept all non-enforcement claims undistinguished in their character. This ECtHR's approach did not identify the roots of the problem as it is seen from the domestic perspective. Accordingly, the expert discussions were divided into 3 thematic topics, reflecting the non-execution problems in cases of (i) **in-kind obligations**, (ii) **social benefits** and (iii) **state-owned enterprises' debts**. All participants in the discussions found this thematic distinction commendable. It brought, in their view, more clarity as to the roots of non-enforcement and identification of measures aimed at resolving each execution claim. However, as suggested by the experts, the problem of execution should be addressed rather **holistically**. Each domestic judgment can be classified and attributed to one or another category and dealt with accordingly. General measures aimed at improving the domestic enforcement system should be pursued along with institutional of specific mechanisms designed for execution of in-kind obligations, social benefits and debts on part of state-owned entities. In this sense, the roots of the problem must be distinguished into **general** and **collateral**; the former would illustrate fundamental problems affecting the system as a whole, while the later would reveal corroborative causes. Some **specific problems** discussed in each of the thematic round-table will be described in the next sub-chapter of the present Report.

---

[11] This assumption is proven by the *Burmych* findings: "*14. Under Article 46, the Court held that the Ivanov case concerned two recurring problems: (a) the prolonged non-enforcement of final domestic decisions and (b) the lack of an effective domestic remedy to deal with it.* ***These problems lay behind the violations of the Convention found by the Court since 2004 in over 300 cases concerning Ukraine.*** *The Ivanov case demonstrated that these problems had remained without a solution despite the Court's clear rulings urging Ukraine to take appropriate measures to resolve those issues (see Ivanov, …, §§ 73, 74 and 83).* "

[12] In the contrary, in all other pilot-judgments, the substance of the problem has been part of the Court's assessment. For example, in the *Olaru* pilot-judgment[12], the problem of non-enforcement concerned only one type of domestic decisions granting social housing. Though, there were general concerns as to effectiveness of the Moldovan enforcement system overall, the ECtHR did not dare to criticise it in general but only in part of its ineffectiveness in respect of social-housing cases and in respect of particular categories of individuals. Another examples are the *Gerasimov*[12] and *Burdov 2*[12] cases, both dealing with non-enforcement but distinguishing domestic judgments in two types. In the first case, the non-enforcement concerns in-kind obligations, mostly allocation of State-housing, while in the second pilot-judgment the issue was failure to pay monetary benefits by state and state-affiliated institutions. Alternatively, all pilot-judgments in cases of *Colic*[12], *Atanasiu*[12] or *Manushage Pluto & Driza*[12] dealt with non-execution of compensation awards for war damages, issues of confiscated lands restitution and non-enforcement of administrative decisions awarding compensation for confiscated proprieties during communist regime, respectively. All above examples, contrary to the Ukrainian *Ivanov* pilot-judgment, questioned ineffectiveness of the domestic enforcement system only collaterally and in connection with the nature of non-enforced claims. They have been able to identify the roots of the problem in the substance because the ECtHR looked deeply into the nature of the non-enforcement problems. This was not the case of Ukraine where the ECtHR doubted the domestic non-enforcement system as such but not the nature of execution.

Turning to other general subjects of discussions, many opinions were expressed as to the current measures undertaken by the Ukrainian authorities following the CM's suggestions and recommendations. In the CM's view, there are plenty of actions that Ukraine may put forward in dealing with non-enforcement. Indisputably, the CM qualifies the situation as '*major structural problem of non-enforcement or delayed enforcement of domestic judicial decisions, mostly delivered against the state and against state enterprises, and to the lack of effective remedies in this respect*'[13]. Accordingly, two pressing issues could be distinguished from the CM's perspective: (i) an **overall deficiency of enforcement system** and (ii) **lack of effective remedies**. The CM's approach is similar to that of the ECtHR with only one exception. The CM has actually acknowledged the nature of non-execution claims but mostly in part of the so-called **state-owned debts**. In its view, it is the most pressing issue, since a number of these cases exceeds other "in-kind" and "social entitlement" cases.

The discussions continued in the same vain – distinguishing non-enforcement by the criterion of nature of claims – when it came to overview the CM's proposals. Again recalling the CM's suggestions, the participants referred to already implemented measures like *ad hoc* solution aiming at resolving on-going individual execution claims (the so-called "historical debt"), including pending work dealing with the applicants in the *Burmych* judgment (draft amendments to the Laws on State Guarantees and Execution of the ECtHR judgments)[14]. However, it was generally agreed that, unfortunately, there is still a '**persistent lack of a common vision'** at the domestic level on what stands at the roots of the problem and what are potential solutions'. The CM actually emphasised that in its last decision in June[15]. In this sense, the present 3 expert discussions were the first step to elaborate this common vision. It was emphasised by the experts that an *ad-hoc* solution should not consume all authorities' efforts. Paying attention to the *ad-hoc* solutions only would be a wrong way to follow. The so-called "*Burmych crisis*" cannot be taken exclusively from the perspective of individual cases. The approach must be holistic; shifting priorities from individual to general, i.e. to the long-standing solutions aiming at resolving the non-execution problem overall.

In connection with the later aspect, the discussions took around the lack of appropriate **sources of information** regarding the number of execution writs. The authorities, in particular, argued that before going deeper into the roots of non-execution problem, they need to assess the situation as a whole, both in financial numbers and statistics. To date, they have no available databases. Nor they set up mechanisms for recording all domestic decisions requiring enforcement. According to the actual system, an execution writ is not being registered in a single fashion but by each state-debtor responsible for its execution. There could be writs that never pass the state bailiff service. This aspect raised many concerns. It was the principal justification why the authorities were not able to develop the above-mentioned "common vision" and thereby a long-lasting solution.

In this sense, following the experts' intervention, all participants agreed that this void of information is at the root of the deficient enforcement system. It is both a cause and a consequence. As suggested by the CM, the lack of information must not excuse lack of common vision. Setting up an

[13] See the case description in a number of the CM Resolutions / Decisions : CM/ResDH(2008)1, CM/ResDH(2009)159, CM/ResDH(2010)222, CM/ResDH(2011)184, CM/ResDH(2012)234, CM/ResDH(2017)184, CM/Del/Dec(2017)1302/H46-38 and CM/Del/Dec(2018)1318/H46-29.

[14] The programme 4040 under the Law on State guarantees, the Resolution No. 845 on procedure for payments of national courts' decisions delivered against the state / state enterprises, etc.

[15] See CM/Del/Dec(2018)1318/H46-29 (quote) : "…expressed deep concern at the persistent lack of a common vision at the domestic level of the root causes of the problem or the potential solutions; considered that a thorough expert analysis, with the input of all relevant domestic interlocutors, of the root causes of the non-enforcement of judgments given against the State, should be an indispensable part of identifying a long-lasting solution".

appropriate data-collecting system, developing one database of enforcement writs would be the first step in elaborating that common vision. That database must be preferably managed by one entity. In other words, all participants welcomed the principle that knowing the problem is part of its solution.

One small observation was made during the discussions. It was about the way of dealing with the needed reform, i.e. what are the priorities and steps to be taken. Should the authorities attempt first **to change the legislation** and then start building the **administrative practices** implementing new legal provisions? Or else, would be there another way to deal with actual pressing problems by changing administrative/judicial practices and then the legislation? Such questions are familiar to the domestic mentality and legal culture persistent in Ukraine and not only. For the most of Eastern European states the best way to start a reform is actually to overview their legislation first. Then the amended law would change the practice on its own and the scope would be thus achieved.

However, in all States sharing this "change-law-first" attitude the legal reforms met implementation challenges. It is because in the most of them, the laws might have sounded good and qualitative but the administrative/judicial practice would not. In this sense, many participants agreed that the level of law-obedience in Ukraine, both on part of the authorities and civil society, leaves room for better. Thus, the implementation of laws, even good ones, is far from being perfect. Accordingly, the answer to the question becomes self-evident - just drafting laws without sufficient investment into changing of practices and structural administrative reformation would not move forward any envisaged reform. The experts pointed out in this sense that such a question is wrong in itself. One cannot ask what to do first, amend the law or change practice, when these must be done in choir. The implementation in practice of new law is prerequisite for its authority and legitimacy, otherwise the law without practice is just a piece of paper. Changing administrative practices on the other hand is a long-term process, consuming resources and time. It was suggested then that the authorities may need not waiting for adoption of new laws but start reflecting already on changing their practices. Bylaws and internal regulations could be changed easier than laws. Once these transformations have started, the authorities might even give an incentive to the draft laws to follow their own newly established practices. Participants agreed that taken in this way, the laws would have better chances for implementation. In any case, this was in theory. All concurred that drafted laws must have sufficient basis in the domestic practice and they should be adopted only with the perspective of their future implementation.

In the end, some general opinions were expressed as to **other aspects** of the non-enforcement in Ukraine. They could be either directly or collaterally relevant. Two aspects must be mentioned in this regard.

The first aspect is a general reluctance to invest both financial and human resources into an overall reform of the domestic enforcement machinery due to the **upcoming parliamentarian elections**. The participants implied that any substantive reforms are subjected to uncertainty until the balance of political forces within the Ukrainian Rada is clear. Drafting legislative amendments for the reform requires political consensus and the majority of MPs' votes. There is a risk that a particular strategy, even commonly accepted, would be subjected to review and may fall into the abyss once new political forces would come to power. Pending legislative proposals, in particular what concerns the abolition of moratoriums, may or may be not supported by the present or newly-elected parliamentarians.

The second aspect is a confusion on how to proceed with execution of domestic decisions within the context of **pending military conflict in the Eastern part of Ukraine and international dispute over**

the Crimea region. It is widely acknowledged that the Ukrainian authorities have neither access nor "effective control" in both areas. In this sense, the participants expressed concerns as to whether the reform of the entire enforcement system must take into account these contexts. If yes, how then the authorities should approach the execution once there are serious doubts as to the legality of judicial decisions issued by the internationally unrecognised entities, save that the authorities have no granted access to these territories while enforcing their own judicial orders.

Regarding these two aspects, the participants found no solution. Nor they were elaborated in detail pending the discussions. It was however agreed that the first aspect, the so-called "political perspective", must be neither confirmed nor denied. The experts suggested that the non-enforcement problem as a whole is widely acknowledged at the highest political level. Supposed or unexpected political changes would not shift the attention of politicians from this problem. It would rather serve as incentive to seek political credits. There could be discussions and debates on some details of the reform. But in the substance, if a strategy is to be elaborated, it would pass any political confrontation. The idea is to start the process but not to postpone it again until new elections.

As to the second aspect, it was suggested by the experts and agreed by the participants that it requires separate discussions, with another occasion and in another framework. The present *expert discussions* could and may not deal with these issues but to take note that they exist. Some examples were provided as to how similar issues were dealt with by the CM and the ECtHR and what measures have been implemented by another States[16]. Nonetheless, they only illustrated both the sensibility of the problems stemming from State jurisdictional disputes and the fact that these are not dead-end situations. In this vain, the participants agreed that this aspect needs not to be addressed in the present *expert discussions*. They would need new round-table discussions.

Unfortunately, expert discussions dedicated less time and attention to the second biggest issue in relation of the non-execution problem in Ukraine – the lack of **remedies**. As mentioned with many occasions by both the ECtHR and the CM and well acknowledged by the Ukrainian authorities, there are no remedies to deal with non-enforcement. It was noted by the experts, that the *ad-hoc* solutions as proposed by the Ukrainian Government following the *Burmych* case, could not be confused with remedies. Apart from being a temporary solution to deal with rather pressing problems and historical debts, they do not meet the models of remedies instituted by other States facing similar problems.

A bit of confusion hovered among participants about what both the ECtHR and the CM meant when asked Ukraine to develop and implement a remedy. Most of the participants confused general measures needed for reformation of the entire enforcement system with a remedy. Some of them assumed that a remedy, within the meaning of the *Ivanov* and *Burmych* judgments, is a mechanism needed to execute all non-execution claims mentioned therein. A minority of participants, mostly civil society and human rights institutions, realised that a remedy, as rightly pointed by the experts, is in the essence what would stop the flow of application to the ECtHR.

It was explained then that a remedy in the sense of the Convention, according to the well-established practice of the ECtHR and the CM, is either general or special compensatory mechanisms instituted by the domestic authorities as an exhaustion criterion. They need not be understood as securing execution of an enforcement writ, which is solely the task of the enforcement system

[16] For example, the pilot cases *Xenides-Arestis* and *Doğan and others* on compensations schemes in Northern Cyprus or the case of *Grudić* where the Respondent State was required to implement laws in order to secure payment of pensions to insured persons in Kosovo, unrecognised by Serbia.

overall. The remedies mean to repair the consequences or to put an end to a violation. In particular context of the non-enforcement violations, likewise with the problem of unreasonable length of proceedings, the remedies can be only compensatory or acceleratory in character. They cannot be preventive since an effective enforcement system serves that purpose. Eventually, this topic of remedies was left open for later discussions. It requires a separate expert discussion because it keeps being confusing.

Specific questions

In what follows, the present Report describes briefly some of specific points raised during the thematic discussions in each of the events. They are connected with execution of each type of judicial decisions classified by the nature of execution claims.

The Report would not reflect the participants' references and quotations of the domestic law or bylaws provisions. These specific elements exceed both the present Report's scope and international consultancy expertise. As it was noted above, the expert discussions aimed at inciting new way of looking into the problem and to determine creative-thinking. Thus, the references to specific provisions of the domestic law are outside of this scope, since it is not the purpose of the present exercise to evaluate their validity or compatibility. The discretion to review the domestic laws following the expert discussions still lies with the Ukrainian authorities.

In-kind obligations

Two specific issues were raised during discussions at the relevant round table. Firstly, the **judicial practice** ordering in-kind obligations and, secondly, whether and what type of such obligations could be or not **compensated by money instead**. Issues regarding these two aspects could be identified as specific roots determining the difficulties of execution.

This type of obligations is difficult to execute in practice. They require deeds and/or un-deeds which vary in character and usually depend on willingness or ability to perform. On the contrary, in case of monetary obligations, the only difficulty for execution is lack of money. In this line of ideas, the expert discussions were generally concerned with the so-called "real enforceability" of the domestic judgments. It was noted that, sometimes, judges ordering such obligations do not bear in mind the perspectives of execution and practical enforcement difficulties. Occasionally, judicial decisions order rather trivial in-kind obligations (conventionally called the "stop barking dog" scenario) which do not even merit execution efforts or are unfeasible. On the other hand, the representatives of the domestic judiciary, though generally agreed with this criticism, noted that the domestic legislation limits courts' jurisdiction in the execution proceedings. It is not judges' task to substitute the applicants' claims. The courts are bound by imperfections of the domestic law and by the limits of adjudication.

It was noted by the experts during discussions that there could be ways of transferring in-kind obligations into monetary payments. This would require either a **post-judicial review** or special procedures allowing **friendly settlement** of execution claims. In this sense, the participants agreed that as it stands now, the domestic legislation allows no such settlement or judicial oversight. Also, there are scarce provisions or no-procedure at all to change the way of enforcement. The bailiffs have no means to accommodate execution to practical realities. The concept of friendly settlement of non-enforcement claims seems to be outside of the Ukrainian execution system. Changing modality of execution in a given case would require either a judicial review or it would exclusively depend on the parties' will to do so. Moreover, the change of execution has no special or simplified procedure; it is subjected to common procedural rules which overload the courts' already full case-backlog and consume time. Thus, making the changes in execution becomes obsolete.

Special attention during the discussions was dedicated to the liability for non-execution. It is relevant in the context of in-kind obligations because usually this type implies conflictual situations and serious opposition from the parties charged with execution obligations. Some issues on the responsibility of bailiffs lacking due diligence were also discussed. In both situations, as rightly emphasized by the experts, the core principle of execution is that any sanction for non-enforcement **should not punish but aim to induce** a party concerned to execute.

Social Benefits

During the present thematic discussion, two pressing issues featured the exchange of thoughts. The first issue is similar to the previous concerns as to the **clarity of judicial decisions**. The perpetual question **of insufficient financial funding** was the second issue.

All participants reiterated that **judicial decisions must be clear** in order to be enforceable. In practice, governmental agencies indebted to execute social benefits obligations still question the validity of judicial reasoning. In particular, they doubt judicial decisions ordering recalculations of pensions, without clear reasoning how to do it and why previously employed calculation would not be valid. In this sense, it was noted by the experts that social agencies have no legal grounds to doubt the authority of judicial decisions, regardless of their dissatisfaction with the outcomes. On the other hand, it was also accepted by the representatives of the domestic judiciary that their own practice in this type of cases must be revisited. The number of such cases is significant and it is growing. The domestic courts suffer from the so-called copy-paste phenomenon subduing the quality of their decisions. They would indicate neither concrete sums to be paid nor how the calculation should be done. The social governmental agencies, on the other hand, have rigid administrative practices and algorithms calculating social benefits that could be changed only in time and by law, not by the domestic courts. In any case, following these discussions it was agreed that mutual concerns of the judiciary and social governmental agencies responsible for execution of social benefits obligations could be resolved. They need sharing their concerns and proceed to changing their practices, including pursuing necessary amendments to the domestic legislation.

The second fundamental problem affecting execution of social benefits is a **lack of sufficient financial funding**. It was said that the Ukrainian authorities are well aware of this problem and envisage some measures, including financial flows into the social sphere[17]. In this sense, it was reiterated by the experts that lack of funds cannot excuse non-execution. The Ukrainian authorities must not justify a failure to enforce by lack of sufficient funds. They must plan and organise their budgetary incomes and debts. In this sense, the Ukrainian authorities should implement an information collecting mechanism for being able to develop an effective financial plan. All execution claims must be registered, including pending litigations as potential burden for the Social fund in the future. Some opinions also referred to the need of overall reformation of social-payments sphere. Though this was found to be relevant, it was however considered to be generally outside of the framework of non-execution problem.

State-owned enterprises debts

Among many other topics discussed in the present thematic expert discussion, the issue of lifting Moratoriums was central[18]. Anyway, the experts pointed out that the situation on state-owned

[17] For example, the so-called “Programme 4040” or drafting amendments to special laws on social benefits of some categories of persons

[18] To date the following Moratoria have been identified:

1. Moratorium on the forced disposition of state property (Law of 2001): it was not accompanied by an effective compensatory mechanism; the domestic court’s judgment cannot be executed at the

enterprises' debt is a special situation featuring Ukraine, in particular. It is mainly due to the inheritance of previous (post-soviet) central-based and regulated economic system. From non-legal point of view, the problem of unpaid state-owned corporative debts must change the Ukrainian authorities' attitude. On the one hand, the authorities recognise the ownership of these entities but, on the other hand, they would not assume the full responsibility for their obligations. The justifications for this controversial attitude vary. Mostly, the authorities excuse non-execution by bankruptcy proceedings and by difficult economic situation. In other instances, they would substantiate non-execution by the need to defend the public interests and state propriety, thereby questioning the validity of the judicial decisions and qualifying them as "raider-type" take-of operations. For these reasons the Moratoriums are being needed, in their opinion.

It was agreed, however, that the Moratoriums serve no longer their initial purpose. They would rather complicate the situation then would provide viable solutions. In principle, they need to be repealed but an appropriate defence mechanisms aiming at protection of the state interests and public propriety in such enterprises must be put instead. The experts noted in this respect, that Moratoriums are not prohibited as such by the Convention but, in the particular situation of Ukraine, when there are no other means to guarantee execution such a measure becomes clearly incompatible. The State authorities have discretion to introduce limitations for indebting state-owned proprieties, but they should serve a particular purpose and be limited in time. For example, a moratorium in case of bankruptcy must secure the priority of claims over the indebted propriety and be valid only for the time pending insolvency proceedings. They should not restrict or exclude a part of assets outside of the claims. Nevertheless, during the expert discussion it was well-noted that the question of Moratoriums must be dealt with separately and in an urgent fashion. The reform of the bankruptcy proceeding and in overall sector of the state-enterprises ownership are also relevant in this context. And, the relevant authorities must gather together in order to develop a common vision on the status and faith of the state-owned enterprises plus their debts.

---

expense of the debtor's property. On 10/06/2003 the Constitutional Court acknowledged the constitutionality of the moratorium in view of the legitimate aim and of its temporal nature.

2. Moratorium regarding the enterprises of the fuel and energy sector (Law of 2005): it introduced special procedure for the execution of the courts' judgments against the enterprises enlisted in the special Registry –for the term of the procedure for paying the arrears, the enforcement proceedings regarding debts appeared before 1/01/2013 should be stopped (except for employment-related payments), applications from creditors to initiate insolvency proceedings should be returned without consideration. In December 2012 the Constitutional Court stated that the moratorium is not absolute and concerns only the cases of the debt collection for the incomplete payments for energy.
3. Moratorium on the credit recovery provided as collateral for loans in foreign currency by banks and financial institutions from the citizens of Ukraine.
4. Prohibition of the alienation of premises of state and communal ownership where the subjects of publishing activity work or used to work.
5. Moratorium on recourse to the assets of the public transport railway company till the inventory and valuation of property of railway enterprises located on the territory of the antiterrorist operation.
6. Moratorium on initiation of bankruptcy proceedings of State JSC "Chornomornafrogaz" till 1/01/2019, and the existing proceedings should be terminated.
7. Special procedure for the recourse to the property located in the Chernobyl exclusion zone. This special procedure has, without any doubt, a legitimate aim, but does not provide for compensatory mechanism (which was acknowledged by the Court in the *Derkach v.Ukraine (34897/02)).*
8. Moratorium on attachment or arrest of funds of commercial entities in the spheres of heat, water supply and drainage received from international financial organizations for the implementation of investment projects in Ukraine (*draft law)*

Conclusions and recommendations

Two principal needs, as found both by the ECtHR and the CM, have been reiterated during the *expert discussions*:

- overall **reform** of the **enforcement system**, and

- introduction of **general remedies**.

Also, the CM's demands were pointed out in that respect. These are:

- a comprehensive **long-standing Action Plan** reflecting **common vision** of the authorities on overall reform of the enforcement system

- institution of **general remedies**, not only on *ad-hoc* basis

- **all-inclusive approach**, i.e. the *Burmych- Ivanov*-type cases should be dealt along with the all other domestic judicial decisions taken as a whole.

Moreover, there have been some relevant developments following the post-*Burmych* dialog between the Department of Execution[19] and Ukrainian authorities, plus a number of high-level discussions[20] held thereafter. For the purposes of the present Report they need to be briefly reiterated. The 4-steps Strategy based on good-practices of other countries dealing with pilot judgment proceedings has been recommended in this respect:

- 1st step: REGISTRATION and DATA COLLECTION
    - Getting "basic statistical data" on enforcement of judgments against the State (e.g the *Colic and Others)*
    - Establishment of "damage assessment and compensation commissions" in Turkey, concerning the internally displaced persons (e.g the *Dogan and Others case*)
- 2nd step: CHOOSING TECHNIQUES to deal with the problem
    - "isolating the problem" like in Italy with regard to the "length of proceedings" cases
    - "global compensation" solution with defined criteria and time-limits (e.g. the *Vallee case)*
- 3rd step: GET FUNDING either or both from INTERNATIONAL or NATIONAL sources
    - international funding (IMF, EDB, WB, CoE Bank)
        - international funding for prison constructions in Moldova (e.g. the *Shishanov* case)
        - the World Bank assistance in Albania for ensuring viable scheme on restitution of properties nationalized by the former communist regime (e.g. the *Manushaqe Pluto & Driza* cases)

[19] The Department for the Execution of Judgments of the European Court of Human Rights

[20] See for example the meetings with the Ukrainian Bar Association and the Parliament Sub-Committee round-tables of 18.10.2017 and 27.03.2018, respectively (see http://uba.ua/ukr/news/5251/ https://www.ukrinform.ua/rubric-presshall/2326177-12143-sprav-v-ocikuvanni-rozgladu-obgovorenna-risenna-evropejskogo-sudu-z-prav-ludini.html , etc.)

- internal funding: i.e. taxes, bonds (negotiable bonds and sellable on the market), state reserves:
    - from taxes and own financial reserves of the State. This has been done by Slovenia in context of payments of compensation for the foreign currency savings accounts with immediate effect, i.e. from taxes, possibly from the State reserves (e.g. the *Alisic and Others*)
    - a compensation scheme directly from the State budget with immediate effect (e.g. the *Vallee case*)
    - bonds. An example of such payments could be Bosnia-Herzegovina, by administered payments through combined bond and cash scheme (in the *Colic and Others*). The Court however found that the compensation extending to 25 years is too long.

- 4th step: General MANAGEMENT OF THE PROCESS
    - Challenges in identification of beneficiaries
        - The *Bug river cases*, i.e. complexity of identifying the claimants and establishing their eligibility for compensation. However, these have been successfully resolved by the Polish authorities (e.g. the *Broniowski* case)
        - Turkish compensation commissions (the *Dogan and Others*)
    - The *ad hoc* solutions are meant only to confine the problem for the future management of the process and development of permanent solutions (e.g. the *Xenides-Arestis* and *Maria Atanasiu* cases)
    - Erasing the roots of the problem by abolition of social-oriented legislation putting an end to the flow of new cases (e.g. *Olaru and others*)
    - Implementation of General Systemic Measures preventing appearance of new cases or substantive reformation of the deficient system (e.g. *Olaru and others*, *Maria Atanasiu*
    - Introduction of Special Remedies, both preventive and compensatory in character or improvement of general remedies (e.g. *Olaru and others*, *Dogan and Others*

The above CM's suggestions plus the 4-steps Strategy could already serve as valid general recommendations for the Ukrainian authorities. They need nothing but to be reiterated and put in practice. Indeed, nether the present discussions nor the experts could question these recommendations or articulate new ones. This was not the purpose of the expert discussions and of the present Report.

Accordingly, in what follows, the below references result from the discussions in the above-described framework. They should not take priority over the already on-going measures or implementation of the above-mentioned recommendations. The present conclusions are only preliminary and must be subjected to a degree of caution. They are general in character and refer to the problem as a whole. Thus, they cannot provide a list of concrete suggestions with the reference to the domestic practice and legislation. A domestic consultant is needed for this purpose.

The later element would be the first general consideration. An international expertise requires close scrutiny from a domestic point of view, thus both international and national consultants should work together. This consideration is valid for the Ukrainian authorities in particular because, as it seems, they have been exhausted in dealing with the problem. The authorities have less creativity and patience. It is thus recommended to engage **national and international outsource expertise** on permanent basis for the strategic development of the enforcement system reform. Inclusion of civil society and non-governmental organisations, human right defenders would be highly commendable.

Another general recommendation would be the need for development of a comprehensive **strategy** covering **wide-ranging questions** in the long run. The Ukrainian authorities could not be blamed for doing nothing in dealing with the non-execution problems. However, their actions seem to be instinctive and impulsive rather than well-thought and planned. One all-inclusive strategy covering both the key-issues and the details thereof would do the job. It could be either or both officially-binding or recommendatory in nature. It will include the strategic lines of actions, description of roots of the problems and priorities. It could include time-frameworks. This strategy would lead to development of detailed actions plans and time-limits for their implementation. Moreover, such a strategy, would define priorities and identification of key-questions. Secondary issues should not shift attention from the fundamental problems.

Such a strategy should be developed, preferably by **one entity** assembled in this respect and include all relevant authorities. It could be the Parliamentary subcommittee on the execution of the ECtHR judgments or any other inter-institutional assembly, such as the *Governmental Interdepartmental working group*. The main requirement is that such an entity must be charged with both tasks, **development of the strategy** and **supervision of its implementation**. It must benefit from that brainstorming approach employed by the present expert discussions and new methods in engaging the authorities' responsibility (for example sharing and exchange of information, periodic reports, etc.).

Turning to the **results of the expert discussions,** the following general recommendations can be drawn from the exchange of thoughts and identified roots of the problem. They would rather refer to the methods than to concrete actions need to be made. Indeed, these actions and concrete steps, as reiterated with many occasions during the expert discussions, must be developed by the Ukrainian authorities. It is not the purpose of the experts to substitute them in doing this task. Only some general suggestions as to the strategic steps and methodology could be made as follows:

- **Collection of information**. Information gathering mechanisms and records of all domestic judgments, be that part of the "historic debt" or new judicial decisions, must be set up. All judgments and debts must be recorded and compiled into one database. The Ministry of Justice's initiatives in this respect, aiming at receiving and recording *Burmych*-type complaints[21], are commendable but not enough. There must be one permanent recording system of all enforceable judgments or execution writs. The details of such database is a separate question. However, it is undisputed that an isolated database is needed.

- **Holistic approach.** No priority should be given to *ad-hoc* solutions or enforcement of *Burmych*-type cases. Moreover, there should be no formal distinction and priority between the ECtHR enforcement and domestic execution. The Ukrainian authorities must view the problem of non-enforcement as a whole from different angles, both in terms of confining

[21] See for example press-release https://minjust.gov.ua/news/ministry/nataliya-bernatska-minyust-rozrobiv-dieviy-mehanizm-virishennya-problemi-nevikonannya-rishen-natsionalnih-sudiv

the actual pressing situation and looking into the perspective of the enforcement system reform. Here the reforms of the judiciary, social benefits and state ownership arias must be taken into consideration. That is why an interdepartmental approach works better.

- Strategic vision. It was observed that the Ukrainian authorities are willing to resolve the problem of non-enforcement. They deal with actual and pressing problems. However, they seem lacking strategic vision as to the outcomes of their activity and what they would like to achieve when doing a particular action. For example, draft amendments to the Law on State Guarantees would settle an actual legal problem of non-recognition of state responsibility for the debts. This vision is good but only in part. Today these amendments are relevant. But what would happen in the long run of the overall enforcement reform and institution of remedies needs more reflection. The legislative recognition of state responsibility goes further than just to be relevant within the enforcement context. Hypothetically, it may affect both ways, good or bad, other arias of State administration and economy, as well as legal branches (for example a state guaranteed responsibility may exhaust state funds and became burden for the on-going reform of the enforcement). In the end, the Ukrainian authorities must see the reforms they are doing or envisaging to, in a short- and long-term perspective and within the larger context. Furthermore, the strategic vision means not only planning of certain actions but it outlines alternative scenarios, if one or some actions would fail.

- **Expert level**. The suggested strategy and a common vision must be developed first on the expert level, i.e. persons dealing with the problem on daily basis. A high-level entity, be that executive or parliamentarian commissions or sub-committees must serve only for decision-making purposes. An interdepartmental working group, however, works far better. Only it would be able to develop a valid strategy. In this way the risks of undermining on-going work by political fluctuations would be reduced. Moreover, it would work informally, without inherent bureaucracy, adopting creative-thinking attitude and brainstorming.

- **Time-limits**. They are needed for self-discipline. Their purpose is not to control the results but to alert authorities about the risks of the on-going reform. In this sense, deadlines are prerequisite for a successful outcome.

- **Prioritization**. The envisaged measures must be subjected to evaluation of their priority. According to that the time-limits in their implementation should be set up.

- **Roots.** The results of the present *expert discussions* would serve as a source for inspiration in identification and description of the roots of the problem. Some of them have been identified but they need official recognition from the authorities. Therefore, it is not feasible to describe them in detail in the present operative part of the Report. However, they could be discerned from the description of the discussions as follows:

- **primary roots**

- *Inefficient enforcement system overall*. It is based on State-owned bailiffs acting under deficient legislation, with no real enforceable mechanisms and no incentives. There is little or no interest to execute judgments. There is also neither judicial nor any other real oversight (except that of the ECtHR) on the execution. The enforcement procedural rules are inflexible to new circumstances and realities of execution. Both the legislative system and the

administrative practices and institutional organisation leave room for better. Still there is great controversies on how the enforcement should look like – be private, mixed or exclusively state-owned and under whose authority, judicial or executive power. Moreover, the Ukrainian enforcement system is led by the idea that any judicial decision requires additional efforts to be executed. There is no or little benevolent attitude to execute judgments without resorting to the state enforcement machinery.

- *Moratorium-execution system*. It serves no longer to the purposes of protecting state interests. Nor it helps recovering or prioritising debts pending insolvency proceedings. Rather, it indebts the State furthermore. However, the abolition of moratoriums is still perceived as highly-sensitive political question.

- *No remedies*. There is no clear vision of what remedies are and how they should look like in the Ukrainian legal system. Thus it stems the reluctance to introduce them.

- **Secondary roots**

- low-level of judicial authority or, often, no credibility in judicial decisions;

- little or no liability of civil servants (including bailiffs and judges) and thus a general sense of impunity for failures and shifting responsibility phenomenon;

- weak legal representation service within the government and ministerial authorities, subjected both to the lack of professional human resources and no incentives or interests to do a proper job;

- excessive reliance on the need of legislative amendments, in the contrary to commitments on changing administrative/judicial practices;

- little initiative to change well-established administrative and judicial practices;

- low-level of legislative implementation and law obedience;

- mere justification of non-enforcement by lack of funding and insufficient financial resources;

- presence of deficient socially-oriented legislation and too formal procedural rules both before the administrative entities and courts;

- deep-rooted state-ownership mentality and State exclusive control-market economy.

It is not an all-inclusive list. Both the roots of the problem and the solutions thereto can be better identified in thematic discussions on the expert level and within the less official layout.

Usually, the recommendations include positive actions. However, at some points, the experts have also emphasised on what **should not be done**, while implementing reforms. Among these:

- no extraordinary review of final judicial decisions, leading to breach of legal certainty (see issues in the *Ponomaryov* group of cases or the *Sovtransavto Holding* case);

- no disagreement or critics to both the domestic judiciary and the ECtHR for the *Ivanov* and *Burmych* judgments; this would not solve the problem but consume the energy and undermine the already weak credibility in the domestic courts and judicial authority;

- no hidden legislative techniques undermining implementation, such as deliberately unclear legal provisions capable to double interpretation or concurrent legislative provisions in special laws;

- no procrastination.

In the end, some of the questions discussed pending round-tables needs **separate attention**. It is recommended to organise a dedicated discussion, but within the larger context, on issues of execution in the **arias outside of the Ukrainian authorities' effective control** (Crimea and Eastern parts). Separate discussions are needed for clarifying **judicial standards** of clarity, judicial motivation of the courts' decisions, review and judicial supervision on the execution proceedings. At last, a separate round-table, probably even a series of discussions are needed to explain and define the **concept of remedies** and the way how the Ukrainian authorities should address the issue. As noted above, there is still a bit of confusion and no clear vision on their part regarding these particular subjects.

Lilian APOSTOL

15 September 2018

Edited and reviewed on 20 September 2018